THE CAYMAN ISLANDS LAW REFORM COMMISSION

FINAL REPORT

THE PENAL CODE

PART 2 – ABORTION

6TH SEPTEMBER, 2024

THE CAYMAN ISLANDS LAW REFORM COMMISSION

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ACRONYMS

ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
WHO	World Health Organization
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child

ACKNOWLEDGEMENTS

The Law Reform Commission extends thanks to all stakeholders and the general public for the valued contributions leading to the conclusion of this Final Report.

FINAL REPORT

THE PENAL CODE

PART 2 - ABORTION

1. INTRODUCTION

1.1 In accordance with section 12 of the *Law Reform Commission Act (2019 Revision)*, the Law Reform Commission (the "Commission") submits for the consideration of the Honourable Attorney General its Final Report titled **"The Penal Code: Part 2 – Abortion"**.

1.2 This Final Report recommends repealing those provisions in the *Penal Code (2024 Revision)* (the "Penal Code") relating to abortion that are incompatible with the Bill of Rights, Freedoms and Responsibilities (the "Bill of Rights") contained in Part I to Schedule 2 of the *Cayman Islands Constitution Order, 2009* (the "Constitution") and enacting standalone legislation regulating abortion. This Report is supported by the *Termination of Pregnancy Bill, 2024* (Appendix 1) and the *Penal Code (Amendment) Bill, 2024* (Appendix 2).

2. BACKGROUND

2.1 The examination into this issue was based on a referral by the Honourable Attorney General in 2017 requesting that the Commission review the Penal Code to assess its compatibility with the Bill of Rights and to recommend areas of reform as required.

2.2 The Commission noted that, since its introduction in 1975, the Penal Code had not undergone a comprehensive review and that, with the adoption of the Constitution, it was imperative that the Penal Code be reviewed to ensure its compatibility with the fundamental human rights principles enshrined in the Bill of Rights as well as with the similar rights in Conventions and treaties that have been extended to the Cayman Islands.

3. DISCUSSION PAPER

3.1 On 17 December 2021, the Commission published a Discussion Paper titled **"The Penal Code: Is It Compatible With The Bill Of Rights?"** for public consultation (the "Discussion Paper"

- Appendix 3). The Discussion Paper examined provisions of the Penal Code relating to the following areas –

(a) immature age (minimum age of criminal responsibility);

(b) compulsion by spouse;

(c) insulting the modesty of a woman;

(d) abortion;

(e) unnatural offences; and

(f) indecent assault.

3.2 The provisions of the Penal Code relating to abortion are as follows –

Penal Code (2022 Revision)

Section 141 - Attempts to procure abortion

(1) A person who with intent to procure the miscarriage of a woman, whether the woman is or is not with child, unlawfully administers to that woman any poison or other noxious thing, or uses any force of any kind, or other means whatsoever to that purpose commits an offence.

(2) Notwithstanding subsection (1) no person commits such offence unless it is proved that the act alleged to constitute the offence was not done in good faith for the purpose only of preserving the life of the mother.

(3) Notwithstanding subsections (1) and (2) a health practitioner registered to practise medicine under the Health Practice Law (2021 Revision) has not committed an offence under subsection (1) in respect of any act if such act is first certified in writing by two such registered health practitioners acting in good faith, one of whom is registered by the Medical and Dental Council as an obstetrician, a gynaecologist or is employed as a Government Medical Officer in either capacity, as being necessary for the purpose of preserving the life of the mother.

Section 142 - Attempt by woman with child to procure abortion

Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever to that purpose, or permits any such thing or means to be administered to her commits an offence.

Section 143 - Supplying drugs or instruments to procure abortion

A person who unlawfully procures for or supplies to any person any thing whatsoever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits an offence.

3.3 The Discussion Paper summarised the provisions of international instruments relevant to abortion and examined legislation relating to abortion in the United Kingdom, Canada, Jamaica and the Northern Territory of Australia before presenting questions for consultation.

4. CONSULTATION PROCESS

4.1 The consultation period for the Discussion Paper commenced on 29th December, 2021 and concluded on 15th March, 2022.

4.2 In relation to the provisions of the Penal Code dealing with abortion, the Commission sought the views of stakeholders and the public in response to the following questions –

1. Should sections 141, 142 and 143 of the Penal Code be repealed and substituted with bespoke legislation which provides for safe access to termination of pregnancy?
2. Should the Penal Code be amended to expand the grounds for legal abortion in the following cases —
   (a) where there is a threat to the pregnant woman's physical or mental health, without conditionality of "long-term or permanent" effects;
   (b) where the pregnancy is as a result of rape or incest;
   (c) where there is a severe foetal impairment, including fatal foetal abnormality;
   (d) where the pregnancy is a result of carnal knowledge of a minor;

(e) where there is a serious health problem with the foetus which did not present itself until a later date;

(f) where the woman is not more than 23 weeks pregnant;

(g) where there is an inability to pay for the abortion procedure before 23 weeks;

(h) where the intellectual or cognitive ability of the woman is impaired.

(i) where the woman's current and future physical, psychological and social circumstances will be adversely impacted;

(j) where there is unpreparedness for the transition to motherhood;

(k) where there is an absence of a partner or lack of support of a partner;

(l) where the woman cannot mentally fathom the thought of placing the baby for adoption; or

(m) where the woman does not want to be a single mother or is having relationship problems?

4.3 In addition to publishing the Discussion Paper for review by the general public, the Commission forwarded the Discussion Paper to the following stakeholders –

- Hon. Anthony Smellie, Chief Justice;
- Dale Crowley, Human Rights Commission;
- Chairman, Gender Equality Tribunal;
- Derek Byrne, Commissioner of Police, Royal Cayman Islands Police Service**;**
- Paulinda Mendoza-Williams, Department of Children and Family Services;
- Judith Seymour, Department of Counselling Services;
- Erik Bodden, Cayman Islands Legal Practitioners Association;
- Chairman, Cayman Islands Medical and Dental Council;
- Michael Bromby, Truman Bodden Law School;
- Ben Tonner, McGrath & Tonner; and
- Bishop Nicholas Sykes, Cayman Ministers' Association.

4.4 In relation to abortion, the Commission received submissions from the following respondents –

Organisations	
Royal Cayman Islands Police Service	Ministry of Youth, Sports, Culture and Heritage – Youth Services Unit
Department of Counselling Services	Samson Law
Human Rights Commission	Church of God Chapel
Cayman Ministers' Association	British Pregnancy Advisory Service
Ministry of Home Affairs	St. Ignatius Catholic Church
Individuals	
Dr. Charlotte Dobson	Suzanne Howden
Philippa Ball	Rev. Joseph Kirkconnell
Georgia Bromby	Stephen Ryan
Alex Henk	John-Michael Kirkconnell
Mikana Scott	Deborah Kirkconnell
Richard Coles	William and Deborah Ryan
Michael and Mary Bowerman	Simone Middleton
Susana and David Bowerman	Lisa Arch-Scott
Joseph Westin	Corey Christian
Timothy Adam	Estefanie Barnett

4.5 As was anticipated by the Commission, the issue of abortion was polarising and solicited numerous submissions. In order to allow a thorough consideration of the range of views expressed and the complexity of the issue, the Commission determined that the issue of abortion should be treated as a separate reform project.

5. PUBLIC AND STAKEHOLDER RESPONSES TO THE DISCUSSION PAPER

5.1 The respondents who supported providing access to legal abortion pointed to the benefit of abortion to women and society at large. They viewed the criminalisation of abortion – either by punishing women who choose to have abortions or by punishing the service providers that perform them – as violating women's reproductive rights, leading to devastating health consequences, and having a disproportionately grave impact on the most vulnerable women. On the other hand, those respondents who were pro-life queried the rationale behind the

destruction of one individual (the foetus) for the survival or benefit of another individual (the mother). This view is grounded in a deep reverence for human life.

Responses opposed to legal access to abortion

5.2 A key argument in the submissions opposing legal access to abortion centres on the sanctity of life. A consistently expressed view in these submissions is that foetal viability (that is, the ability of a foetus to survive outside the uterus) is either an irrelevant or, at the very least, arbitrary consideration in determining whether it should be permissible to terminate a pregnancy. Proponents of this view refer to section 2 of the Bill of Rights, which enshrines the right to life, as well as Article 6 of the International Covenant on Civil and Political Rights (the "ICCPR"), which recognises the inherent right to life of every human being, and Article 6 of the UN Convention of the Right of the Child, which recognises the inherent right to life of every child. These respondents argue that the destruction of a foetus, regardless of its viability, is no different to the destruction of any other human life and should be illegal.

5.3 In response to the argument that a woman should have the right to bodily autonomy, it was submitted that a foetus is not a part of a woman's body. Rather, the woman is the temporary host of another, equally important, human life. According to this view, a law that gives precedence to the rights of the mother runs contrary to the principle that every human life is equal. Proponents of this view do not see a prohibition on abortion as an infringement on a woman's right to bodily autonomy. Instead, they argue that the right to bodily autonomy is not accompanied by the right to inflict harm on the life of another.

5.4 Another recurring argument in the submissions opposing legal access to abortion equates legalising abortion with legalising involuntary euthanasia and eugenics. This view is similarly rooted in the belief that all human life is equal, regardless of the developmental stage of that life.

5.5 A number of respondents expressed a strongly held view that the principles expressed in section 1 of the Bill of Rights, specifically the recognition of the Christian values of the Cayman Islands, are fundamentally at odds with amending the Penal Code to abolish the prohibition on abortion. Some of these respondents submitted that legalising abortion would

irreparably damage the moral and social fabric of the Cayman Islands. Some submitted that no reform relating to abortion should take place without a referendum, arguing that amendments to the Penal Code would be a "back door" to reform that should properly be undertaken as an exercise in Constitutional reform.

5.6 Several submissions opposing legal access to abortion nonetheless expressed sympathy for women who find themselves with an unwanted pregnancy. These submissions recommended focusing on increasing financial and other support to pregnant women and mothers, including by providing adequate parental leave, childcare options and mental health support. In addition, a number of respondents recommended reforming adoption laws and procedures to facilitate a more efficient system.

5.7 It is important to note that a majority of respondents who opposed reforming the law relating to abortion expressed support for the current exception in section 141(3) of the Penal Code, which allows for abortion where necessary to preserve the life of the mother. In addition, one respondent, while opposed to legalising abortion, expressed support for repealing section 142 of the Penal Code, under which a woman who procures an abortion commits an offence. That respondent considered the imposition of criminal liability on the woman seeking the abortion to be misplaced, and instead advocated for the compassionate treatment of women in such circumstances.

Responses supporting legal access to abortion

5.8 A number of respondents who support legal access to abortion noted that demand for abortions is prevalent in the Cayman Islands, resulting in women travelling overseas to obtain abortions or obtaining illegal and unsafe abortions in the Islands. These respondents argue that this results in discrimination against women of low income who cannot afford to travel and are disproportionately exposed to the risk of maternal death by unsafe abortions. Such respondents view access to safe and legal abortion as a fundamental human right.

5.9 The Youth Services Unit of the Ministry of Youth, Sports, Culture and Heritage facilitated a dialogue with the Cayman Islands Youth Assembly and provided a response summarising the views expressed. In support of reforming the law to allow for legal access to abortion, the

response highlighted the negative impact of the current state of the law on the mental and physical health of girls and women, the prevalence of illegal and unsafe abortions, and the challenging economic and social environment for raising a child resulting from an unplanned pregnancy.

5.10 While supporting reform of the law to allow for access to safe and legal abortion, the Ministry of Home Affairs and the Department of Counselling services both highlighted the need for additional measures to reduce instances of unwanted pregnancies. Specifically, they recommended providing additional and comprehensive sex education in schools, free access to birth control, and improved access to counselling and mental health support, including pre-procedure counselling.

5.11 The Human Rights Commission responded in support of repealing sections 141, 142 and 143 of the Penal Code, noting General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (see section 7.1 below). The Commission noted that "blanket criminality for abortion does not account for specific circumstances unique to any one individual" and expressed the view that "any amendment to the legislation ought to provide for the safety and personal security of a woman pursuant to rights which are protected under the Bill of Rights in the Cayman Islands Constitution."

5.12 The British Pregnancy Advisory Service (BPAS) provided a comprehensive response containing a number of recommendations. In addition to strongly supporting the repeal of section 141, 142 and 143 of the Penal Code, BPAS proposed a model for reform. BPAS argued that the law in the Cayman Islands, and in particular the imposition of criminal liability on women seeking to end their own pregnancies, "is out of step with the democratic world and goes further than laws even in the most restrictive of abortion regimes."

5.13 BPAS expressed support for bespoke legislation to facilitate access to abortion, noting –

> "BPAS recognises the challenges faced in developing a system for abortion care in communities where it has – until this point in time – been illegal.
>
> Although we believe fundamentally that abortion care should be treated like any other medical procedure, and governed by relevant medical – and not criminal – laws, we

recognise that in places like the Cayman Islands an absence of clear guidance and requirements grounded in legislation may leave potential abortion providers fearful of providing care. Ultimately, the key goal of such legal reform cannot simply be the absence of sanction, but on ensuring that women can access high quality, evidence-based medical care through the formal healthcare system."

Specifically, BPAS strongly recommended that any new legislation should not incorporate substantial criminal penalties for providers engaging in provision outside the terms of the legislation. BPAS also stressed the need to ensure that ending a woman's pregnancy without consent should continue to be an offence carrying an appropriate penalty, a view also expressed by the Director of Public Prosecutions.

5.14 In relation to the model for reform, BPAS does not support an exhaustive list of grounds for abortion, noting the following issues with this approach –

"1. The provision of care is no longer based on the health or wellbeing of the woman concerned, but on the legal justification for the proposed treatment;

2. The longer the list is…the more likely it is that the grounds are tightly drawn and women in deeply distressing circumstances are not deemed to meet the exclusive conditions;

3. It places a significant amount of power in the hands of individual medical professionals, politicians, and their interpretation of the law, rather than in the hands of the pregnant woman;

4. The list is liable to continual updating and change, reducing the confidence of medical providers in the legal underpinning of their work."

Instead, BPAS supports abortion without restriction as to reason, while noting that many jurisdictions take a phased approach that allows abortion without restriction as to reason up to 24 weeks gestation, with some broad grounds introduced after 24 weeks.

5.15 In relation to gestational limits, BPAS noted that the 23 week limit mentioned in the Discussion Paper is out of line with the 24 week limit in the United Kingdom and some other British

Overseas Territories, and that there is no scientific evidence base for the reduced time limit. In addition, BPAS noted that a time limit of 23 weeks risks endangering a woman's ability to access abortion on the grounds of severe or fatal foetal abnormality, particularly given that the detailed anomaly scan of the foetus takes place between 18 and 23 weeks in the Cayman Islands. A diagnosis made at the end of this period can result a woman being unable to obtain an abortion and instead experiencing late foetal death, stillbirth or neonatal death. Similar arguments opposing the 23 week limit were advanced by other individual respondents.

5.16 BPAS made a number of additional recommendations –

1. The law should not require abortion procedures to be undertaken by a specific type of healthcare professional. Rather, clinical bodies should be able to determine the qualifications required, ensuring that women can access care from a range of healthcare professionals.
2. There should be no requirement for consultation with or approval from more than one healthcare professional before procuring an abortion, as there is no clinical basis for such a requirement.
3. There should be no legal limits as to where abortions can be provided.
4. The law should include provisions specifying the extent of legally permissible conscientious objection by healthcare professionals, limiting this to taking a "hands-on" role in providing abortion.
5. The law should make it clear that the public healthcare system is obliged to provide abortion care.

6. SURVEYS

6.1 There has been limited research in relation to opinions about abortion in the Cayman Islands and its prevalence. It would be instructive for a comprehensive study to be conducted with a large sample size. However, two studies provide some insights.

6.2 A number of submissions received in response to the Discussion Paper referenced the Adolescent Health and Sexuality Study conducted collaboratively by the Cayman Islands Government and the Pan American Health Organization (a regional office of the World Health

Organization) in the Cayman Islands in 2012 and reported on in 2013.[1] The target population of the survey was young people in school in the age group 15-19 years. The survey achieved a very high participation rate, with 955 young people out of a potential 1186 participating, representing 80.5%.[2] The survey found that 12.3% of sexually experienced participants had either been pregnant or got someone pregnant. More males had got someone pregnant twice or more than females had been pregnant twice or more. Of the females who had ever had sex, 7.7% indicated they had had an abortion, of which 6% had one abortion and 1.7% had two or more abortions.[3]

6.3 A smaller set of surveys was conducted in 2022 by a student at the University College of the Cayman Islands as part of a Bachelor of Science in Social Work (Appendix 4).[4] The first of these surveys produced 70 responses, 55 from females and 15 from males. 94% of participants agreed that abortion should be legal in specific circumstances. Of those participants, 75.4% agreed that abortion should be legal if the mother is unable to afford the pregnancy or baby or has no support, and 79.7% agreed that abortion should be legal if the mother does not wish to give birth.

6.4 The second of these surveys targeted the female population of the Cayman Islands, producing 252 responses. Some of the key findings of the survey are as follows –

- 90.4% of participants believed that women should have the right to safe and legal abortions in the Cayman Islands;
- 77.3% believed that their basic human rights are being denied by the current law;
- 31% had had an abortion, 18% of whom did so illegally in the Cayman Islands by taking medication and 48% of whom travelled overseas to obtain an abortion, with the remainder having obtained an abortion while living overseas; and

[1] Ministry of Health, Environment, Youth, Sports and Culture/Pan American Health Organization, *A Report on the Adolescent Health and Sexuality Survey: Cayman Islands* (2013), online: <https://www.humanrightscommission.ky/upimages/publicationdoc/AdolescentHealthandSexualityFinalReport_1471471847_1471471862.pdf.>
[2] Id, p. 9.
[3] Id, p. 47.
[4] Barnett, *Restricted Abortion Access: Opinions About Abortion Among Reproductive-Age Women in the Cayman Islands* (2022).

- 81% consider abortion to be morally acceptable.

7. INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL GUIDELINES

7.1 International Covenant on Civil and Political Rights

7.1.1 The ICCPR,[5] which has been extended to the Cayman Islands, contains a number of protections relevant to abortion. Article 6 protects the right to life. Article 7 protects against torture or cruel, inhuman or degrading treatment or punishment. Article 17 protects against arbitrary or unlawful interference with privacy. Article 26 protects against discrimination on any ground.

7.1.2 General Comment No. 36 on the ICCPR, promulgated by the Human Rights Committee, specifies that –

> "…restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates Article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly. For example, they should not take measures such as….applying criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers to effective access by women and girls to safe and

[5] *International Covenant on Civil and Political Rights*, 16 December 1966, online: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en.

legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers."[6]

7.1.3 The Human Rights Committee has applied the protections afforded by the ICCPR in cases relating to abortion. *Mellet v. Ireland*[7] concerned a woman carrying a foetus with congenital defects such that the foetus would die before or shortly after birth. Because the pregnancy did not pose a risk to the mother's life, she was unable to obtain an abortion in Ireland and was left with the choice of carrying the foetus to term, knowing it would die, or travelling overseas to procure an abortion. The Committee found that Ireland had violated Article 7 of the ICCPR, noting –

> "the State party subjected the author to conditions of intense physical and mental suffering. The author…had her physical and mental anguish exacerbated by not being able to continue receiving medical care and health insurance coverage for her treatment from the Irish health-care system; the need to choose between continuing her non-viable pregnancy or travelling to another country while carrying a dying fetus, at her personal expense and separated from the support of her family, and returning while not fully recovered; the shame and stigma associated with the criminalization of abortion of a fatally ill fetus; the fact of having to leave the baby's remains behind and later having them unexpectedly delivered to her by courier; and the State party's refusal to provide her with the necessary and appropriate post-abortion and bereavement care. …[N]o limitation and no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reason. Accordingly, the Committee considers that, taken together, the above-mentioned facts amounted to cruel, inhuman or degrading treatment in violation of article 7 of the Covenant."[8]

7.1.4 The Committee further found that Ireland had violated the protection against arbitrary or unlawful interference with privacy under Article 17. The interference was not unlawful, as it was provided for under Ireland's domestic law. Ireland further argued that the interference was

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[6] UNHRC, General Comment No. 36: Article 6: Right to Life, 3 September 2019, UN Doc CCPR/C/GC/36, online: https://digitallibrary.un.org/record/3884724?ln=en, para 8.
[7] UNHRC, Communication No 2324/2013, *Mellet v Ireland*, UN Doc CCPR/C/116/D/2324/2013, online: https://juris.ohchr.org/casedetails/2152/en-US.
[8] Id, paras. 7.4-7.6.

not arbitrary, as it was proportionate to the legitimate aims of the ICCPR, taking into account the balance between protection of the foetus and the rights of the woman. In the circumstances of the case, given that the foetus was not viable and the options available to the woman were the source of intense suffering and negative consequences for her, the Committee found the interference to be unreasonable and arbitrary.[9]

7.1.5 The Committee also found that Ireland's legal regime violated the protection against discrimination under Article 26, noting –

> "The Committee notes that under the legal regime in the State party, women pregnant with a fetus with a fatal impairment, who nevertheless decide to carry the fetus to term continue to receive the full protection of the public health-care system. Their medical needs continue to be covered by health insurance and they continue to benefit from the care and advice of their public medical professionals throughout the pregnancy. After miscarriage or delivery of a stillborn child, they receive any post-natal medical attention and bereavement care they need. By contrast, women who choose to terminate a non-viable pregnancy must rely on their own financial resources to do so entirely outside the public health-care system. They are denied health insurance coverage for that purpose; they must travel abroad at their own expense to secure an abortion and incur the financial, psychological and physical burdens that such travel imposes; and they are denied post-termination medical care and bereavement counselling they need."[10]

7.1.6 *Whelan v. Ireland*[11] concerned similar circumstances of a non-viable pregnancy. The Committee confirmed the position it articulated in *Mellet*, finding that Ireland had violated Articles 7, 17 and 26 of the ICCPR. The Committee also found that the moral and political considerations underlying the legal framework in Ireland did not justify a violation of Article 7.[12]

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[9] Id, para. 7.8.
[10] Id, para. 7.10.
[11] UNHRC, Communication No 2425/2014, *Whelan v Ireland*, UN Doc CCPR/C/119/D/2425/2014, online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/Whelan_v_Ireland.pdf>
[12] Id, para. 7.7.

7.2 International Covenant on Economic, Social and Cultural Rights

7.2.1 Article 12 of the International Covenant on Economic, Social and Cultural Rights[13] ("ICESCR"), which has been extended to the Cayman Islands, provides –

> "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

7.2.2 General Comment No. 22 on the ICESCR further specifies –

> "The realization of the rights of women and gender equality, both in law and in practice, requires repealing or reforming discriminatory laws, policies and practices in the area of sexual and reproductive health. Removal of all barriers interfering with access by women to comprehensive sexual and reproductive health services, goods, education and information is required. To lower rates of maternal mortality and morbidity requires… prevention of unsafe abortions. Preventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents; to liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion

[13] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, online: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health."[14]

7.3 European Convention on Human Rights

7.3.1 The European Convention on Human Rights ("ECHR"),[15] which has been extended to the Cayman Islands, contains a number of protections that are relevant to restrictions on access to abortion. Article 2 enshrines the right to life, Article 8 protects the right to private and family life and Article 14 prohibits discrimination in relation to the rights and freedoms set out in the ECHR. These protections are reflected in sections 2, 9 and 16 of the Cayman Islands Bill of Rights.

7.3.2 The European Court of Human Rights, to which persons in the Cayman Islands have the right of individual petition, has considered the application of these protections in relation to abortion in a number of cases. The Court has not found that these protections confer a right to abortion, and it has been reluctant to interfere with the rights of States to regulate abortion. However, it has established a number of important principles in interpreting the protections afforded by the ECHR. In *Vo v France*, the Court considered whether the right to life enshrined in Article 2 extends to the life of an unborn child, stating –

> "the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention…if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests…the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child."[16]

[14] UNCESCR, General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, UN Doc E/C.12/GC/22, online: <https://digitallibrary.un.org/record/832961?ln=en>, para 9.
[15] *European Convention on Human Rights*, 2 October 2013, online: https://www.echr.coe.int/documents/d/echr/convention_ENG.
[16] *Vo v. France* App. no. 53924/00 (ECtHR, 8 July 2004), [80].

7.3.3 In *A, B and C v. Ireland*,[17] the Court noted the broad scope of the right to private life under Article 8 –

> "the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development…It concerns subjects such as gender identification, sexual orientation and sexual life …a person's physical and psychological integrity as well as decisions both to have and not to have a child or to become genetic parents…. legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman."[18]

7.3.4 Further, the Court confirmed that Article 8 may impose positive obligations on the State to legislate to protect the rights conferred.[19] At the time, Article 40.3.3 of the Irish Constitution acknowledged "the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." This provision had been interpreted by the Irish Supreme Court to permit abortion in the case of a real and substantial risk to a woman's life, despite abortion being prohibited in all circumstances by the *Offences Against the Person Act 1861*. However, the statute had not been updated to reflect this exception.

7.3.5 In this case, applicant C was in remission from cancer when she unintentionally became pregnant. Unaware that she was pregnant, she underwent a series of tests that were contraindicated during pregnancy. After learning she was pregnant, she was unable to find a doctor willing to make a determination as to whether her life would be at risk if she continued with the pregnancy or how the foetus might have been impacted by the tests she had undergone. The Irish government argued that the woman was free to seek another medical opinion or make an emergency application to the High Court. The Court was not satisfied that the medical consultation or litigation options were adequate to protect the applicant's rights under Article 8, as no criteria had been prescribed by law to reasonably measure the risk of the pregnancy to the applicant's life. In addition, there was no framework to resolve any difference of opinion

[17] App. no. 25579/05 (ECtHR, 16 December 2010).
[18] Id, [212]-[213].
[19] Id, [244].

between a woman and her doctor or between doctors. Given this uncertainty, the Court considered the serious criminal penalties for having or assisting in an unlawful abortion "would constitute a significant chilling factor for both women and doctors in the medical consultation process".[20] The Court found that Ireland had violated its positive obligations under Article 8 by failing to adopt legislation establishing an effective and accessible procedure by which applicant C could have determined whether she qualified for a legal abortion in Ireland –

> "The Court considers that the uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation."[21]

7.3.6 Most recently, the Court confirmed its previously expressed position that restrictions on access to abortion have the potential to infringe the right to private and family life under Article 8 –

> "[L]egislation regulating the termination of pregnancy touches upon the sphere of a woman's private life, since whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. A woman's right to respect for her private life should be weighed against other competing rights and freedoms invoked, including those of the unborn child. In view of the above, while Article 8 cannot be interpreted as conferring a right to abortion, the Court finds that the prohibition of abortion…where abortion is sought for reasons of health and well-being…comes within the scope of the applicant's right to respect for her private life, and accordingly Article 8 applies."[22]

[20] Id, [254].
[21] Id, [264].
[22] *M.L. v. Poland* App. no. 40119/21 (ECtHR, 14 March 2024), [94]-[94].

7.4 World Health Organization

7.4.1 The World Health Organization's ("WHO") Reproductive Health Strategy identifies the elimination of unsafe abortion as a priority mandate.[23] WHO's Abortion Care Guideline notes –

> "Globally, abortion is a common procedure, with 6 out of 10 unintended pregnancies and 3 out of 10 of all pregnancies ending in induced abortion. However, global estimates demonstrate that 45% of all abortions are unsafe. This is a critical public health and human rights issue…The legal status of abortion makes no difference to a woman's need for an abortion, but it dramatically affects her access to safe abortion. Between 4.7% and 13.2% of all maternal deaths are attributed to unsafe abortions, which equates to between 13,865 and 38,940 deaths caused annually by the failure to provide safe abortion."[24]

The guideline identifies respect for human rights, including a supportive framework of law and policy, as one of the cornerstones of an enabling environment for abortion care.[25]

7.4.2 The guideline makes seven evidence-based law and policy recommendations. The recommendations are the outcome of reviews of studies conducted over multiple years in multiple countries –

1. Recommend: the full decriminalisation of abortion by removing abortion from all criminal laws and ensuring there are no criminal penalties for having, assisting with, providing information about, or providing abortion. The guideline notes that criminalisation does not impact the decision to have an abortion or prevent women having abortions. However, it does increase recourse to unlawful and unsafe abortion.[26]

2. Recommend against: law and other regulations that restrict abortion by grounds. The guideline notes that grounds-based approaches to abortion regulation are often narrowly defined, conservatively applied, and inconsistently interpreted by abortion

[23] World Health Organization, *Abortion Care Guideline* (2022), online: <https://iris.who.int/handle/10665/349316>, p xix.
[24] Id, p. xx.
[25] Ibid.
[26] Id, p. 24.

providers. In addition, grounds-based approaches have a disproportionately negative impact on women seeking abortion following rape, who may be subjected to questions, delay and bureaucratic processes to establish a ground for abortion.[27]

3. Recommend against: laws and other regulations that prohibit abortion based on gestational age limits. The guideline notes that gestational age limits delay access to abortion, particularly among women close to the gestational age limit or with limited access to clinics, and are associated with increased rates of maternal mortality and poor health outcomes.[28]

4. Recommend against: mandatory waiting periods for abortion. The guideline notes that mandatory waiting periods can delay access to abortion to the extent that a woman's access to abortion or choice of abortion method is restricted. In addition, mandatory waiting periods increase resource use by healthcare facilities by mandating unnecessary visits or interventions that are not evidence-based.[29]

5. Recommend: that abortion be available on request by a woman without the authorisation of any other individual, body, or institution. The guideline notes that third-party authorisation requirements are incompatible with international human rights law, which provides that States may not restrict women's access to health services on the ground that they do not have the authorisation of husbands, partners, parents or health authorities.[30]

6. Recommend against: regulation on who can provide and manage abortion that is inconsistent with WHO guidance. The guideline notes that provider restrictions result in delays to and burdens in accessing abortion, while expanding the range of health workers who can provide abortion care improves timely access to abortion, reduces costs, travel and waiting time, makes abortion available in rural areas and at primary

[27] Id, p. 26-27.
[28] Id, p. 28.
[29] Id, p. 41-42.
[30] Id, p. 43.

health care level, prevents unsafe self-management of abortion, and reduces system costs.[31]

7. Recommend: that access to and continuity of comprehensive abortion care be protected against barriers created by conscientious objection. The guideline notes that conscientious objection can delay access to abortion and increase abortion-related morbidity. The guideline emphasises the importance of clear and enforceable regulation of conscientious objection, outlining clearly who may object to what components of care, prohibiting institutional claims of conscience, requiring objectors to provide prompt referral to accessible, non-objecting providers, requiring conscientious objection to be exercised in a respectful and non-punitive manner, and prohibiting conscientious objection in urgent or emergency situations.[32]

7.5 When does the right to life begin under international law?

7.5.1 A key issue raised in the submissions is the right to life of a foetus. Article 1 of the Universal Declaration of Human Rights (the "UDHR") provides –

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[33]

7.5.2 The inclusion of the word "born" in Article 1 was intended to ensure the protections afforded by it begin at birth. This is evidenced by the deliberations around the wording, including a proposed amendment to delete the word "born" in order to protect the right to life from conception. The amendment was rejected, and Article 1 was adopted by 45 votes, with nine abstentions.[34]

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[31] Id, p. 59.
[32] Id, p. 60-61.
[33] *Universal Declaration of Human Rights*, 10 December 1948, online: https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[34] Copelon, Zampas, Brusie and deVore, "Human Rights Begin at Birth: International Law and the Claim of Fetal Rights", (2005) 13(26) *Reproductive Health Matters*, p. 122.

7.5.3 Article 6 of the ICCPR provides –

> "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."

As was the case for Article 1 of the UDHR, when the wording of Article 6 was negotiated an amendment was proposed that would alter the wording to state, "the right to life is inherent in the human person from the moment of conception, this right shall be protected by law." The amendment was rejected, and Article 6 was adopted by a vote of 55 to nil, with 17 abstentions.[35]

7.5.4 As evidenced by General Comment No. 36, the Human Rights Committee has expressed in strong terms the need for States parties to ensure compliance with the ICCPR by protecting women and girls from the dangers of unsafe abortion, including by not applying criminal sanctions to women and girls who undergo abortion. As the Human Rights Committee is responsible for monitoring compliance with the ICCPR, it has been observed that its statements on abortion would be problematic if the right to life in Article 6 applied before birth.[36]

7.5.5 The preamble to the United Nations Convention on the Rights of the Child (the "UNCRC"), which has been extended to the Cayman Islands, does refer to protections before birth –

> "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'"[37]

However, arguments that this implies that the right to life begins at conception have been rejected on the basis of the documented negotiations of the wording. The words "before as well as after birth" were added following a proposal by the Holy See, which stated that the purpose of the amendment was not to preclude the possibility of an abortion. Instead, the wording is

[35] Ibid.
[36] Ibid.
[37] *United Nations Convention on the Rights of the Child*, 20 November 1989, online: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

intended to recognise the duty of States parties to promote, through healthcare (among other things), a child's capacity to survive and thrive after birth.[38]

7.5.6 The Committee on the Rights of the Child, which monitors implementation of the UNCRC, has repeatedly expressed the need for States parties to ensure that adolescent girls have access to safe abortion services, noting that safe abortion is part of adolescent girls' right to adequate health under Article 24. This position would be incompatible with a view that the rights afforded by the Convention extend to unborn children.[39]

7.5.7 The right to life is also protected by Article 2 of the ECHR. The established position of the European Court of Human Rights is that a foetus is not afforded the protections of Article 2, and any "rights" of the unborn are limited by the rights and interests of the mother.[40]

8. DISCUSSION

8.1 Response to submissions

8.1.1 The Commission acknowledges the strongly held views expressed in the submissions received in response to the Discussion Paper. The issue of abortion is exceptionally divisive, not just in the Cayman Islands but across the world. The Commission recognises the sincerity underlying the views expressed on both sides of the debate, some of which are based on moral and religious beliefs. However, the Commission takes an evidence-based approach to formulating its recommendations in relation to any matter.

8.1.2 It is clear from the surveys conducted in 2012 and 2022 that illegal abortion occurs in the Cayman Islands at not insignificant levels. In particular, an alarming percentage of adolescent girls surveyed in 2012 had undergone an abortion. While it is imperative that the level of unwanted adolescent pregnancies is addressed through sexual and reproductive health education, it is also vital to ensure that the health of adolescent girls is not jeopardised by the failure to provide access to safe and legal abortion.

[38] Copelon et al., p. 122.
[39] Id, p. 123.
[40] *Vo v. France*, [80].

8.1.3 The 2022 survey highlights another extremely concerning aspect of the current situation – 18% of those surveyed who had obtained an abortion did so illegally in the Cayman Islands. It is reasonable to assume that procuring an abortion illegally is a measure of last resort. This may result from the woman or girl having insufficient means to travel, but it can also result from fear of stigmatisation or inability to travel due to work, study, family, or other commitments. In this respect, the criminalisation of abortion has a disproportionate impact on women and girls of lower economic means and family and social support. Those who resort to obtaining an illegal abortion are placed at significant risk of serious health complications or even mortality.

8.1.4 A number of submissions recommended increasing support to parents facing hardship, including mental health support, childcare, and financial support. The Commission supports this. However, there are many reasons why a person may not wish to continue a pregnancy that will not be resolved by increasing such support. Those who have the means to do so will continue to travel overseas to obtain abortions. Again, the impact of an approach that seeks to ease the burden of parenthood rather than provide access to safe and legal abortion disproportionately affects those who are unable to avail themselves of the option to travel overseas for medical care. As noted by WHO –

> "The legal status of abortion makes no difference to a woman's need for an abortion, but it dramatically affects her access to safe abortion."[41]

8.2 Compatibility with Bill of Rights

8.2.1 The Bill of Rights contains relevant protections that reflect those contained in the ICCPR and the ECHR, notably sections 2 (right to life), 3 (protection against torture and inhuman treatment), 9 (right to private and family life) and 16 (protection against discrimination).

Right to life

8.2.2 The Commission accepts the view, articulated in section 7.5 above, that the right to life under Article 6 of the ICCPR and Article 2 of the ECHR applies from birth. Section 2 of the Bill of Rights does not contain any wording that warrants a different interpretation. The Commission

[41] *Abortion Care Guideline*, p xx.

therefore holds the view that the right to life under section 2 of the Bill of Rights applies from birth.

8.2.3 The Commission further notes that a failure to provide access to safe abortion runs counter to these protections by endangering the lives of women and girls. General Comment No. 36, formulated by the Committee responsible for monitoring compliance with the right to life protection in the ICCPR, is highly instructive in relation to the measures required to ensure that protection. Although it acknowledges the right of States parties to regulate abortion, it emphasises that such regulation must not endanger lives.[42] Unsafe abortions outside the healthcare system are provided in the Cayman Islands as a result of the criminal sanctions imposed by sections 141, 142 and 143 of the Penal Code. As such, it is the Commission's view that sections 141, 142 and 143 are potentially inconsistent with the right to life contained in section 2 of the Bill of Rights. Regardless of inconsistency with the Bill of Rights, as a matter of policy the Commission considers that the current legal regime has created an unacceptable risk to the lives of women and girls.

Protection against torture and inhuman treatment

8.2.4 The Commission notes the relevance of the decisions of the Human Rights Committee in *Mellet* and *Whelan*. Both cases concerned a legal regime which prohibited abortion except in the case of a real and substantial risk to the life of the mother. This is similar to the position in the Cayman Islands, where abortion is only permitted under section 141 of the Penal Code to preserve the life of the mother. In both cases, the Human Rights Committee found that the law violated the protection against cruel, inhuman or degrading treatment under the ICCPR. The protection in section 3 of the Bill of Rights does not extend to cruel treatment, but it does extend to inhuman or degrading treatment. The Human Rights Committee outlined at length the extent of the mental and physical suffering inflicted on the applicants in those cases, and noted that moral considerations do not justify a violation of the protection. It is reasonable to assume that women in the Cayman Islands find themselves in similar circumstances, forced to travel to obtain abortions away from their support networks in circumstances where they are facing deep emotional trauma. As such, it is the Commission's view that, in such

[42] General Comment No. 36, para 8.

circumstances, sections 141, 142 and 143 of the Penal Code are potentially inconsistent with the protection against inhuman or degrading treatment contained in section 3 of the Bill of Rights. Regardless of inconsistency with the Bill of Rights, as a matter of policy the Commission considers that the current legal regime has the potential to cause significant psychological trauma to women and girls seeking abortions.

Right to private and family life

8.2.5 Both the Human Rights Committee and the European Court of Human Rights have found that the concept of private and family life is broad, encompassing the right to personal autonomy in relation to reproductive decisions. They have also found that laws restricting access to abortion have the potential to infringe upon the right to private and family life, but have stopped short of interpreting the right as encompassing a right to abortion. The case of *A, B and C v. Ireland* is highly relevant, as it concerned a law that did not provide a satisfactory framework for determining whether a woman was eligible for an abortion on the basis of the narrow exception of risk to the woman's life. In finding that the Irish legal regime violated the positive obligation to legislate to protect the right to private and family life, the Court emphasised the discord between the theoretical right to abortion and the reality of obtaining one due to a lack of legislated procedures combined with harsh criminal penalties. This is also the position in the Cayman Islands. Section 141 of the Penal Code requires two health practitioners to certify that an abortion is required to preserve the life of the mother, but there is no framework to resolve differences of opinion between practitioners. A woman may be required to consult multiple practitioners (who are operating against a background of harsh criminal penalties), in circumstances where her health may be compromised by delay. The WHO Abortion Care Guideline also notes that grounds-based approaches to abortion regulation are often narrowly defined, conservatively applied, and inconsistently interpreted by abortion providers, eroding the theoretical right to abortion. As such, it is the Commission's view that sections 141, 142 and 143 of the Penal Code are potentially inconsistent with the right to private and family life contained in section 9 of the Bill of Rights. Regardless of inconsistency with the Bill of Rights, as a matter of policy the Commission considers that the current legal regime interferes with the personal choices and reproductive autonomy of women and girls in an unjustifiable and unacceptable manner.

Protection against discrimination

8.2.6 The Human Rights Committee outlined in *Mellet* the discriminatory aspects of the former Irish regime, in which a woman who carried a non-viable foetus to term was afforded the full protection of the public healthcare system, while a woman who chose to terminate such a pregnancy was stripped of those rights. However, the discriminatory nature of laws that restrict access to abortion applies in much broader circumstances than those outlined in that case. Given the availability of abortion overseas, the current law in the Cayman Islands inevitably discriminates against women and girls who cannot travel to obtain an abortion, whether because of socio-economic factors, age or any other circumstance. The majority of the consequences of the current law, whether they be financial, emotional, physical or social, are experienced by the women and girls who are forced to travel to obtain an abortion or to carry an unwanted or non-viable pregnancy to term. The current law has a disproportionate impact on women and girls. As such, it is the Commission's view that sections 141, 142 and 143 of the Penal Code are potentially inconsistent with the protection from discrimination contained in section 16 of the Bill of Rights. Regardless of inconsistency with the Bill of Rights, as a matter of policy the Commission considers that the negative consequences of the current legal regime disproportionately impact women and girls, particularly those of limited economic means, in an unacceptable manner.

9. RECOMMENDATIONS

9.1 The Commission strongly agrees with the view expressed in numerous submissions that there is no justification for imposing a criminal sanction on a woman who obtains an abortion. Regardless of the position taken on providing an abortion (or the means for one), applying criminal sanctions to a woman seeking an abortion is a draconian measure.

Recommendation 1:

Section 142 of the Penal Code should be repealed.

9.2 The Commission holds the view that the current restrictions on accessing abortion present unacceptable health risks to women and girls, create the potential for inhuman or degrading

treatment of women and girls, interfere with reproductive autonomy and discriminate against women and girls.

Recommendation 2:

Sections 141 and 143 of the Penal Code should be repealed.

9.3 The Commission agrees with the view expressed by BPAS that the removal of existing criminal sanctions should be accompanied by legislation that provides clear parameters for healthcare providers to ensure women and girls can access high quality, evidence-based abortion care.

Recommendation 3:

Standalone legislation should be enacted providing for safe access to abortion in the form of the proposed *Termination of Pregnancy Bill, 2024*.

9.4 The Commission accepts the evidence presented by WHO and BPAS that a grounds-based approach to abortion access has the potential to erode access to abortion in unintended ways. However, the Commission favours the application of broad grounds in the case of abortion beyond 24 weeks gestation. The Commission accepts the submission of BPAS that the gestational limit for most abortions should be 24 weeks rather than 23 weeks.

Recommendation 4:

Abortion should be permitted without restriction up to 24 weeks gestation.

Recommendation 5:

The grounds for abortion after 24 weeks gestation should be as follows –

(a) the continuation of the pregnancy would result in risk to the physical or mental health of the woman that is greater than if the pregnancy were terminated; or

(b) there is a substantial risk that the condition of the foetus is such that –

  (i) the death of the foetus is likely before, during, or shortly after birth; or

  (ii) if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

9.5 The Commission accepts the evidence presented by WHO that mandatory waiting periods can have the effect of eroding access to abortion, and accepts the WHO recommendation against such mandatory waiting periods.

Recommendation 6:

There should be no mandatory waiting periods for abortion.

9.6 The Commission agrees with the recommendations of WHO and BPAS that clinical bodies should regulate which health practitioners can perform abortions, and accepts that restricting the performance of abortions to medical practitioners has the effect of restricting access to abortion in remote areas.

Recommendation 7:

The legislation should allow for registered health practitioners to perform abortions in accordance with their scope of practice.

9.7 The Commission accepts the recommendations of WHO and BPAS that clear parameters be provided in relation to conscientious objection that strike a balance between protecting conscientious objectors and ensuring that such protections do not impede a woman's ability to obtain an abortion.

Recommendation 8:

The legislation should specify that –

(a) a conscientious objector is not required to participate in the provision of an abortion unless it is necessary to save the life of a woman; and

(b) a conscientious objector is required to inform the woman of her right to seek healthcare from another practitioner and ensure that the woman has sufficient information to do so.

9.8 The Commission favours retaining the offence of killing an unborn child contained in section 199 of the Penal Code, subject to an amendment to specify that the offence does not apply in the case of a lawful abortion.

Recommendation 9:

Section 199 of the Penal Code should be amended to specify that a person who terminates a pregnancy in accordance with the recommended standalone legislation does not commit an offence under that section.

9.9 The Commission favours creating a comprehensive offence for the termination of pregnancy by unqualified persons in order to safeguard the health and safety of women and girls seeking abortions.

Recommendation 10:

The Penal Code should be amended to specify that it is an offence for an unqualified person to perform a procedure on, or administer or supply a drug to, a woman with the intention of causing a termination of the woman's pregnancy. An unqualified person is a person who is not a practitioner acting in accordance with the proposed standalone legislation.

9.10 Section 141 of the Penal Code currently encompasses termination of pregnancy by force. As the Commission recommends repealing this section, the Commission favours creating a separate offence for termination of pregnancy by coercion or without consent.

Recommendation 11

The Penal Code should be amended to include an offence for coercing a woman to terminate her pregnancy or performing a procedure on, administering a drug to, or causing a drug to be taken by, a woman with the intention of causing a termination of the woman's pregnancy without her consent.

10. CONCLUSION

10.1 The review by the Commission of the provisions of the Penal Code relating to abortion suggests that these offences should be repealed. The Commission recommends standalone legislation to provide access to and regulate abortion.

Accordingly, the Commission recommends for consideration the *Termination of Pregnancy Bill, 2024* and the *Penal Code (Amendment) Bill, 2024*.

LIST OF REFERENCES

Articles, reports, and other materials

Barnett, *Restricted Abortion Access: Opinions About Abortion Among Reproductive-Age Women in the Cayman Islands* (2022)

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World Health Organization, *Abortion Care Guideline* (2022), online: <https://iris.who.int/handle/10665/349316>

Legislation

Cayman Islands Constitution Order, 2009

Penal Code (2024 Revision)

International instruments

European Convention on Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

United Nations Convention on the Rights of the Child

Universal Declaration of Human Rights

Case Law

A, B and C v Ireland App. no. 25579/05 (ECtHR, 16 December 2010)

M.L. v. Poland App. no. 40119/21 (ECtHR, 14 March 2024)

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UNHRC, Communication No 2324/2013, *Mellet v Ireland*, UN Doc CCPR/C/116/D/2324/2013, online: <https://juris.ohchr.org/casedetails/2152/en-US>

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APPENDIX 1

TERMINATION OF PREGNANCY BILL, 2024

CAYMAN ISLANDS

TERMINATION OF PREGNANCY BILL, 2024

A BILL FOR AN ACT TO PROVIDE A FRAMEWORK FOR THE TERMINATION OF PREGNANCY; AND FOR INCIDENTAL AND CONNECTED PURPOSES.

PUBLISHING DETAILS

Sponsoring Ministry/Portfolio: Ministry of Health and Wellness (H&W)

Memorandum of

OBJECTS AND REASONS

This Bill provides a framework for the lawful termination of pregnancy.

The Bill is divided into four Parts and contains thirteen clauses.

PART 1 - PRELIMINARY

Clause 1 of the Bill provides for the short title and commencement of the legislation.

Clause 2 defines terms used in the Bill, including definitions of the various categories of health practitioner.

PART 2 – ROLE OF HEALTH PRACTITIONERS

Part 2 provides for the circumstances in which a pregnancy can be terminated, and also provides for the circumstances in which a practitioner may refuse to perform, or assist in the performance of, a termination.

Clause 3 specifies what it means to terminate a pregnancy or assist in the termination of a pregnancy. A termination is performed when a medical practitioner performs a surgical procedure or prescribes, supplies or administers a termination drug intending to induce an abortion.

Clause 4 provides that a termination may be performed on a woman who is not more than 24 weeks pregnant. There is no requirement that any grounds for the termination be established – the termination may be performed on request by the woman.

Clause 5 provides that a termination may be performed on a woman who is more than 24 weeks pregnant in certain circumstances. To perform a termination at this stage, a medical practitioner must be satisfied that:

(a) the continuation of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman that is greater than if the pregnancy were terminated; or

(b) there is a substantial risk that the condition of the foetus is such that the death of the foetus is likely before, during or shortly after birth or, if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

Clause 6 provides that a medical practitioner may perform a termination on a woman in an emergency if the medical practitioner considers the termination is immediately necessary to preserve the life of the woman.

Clause 7 provides that a medical practitioner is not required to perform a termination on a woman if the medical practitioner has a conscientious objection. If the practitioner has such an objection, they must refer the woman to another medical practitioner who does not so object.

Clause 8 provides that a nurse is not required to assist in the performance of a termination on a woman if they have a conscientious objection. If the nurse objects, the medical practitioner directing the termination must direct another nurse to assist who does not so object.

Clause 9 provides that a pharmacist is not required to assist in the performance of a termination on a woman if they have a conscientious objection. If the pharmacist objects, they must refer the woman to another pharmacist who does not so object.

Clause 10 provides that a medical practitioner or nurse has a duty to perform, or assist in the performance of, a termination in an emergency where the termination is necessary to preserve the life of the pregnant woman. This duty applies regardless of any conscientious objection to terminations held by the medical practitioner or nurse.

PART 3 – SAFE ACCESS ZONES

Part 3 provides for protections within safe access zones. A safe access zone is the area within 150 metres of premises used for performing terminations.

Clause 11 provides an offence for harassing, hindering, intimidating, interfering with, threatening or obstructing a person within a safe access zone in a way that may deter the person from entering or leaving premises used for performing terminations or performing or receiving a termination at such premises.

Clause 12 provides an offence for publishing a recording of a person who is in a safe access zone showing the person entering or leaving, or attempting to enter or leave, premises used for performing terminations.

PART 4 - MISCELLANEOUS

Clause 13 provides that the Cabinet may make regulations for the Act.

CAYMAN ISLANDS

TERMINATION OF PREGNANCY BILL, 2024

Arrangement of Clauses

CAYMAN ISLANDS

TERMINATION OF PREGNANCY BILL, 2024

A BILL FOR AN ACT TO PROVIDE A FRAMEWORK FOR THE TERMINATION OF PREGNANCY; AND FOR INCIDENTAL AND CONNECTED PURPOSES.

ENACTED by the Legislature of the Cayman Islands.

PART 1 – PRELIMINARY

Short title

1. (1) This Act may be cited as the Termination of Pregnancy Act, 2024.

(2) This Act comes into force on such date as may be appointed by Order made by the Cabinet and different dates may be appointed for different provisions of this Act and in relation to different matters.

Interpretation

2. In this Act —

"**medical practitioner**" means a person registered to practise as a medical doctor under the *Health Practice Act (2021 Revision)*;

"**nurse**" means means a person registered to practise as any of the following under the *Health Practice Act (2021 Revision)* —

(a) Registered General Nurse;

(b) Advanced Practice Nurse;

(c) Registered Midwife;

(d) Registered Nurse; or

(e) Public Health Nurse;

"**pharmacist**" means a person registered to practise as a pharmacist under the *Health Practice Act (2021 Revision)*;

"**perform a termination**" has the meaning given in section 3;

"**premises used for performing terminations**" means premises where either or both of the following take place –

(a) terminations are performed by medical practitioners; or

(b) nurses or pharmacists assist in the performance of terminations;

"**publish**" means communicate or disseminate information in a way or to an extent that makes it available to, or likely to come to the notice of, the public or a section of the public or anyone else;

"**safe access zone**" means the area —

(a) within the boundary of premises used for performing terminations; and

(b) within 150 metres outside that boundary;

"**termination**" means the termination of a woman's pregnancy;

"**termination drug**" means a substance or combination of substances used for terminations; and

"**woman**" means a female person of any age.

PART 2 – ROLE OF HEALTH PRACTITIONERS

Performing a termination

3. (1) A medical practitioner performs a termination if he or she does any of the following intending to induce an abortion —

(a) performs a surgical procedure; or

(b) prescribes, supplies or administers a termination drug.

(2) A nurse assists in the performance of a termination by supplying or administering, under the direction of a medical practitioner, a termination drug.

(3) A pharmacist assists in the performance of a termination by supplying, under the direction of a medical practitioner, a termination drug.

Termination of pregnancy up to 24 weeks

4. (1) A medical practitioner may perform a termination on a woman who is not more than 24 weeks pregnant.

(2) A medical practitioner may direct a nurse or pharmacist to assist in the performance of a termination on a woman who is not more than 24 weeks pregnant.

(3) A nurse or pharmacist may supply or administer a termination drug —

(a) if directed to do so by a medical practitioner; and

(b) in accordance with that direction.

Termination of pregnancy without gestational limit

5. A medical practitioner may perform a termination on a woman who is more than 24 weeks pregnant if the medical practitioner considers that —

(a) the continuation of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman that is greater than if the pregnancy were terminated; or

(b) there is a substantial risk that the condition of the foetus is such that —

(i) the death of the foetus is likely before, during or shortly after birth; or

(ii) if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

Termination of pregnancy in emergency

6. A medical practitioner may perform a termination on a woman in an emergency if the medical practitioner considers the termination is immediately necessary to preserve the life of the woman.

Conscientious objection - medical practitioner

7. (1) A medical practitioner is not required to perform a termination on a woman if the medical practitioner has a conscientious objection in relation to terminations.

(2) However, the medical practitioner must refer the woman, within a clinically reasonable time, to another medical practitioner known by the medical practitioner not to have a conscientious objection in relation to terminations.

Conscientious objection - nurse

8. (1) A nurse is not required to assist in the performance of a termination on a woman if the nurse has a conscientious objection in relation to terminations.

(2) The medical practitioner directing the performance of the termination must instead direct another nurse, known by the medical practitioner not to have a conscientious objection in relation to terminations, to assist.

Conscientious objection - pharmacist

9. (1) A pharmacist is not required to assist in the performance of a termination on a woman if the pharmacist has a conscientious objection in relation to terminations.

(2) However, the pharmacist must refer the woman, within a clinically reasonable time, to another pharmacist known by the pharmacist not to have a conscientious objection in relation to terminations.

Duty to perform or assist to save life

10. (1) Despite any conscientious objection in relation to terminations, a medical practitioner has a duty to perform a termination in an emergency where the termination is necessary to preserve the life of a pregnant woman.

(2) Despite any conscientious objection in relation to terminations, a nurse has a duty to assist a medical practitioner in an emergency where a termination is necessary to preserve the life of a pregnant woman.

PART 3 – SAFE ACCESS ZONES

Prohibited conduct in safe access zones

11. (1) A person commits an offence if the person engages in any of the following conduct in a safe access zone —

(a) conduct, such as harassing, hindering, intimidating, interfering with, threatening or obstructing a person, including by recording the person by any means without the person's consent, that may result in deterring the person from —

(i) entering or leaving premises used for performing terminations; or

(ii) performing or receiving a termination at premises used for performing terminations; or

(b) conduct that could be seen or heard by a person in the vicinity of premises used for performing terminations that may result in deterring the person or another person from —

(i) entering or leaving the premises; or

(ii) performing a termination or receiving a termination at the premises.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine of five thousand dollars or imprisonment for 12 months, or both.

Publication of recording

12. (1) A person commits an offence if —

(a) the person publishes a recording of another person who is in a safe access zone;

(b) the recording was made without the other person's consent; and

(c) the recording shows the other person entering or leaving, or attempting to enter or leave, premises used for performing terminations.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine of five thousand dollars or imprisonment for 12 months, or both.

PART 4 - MISCELLANEOUS

Regulations

13. The Cabinet may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary to be prescribed for giving effect to the purposes of this Act.

Passed by the Parliament the day of , 2024.

Speaker

Clerk of the Parliament

APPENDIX 2

PENAL CODE (AMENDMENT) BILL, 2024

CAYMAN ISLANDS

PENAL CODE (AMENDMENT) BILL, 2024

A BILL FOR AN ACT TO AMEND THE PENAL CODE (2024 REVISION) IN RELATION TO ABORTION OFFENCES; AND FOR INCIDENTAL AND CONNECTED PURPOSES.

PUBLISHING DETAILS

Sponsoring Ministry/Portfolio: Portfolio of Legal Affairs (PLA)

Memorandum of

OBJECTS AND REASONS

This Bill amends the Penal Code (2024 Revision) in relation to abortion offences. These amendments are consequential to the enactment of the Termination of Pregnancy Act, 2024, which provides a framework for the lawful termination of pregnancy.

The Bill contains four clauses.

Clause 1 of the Bill provides for the short title and commencement of the legislation. The legislation commences on the date the Termination of Pregnancy Act, 2024 commences.

Clause 2 repeals and replaces sections 141 and 142 of the Penal Code (2024 Revision). Section 141 contains an offence for procuring an abortion, with the exception of an abortion performed with the written certification of two medical practitioners as being necessary to preserve the life of the mother. Section 142 contains an offence for a woman who attempts to procure an abortion. Clause 2 repeals these sections and replaces them with two new offences. New section 141 provides that it is an offence for a person other than a medical practitioner, nurse or pharmacist acting in accordance with the Termination of Pregnancy Act, 2024 (a "qualified person") to attempt to terminate a woman's pregnancy by administering a drug or using an instrument. New section 141 also provides that it is an offence for a person other than a qualified person to supply an instrument or drug to a woman that is intended to cause a termination of the woman's pregnancy. New section 142 contains an offence for coercing a woman to terminate her pregnancy, or performing a termination without the woman's consent.

Clause 3 repeals section 143, which contains an offence for supplying drugs or instruments to procure an abortion. The offence contained in the new section 141 covers the supply of such items by a person other than a qualified person.

Clause 4 amends section 199, which contains an offence for killing an unborn child. The amendment inserts an exception to the offence for a medical practitioner, nurse or pharmacist acting in accordance with the Termination of Pregnancy Act, 2024.

CAYMAN ISLANDS

PENAL CODE (AMENDMENT) BILL, 2024

Arrangement of Clauses

CAYMAN ISLANDS

PENAL CODE (AMENDMENT) BILL, 2024

A BILL FOR AN ACT TO AMEND THE PENAL CODE (2024 REVISION) IN RELATION TO ABORTION OFFENCES; AND FOR INCIDENTAL AND CONNECTED PURPOSES.

ENACTED by the Legislature of the Cayman Islands.

Short title

1. (1) This Act may be cited as the Penal Code (Amendment) Act, 2024.

(2) This Act comes into force on the date the *Termination of Pregnancy Act, 2024* comes into force.

Repeal and substitution of sections 141 and 142 of the Penal Code (2024 Revision) - attempts to procure abortion; attempt by woman with child to procure abortion

2. The *Penal Code (2024 Revision)*, in this Act referred to as the "principal Act", is amended by repealing sections 141 and 142 and substituting the following sections —

"**Termination of pregnancy by unqualified person**

141. (1) A person commits an offence if —

(a) the person does either of the following with the intention of causing the termination of a woman's pregnancy —

(i) administers a drug to the woman or causes a drug to be taken by the woman; or

(ii) uses an instrument or other thing on the woman; and

(b) the person is not a qualified person.

(2) A person who commits an offence under subsection (1) is liable on conviction to imprisonment for ten years.

(3) A person commits an offence if —

(a) the person procures for, or supplies to, a woman a drug, instrument or other thing; and

(b) the drug, instrument or other thing is intended to be used for the purpose of causing the termination of the woman's pregnancy; and

(c) the person is not a qualified person.

(4) A person who commits an offence under subsection (3) is liable on conviction to imprisonment for ten years.

(5) This section does not apply to a woman who consents to, or assists in, the performance of a termination on herself.

(6) In this section –

"**qualified person**" means a medical practitioner, nurse or pharmacist acting in accordance with the *Termination of Pregnancy Act, 2024*; and

"**woman**" means a female person of any age.

Termination of pregnancy by coercion or without consent

142. (1) A person commits an offence if the person coerces a woman to terminate her pregnancy.

(2) A person who commits an offence under subsection (1) is liable on conviction to imprisonment for fifteen years.

(3) A person commits an offence if —

(a) the person does either of the following with the intention of causing the termination of a woman's pregnancy —

(i) administers a drug to the woman or causes a drug to be taken by the woman; or

(ii) uses an instrument or other thing on the woman; and

(b) the woman does not consent to the termination.

(4) A person who commits an offence under subsection (3) is liable on conviction to imprisonment for fifteen years.

(5) In this section –

"**coerce**", a person, means to compel or force the person, by physical or mental pressure, to do something the person would not otherwise do; and

"**woman**" means a female person of any age."

Repeal of section 143 - supplying drugs or instruments to procure abortion

3. The principal Act is amended by repealing section 143.

Amendment of section 199 - killing an unborn child

4. The principal Act is amended in section 199 by repealing subsections (2) and (3) and substituting the following subsection —

"(2) Subsection (1) does not apply to a medical practitioner, nurse or pharmacist acting in accordance with the *Termination of Pregnancy Act, 2024*."

Passed by the Parliament the day of , 2024.

Speaker

Clerk of the Parliament

APPENDIX 3

THE PENAL CODE: IS IT COMPATIBLE WITH THE BILL OF RIGHTS?

DISCUSSION PAPER

THE CAYMAN ISLANDS LAW REFORM COMMISSION

PART 1

THE PENAL CODE: IS IT COMPATIBLE WITH THE BILL OF RIGHTS?

DISCUSSION PAPER

17th DECEMBER, 2021

THE CAYMAN ISLANDS LAW REFORM COMMISSION

Chairman	**Mr. Hector Robinson, QC**
Commissioners	**Hon. Justice Alexander Henderson, QC, (retd.)**
	Mr. Vaughan Carter, Attorney-at-Law
	Mr. Abraham Thoppil, Attorney-at-Law
	Ms. Reshma Sharma, QC, Solicitor General
	Mrs. Candia James-Malcolm, Director of Public Prosecutions (actg.)
Director	**Mr. José Griffith, Attorney-at-Law**
Senior Legislative Counsel	**Ms. Catriona Steele, Attorney-at-Law**
Paralegal Officer	**Ms. Felicia Connor**
Administrative Secretary	**Ms. Milicia Bodden**

CAYMAN ISLANDS LAW REFORM COMMISSION

Public Submissions

Stakeholders and members of the general public are invited to comment on the issues identified in the Discussion Paper and, in particular, to submit their views on the recommendations presented for discussion.

The Paper and supporting legislation may be viewed on the following website: **www.lrc.gov.ky** or **www.gov.ky** or a copy may be collected from the Offices of the Law Reform Commission.

Submissions should be forwarded no later than 15th March**,** 2022 to the Director of the Law Reform Commission, 4th Floor Government Administration Building, Portfolio of Legal Affairs, 133 Elgin Avenue, George Town, Grand Cayman, P.O. Box 136, Grand Cayman KY1-9000 either electronically to **cilawreform@gov.ky**, or in writing, by post or hand-delivered.

Contents

CAYMAN ISLANDS LAW REFORM COMMISSION

THE PENAL CODE: IS IT COMPATIBLE WITH THE BILL OF RIGHTS?

1. BACKGROUND

1.1 This Discussion Paper ("the Paper") is prepared in response to a referral by the Honourable Attorney General in 2017 requesting that the Law Reform Commission ("the Commission") review the *Penal Code (2019 Revision)* ("Penal Code")[1] to assess its compatibility with the Bill of Rights, Freedoms and Responsibilities[2] (the "Bill of Rights") as reflected in Part I to Schedule 2 of the *Cayman Islands Constitution Order, 2009* ("the Constitution")[3] and to update the obsolete and archaic provisions contained therein.

1.2 The Commission, at its 6th November, 2018 meeting, confirmed that the review of the Penal Code would be carried out in phases and that, in the first instance, the Commission would examine the compatibility of the Penal Code's provisions with the Bill of Rights, Freedoms and Responsibilities[4].

1.3 Since its introduction in 1975, the Penal Code has not undergone a comprehensive review. With the adoption of the Constitution, it is imperative that all laws, including the Penal Code, are compatible with the fundamental human rights principles enshrined in the Bill of Rights[5] set out in the Constitution as well as with the similar rights in Conventions and treaties that have been extended to the Cayman Islands.

1.4 The Bill of Rights[6] provides for the fundamental rights to life; protection against torture and inhuman treatment; protection against slavery or forced or compulsory labour; personal liberty; humane treatment of prisoners; a fair trial; no punishment

[1] Penal Code (2019 Revision).
[2] Part 1 of Schedule 2 of the Cayman Islands Constitution Order, 2009, SI No. 1379.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] The Bill of Rights, Freedoms and Responsibilities came into effect on 6 November 2012 (except for sections 6 (2) and (3) which came into effect on 6th November 2013).

without law; respect to private and family life; freedom of conscience and religion; freedom of assembly and association; freedom of expression; property; marriage between opposite sexes; non-discrimination of any rights under the Constitution and protection of children and protection of the environment. These fundamental rights are intended to reflect broadly accepted international standards of human rights and it is imperative that the provisions of the Penal Code reflect and are consistent with the principles underpinning these rights as expressed in the Bill of Rights.

2. HISTORICAL BACKGROUND OF THE PENAL CODE IN THE CAYMAN ISLANDS

2.1 The Penal Code is derived from the *Indian Penal Code (1860)*[7] ("IPC of Macaulay") and is primarily a consolidation of a number of pieces of legislation which were passed between the late 1800s and the mid-1900s. It has its roots in English law of the Victorian era and comprises 325 sections divided into twelve (12) parts[8] in order to capture the general criminal laws within the Islands.[9]

2.2 The *Cayman Islands Act, 1863* allowed for all British Acts or Laws, together with those Laws of The Colony of Jamaica to be applicable to the Cayman Islands.[10] These provisions were later compiled in an Edition namely, the *(Laws of the Cayman Islands) Law, 1960* which was amended by the *Revised Edition (Laws of the Cayman Islands) (Amendment) Law, 1963*, as well as subsequent volumes, including the modifications effected by and under section 56 of the *Cayman Islands (Constitution) Order in Council, 1962.*[11]

[7] Thomas Babington Macaulay chaired the first Law Commission of India and was the main drafter of the Indian Penal Code – the first comprehensive codified criminal law produced anywhere in the British Empire (Friedland 1992, p. 1172).
[8] Part I Preliminary; Part II Punishments; Part III Offence against Public Order; Part IV Offence against Administration of Public Authority; Part V Offence Injurious to the Public in General; Part VI Offence against the Person; Part VII Offence against the Children; Part VII Anti Gangs Provisions; Part IX Offence relating to Property; Part X Malicious injuries to Property; Part XI Forgery, Coining and Counterfeiting.
[9] Grand Cayman, Cayman Brac and Little Cayman.
[10] Cayman Islands Act 1863.
[11] The Law of the Cayman Islands Revised Edition 1963, Vol 1, Chpts 1-43, Eyre and Spottiswoode Limited, Her Majesty's Printers, 2 Serjeants' Inn, London, E.C.4. pg. vii.

2.3 By the *Penal Code Law 12 of 1975* the Cayman Islands Legislative Assembly (as it was then called), repealed laws which were penal[12] in nature,[13] some in part[14], in order to consolidate such laws into one statute, following the IPC of Macaulay, which was adopted throughout the British Colonies. [15]

2.4 The Penal Code creates offences relating to public order, the administration of lawful authority, religion, morality, marriage and domestic relations, nuisances, health and defamation. Further, the Penal Code creates offences against the person such as manslaughter, murder, procuring abortion, indecent assault, unnatural offences, incest, suicide pacts and kidnapping, offences relating to children, such as cruelty to children and child pornography offences and offences in relation to property and animals.

2.5 Since its introduction in 1975, the Penal Code has been amended and revised primarily by the adjustment of the type and length of punishments, and by the introduction of some new offences. However, the Penal Code has not undergone a comprehensive review to determine if any of the offences are obsolete based on changes in social conditions since the time of its enactment. Further, with the enactment of the Bill of Rights contained in the Constitution, there is an even more pressing need to examine the Penal Code to determine if any of its provisions are in conflict with the fundamental human rights.

[12] Black's Law Dictionary (16c) A statute by which punishments are imposed for transgressions of the law, civil as well as criminal; esp., a statute that defines a crime and prescribes its corresponding fine, penalty, or punishment. — Also termed penal law; punitive statute; criminal statute.
[13] Cap 20 The Coinage Offence Law; Cap 28 The Country Fires Law; Cap 57 The Foreign Recruiting Law; Cap 58 The Forgery Law; Cap 69 The Incest (Punishment) Law; Cap 82 The Larceny Law; Cap 91 The Malicious Injuries to Property Law; Cap 101 The Military Training (Prohibition) Law; Cap 113 The Obeah Law; Cap 114 The Obscene Publications (Suppression) Law; Cap 115 The Offence Against The Person; Cap 122 The Perjury Law; Cap 146 The Recognisances' and Sureties of the Peace Law; Cap 151 The Riot Law; Cap 155 The Seditious Meetings Law; Cap 172 The Treason Felony Law; Cap 173 The Trespass Law; Cap 177 The Undesirable Publications (Prohibitions of Importation) Law; Cap 178 The Unlawful Possession of Property Law; Cap 180 The Vagrancy Law; No 13 of 1964 The Dangerous Offensive Weapons Law; No 7 of 1972 The Criminal Deception Law.
[14] The Defamation Law, 1996 (Part III); Cap 112 The Oaths Law (Sections 21-27).
[15] Memorandum of Objects and Reasons- Penal Code- Law 12 of 1975; International Encyclopedia of Comparative Law, Vol 1, National Reports, Victor Knapp, 1976 Mouton, The Hague & JCB MOHR (Paul Siebeck), Tubingen.

3. SCOPE OF THE DISCUSSION PAPER

3.1 This Paper examines the provisions in the *Penal Code (2019 Revision)*[16] against the Bill of Rights and identifies those provisions that raise issues of potential incompatibility with the Bill of Rights. Among the provisions identified are those relating to immature age (minimum age of criminal responsibility)[17], compulsion by spouse[18], insulting the modesty of a woman[19], procuring abortion[20], unnatural offences[21], indecent assault[22] and incest[23].

3.2 A desk review of the provisions identified as raising Bill of Rights compatibility issues was carried out having regard to the relevant provisions of the penal laws of various jurisdictions including England and Wales, Jamaica, Canada, India, The Bahamas and Australia.

3.3 Accordingly, the findings, comments and recommendations of the Commission on each issue together with questions on issues for consultation are presented in this Paper.

4. MINIMUM AGE OF CRIMINAL RESPONSIBILITY

4.1 The minimum age of criminal responsibility is the minimum age below which a person is presumed not to have the capacity to infringe the criminal law. This means that children below the minimum age of criminal responsibility cannot be arrested or charged, but those above are presumed to be sufficiently mature to stand trial, and in the eyes of the law, held accountable as adults.

4.2 The traditional common law position was a minimum age of criminal responsibility of seven (7) years and a rebuttable presumption of *doli incapax* from seven (7) years until fourteen (14) years.[24]

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[16] Penal Code (2019 Revision).
[17] Ibid. s 12.
[18] Ibid, s 16.
[19] Ibid, s. 133.
[20] Ibid, s. 141, 142, 143.
[21] Ibid, s. 144.
[22] Ibid, s. 132, 145.
[23] Ibid, s. 146. 147.
[24] *JM v Runeckles* (1984) 79 Cr App R 255.

4.3 The presumption of *doli incapax* means that the law presumes a child under the age of fourteen (14) years does not possess the necessary knowledge required to have criminal intent. The presumption may be disproved or rebutted by evidence showing that a child knew his or her actions were morally wrong.

4.4 Many countries have moved away from the common law position and in doing so, there has been a tendency to increase the minimum age of criminal responsibility to ten (10) or twelve (12) years and in some cases to abolish the rebuttable presumption of *doli incapax.*

(a) International standard for minimum age of criminal responsibility

4.5 The United Nations Convention on the Rights of the Child[25] ("UNCRC") established an international standard for the recognition and support of the rights of the child and highlights the need for appropriate legal protection and special safeguards for children. The UNCRC requires States parties to establish a minimum age of criminal responsibility that reflects the physical and mental immaturity of children and promotes non-judicial measures (such as care and counselling)[26] for dealing with children in conflict with the law[27].

4.6 In 2007, the UNCRC[28] recognised that reports submitted by States parties showed the existence of a wide range of minimum ages of criminal responsibility ranging from a very low level of age seven (7) or eight (8) years to the high level of age fourteen (14) or sixteen (16) years[29]. The UNCRC also found that, as is the case in the Cayman Islands[30], a number of States parties apply two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age, but below the

[25] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entry into force 2 September 1990, in accordance with article 49. <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.
[26] Ibid, Article 40(3), p 11.
[27] Children in conflict with the law: children alleged as, accused of, or recognised as having infringed the penal law see page 3 of the UNCRC General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice.
[28] To assist in the interpretation of the rights under the Convention, the UN Committee on the Rights of the Child, a body of independent experts which monitors implementation of the UNCRC, issues documents known as General Comments. These have dealt with such issues as adolescent health (General Comment 4) and the right of children to be heard (General Comment 12). 14. States Parties are also required to report periodically to the Committee. After consideration of a State party's report the Committee issues observations and recommendations. Concluding observations refer both to positive aspects of a State's implementation of the UNCRC and areas where the Committee recommends that further action needs to be taken by the State.
[29] General Comment No. 10 (2007), Children's rights in juvenile justice CRC/C/GC/10, 25 April 2007, p 10.
[30] Penal Code (2019 Revision), s 12.

higher minimum age, are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of the required level of maturity is left to the court or judge, often without the requirement of involving a psychological expert, and results, in practice, in the use of the lower minimum age in cases of serious crimes.[31]

4.7 The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court or judge and may result in discriminatory practices.[32] In light of this wide range of minimum ages of criminal responsibility, the UNCRC felt that there was a need to provide the States parties with clear guidance and recommendations regarding the minimum age of criminal responsibility and declared a minimum age of less than twelve (12) years "not to be internationally acceptable".[33]

4.8 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")[34] which accompanied the UNCRC as a supplemental guide, observed that the "modern approach to consider was whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child can be held responsible for essentially antisocial behavior.".[35]

4.9 Whilst the Beijing Rules do not specify a minimum age, rule 4.1 states that the minimum age of criminal responsibility should "not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."[36] In addition, the rule suggested that there should be a relationship between this age and other rights and responsibilities of the child, such as the age of majority.[37]

4.10 Although, in line with rule 4 of the Beijing Rules, the UNCRC in General Comment No. 10 (2007) had considered twelve (12) years as the absolute minimum age for criminal responsibility, the recommendation in its draft General Comment No. 24

[31] General Comment No. 10 (2007), Children's rights in juvenile justice CRC/C/GC/10, 25 April 2007, p 10.
[32] Ibid, p 11.
[33] Ibid.
[34] General Assembly Resolution 40/333, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), A/RES/40/33 (29 November 1985) <https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf>.
[35] Ibid, p 3.
[36] Ibid.
[37] Ibid.

is that this age indication is still low. It is reported that the UNCRC has stated that it increased its recommended age to reflect current research in child development and neuroscience, which says that abstract reasoning skills are not fully developed in children aged twelve (12) and thirteen (13) years.[38]

4.11 States parties are therefore encouraged to increase their minimum age to at least fourteen (14) years of age. At the same time, the UNCRC commends States parties that have a higher minimum age, for instance fifteen (15) or sixteen (16) years of age. The UNCRC further recommends that a State party should under no circumstances reduce the minimum age of criminal responsibility, if its current penal law sets the minimum age of criminal responsibility at an age higher than fourteen (14) years.

4.12 Accordingly, many countries have introduced a minimum age of criminal responsibility or have raised their minimum age of criminal responsibility.

(b) Minimum age of criminal responsibility in the Cayman Islands

4.13 The Cayman Islands currently has a minimum age of criminal responsibility of ten years. Section 12(1) of the Penal Code provides that a person under the age of ten years is not criminally responsible for any act or omission.[39] However, under section 12(2), a person under the age of fourteen (14) years is not criminally responsible for an act or omission unless it is proved that, at the time of doing the act or making the omission, the person had capacity to know that the person ought not to do the act or make the omission.[40] In addition, under section 12(3), if the child is a male person under the age of twelve (12) years, the child will be presumed to be incapable of having carnal knowledge.[41]

4.14 Section 17 of the Constitution affords fundamental human rights protection for children and requires that the Legislature shall enact laws to provide every person

[38] <https://www.theguardian.com/law/2019/sep/26/australia-urged-to-follow-un-advice-and-raise-age-of-criminal-responsibility-by-four-years>.
[39] Penal Code (2019 Revision), s 12(1).
[40] Ibid, s 12(2).
[41] Ibid, s 12(3).

under the age of eighteen (18) years (a "child") with such facilities as would aid the child's growth and development.

4.15 As a British Overseas Territory of the United Kingdom, the UNCRC was extended to and ratified by the Cayman Islands in 1994.[42] To better comply with its provisions and principles, the Cayman Islands Government enacted the *Children Act (2012 Revision).*[43]

4.16 Article 3(1) of the UNCRC, which provides for the "best interest of the child" principle, is the predominant theme echoed throughout the *Children Act (2012 Revision).* However, the reliability of the principle is questioned when the Penal Code assigns criminal responsibility to persons who have attained the age of ten years. Hull J, sitting in the Grand Court observed in *R. v. T.E.B. and McKenzie*[44] that while a person remains a juvenile, that is, under the age of seventeen, special provisions govern the way in which the person can be dealt with.[45] Therefore, in making a decision about a juvenile, the Grand Court has to have regard both to the welfare of the juvenile and to the necessity of doing justice.[46]

4.17 Another issue that potentially arises is the difficulty in determining the age of majority for rehabilitation. The confusion arises because of the use of terms such as "child" and "young person" interchangeably in Cayman Islands legislation. Section 17 of the Bill of Rights refers to a child as being "a child and young person under the age of eighteen". Section 17 of the Bill of Rights also gives a child the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 5 and 22 of the Bill of Rights, the child may be detained only for the shortest appropriate period of time, and shall be treated in a manner and kept in conditions that take account of his or her age.

4.18 A further issue is the distinction made in section 12(3) of the Penal Code such that if a child under the age of twelve (12) years is a male person, the child will be

[42] <http://www.gov.ky/portal/page/portal/hrthome/publications/international-treaties>.
[43] Children Act (2012 Revision).
[44] [1984–85 CILR 316].
[45] Ibid para 37-39, p 29.
[46] [1984-85 CILR 320] para 15-17.

presumed to be incapable of having carnal knowledge.[47] In light of section 16 of the Bill of Rights, which affords protection from discrimination in respect of rights under the Bill of Rights (arising from different and unjustifiable treatment on any ground including sex), in the application of section 12(3) of the Penal Code only to "a male person" raises gender neutrality questions which may render the provision inconsistent with the Bill of Rights. These issues are raised despite the direction in the *Interpretation Act (1995 Revision)*[48] that words importing the masculine gender in the Interpretation Act and in all other Acts include females. We also acknowledge that section 16 is not a standalone right.

4.19 In determining whether or not changes are required to the Penal Code provision on the minimum age of criminal responsibility to make it compatible with the Bill of Rights and the UNCRC, relevant laws in a number of jurisdictions were examined. In particular, reference is made in this Paper to the laws and authorities regarding minimum age in Australia, England and Wales, and Scotland.

(d) Countries with a minimum age that is ten (10) years or under

4.20 The Cayman Islands is joined by a few countries around the word which still have a minimum age of criminal responsibility which is ten (10) years or under, such as Australia and the United Kingdom (England and Wales and Northern Ireland).[49]

(i) Australia

4.21 In Queensland, Australia, a person under ten (10) years is not criminally responsible for any act or omission.[50] However, a person under the age of fourteen (14) years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.[51] Therefore, to prove

[47] Penal Code (2019 Revision) s 12(3).
[48] Interpretation Act (1995 Revision), s 4.
[49] Also, The Bahamas, New Zealand and India.
[50] Criminal Code Act 1899 (Queensland), s 29(1).
[51] Ibid, s 29(2).

capacity, it must be proven beyond reasonable doubt that the accused has the capacity to know that he or she ought not to have done the act.[52]

4.22 In its concluding observations on the combined fifth and sixth periodic reports of how Australia implements the provisions of the UNCRC[53], the UNCRC states that it regrets the lack of implementation of its previous recommendations and remains seriously concerned about, among other things, the very low age of criminal responsibility. With reference to its general comment, No. 24 (2019) on children's rights in the child justice system, the Committee on the Rights of the Child urged the State party to bring its child justice system fully into line with the UNCRC and to "raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of fourteen (14) years at which *doli incapax* applies."[54]

4.23 The State and Commonwealth Attorneys General investigated the issue of the minimum age of criminal responsibility in Australia in 2018 after legal and medical experts called for the age to be raised to fourteen (14) years. Dr. Tony Bartone, the Australian Medical Association President's view was that raising the minimum age of criminal responsibility will prevent the unnecessary criminalisation of vulnerable children. In an Australian Medical Association media release, Dr. Bartone stated:

> "*Australia has one of the lowest ages of criminal responsibility in the world. The criminalisation of children in Australia is a nationwide problem that disproportionately impacts Aboriginal and Torres Strait Islander children. Most children in prison come from backgrounds that are disadvantaged. These children often experience violence, abuse, disability, homelessness, and drug or alcohol misuse. Criminalising the behaviour of young and*

[52] [1998] QCA 097.
[53] United Nations CRC/C/AUS/CO/5-6 ADVANCE UNEDITED VERSION, Committee on the Rights of the Child Concluding observations on the combined fifth and sixth periodic reports of Australia. <https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUS/CRC_C_AUS_CO_5-6_37291_E.pdf>.
[54] United Nations CRC/C/AUS/CO/5-6 ADVANCE UNEDITED VERSION, Committee on the Rights of the Child Concluding observations on the combined fifth and sixth periodic reports of Australia, p 13. <https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUS/CRC_C_AUS_CO_5-6_37291_E.pdf>.

vulnerable children creates a vicious cycle of disadvantage and forces children to become entrenched in the criminal justice system. Children who are forced into contact with the criminal justice system at a young age are also less likely to complete their education or find employment, and are more likely to die an early death".[55]

4.24 The Law Council of Australia President, Arthur Moses SC is of the view that "Research-based evidence on brain development supports a higher age as children are not sufficiently able to reflect before acting or comprehend the consequences of a criminal action".[56] Mr. Moses also believes that increasing the minimum age of criminal responsibility to fourteen (14) years would remove the need for courts to consider the confusing and complex *doli incapax* presumption which in practice has proven to be extremely difficult to apply in court. For example, the Northern Territory Court of Appeal allowed an appeal in the case of *KG v Firth*[57] which demonstrated the uncertainty surrounding *doli incapax* and the risks of its erroneous application.

4.25 Mr. Moses further believes that children must be protected and not criminalised. Additionally, it is Mr. Moses' view that raising the minimum age of criminal responsibility to fourteen (14) years would improve justice outcomes for some of the most vulnerable children and honour Australia's commitments under international law, including promoting the best interests of the child. This would also replace *doli incapax* altogether, significantly reducing complexity and confusion in the Australian courts.

[55] <https://www.ama.com.au/gp-network-news/ama-calls-age-criminal-responsibility-be-raised>.
[56] <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>.
[57] [2019] NTCA 5.

(ii) United Kingdom (England and Wales and Northern Ireland)

4.26 The minimum age of criminal responsibility in the United Kingdom is a devolved matter[58], which, in each case (except for Scotland), is below the internationally recommended absolute minimum of twelve (12) years of age.[59]

4.27 In England, Wales and Northern Ireland the minimum age of criminal responsibility is ten (10) years of age.[60] In England, Wales and Northern Ireland, in addition to the ten (10) years minimum age of criminal responsibility until 1998, there was also a legal presumption (known as "*doli incapax*") that children under the age of fourteen (14) years did not know the difference between right and wrong and were therefore incapable of committing an offence. The *doli incapax* presumption was rebuttable if the prosecution could satisfy the court that the child knew that what he or she was doing was seriously wrong, not merely naughty or mischievous.[61]

4.28 However, the *doli incapax*[62] presumption was abolished in England and Wales by section 34 of the *Crime and Disorder Act 1998*[63] and in Northern Ireland by Article 3 of the *Criminal Justice (Northern Ireland) Order, 1998*.[64] This meant that under the criminal law in England and Wales children aged ten (10) to thirteen (13) years would be treated in the same way as those aged fourteen (14) years or over.[65]

4.29 A minimum age of criminal responsibility of ten (10) years does not comply with the UNCRC and is out of step with the rest of Europe where the average age of criminal responsibility is fourteen (14) years and, lately, with that of Scotland where the age is now twelve (12) years[66]. The UNCRC has criticised the United Kingdom's minimum age of criminal responsibility and has repeatedly urged the

[58] Devolved matters are those areas of government where decision-making has been delegated by Parliament to the devolved institutions such as the Scottish Parliament, the Assemblies of Wales, Northern Ireland and London or to Local Authorities.
[59] <https://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf>.
[60] Section 50 of the Children and Young Persons Act 1933 (as amended). The Act as introduced set the age at eight and this was increased to the current age of ten by section 16 of the Children and Young Persons Act 1963.
[61] *JM v Runeckles* (1984) 79 Cr App R 255.
[62] <https://www.iclr.co.uk/knowledge/glossary/doli-incapax/>.
[63] Crime and Disorder Act 1998, s 34. <https://www.legislation.gov.uk/ukpga/1998/37/contents>.
[64] Criminal Justice (Northern Ireland) Order, 1998, s 3. <https://www.legislation.gov.uk/nisi/1998/2839/contents/made>.
[65] House of Commons Library, Briefing Paper Number 7687, 16th August 2016, p 4. <https://researchbriefings.files.parliament.uk/documents/CBP-7687/CBP-7687.pdf>.
[66] The Age of Criminal Responsibility (Scotland) Act 2019, Part 1, s 1. <https://www.legislation.gov.uk/asp/2019/7/data.pdf>.

United Kingdom to increase the age to at least twelve (12) years.[67] In the UNCRC's list of issues in relation to the fifth periodic report, the United Kingdom was asked to provide information on progress made in raising the minimum age of criminal responsibility, developing a broad range of alternative measures to detention for children in conflict with the law and ensuring that such children are never tried as adults in ordinary courts. The Committee on the Rights of the Child also asked about the progress made in establishing a juvenile justice system in Northern Ireland, the overseas territories and Crown dependencies.[68]

4.30 Although there is mixed public opinion, the call to increase the minimum age of criminal responsibility is supported by many stakeholders. In 2008, a YouGov[69] poll suggested that just under half of those polled believed children are an increasing danger and that "something has to be done".[70] In 2010, two out of five of British adults surveyed were in favour of increasing the minimum age of criminal responsibility.[71]

4.31 The criminalisation of children in conflict with the law is perceived by many as being unfair and contrary to international human rights. While children in the United Kingdom are not deemed to be mature enough to marry (even with parental consent) until they are sixteen (16) years of age, to drive a car until seventeen (17) years of age, or to vote in a general election until they are eighteen (18) years of age, they may be criminalised at ten (10) years of age. Further, it is reported that most children in conflict with the law have poor mental health, dysfunctional families and backgrounds of emotional, physical or sexual abuse.[72]

4.32 One argument for maintaining the minimum age of criminal responsibility at ten (10) years is that children should be held accountable, especially when public

[67] See the House of Lords and House of Commons Joint Committee on the UN Convention on the Rights of the Child, Tenth Report of Session 2002-2003, p 3; p 54. <https://publications.parliament.uk/pa/jt200203/jtselect/jtrights/117/117.pdf>.
[68] CRC/C/GBR/Q/5, p 3. <https://www.refworld.org/pdfid/573d76574.pdf>.
[69] YouGov is a British international Internet-based market research and data analytics firm, headquartered in the UK, with operations in Europe, North America, the Middle East and Asia-Pacific.
[70] Houses of Parliament POSTNOTE 577, June 2018 Age of Criminal Responsibility, p 2. <https://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf>.
[71] Ibid, p 2. See also Rules of Engagement Changing the heart of youth justice A policy report by the Youth Justice Working Group January 2012.
[72] Houses of Parliament POSTNOTE 577, June 2018 Age of Criminal Responsibility, p 1. <https://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf>.

protection is at stake.[73] This view is shared by many who support increasing the minimum age of criminal responsibility, but alternative, age-appropriate responses are advocated.[74]

4.33 The murder of James Bulger (a toddler) by two ten (10) year old boys Jon Venables[75] and Robert Thompson in 1993 is cited as a reason for maintaining a minimum age of ten (10) years.[76] In that case, two (2) year old James Bulger was abducted and murdered by two ten (10) year olds in Mersyside. The two boys were prosecuted and found guilty and served their sentences. The James Bulger case was shocking and generated many debates on the minimum age of criminal responsibility. If the minimum age of criminal responsibility is increased the effect would be that children such as James Bulger's killers who were ten (10) years of age when they took him away and murdered him could not be prosecuted for a crime and would have to be dealt with through the social care system.

4.34 Despite the claims and supporting evidence that serious, sexual or violent offences by young children are rare and that an increase in the minimum age of criminal responsibility would serve society and protect the rights of children, reform in England and Wales seems unlikely whilst the James Bulger case casts a shadow over the criminal justice system.

4.35 The United Kingdom government's position is that a ten (10) year old child knows the difference between right and wrong and to prosecute a child of that age[77] for an offence is perfectly legitimate[78]. It is also believed that setting the age of criminal responsibility at ten (10) years provides flexibility in addressing offending behaviour by children and allows for early intervention to help prevent further offending[79]. However, others believe that this contradicts evidence about the

[73] Houses of Parliament POSTNOTE 577, June 2018 Age of Criminal Responsibility, p 2. <https://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf> and see House of Commons Hansard, Young Offenders, 08 March 2011 Volume 524.
[74] Cipriani, D. (2009) Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective. Farnham, England: Ashgate Publishing.
[75] *Reg. v. Secretary of State for the Home Department, Ex parte V. and Reg. v. Secretary of State for the Home Department, Ex parte T.* Session 1997-98.
[76] Ibid.
[77] See <https://criminaljusticealliance.org/wp-content/uploads/Age-of-Criminal-Responsibility-Bill-Lords-Second-Reading-080917.pdf>.
[78] <https://theconversation.com/the-james-bulger-case-should-not-set-the-age-of-criminal-responsibility-91342>.
[79] <https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts>.

processes by which children as young as nine (9) years old have the capacity to make moral judgements and behavioural choices.[80]

4.36 In 1999, in the cases *Venables v the United Kingdom* and *Thompson v the United Kingdom*[81], the European Court of Human Rights decided that the two boys who were prosecuted for killing James Bulger had been denied the right to a fair trial under Article 6 of the Human Rights Convention[82] due to the tense courtroom and public scrutiny and given their immaturity and disturbed emotional state. After the ruling, Thompson and Venables were granted new identities and lifelong anonymity.[83]

4.37 The rulings in the *Venables v the United Kingdom* and *Thompson v the United Kingdom* cases triggered a number of changes to the England and Wales justice system. One such change was that cases in respect of all children between ten (10) and seventeen (17) years of age who are accused of offences including theft and burglary, antisocial behaviour and drug offences would be tried in youth courts, while serious crimes like rape and murder would be passed to a Crown Court. Children who are tried in youth courts are entitled to anonymity, face different sentences from adults, and go to special secure centres for young people if they are convicted, rather than standard prisons.

4.38 Additional steps are more routinely taken in a youth court to ensure a child defendant understands his or her trial. However, the "Children in Dock series"[84] produced by the Guardian exposed failures in the youth justice system in the United Kingdom and the youth justice system in England and Wales continues to receive criticism more than twenty-five (25) years after the James Bulger case. The Guardian has reported that Anne Longfield, the Children's Commissioner for England, described current practices as chaotic and dysfunctional and has called for a wholesale review of the youth justice system.[85]

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[80] Weithorn LA, Campbell SB Child Dev. 1982 Dec; 53(6):1589-98.
[81] [1997] UKHL 25.
[82] Article 6 of the Human Rights Convention.
[83] See <https://www.mirror.co.uk/news/uk-news/four-criminals-handed-lifelong-anonymity-11990821>.
[84] A **series** investigating the youth justice system in England and Wales, which sees **children** as young as 10 put on trial.
[85] Youth court system in 'chaos', says children's commissioner, November 3, 2019.
<https://www.theguardian.com/society/2019/nov/03/youth-court-system-in-chaos-says-childrens-commissioner>.

4.39 It is believed that the deeply shocking nature of the James Bulger case has prevented successive governments from dealing with the issue.[86] Consecutive governments have reiterated that there is no intention to review the minimum age of criminal responsibility[87]. A 2011 statement on Youth Justice declared "It is entirely appropriate to hold (children over the age of ten (10)) to account for their actions if they commit an offence"[88]. In 2012, the government position was that "young people aged ten (10) and over are able to differentiate bad behaviour and serious wrongdoing".[89]

4.40 In 2017, a Private Members Bill proposing to increase the age of criminal responsibility to twelve (12) years was introduced in the House of Lords. At the second reading of the Bill, the Government responded that the current minimum age of criminal responsibility, "is appropriate and accurately reflects what is required of our justice system".[90] The Bill failed to complete its passage before the end of the Session.[91]

4.41 The Review of the Youth Justice System in Northern Ireland by the Department of Justice in 2011[92] recommended increasing the minimum age of criminal responsibility from ten (10) to twelve (12) years with "consideration given after a period of time to raising it further to fourteen (14) years".[93] The Report considered that "small numbers of children below these ages involved in offending still need support and discipline and to be held to account for their behaviour, but this should not be through a criminal justice process that further damages them".[94] While this

[86] At What Age Is It Right To Prosecute Children? By Emily Kent, Volunteer Writer20 Nov 2019 <https://eachother.org.uk/age-criminal-responsibility>.
[87] <https://www.brisbanetimes.com.au/politics/queensland/labor-at-odds-over-sending-children-to-jail-20210812-p58i8k.html>.
[88] <https://www.icca.ac.uk/revision-considered-to-age-of-criminal-responsibility/>.
[89] Age of Criminal Responsibility Bill [HL] (HL Bill 3 of 2017–19). See <http://hansard.parliament.uk/Lords/2016-01-29/debates/16012936000411/AgeOfCriminalResponsibilityBill(HL)> col 1574.
[90] Age of Criminal Responsibility Bill [HL] Volume 783: debated on Friday 8 September 2017. See Baroness Vere of Norbiton comment.
[91] <https://services.parliament.uk/Bills/2017-19/ageofcriminalresponsibility.html>.
[92] Northern Ireland Department of Justice: A Review of the Youth Justice System in Northern Ireland, 2011. Belfast. See <https://restorativejustice.org.uk/sites/default/files/resources/files/Report%20of%20the%20Youth%20Justice%20System%20in%20Northern%20Ireland.pdf>.
[93] Ibid, p 14.
[94] Ibid, p 14.

recommendation was widely supported,[95] a failure to implement it has been attributed to a lack of political consensus.[96]

(e) Countries with a minimum age of criminal responsibility that is higher than ten (10) years of age

4.42 Countries with a minimum age of criminal responsibility higher than ten (10) years of age include Jamaica, most European Countries and Scotland. In Jamaica, no child under the age of twelve (12) years can be found guilty of an offence.[97] Currently, most European countries have a minimum age of criminal responsibility of at least twelve (12) years including France (thirteen (13) years), Poland (thirteen (13) years), Turkey (twelve (12) years), and the Netherlands (twelve (12) years).[98] Scotland is of particular interest to this review as the minimum age was changed from eight (8) to twelve (12) years in 2019.

(i) Scotland

4.43 The *Age of Criminal Responsibility (Scotland) Act, 2019*[99], which increased the minimum age of criminal responsibility from eight (8) years to twelve (12) years[100] was passed unanimously by the Scottish Parliament in May 2019 and received Royal Assent on 11 June, 2019.

4.44 Prior to the passage of the Bill, Scotland was reported to have the lowest age of criminal responsibility in Europe[101] and there were numerous calls for its increase by the Committee on the Rights of the Child.

4.45 In 2015, the Scottish Government established an expert advisory group to identify the key issues arising from an increase in the minimum age of criminal responsibility from eight (8) to twelve (12) years, which made a number of

[95] Northern Ireland Assembly Committee for Justice, Review of Youth Justice, Ministerial Briefing, Official Report (Hansard) 28th June 2012. ; Northern Ireland Assembly Committee for Justice, Official Report, (Hansard) 31st May 2012. See Include Youth, Response to the UN Committee on the Rights of the Child Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice, p.3.
[96] Ibid, p 3.
[97] Child Care Protection Act 2004, s 63.
[98] See Child Rights International Network (CRIN), Minimum Ages of Criminal Responsibility in Europe. <https://archive.crin.org/en/home/ages/europe.html>.
[99] Age of Criminal Responsibility (Scotland) Act 2019.
[100] Ibid, s 1.
[101] The Report of the Advisory Group on the Minimum Age of Criminal Responsibility To Michael Matheson, MSP, Cabinet Secretary for Justice and Angela Constance, MSP, Cabinet Secretary for Education and Lifelong Learning, para 1.1.

recommendations about how to safely and responsibly raise the age.[102] The work of the advisory group resulted in the *Age of Criminal Responsibility (Scotland) Act, 2019*[103] being enacted.

4.46 The *Age of Criminal Responsibility (Scotland) Act, 2019*[104] is aimed at protecting children, reducing stigma and ensuring better future life chances, rather than reflecting a particular understanding of when an individual child in fact has the capacity to understand their actions, or the consequences that could result from those actions – either for them or for the people they may have harmed.[105] The Act reflects Scotland's commitment to international human rights standards and promoting the rights and interests of children and young people as well as addressing offending behavior by young people.[106]

4.47 The *Age of Criminal Responsibility (Scotland) Act, 2019*[107] also provides for a number of safeguarding measures to ensure that action (including investigations) can still be conducted by the police and other authorities when children under the age of twelve (12) years are involved in serious incidents of harmful behavior and to protect the child's rights and best interests and the interests and rights of anyone harmed. The safeguarding measures include specific investigatory powers for the police.

4.48 The changes made by the *Age of Criminal Responsibility (Scotland) Act, 2019*[108] also makes provision for a victim of a serious incident to receive information and for the right of a child under the minimum age of criminal responsibility who is thought to be responsible for a serious incident to have "access to a supporter and an advocacy worker during a formal police interview".[109]

[102] Ibid, para 1.3.
[103] Age of Criminal Responsibility (Scotland) Act 2019.
[104] Ibid.
[105] The Report of the Advisory Group on the Minimum Age of Criminal Responsibility To Michael Matheson, MSP, Cabinet Secretary for Justice and Angela Constance, MSP, Cabinet Secretary for Education and Lifelong Learning, para 1.14.
[106] See Scottish Government, Youth Justice, Raising the age of criminal responsibility, <https://www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility/>.
[107] Age of Criminal Responsibility (Scotland) Act 2019.
[108] Ibid.
[109] Child Rights and Wellbeing Impact Assessment, CRWIA for the Age of Criminal Responsibility (Scotland) Bill, p 1.

4.49 The *Age of Criminal Responsibility (Scotland) Act, 2019*[110] makes changes to the disclosure system by removing the automatic disclosure of convictions for the behaviour of children under twelve (12) years and putting in place independent consideration of information to be included in response to a disclosure check, when that check may disclose non-conviction, but potentially adverse information dating back to when a person was under the minimum age of criminal responsibility.[111]

4.50 There are still calls for the minimum age of criminal responsibility to be raised to fourteen (14) years in Scotland.[112] The Children and Young People's Commissioner for Scotland, Bruce Adamson, has also made his view clear that fourteen (14) years is the "lowest acceptable age".[113] The Scottish Government has reported that the Minister for Children and Young People has committed to creating a new advisory group to consider whether the age of criminal responsibility in Scotland should be increased further to fourteen (14) years and to review the operation of the *Age of Criminal Responsibility (Scotland) Act, 2019*[114].

(f) Comments and recommendations regarding minimum age of criminal responsibility

4.51 The Commission is of the view that children must be protected from the harmful effects of early criminalisation while ensuring that incidents of harmful behaviour by those who are under the minimum age may be effectively investigated to ascertain the facts surrounding the behaviour. The best interests of the child must be protected as well as the interests of victims and other persons that are affected by such harmful behaviour.

4.52 Recommendations made with regard to increasing the age of criminal responsibility must be aimed at protecting children and affirming the commitment of the Cayman Islands to comply with the Constitution and the UNCRC. However, these recommendations may not necessarily reflect a particular view of the age at which

[110] Age of Criminal Responsibility (Scotland) Act 2019.
[111] Child Rights and Wellbeing Impact Assessment, CRWIA for the Age of Criminal Responsibility (Scotland) Bill, p 1.
[112] The Sunday Post Report, Age of criminal responsibility raised to 12 in Scotland <https://www.sundaypost.com/fp/age-of-criminal-responsibility-raised-to-12-in-scotland>.
[113] Ibid.
[114]Age of Criminal Responsibility (Scotland) Act 2019<https://www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility/>.

a child has the capacity to understand their actions or the consequences of those actions for themselves or for their victim.

4.53 In making recommendations to increase the age of criminal responsibility, provision must be made to ensure that a child who is under the minimum age of criminal responsibility and whose behaviour is in conflict with the law will not be labelled as an offender or disadvantaged or stigmatised by being left with a criminal record for that behaviour.

4.54 Specific investigatory powers for the police may also be required together with a right for a child under the minimum age of criminal responsibility who is thought to be responsible for a serious incident to have access to a supporter and an advocacy worker during a formal police interview.

4.55 The victim of a serious incident must also have the right to support and to receive information regarding the incident.

4.56 The Commission's view is that an increase in the minimum age of criminal responsibility to either age twelve (12) or fourteen (14) should be considered by amending section 12 of the Penal Code to reflect the protections afforded in the Bill of Rights and the international standards and obligations that have been extended to the Cayman Islands. In achieving this, consideration should also must be given to the other legislation and mechanisms for youth justice currently in place in the Cayman Islands.

Recommendation:

That the age of criminal responsibility should be increased from ten (10) years of age to –

(a) twelve (12) years of age; or

(b) fourteen (14) years of age.

(g) Consultation questions on minimum age of criminal responsibility

Questions (Please give reason for your answers)

1. Do you agree with the recommendations of the UNCRC that the age of criminal responsibility should be increased?
2. If the answer to question 1 is "Yes", what age should the age of criminal responsibility be?
3. Do you anticipate that adjustments may be required in relation to child protection if the minimum age of criminal responsibility is increased?
4. If the age of criminal responsibility is increased, do you agree that it will be possible to deal with the harmful behaviour of children under the age of criminal responsibility via the existing youth justice legislation and system?
5. If the minimum age of criminal responsibility is increased, should some police power in respect of children below the minimum age of criminal responsibility be retained?
6. What safeguards should be put in place for children aged under the minimum age of criminal responsibility in relation to the use of police powers?
7. Do you agree that there should be a strong presumption against the release of information about a child's harmful behaviour when an incident occurred before the minimum age of criminal responsibility?
8. Should this strong presumption also apply to cases retrospectively?
9. Where it is felt necessary to release information about an incident occurring before a child reaches the minimum age of criminal responsibility do you agree that this process should be subject to independent ratification?

10. Do you agree that information about an incident of harmful behaviour that took place when a person was a child should continue to be disclosed when that person reaches the age of eighteen (18)?

11. If the age of criminal responsibility is increased, will this lead to any gaps in the support and information available to victims of a child's harmful behaviour, including other children?

5. COMPULSION BY SPOUSE

5.1 The defence of compulsion by spouse derives from the old English common law rule of marital coercion (compulsion by spouse) that, "subject to limited exceptions, if a wife committed a crime in her husband's presence she was presumed, *prima facie*, to have committed it under such compulsion as to entitle her to be acquitted."[115] The mere fact of the presence of the husband at the time of commission of the offence was sufficient to raise the presumption and in the absence of evidence that the wife was principally responsible for commission of the crime (or at least that she was acting independently) she would be acquitted, even though there is no evidence that she was acting under threats, pressure, or instructions from her husband.[116]

5.2 Generally, the defence of compulsion was rarely used. Writing in 1888, Sir Fitzjames Stephen declared that in the course of nearly thirty years' experience at the bar and on the bench, during which he paid special attention to the administration of criminal law, he never knew or heard of the defence of compulsion being made except in the case of married women.[117] At that time he only found two reported cases[118]. J.W. Cecil Turner sets out that in whatever form compulsion appears, the courts have been indisposed to admit that it can be a defence for any crime committed through yielding to it and the law of the matter is

[115] Archbold, Criminal Pleading (1848) 11th Edition, p. 17. See <https://www.ojp.gov/pdffiles1/Digitization/57842NCJRS.pdf>.
[116] Report of Avory Committee (1922)-Cmd. 1677, and Peel Case there referred to; R. v. Whelan (1937) S.A.S.R. 237: Glanville Williams, The Criminal Law-The General Part, Section 249. See <https://www.ojp.gov/pdffiles1/Digitization/57842NCJRS.pdf>.
[117] History of the Criminal Law, Vol. II, p. 106. <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1951.tb00208.x>.
[118] *R. v. McCrowtlicr* (1746) 18 St.Tr. 801, and *R. v. Crutchlpy* (1831) 5 C. C P. 133.

both meagre and vague[119]. It can best be considered under the heads of obedience to orders, martial coercion, duress *per minas,* and necessity[120] defined by spouse.

(a) The defence of compulsion by spouse in the Cayman Islands

5.3 In the Cayman Islands, section 16 of the Penal Code provides that a person is not free from criminal responsibility for something that they did or did not do on the grounds that the act or omission was in the presence of their spouse. However, except on a charge of murder or treason, a defence of compulsion by spouse may be used when an individual is charged with an offence if the accused can prove that their act or failure to act was in the presence of and under coercion from the person's spouse.[121]

5.4 Neither the Penal Code nor the *Interpretation Act (1995 Revision)*[122] defines the term "spouse". Black's Law Dictionary which defines "spouse" as "one's husband or wife by lawful marriage; a married person". [123]The defence of compulsion is restrictive as it is available only in respect of the case of persons of the opposite sex who are married. It is to be noted that section 2 of the *Marriage Act (2010 Revision)*[124] defines "marriage" as the union between a man and a woman as husband and wife[125].

5.5 The restrictions in the defence of compulsion raise human rights compatibility issues in particular in relation to section 16 of the Bill of Rights[126] which restricts the Government from treating any person in a discriminatory manner in respect of the rights under the Bill of Rights. "Discriminatory"[127] includes discrimination on any ground including grounds of sex, birth and other status. This means that discrimination on the basis of the status of not being married may fall well within the scope of section 16 of the Bill of Rights. Further, with the enactment of the *Civil*

[119] Kenny's Outlines of Criminal Law 54 (16th ed. 1952).
[120] Ibid.
[121] Penal Code (2019 Revision), s 16.
[122] Interpretation Act (1995 Revision).
[123] Garner, Bryan A., "Black's Law Dictionary, Tenth Edition" (2014). *Faculty Books and Book Contributions*. 18.
[124] Marriage Act (2010 Revision).
[125] Ibid, s 2.
[126] The Cayman Islands Constitution Order 2009, No. 1379, Part I, Bill of Rights, Freedoms and Responsibilities, s 16.
[127] Ibid, s 16(2).

Partnership Act, 2020[128], civil partnerships are recognised as a union between two persons.[129]

5.6 The protection from discrimination is not absolute as section 16(3) of the Bill of Rights provides that a law shall not contravene that section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.[130] Further, section 16(4) of the Bill of Rights prevents section 16(1) from rendering unlawful laws which make provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description.[131] However, the defence does not appear to be protected by section 16(3) or (4) of the Bill of Rights.

5.7 A less restrictive provision for the defence of compulsion is found in section 13 of the Penal Code which provides that a person is not criminally responsible for an offence if that act was committed by two or more persons[132] and on the basis that during the time when the act was being done or omitted, the person was compelled to do or failed not to do an act because the other person was threatening to kill them or do grievous bodily harm. In other words, the reason for the act or the failure to act was due to compulsion. Section 13 of the Penal Code also provides that threats of future injury do not excuse any offence and are not reasonable grounds to rely on compulsion.[133] The defence of compulsion is similar to the common law defence for duress and a person who committed a crime due to compulsion whether by a spouse or other person would have that defence available to them if the elements of the defence are satisfied.

5.8 Quin J, sitting in the Grand Court in *R v Hill*[134] observed that the elements for defence of duress[135] are as follows —

[128] Civil Partnership Act, 2020.
[129] Ibid, s 2.
[130] The Cayman Islands Constitution Order 2009, No. 1379, Part I, Bill of Rights, Freedoms and Responsibilities, s 16(3).
[131] Ibid, s 16(4).
[132] Penal Code (2019 Revision), s 13.
[133] Ibid.
[134] [2014 (2) CILR Note 2].
[135] See <https://cilr.judicial.ky/Judgments/Cayman-Islands-Law-Reports/Cases/CILR2014/CILR14N202.aspx>.

(a) there was a threat of serious injury or death;

(b) the harm threatened was directed at the defendant, a member of the defendant's immediate family, someone close to the defendant, or someone for whose safety the defendant reasonably regarded himself or herself as responsible;

(c) the defendant genuinely and reasonably believed that the threat would be carried out immediately, or almost immediately, if the defendant did not comply;

(d) the threat, or the defendant's reasonable belief in the threat, was a direct cause of the defendant's actions;

(e) a reasonable person (being a sober person of reasonable firmness, and sharing the same age, gender and any other relevant characteristics as the defendant) in the defendant's situation would have been given to act as the defendant did; and

(f) the defendant could not reasonably have taken any action to evade the effects of the threat.[136]

5.9 There are no reported cases in which the defence of compulsion by the spouse has been relied upon in the Cayman Islands.

(b) The defence of compulsion by spouse in other jurisdictions

5.10 In determining any human rights issues raised by the defence of compulsion by spouse in the Cayman Islands, the relevant laws of England and Wales and Canada were examined.

(i) England and Wales

5.11 In 1925, attempts were made in England and Wales to abolish the old common law presumption of compulsion by spouse that permitted the mere presence of a husband to be sufficient to raise the defence for an offence committed by his wife.

[136] [2014 (2) CILR Note 2].

Although section 47 of the *Criminal Justice Act 1925*[137] abolished the presumption, that section also provided a defence on a charge against a wife for any offence other than treason or murder if a wife proved that the offence was committed in the presence of, and under the coercion of, the husband.

5.12 However, as there was little authority to the correct test to be applied where the defence of compulsion by spouse was raised,[138] the use of the defence led to unfavourable decisions.[139] In 1977[140], the Law Commission Defences of General Application (Law Commission No. 83)[141] took the view that the defence was not appropriate to modern conditions.[142] It recommended that the defence should be abolished and that the limit of the general defence of duress was to be considered instead.[143]

5.13 In 2014, the defence of compulsion by spouse was abolished by the *Anti-Social Behavior, Crime and Policing Act 2014*.[144] The abolition was influenced by the use of the defence in *R v Pryce and Huhne*.[145] Here, Vicky Pryce, the ex-wife of ex-Liberal Democrat MP and Cabinet Minister, Chris Huhne claimed that Huhne had forced her to claim she was driving, when in fact he was the driver. This coercion went on for many years which caused her driving licence to incur penalties. The use of the defence was rejected. The trial judge, Justice Sweeney, noted that Pryce was readily persuaded but chose to go along with it for her mutual benefit. Pryce was sentenced to eight months imprisonment.[146]

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[137] Criminal Justice Act 1925, 925 Chapter 86 15 and 16 Geo 5, s 47.
[138] *R v Pierce* (1941) 5 Jo. Cr. L. 124. The jury was directed that moral pressure was sufficient, but in fact convicted the defendant.
[139] *R v Bourne* [1952]36 Cr App R. 125. A husband forced his wife to have a connection with a dog. She raised the defence arguing that she was coerced. He was charged with, and convicted of, abetting the offence of his wife. However, it was shown that the wife was coerced and was therefore found not guilty of the offence herself.
[140] The Law Commission (Law Com No. 83) Criminal Law Report on Defences of General Application. See Edwards, (1953) 69 L.Q.R. 226 and Cross (1953) 69 L.Q.R. 354.
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228595/0556.pdf>.
[141] Criminal Law: Defences of General Application Report. See <https://www.lawcom.gov.uk/project/criminal-law-report-on-defences-of-general-application/>.
[142] Ibid, p 18.
[143] Ibid, p 19.
[144] Anti-social behavior, Crime and Policing Act 2014, c. 12 Pt 13 s 177(2). (May 13, 2014: subject to transitional provisions specified in 2014 c.12 s.1.
[145] *R v Vasiliki Pryce and Christopher Huhne*, Indictment No. T20127076. See <https://www.judiciary.uk/wp-content/uploads/2014/05/r-v-pryce-and-huhne-judgment1.pdf> and <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/pryce-huhne-sentencing-remarks.pdf>.
[146] Ibid.

(ii) Canada

5.14 Section 18 of the Canada *Criminal Code*[147] provides that —

> "*No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person.*".[148]

5.15 Section 18 of the Canada *Criminal Code*[149] removes the common law presumption that a woman who commits an offence in the presence of her husband doing so at the compulsion of her husband (known as the doctrine of marital coercion). In other words, the criminal law of Canada does not presume that a person who commits an offence in the presence of a spouse has been compelled to do the criminal act merely by virtue of their relationship.[150]

5.16 Section 18 of the Canada *Criminal Code*[151] begs the question as to why the marriage relationship is singled out in this way. The section does not speak to any other family relationships or other relationships with a strong bond. Lisa Silver, a Calgary educator and lawyer, is of the view that the answer lies in the original version of section 18 and although the present iteration seems benign enough, the historical version, on today's standards, is much more contentious.[152] According to Silver, the original provision "Compulsion of Wife" found in the *Criminal Code 1892*[153] under the then section 13 was based on gender stereotypes as it held that "no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband".[154] This was changed to gender-neutral language in the 1980 *Code* amendments.

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[147] Criminal Code (R.S.C., 1985, c. C-46).
[148] Ibid, s 18.
[149] Criminal Code (R.S.C., 1985, c. C-46).
[150] Lisa Silver, IDEABLAWG, Section 18 – A Duress Addendum? Episode 20 of the Ideablawg Podcasts on The Criminal Code of Canada.
[151] Criminal Code (R.S.C., 1985, c. C-46).
[152] Lisa Silver, IDEABLAWG, Section 18 – A Duress Addendum? Episode 20 of the Ideablawg Podcasts on The Criminal Code of Canada.
[153] 55-56 Victoria Chap 129 found at <https://archive.org/details/criminalcodevic00canagoog/page/n46/mode/2up>.
[154] Ibid [110].

5.17 In Canada, some common law defences available to an accused are still available through section 8(3) of the Canada *Criminal Code* which provides that every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under the Canada *Criminal Code* or any other Act of Parliament except in so far as they are altered by or are inconsistent with the Canada *Criminal Code* or any other Act of Parliament.[155] Marital coercion was one such common law defence but it was rarely used. Common law defences are available unless they are "altered by or inconsistent with" the Canada *Criminal Code*[156]. The defence of marital coercion is altered by section 18 of the Canada *Criminal Code* and thus the defence of marital coercion is no longer available.

5.18 Section 18 of the Canada *Criminal Code* does not preclude the accused person from raising the defence of duress which exists in Canada both in statute under section 17 of the Canada *Criminal Code* and under the common law.

5.19 Under Section 17 of the Canada *Criminal Code*, a person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion. [157]

5.20 However, this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

[155] Criminal Code (R.S.C., 1985, c. C-46), s 8(3).
[156] Lisa Silver, IDEABLAWG, Section 18 – A Duress Addendum? Episode 20 of the Ideablawg Podcasts On The Criminal Code of Canada.
[157] Criminal Code (R.S.C., 1985, c. C-46), s 17.

5.21 The statutory defence of compulsion by threats was held to be "quite restrictive in scope" in *R v Ruzic*.[158] In this case, the Canadian Court of Appeal found that the defence of compulsion by threats breached the principles of fundamental justice under section 7 of the *Canada Constitution Act, 1982*[159] when it limited the defence of duress to a person who is compelled to commit an offence under threats of immediate death or bodily harm from a person who is present when the offence is committed.[160]

5.22 Accordingly, the requirements of section 17 of the *Canada Criminal Code* to have "presence" and "immediacy"[161] are unconstitutional as those requirements violate section 7 of the *Canada Constitution Act, 1982* and thus that portion of the section has no force or effect.

(c) Comments and recommendation regarding the defence of compulsion by spouse

5.23 Section 16 of the Penal Code only offers protection to an individual who is married and therefore is discriminatory as it raises issues regarding compatibility with section 16 of the Bill of Rights. If an unmarried individual has been forced to commit an act, this defence is not available to them. The rights that are available to a married person should also be available to any individual whether they be civil partners, common law partners, siblings and parents.

5.24 The Commission supports the approach taken in England and Wales to repeal the defence of compulsion by spouse as the Commission is of the view that the provision is restrictive and discriminatory. Further, a spouse who commits an offence under pressure from their spouse can avail themselves of the defence of duress.

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[158] *R. v Ruzic* [2001] 1 SCR 687, 2001 SCC 24 (CanLII). See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1861/1/document.do>.
[159] Enacted as Schedule B to the Canadian Act 1982, 1982, c. 11 (U.K.), which came into force on April 17, 1982.
[160] *R. v Ruzic* [2001] 1 SCR 687, 2001 SCC 24 (CanLII), at 688. See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1861/1/document.do>.
[161] Ibid, at 688.

Recommendation 2: That offence of compulsion by spouse in section 16 of the Penal Code should be repealed.

(d) Consultation question regarding the defence of compulsion by spouse

5.25 The Commission seeks the views of stakeholders and the public as to whether the defence of compulsion by spouse should be repealed. The Commission invites stakeholders and the public to consider and respond to the question below which will inform the report of the Commission.

Question (*Please give reasons for your answer)*

Should the offence of compulsion by spouse in section 16 of the Penal Code be repealed?

6. INSULTING THE MODESTY OF A WOMAN

6.1 The word modesty is defined to mean the state of being free from undue familiarities and indecency, and being pure in thought and conduct.[162] A woman's modesty may therefore be attributable to her womanhood and to her sense of decency and dignity. The offence of insulting the modesty of a woman presumes that women possess those qualities of modesty that are capable of being insulted and that anyone who insults a woman's decency without her consent commits an offence that is punishable.

6.2 The Supreme Court of India in the 1967 decision in *State of Punjab v Major Singh* AIR 1967 SC 63 stated that —

> *(The)* ***"essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex".***[163]

[162] See the Oxford English Dictionary.
[163] *State of Punjab v Major Singh* AIR 1967 SC 63.

(a) Prohibition on insulting the modesty of a woman in Cayman Islands

6.3 Under section 133 of the Penal Code, a person commits the offence of insulting the modesty of a woman when they utter any word, make any sound or gesture or exhibit any object intending that such word or sound shall be heard, or that such gesture or object seen by such woman, or intrudes upon the privacy of such woman, and is liable to imprisonment for 3 years.[164]

6.4 The intent is to punish offenders who intentionally conduct acts of lewd behaviour directed at females. This section expresses the illegal act of a sexual assault on women where the perpetrator has stopped short of causing physical harm. This means that society will not condone whatever method was used to insult the dignity of a woman's modesty. The best authorities that give insight into the operation of the section are the jurisprudence of India and Singapore along with some assistance from the United Kingdom's legislation (which refers to "*affronting the modesty of a woman"*).

6.5 The general meaning of modesty of a woman is a multifaceted concept. It is linked to religious beliefs, especially in very conservative countries and is found in all cultures. Muslim cultures take a woman's modesty to the highest degree, and many require that a woman must be covered in public. This is not exclusive to one religion as it extends to the Jewish faith, Mormon and Amish cultures and traditional conservative values.

6.6 Both Catholic and Protestant wings of Christianity, which is where the majority of Caymanians are aligned, tend to take a stricter view than those taken by persons with little or no religious allegiances. The opposite of being modest is being immodest which goes to behaviour beyond just clothing to cover the body. Interestingly it is something that is both subjective to the individual and the values they hold as well as objective to society. The intention of section 133 is to capture both the standard of moral conduct expected in Cayman as well as the protection of a woman's privacy and her person.

[164] Penal Code (2019 Revision), s 133.

6.7 The broad scope and low threshold of this offence enables it to be charged frequently.[165] However, many of the accused persons in these cases are reported to be admonished or discharged.[166] This was the situation in the case of Anthony White, a former Police Inspector who was formally charged with the offence of insulting the modesty of a woman. The court imposed a fine of $100 and the conviction was not recorded.[167]

6.8 The Cayman Islands also has in place section 88A of the Penal Code which makes it an offence for a person to intentionally harass, alarm or distress another person by using threatening, abusive or insulting words or behaviour, by using disorderly behaviour, or by displaying any writing, sign or other visible representation which is threatening, abusive or insulting.[168]

(b) Human rights issues raised by the offence of insulting the modesty of a woman

6.9 The offence of insulting the modesty of a woman is applicable only in relation to a woman and therefore prohibits a man from being the complainant or victim in relation to that offence.[169] The offence of insulting the modesty of a woman therefore raises human rights compatibility issues with respect to the fundamental right to be free from discrimination enshrined in section 16 of the Bill of Rights, Articles 2 and 7 of the Universal Declaration of Human Rights (the "Universal Declaration")[170] and Articles 2[171] and 26[172] of the International Covenant on Civil and Political Rights. It also raises compatibility issues with the right to freedom of expression enshrined in section 11 of the Bill of Rights.

6.10 The offence of insulting the modesty of a woman fails to specify where the insult must occur before it can amount to an offence. Therefore, even insults exchanged

[165] RCIPS Annual Crime and Traffic Statistical Report Full report 2019. There were 76 cases in 2019 and 48 cases in 2018.
[166] <https://www.caymancompass.com/2011/08/15/ex-police-inspector-pleads-to-insulting-modesty/>.
[167] Ibid.
[168] Penal Code (2019 Revision), s. 88A.
[169] See for example, report in Cayman Compass March 27, 2015: <https://www.caymancompass.com/2015/03/27/modesty-charge-archaic-attorney-says/>.
[170] The Universal Declaration of Human Rights (UDHR) is a historic document that was adopted by the United Nations General Assembly at its third session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.
[171] International Covenant on Civil and Political Rights, Article 2.
[172] Ibid, Article 26.

during an argument in a private dwelling can amount to a criminal offence. In such an instance, this presumption conflicts with a person's right to private and family life as well as their right to expression enshrined in sections 9 and 11 of the Bill and Rights.

6.11 At present, apart from the Cayman Islands, mainly patriarchal societies[173] such as India, Pakistan, Malaysia and Fiji have kept this offence.[174] However, in most multicultural societies, similar to the Cayman Islands, this offence has been amended to suit societal norms. Accordingly, in examining the human rights issues raised by the offence of prohibition on insulting the modesty of a woman, the Commission considered the legislation of Canada and England and Wales.

(c) Other Jurisdictions with offences relating to insulting the modesty of a woman

(i) England and Wales

6.12 In England and Wales, the offence of harassment, alarm or distress is found in section 5(1) of the *Public Order Act 1986*.[175] A person is guilty of this offence if they use threatening or abusive words or behaviour, or disorderly behaviour[176] in a public place[177] within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

6.13 In the case *Abdul and others v DPP*[178] the High Court ruled that prosecution of a group of people who had shouted slogans, including, *"burn in hell"*, *"baby killers"* and *"rapists"* at a parade of British soldiers, was not a breach of their right to freedom of expression, protected by Article 10 of the European Convention on Human Rights. Five men were convicted of using threatening, abusive or insulting words within the hearing or sight of a person likely to be caused harassment, alarm

[173] K.D. Gaur 1992, A Textbook on the IPC, p 694. Societies where women suffer a variety of psychological, economical and sociological forms of victimizations; There is a high price placed on a woman's virginity and sex before marriage is generally condemned.
[174] The Cayman Islands Law Reform Commission 11th Annual Report, 1st April 2015/31 March 2016.
[175] Public Order Act 1986 c. 64, s 5(1).
[176] Ibid, s 5(1)(a).
[177] Ibid, s 5(2). No offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
[178] [2011] EWHC 247 (Admin), at 52 <http://www.bailii.org/ew/cases/EWHC/Admin/2011/247.html>.

or distress thereby (contrary to section 5 of the *Public Order Act 1986*). The men launched an appeal, raising amongst other things the question of whether the decision to prosecute them for shouting slogans and waving banners close to where the soldiers and other members of the public were was compatible with Article 10. On appeal the court found that decision to prosecute was compatible with Article 10.

6.14 Freedom of expression is protected under Article 10 of the European Convention on Human Rights. However, Article 10 is subject to a number of qualifications set out in article 10(2). Article 10 is therefore a qualified right and as such infringements on the right to freedom of expression must be proportionate and justifiable. Accordingly, while Article 10 does not confer an unqualified right to freedom of expression, the restrictions contained in Article 10 are to be narrowly construed.

6.15 Previously, section 5(1) of the *Public Order Act 1986*[179] included the word "insulting".[180] However, in 2009 the Joint Committee on Human Rights (JCHR) observed that "whilst arresting a protester for using 'threatening or abusive' speech may, depending on the circumstances, be a proportionate response, we do not think that language or behaviour which is merely 'insulting' should ever be criminalised in this way".[181] As a result, the Reform Section 5 Campaign sought to delete the word "insulting" to avoid frivolous arrests like Sam Brown who was arrested for saying, "Excuse me, do you realize that your horse is gay?".[182]

(ii) Canada

6.16 In Canada, the relevant offence is causing disturbance, indecent exhibition, loitering etc.[183] A person who, not being in a dwelling-house, causes a disturbance in or near a public place, by fighting, screaming, shouting, swearing, singing or

[179] Public Order Act 1986, s 5(1).
[180] Reform Section 5 Campaign <http://reformsection5.org.uk/; House of Lords voted by 150 to 54, a majority of 96, to remove the word insulting.
[181] UK Parliament Publication, Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest, Joint Committee on Human Rights, HC 320-1 and HL Paper 47-1 Vol.1 paras 80-85.
[182] BBC News <http://news.bbc.co.uk/2/hi/uk_news/england/oxfordshire/4606022.stm>.
[183] Criminal Code, R.S.C.1985, C-C-46, s 175(1)(a)(i).

using insulting or obscene language is guilty of an offence punishable on summary conviction.[184]

6.17 The Canada Supreme Court in *R v Lohnes*[185] observed that the offence is something more than mere emotional upset or annoyance. Therefore, before an offence can arise, the enumerated conduct must cause an externally manifested disturbance of the public peace, in the sense of an interference with the ordinary and customary use by the public of the place in question. The interference may be minor, but it must be present.[186]

(d) Comments and recommendations regarding the offence of insulting the modesty of a woman

6.18 The Commission supports the approach followed in England and Wales because it defends a person's right to freedom of expression enshrined in section 11 of the Bill of Rights. That approach would not raise any compatibility issues with right to protection from discrimination enshrined in section 16 of the Bill of Rights.

6.19 The Commission also acknowledges that the approach taken in England and Wales in relation to the removal of the word "insult" from section 5(1) of the *Public Order Act 1986* should be followed.

6.20 Accordingly, the Commission recommends the repeal of section 133 of the Penal Code and the removal of the reference to "insulting" in relation to words or behaviour in section 88A of the Penal Code.

> **Recommendation 3:** That section 133 (Insulting the modesty of a woman) of the Penal Code is repealed.
>
> **Recommendation 4:** That section 88A (Intentional harassment, alarm or distress) of the Penal Code is amended by deleting the reference to "insulting" in relation to words or behaviour.

[184] Ibid, s 175.
[185] [1992] 1 S.C.R. 167. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/831/1/document.do>.
[186] Ibid. See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/831/1/document.do>.

(e) Consultation question regarding the offence of insulting the modesty of a woman

6.21 The Commission seeks the views of of the stakeholders and public in considering whether the offence of insulting the modesty of a woman should be repealed and whether the reference to "insulting" words or behaviour in the offence of intentional harassment, alarm or distress should also be repealed.

Questions (*Please give reasons for your answer)*

1. Should the offence of insulting the modesty of a woman be repealed?

2. Should the reference to "insulting" words or behaviour in the offence of intentional harassment, alarm or distress be repealed?

7. ABORTION

7.1 Abortion is the commonly used term for the deliberate termination of an established pregnancy, where "established" is taken to mean that the embryo has implanted in the uterus.[187]

7.2 According to the Centre for Reproductive Rights[188], 90 million (5%) women[189] of reproductive age live in the twenty-four countries that fall within the category of countries that prohibit abortion altogether, including where the woman's life is at risk. 359 million (22%) women of reproductive age live in countries that allow abortion to save the life of the woman and thirty-nine countries fall within this category.[190] 237 million (14%) of women of reproductive age live in countries that allow abortion on health grounds. 386 million (23%) women of reproductive age live in countries that allow abortion on broad social or economic grounds and 590

[187] See the Oxford English Dictionary.
[188] <https://maps.reproductiverights.org/worldabortionlaws>.
[189] Ibid.
[190] <https://maps.reproductiverights.org/worldabortionlaws>.

million (36%) women of reproductive age live in countries that allow abortion on request. Sixty-seven countries globally fall within this category.[191]

7.3 The statistics show a woman's ability to access safe and legal abortions is restricted in law or in practice in most countries in the world. In fact, even where abortion is permitted by law, women often have severely limited access to safe abortion services because of lack of proper regulation, health services, or political will. At the same time, only a very small minority of countries prohibit all abortions. Whilst the grounds to allow abortion may vary considerably, common elements covered in the legislation are usually centered on the ground for abortion and gestational limits, who can provide abortion services, conscientious objection and notification requirements. In most jurisdictions, abortion is allowed at least to save the pregnant woman's life, or where the pregnancy is the result of rape or incest.[192]

7.4 There are profound opinions on abortion and the subject of abortion is highly emotive, sensitive, complex and controversial. Women's organisations across the world have fought for the right to access safe and legal abortions for decades, and increasingly, international human rights law supports their claims. International human rights legal instruments and authoritative interpretations of those instruments support the claim that the right to access safe abortion services is a human right and compel the conclusion that women have a right to decide independently in all matters related to reproduction, including the issue of abortion[193]. Where abortion is safe and legal, no one is forced to have one. Where abortion is illegal and unsafe, women are forced to carry unwanted pregnancies to term or suffer serious health consequences and even death. Approximately 13 % cent of maternal deaths worldwide are attributable to unsafe abortions - between 68,000 and 78,000 deaths annually.[194]

[191] <https://reproductiverights.org/wp-content/uploads/2020/12/World-Abortion-Map-ByTheNumbers.pdf>.
[192] Women's human rights, Abortion found at <https://www.hrw.org/legacy/women/abortion.html>.
[193] Ibid.
[194] Ibid.

(a) Prohibition on the procurement of an abortion in Cayman Islands

7.5 The Cayman Islands falls amongst the countries that that only allow an abortion to save the life of a woman. Section 141 of the Penal Code prohibits the procurement of the miscarriage of a woman (abortion)[195] unless it is done in good faith for the purpose of only preserving the life of the mother.[196] Therefore, any person who attempts to procure an abortion, or supply drugs or an instrument to assist with the procurement of an abortion[197] commits a criminal offence.

7.6 Under section 141(3) of the Penal Code[198], a health practitioner registered to practice medicine under the *Health Practice Act (2021 Revision)*[199] does not commit the offence of procuring an abortion in respect of any act if such act is first certified in writing by two such registered health practitioners acting in good faith, as being necessary for the purpose of preserving the life of the mother. One of the registered health practitioners must be registered by the Medical and Dental Council as an obstetrician or a gynecologist or must be employed as a Government Medical Officer in either capacity.[200]

7.7 Section 142 of the Penal Code makes it an offence for a woman with child to intentionally procure abortion[201]. Section 143 goes further by making it an offence for a person to unlawfully procure or supply drugs or instruments to procure abortion.[202]

7.8 There are no reported criminal cases for the procurement of abortion in the Cayman Islands. However, this does not mean that abortion is not being procured. In 2013, the then Ministry of Health, Environment, Sports and Culture released a Report on the Adolescent Health and Sexuality Survey[203], which states that, out of 202 female

[195] Penal Code (2019 Revision), s 141.
[196] Ibid, s 141(2).
[197] Ibid, ss 141, 142, and 143.
[198] Ibid, s 141(3).
[199] Health Practice Act (2021 Revision).
[200] Penal Code (2019 Revision), s 141(3).
[201] Ibid, s 142.
[202] Ibid, s 143
[203] A Report on the Adolescent Health and Sexuality Survey, Cayman Islands, 2013. See <https://www.humanrightscommission.ky/upimages/publicationdoc/AdolescentHealthandSexualityFinalReport_1471471847_147147 1862.pdf>.

participants who answered the question and provided their age, 9.1% of 15-16 year olds and 8.5% among 17-19 year olds admitted to having an abortion.[204]

7.9 The criminalisation of the procurement of abortion in sections 141, 142 and 143 of the Penal Code raises compatibility issues with the fundamental right to life protected in section 2 of the Bill of Rights which provides that everyone's right to life shall be protected by law and that no person shall intentionally be deprived of his or her life. The right to life is also protected by the International Covenant on Civil and Political Rights[205] and the Convention on the Elimination of Discrimination against Women[206], which are both extended to the Cayman Islands[207].

(b) International standards relating to the abortion

(i) International Covenant on Civil and Political Rights

7.10 Article 6 of the International Covenant on Civil and Political Rights recognises and protects the right to life of all human beings. It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threaten the life of the nation.

7.11 The right to life is a fundamental human right of significant importance as it is a fundamental right that exists for every human being and is the prerequisite for the enjoyment of all other human rights.[208]

7.12 In General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the right to life (the "Covenant")[209], the UNRC states that the "right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended

[204] Ibid, p 47.
[205] The International Covenant on Civil and Political Rights is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant.
[206] The Convention on the Elimination of Discrimination against Women (CEDAW) adopted in 1979 by the UN General Assembly.
[207] The UK ratified the International Covenant on Civil and Political Rights on 20 May 1976. The ratification extends to the CDs and the following OTs: Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena and its dependencies (Ascension Island and Tristan da Cunha), and the Turks and Caicos Islands.
[208] General Comment No. 36 (2018), CCPR/C/GC/36, <https://www.ohchr.org/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf CCPR/C/GC/36>, para 2.
[209] General Comment No. 36 (2018), CCPR/C/GC/36.

or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity."[210] States parties must respect the right to life and have the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life."[211]

7.13 General Comment No. 36 (2018) is the result of a three-year process at the United Nations Human Rights Committee. Member states and non-government organisations worked together to create critical global human rights standards to prevent maternal mortality and to ensure that access to abortion is protected under international human rights law. It also reaffirms the fundamental principle that human rights apply only after birth.[212]

7.14 Accordingly, General Comment No. 36 (2018) states that the obligation of States parties to respect and ensure the right to life also extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of Article 6 even if such threats and situations do not result in loss of life. Although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, among other things, jeopardise their lives, subject them to physical or mental pain or suffering which violates Article 7, discriminate against them or arbitrarily interfere with their privacy.[213]

7.15 General Comment No. 36 (2018) also clarifies that the criminalisation of abortion of women or girls undergoing abortion, or of medical service providers assisting them in doing so could be considered a violation of the right to life of women or girls, as it compels them to resort to unsafe abortions. States parties are also obliged to ensure women and girls have access to affordable contraception and evidence-based sexual and reproductive health information. Further, States parties must prevent stigmatisation of women and girls who seek an abortion.[214]

[210] Ibid, para 3.
[211] Ibid, para 7.
[212] General Comment No. 36 (2018), CCPR/C/GC/36.
[213] Ibid, para 8.
[214] Ibid.

7.16 Nancy Northup, President and CEO of the Center for Reproductive Rights said that "General Comment No. 36 (2018) provides the international community with a much-needed framework to hold governments accountable for the high rates of death and injury which occur when women are forced to seek out unsafe abortions."[215]

(ii) Convention on the Elimination of Discrimination against Women (CEDAW)

7.17 The Convention on the Elimination of Discrimination against Women (CEDAW) was adopted in 1979 by the UN General Assembly and has been ratified by almost every single member of the United Nations including the United Kingdom. The United Kingdom extended CEDAW to the Cayman Islands in 2016.

7.18 As well as calling for the criminalisation of all forms of gender-based violence against women, CEDAW also calls for the repeal of provisions that allow, tolerate or condone forms of gender-based violence against women, including legislation that criminalises abortion.[216]

(c) Legislation relating to abortions in other jurisdictions

(i) United Kingdom

7.19 Under the *Offences Against the Person Act, 1861*[217] which applies in England and Wales, Northern Ireland and Scotland, it is a criminal offence for any woman or girl, being with child, unlawfully to do any act with intent to procure a miscarriage. It is also an offence for any person, unlawfully with intention to do an act, to procure a miscarriage of any woman or girl or to unlawfully supply or procure drugs or instruments to cause an abortion. The offence of unlawfully procuring

[215] Centre for Reproductive Rights, Press Release, 10/31/2018 UN Human Rights Committee Asserts that Access to Abortion and Prevention of Maternal Mortality are Human Rights.
[216] CEDAW, Article 2(g). See <https://www.lse.ac.uk/women-peace-security/assets/documents/2020/LSE-WPS-40-Years-of-CEDAW.pdf>.
[217] Offences Against the Person Act, 1861

abortion is punishable with life in prison. More specifically, sections 58 and 59 of the *Offences Against the Person Act, 1861* provide that —

> *"**58. Administering drugs or using instruments to procure abortion.***
>
> *Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.*
>
> ***59. Procuring drugs to cause abortion.***
>
> *Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.".*[218]

7.20 The *Infant Life Preservation Act, 1929*[219] for England and Wales and section 25(1) of the *Criminal Justice Act (Northern Ireland) 1945* also make it a criminal offence for anyone to assist or wilfully act to "destroy the life of a child then capable of being born alive", except where the purpose is to preserve the life of the mother "in good faith". The Act provides that evidence that a woman had been pregnant for a period of 28 weeks is *prima facie* proof that she was at that time pregnant with a child capable of being born alive.[220]

[218] Offences Against the Person Act, 1861, ss 58 and 59.
[219] Infant Life Preservation Act, 1929, 929 Chapter 34 19 and 20 Geo 5 <https://www.legislation.gov.uk/ukpga/Geo5/19-20/34/data.pdf>.
[220] Criminal Justice Act (Northern Ireland) 1945, s 25(1).

7.21 At common law, if a doctor is of the reasonable opinion that the probable consequence of the continuation of the pregnancy is to make a woman or girl a "physical or mental wreck" that will have "real and serious" effects that would be "permanent or long term" it can be construed that the doctor is "operating for the purpose of preserving the life of the woman".[221]

7.22 The *Abortion Act, 1967*[222] which was later amended by the *Human Fertilisation and Embryology Act, 1990* [223] liberalised the rules on abortion in England, Scotland and Wales but not in Northern Ireland. The *Abortion Act, 1967* does not make all abortions legal but it makes exceptions to the *Offences Against the Person Act 1861*[224] which made abortion an offence punishable by life in prison.

7.23 Under the *Abortion Act, 1967*, a doctor can legally perform an abortion, which has been authorised by two doctors, up to the 24th week of pregnancy if continuing the pregnancy would involve risk greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family[225]. An abortion can be authorised and carried out with no time limit if —

(a) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;

(b) there is a risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(c) there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

[221] *R v Bourne* [1939] 1 KB 687 and subsequent cases.
[222] Abortion Act, 1967; UK Public General Acts 1967, c.87.
[223] Human Fertilisation and Embryology Act, 1990.
[224] UK Public General Acts 1861, c.100.
[225] Abortion Act, 1967, s 1(1).

7.24 Health professionals are not required to perform or participate in an abortion if they have a moral or conscientious objection. They still have a duty to participate in an abortion, if it is necessary to save the life of a woman or to prevent serious injury.[226]

7.25 The *Abortion Act 1967* was never extended to Northern Ireland and until October 2019[227] termination was only permitted in Northern Ireland if a woman's life was at risk or if there is a risk of permanent and serious damage to her mental or physical health in accordance with the common law and *Criminal Justice Act (Northern Ireland) 1945*[228].

7.26 The UK government reports that between 2017 and 2018 there were only 12 abortions performed in hospitals in Northern Ireland under the existing common law provisions.[229]

7.27 Although the *Abortion Act 1967* was never extended to Northern Ireland, technically, abortion is no longer a crime in Northern Ireland. Since January 2017, Northern Ireland has been without a devolved government because of the differences between the political parties Sinn Fein and the Democratic Unionist Party and the United Kingdom Parliament has been managing its affairs. In July of 2019, the United Kingdom Parliament passed the *Northern Ireland (Executive Formation etc.) Act 2019*[230] which repealed sections 58 and 59 of the *Offences Against the Person Act 1861* (attempts to procure abortion) under the law of Northern Ireland and provides that no investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland, whenever committed.

7.28 An obligation was also imposed on the Secretary of State to ensure that the recommendations of paragraphs 85 and 86 of the CEDAW Report[231] be made, by

[226] Ibid. See <https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf>.
[227] See Northern Ireland (Executive Formation etc.) Act 2019. See <https://legalresearch.blogs.bris.ac.uk/2019/10/abortion-law-reform-in-northern-ireland/>.
[228] Criminal Justice Act (Northern Ireland) 1945.
[229] HM Government "A new legal framework for abortion in Northern Ireland – Implementation of the legal duty under section 9 of the Northern Ireland (Executive Formation etc. Act 2019. Government consultation.
[230] c. 22, Act of UK Parliament.
[231] Committee on the Elimination of Discrimination against Women, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1, p 21 <https://undocs.org/en/CEDAW/C/OP.8/GBR/1>.

regulations, and any other changes to the law of Northern Ireland which appear to the Secretary of State to be necessary or appropriate for the purpose of complying with the obligation to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented in respect of Northern Ireland. In particular, focus was placed on the need to make provision for the purposes of regulating abortions in Northern Ireland, including provisions as to the circumstances in which abortion may take place.

7.29 Paragraph 85 of the CEDAW Report recommends that the United Kingdom repeal sections 58 and 59 of the *Offences against the Person Act, 1861* so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion. Paragraph 85 of the CEDAW Report also recommends that legislation be adopted to provide for expanded grounds to legalise abortion at least if there is threat to the pregnant woman's physical or mental health without conditionality of "long-term or permanent" effects; if the pregnancy was as a result of rape or incest; and if there is severe fetal impairment.

7.30 Paragraph 85 of the CEDAW Report also recommends the introduction of, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and the ceasing of all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals.[232] The adoption of evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health is also recommended.[233]

7.31 Paragraph 86 of the CEDAW Report recommends that the United Kingdom provide, among other things, non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion;[234] provide women with access to high quality abortion and post-abortion care in all public health facilities;

[232] CEDAW/C/OP.8/GBR/1, para 85(c).
[233] Ibid, para 85(d).
[234] Ibid, para 86(a).

adopt guidance on doctor-patient confidentiality in this area;[235] and monitor its implementation.[236]

7.32 In November 2019 the United Kingdom Government published a consultation paper entitled "A new legal framework for abortion services in Northern Ireland - Implementation of the legal duty under section 9 of the Northern Ireland (Executive Formation etc.) Act 2019".[237] The consultation covers a proposed new legislative framework for Northern Ireland to deliver on the statutory duty in section 9 of the *Northern Ireland (Executive Formation etc.) Act 2019*, and which is consistent with the recommendations in paragraphs 85 and 86 of the CEDAW Report, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the CEDAW. The aim is to provide women and girls in Northern Ireland with access to legal and safe abortion services in accordance with the CEDAW Report recommendations.

7.33 Accordingly, the consultation poses a number of questions regarding the issues relating to abortion including grounds for abortion and gestational time limits, who can provide services and where these can be performed, conscientious objection and notification requirements.

(ii) Canada

7.34 In Canada, this offence was called "procuring miscarriage".[238] It defended the common law position that a person should be punished for destroying infants in the mother's womb.[239]

7.35 However, the offence of "procuring miscarriage" was repealed by *Bill C-39*[240] on the basis that it was "unconstitutional."[241] In *R v Morgentaler* [242] the Supreme Court

[235] Ibid, para 86(c).
[236] Ibid, para 86(d).
[237] See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf>.
[238] Criminal Code (R.S.C., 1985, c. C-46), s 287, previously s 251, which became law in 1969.
[239] William Russell, 'A Treatises on Crimes and Misdemeanors', Philadelphia: T& JW Johnson & Co., 1857, p 671.
[240] Justice Minister Jody Wilson-Raybould proposed the Charter Statement - Bill C-39. An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts. See <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c39-e.pdf>.
[241] Ibid, para 1.
[242] [1988] 1 S.C.R. 30.

of Canada struck down the offence of procuring a miscarriage because it violated the woman's right to life, liberty and security of the person as stipulated in Article 7 of the Canadian Charter of Rights and Freedoms.[243]

7.36 The Supreme Court of Canada in *Morgentaler*[244] observed that forcing a woman, by threat of a criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, was a profound interference with a woman's body and a violation of security of the person.[245]

7.37 Chief Justice Dickson observed in *Morgentaler*[246] that even the exception mechanism that allowed therapeutic abortions to be performed only in "accredited or approved hospitals"[247] was illusory. This was because the requirement to have at least four physicians available to authorise and perform an abortion meant in practice that abortions would be absolutely unavailable in almost one quarter of all hospitals in Canada.[248] The domino effect of such a procedural requirement of this law is that it placed a pregnant woman at a higher risk for complications[249] because she was forced to wait on the Therapeutic Abortion Committee to decide to grant or not grant the approval to abort.[250]

(iii) Jamaica

7.38 In Jamaica, this offence is captured partly under the English common law, which follows the holding of the English case *Rex v. Bourne*[251], and partly by statute, in section 72 of the *Offences Against the Person Act of 1864*[252] (as amended in 2005), which is based on the 1862 English Act of the same title. That Act provides that every woman with the intent to procure her own miscarriage or whosoever with

[243] (Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The Canada Act 1982, other than Schedules A and B).
[244] [1988] 1 S.C.R 30.
[245] Ibid. See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/288/1/document.do>.
[246] [1988] 1 S.C.R. 30.
[247] Ibid, p 149. See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do>.
[248] Ibid, p 66.
[249] Ibid, p 33.
[250] Ibid p 60.
[251] [1939] 1 K. B. 687 3 All E. R. 615 (1938).
[252] Offences Against the Person Act of 1864, Jamaica Cap 268 Law 43 of 1958, s 72.

intent to procure the miscarriage of any woman, is guilty of a felony and is liable to life imprisonment except where the mother's actual life is at risk.[253]

7.39 In spite of this offence, women continue to procure abortions. The Jamaican Ministry of Health concluded that the offence encroached on the reproductive rights of women, the right to liberty and security of the person and the right to privacy.[254] It examined neighbouring countries, such as Barbados,[255] with the hopes to establish a similar civil law to regulate the service of abortion. However, no such law has been enacted in Jamaica. Consequently, illegal abortions continue in Jamaica. In fact, "some 22,000 pregnancies are aborted annually in Jamaica, and this is only a rough estimate from research done by the Caribbean Policy Research Institute (CAPRI), which believes that the figures for the clandestine, criminal acts could be more."[256]

(iv) Australia (Northern Territory)

7.40 In the Northern Territory of Australia, procuring an abortion is prohibited.[257] However, a woman may acquire consent[258] to procure an abortion, if a medical practitioner reasonably believes that she is not more than 14 weeks to 23 weeks pregnant.[259]

7.41 Pregnancies over 23 weeks may only be terminated to prevent serious harm to the woman's physical or mental health[260] or for the sole purpose of preserving life.[261] Furthermore, the abortion must take place at a hospital.

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[253] Ibid.
[254] A Ministry Advisory Group on Abortion Policy Review in 2007, <http://www.japarliament.gov.jm/attachments/375_Abortion%20Policy%20Review%20Advisory%20Group%20Final%20Report.pdf>.
[255] The Medical Termination of Pregnancy Act (Act No.4 of 11 February 1983) and the 1983 Regulations to the Act; In Barbados a pregnancy can be terminated to protect the life and physical and mental health of the woman, in pregnancies resulting from rape, for deformations of the fetus, and for economic and social reasons.
[256] <https://jamaica-gleaner.com/article/lead-stories/20210131/millions-illegal-abortions-taxpayers-fork-out-us14-million-annually>.
[257] Criminal Code Act 1983, s 208 A-C. Division 8, s 208 A-C. Criminalises the administration of drugs or an instrument to procure an abortion.
[258] The Discussion Paper, Termination of Pregnancy Law Reform; Improving access by Northern Territory women to safe termination of pregnancy services, was released by the Department of Health on 9 December 2016 and submissions closed on the 27 January 2017. See Medical Services Act 1982 (NT), s 11(5). The consent of each person having authority in law is required if the woman is under 16 years of age or is incapable in law of giving consent. See <https://www.gotocourt.com.au/criminal-law/nt/the-age-of-consent/>.
[259] Medical Services Act 1982 (NT) s 11(1)-(2) in relation to pregnancies not more than 14 weeks; s 11(3) in relation to pregnancies not more than 23 weeks.
[260] See <https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf>.
[261] Medical Services Act (NT) s 11(4). Abortion to save a woman's life is permitted at any stage of pregnancy, but is the only circumstance in which it is permitted after 23 weeks gestation.

7.42 The requirements which detailed when a pregnancy could be terminated were criticised as being outdated [262] because they failed to keep abreast with the changing nature of medicine[263], best practices in medicine[264] and societal expectations or legislation elsewhere in Australia.[265] Therefore, to improve a woman's access to terminate a pregnancy safely, the Government repealed the offence of procuring an abortion in its entirety by passing the *Termination of Pregnancy Law Reform Act 2017*.[266]

7.43 The *Termination of Pregnancy Law Reform Act 2017* removed the procedural requirement that abortions could only be done in a hospital by enabling the procedure to be done in any place termed as a "safe access zone." [267] It also amended the consent requirement in order for it to be uniform with the age of consent to acquire a medical procedure.[268]

7.44 The effect of the Act is that it decriminalises the conduct of a woman seeking an abortion and upholds the Government objective to ensure that she has access to safe health care. In particular, the Act requires that only a suitably qualified medical practitioner can terminate a pregnancy when having regard to all relevant medical circumstances, and current and future physical, psychological and social circumstances of the woman and they are in compliance with professional standards and guidelines.[269]

(d) Comments and consultation questions regarding the offences of procuring an abortion

7.45 The Commission is of the view that reform is needed in the area of abortion and in particular takes note of the Australian approach which focuses on the safety

[262] Medical Services Act 1987, s 11, which was drafted in 1970 – not taken in consideration that termination of pregnancy can be done surgically (instruments) or medically (drugs).
[263] Drugs such as Mifepristone (RU486) and Misoprostol.
[264] Therapeutic Goods Administration (TGA). Authorised Prescriber Scheme and Pharmaceutical Benefit Scheme.
[265] Discussion Paper, Termination of Pregnancy Law; Improving access by Northern Territory women to safe termination of pregnancy services, 9, December 2016.
[266] Termination of Pregnancy Law Reform Act 2017.
[267] Termination of Pregnancy Law Reform Bill 2017 (Australia –NT), Clause 4.
[268] See <https://legislation.nt.gov.au/en/Legislation/TERMINATION-OF-PREGNANCY-LAW-REFORM-ACT-2017>. Requirements where a female age sixteen or under had to first obtain both parents/legal guardians consent.
[269] Termination of Pregnancy Law Reform Bill 2017 (Australia-NT), clause 7.

requirements needed to terminate a pregnancy, whether terminated surgically or by administering medication.

7.46 The Commission seeks the views of the stakeholders and the public in relation to the following -

Questions (Please give reasons for your answer)

1. Should sections 141, 142 and 143 of the Penal Code be repealed and substituted by bespoke legislation which provides for safe access to termination of pregnancy.

2. Should the Penal Code be amended to expand the grounds for legal abortion in the following cases —
    (a) where there is a threat to the pregnant woman's physical or mental health, without conditionality of "long-term or permanent" effects;
    (b) where the pregnancy is as a result of rape, incest;
    (c) where there is a severe fetal impairment, including fatal fetal abnormlity;
    (d) where the pregnancy is as a result of carnal knowledge of a minor;
    (e) where there is a serious health problem with the fetus which did not present itself until a later date;
    (f) where the woman is not more than 23 weeks pregnant;
    (g) where there is an inability to pay for the abortion procedure before 23 weeks;
    (h) where the intellectual or cognitive ability of the woman is impaired.

(i) where the woman's current and future physical, psychological and social circumstances will be adversely impacted;

(j) where there is unpreparedness for the transition to motherhood;

(k) where there is an absence of a partner or lack of support of partner;

(l) where the woman cannot mentally fathom the thought of placing the baby for adoption; or

(m) where the woman does not want to be a single mother or was having relationship problems.

8. UNNATURAL OFFENCES

8.1 The term unnatural offence is used to describe the prohibition of a sexual act which is against the "order of nature"[270], for example, with a person of the same sex. Other terms used to describe the offence include "sodomy" and "buggery".

8.2 In 2019, it was reported by the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA Report)[271] that, while 113 countries permit consensual same-sex sexual activity among adults, at least 78 countries have laws in effect that are used to criminalise consensual relationships between adults of the same sex.[272]

[270] Penal Code (2019 Revision), s.144.
[271] State-sponsored Homophobia: a world survey of laws criminalising same-sex sexual acts between consenting adults", International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), Brussels, December 2019 13th Edition.
[272] See https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf. See https://www.equalrightstrust.org/ertdocumentbank/The%20criminalisation%20of%20consensual%20same sex%20relations%20across%20the%20commonwealth%20-%20developments%20and%20opportunities.pdf.

8.3 Among those countries reported were Commonwealth Caribbean countries such as Antigua and Barbuda[273], Barbados[274], Jamaica[275] and Saint Lucia[276]. The laws of those countries that criminalise sexual activity between persons of the same sex typically prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In many cases, the language used refers to "carnal knowledge against the order of nature" or "gross indecency". These are usually known as moral offences and are justified by reference to tradition, popular opinion, and public morality. They all make private sexual activity between consenting same sex adults illegal.

8.4 Other Commonwealth countries, including Australia, Canada, India and the United Kingdom, were reported in the ILGA Report to have repealed the prohibition and as such, have legislation permitting sexual activity between consenting adults of the same-sex.

(a) Prohibition on sexual activity between consenting adults of the same sex

8.5 Whilst the Cayman Islands was not featured in the ILGA Report, there is still legislation on the statute books that prohibit sexual activity between consenting adults of the same-sex.

8.6 Notably, section 144(1) of the Penal Code provides that a person who has carnal knowledge of any person against the order of nature, or has carnal knowledge of any animal or who permits a male person so to have carnal knowledge of him or her commits an offence and is liable to imprisonment for ten years.[277] By section 144(2) of the Penal Code, a person who attempts to commit an offence under section 144(1) commits an offence.[278]

8.7 Additionally, section 145(5) of the Penal Code provides that a male person who commits, or is party to the commission of or who procures or attempts to procure

[273] Sexual Offences Act of 1995 (Act No. 9) 264, 'Buggery' - Article 12 and 'Serious Indecency' - Article 15.
[274] Sexual Offences Act 1992, Chapter 154, 'Buggery' - s 9 and 'Serious Indecency' - s 12.
[275] The Offences Against the Person Act, Article 76 (Unnatural Crime) and Article 77 (Attempt).
[276] Criminal Code, No. 9 of 2004 (Effective January 1, 2005), 'Gross Indecency' - s 132 and 'Buggery', s 133.
[277] Penal Code (2019 Revision), s 144(1).
[278] Ibid, s 144(2).

the commission by any male person of, an act of gross indecency with another male person commits an offence.[279]

8.8 However, while these offences remain in the Penal Code, by an Order in Council made the 13th day of December, 2000 that came into force on January 2001, it is provided, *inter alia*, that "a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen years."[280]

8.9 Section 144 and 145(5) of the Penal Code restrict a male person's right to engage in sexual relations with a person of their choice.[281] The Penal Code does not create a similar offence in relation to female persons. Further, the term "unnatural offence" used to describe sexual activity between persons of the same sex is outdated and discriminatory against persons who engage in this type of relationship. It is incompatible the Civil Partnership Act (2020) which allows persons involved in same-sex relationships to formalize and register their union in the Cayman Islands. Laws such as section 144 of the Penal Code that criminalise sexual activity between persons of the same sex give rise to a number of separate but interrelated human rights violations.

8.10 Sections 144 and 145(5) of the Penal Code raise human rights compatibility issues with the fundamental right to be free from discrimination enshrined in section 16 of the Bill of Rights, Articles 2 and 7 of the Universal Declaration, Articles 2 and 26 of the International Covenant on Civil and Political Rights as well as other core international human rights treaties.

8.11 Sections 144 and 145(5) also raise compatibility issues with an individual's right to private and family life enshrined in section 9 of the Bill of Rights, Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights. Further, section 144 of the Penal Code raises compatibility issues with the right to personal liberty enshrined in section 5 of the Bill of Rights, Article

[279] Ibid, s 145(5).
[280] *A.D.T. v The United Kingdom* (Application no. 35765/97).
[281] Penal Code (2019 Revision), s 144 and 145(5).

9 of the Universal Declaration and Article 9 of the International Covenant on Civil and Political Rights.

8.12 A further discrimination occurs with the provision in the Order in Council of 13th December 2000 in that the age of consent to engage in a homosexual relationship under the Penal Code is 18 years whereas the age of consent to engage in a heterosexual relationship under the Penal Code is 16 years.[282]

8.13 The right to private and family life is broad. In general, it means that a person has the right to live their own life, with reasonable personal privacy in a democratic society, taking into account the rights and freedom of others.

8.14 The right to freedom from discrimination prevents discrimination on grounds of age and other status which may include sexual orientation. In some of the countries, for example the United Kingdom, that have decriminalised same-sex adult consensual sexual conduct, different ages of consent for homosexual and heterosexual relationships remain. Young people who engage in same-sex sexual conduct may be subject to criminal penalties, while those who engage in heterosexual sex are not. Differing ages of consent in respect of same-sex relationships constitute discrimination on the basis of sexual orientation.

8.15 Another concern that arises in the context of the criminalisation of same-sex sexual conduct is arrest and detention on the basis of sexual orientation. Section 9 of the Bill of Rights as well as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights all guarantee the right to be free from arbitrary arrest or detention. The UNHR Working Group on Arbitrary Detention[283] has consistently maintained that detaining an individual on the basis of her or his sexual orientation is prohibited under international law.

8.16 While all of those fundamental rights are not absolute rights, any interference with those rights by the government needs to be proportionate and justified and must

[282] Penal Code (2019 Revision), s 132(2), 134, and 145(2).
[283]The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights to among other things investigate cases of deprivation of liberty.

achieve a legitimate public objective. Grounds for government interference include the interest of defence, public safety, public order, public morality or public health.

(b) Human rights challenges and changes made in the legislation of other jurisdictions regarding

(i) Australia

8.17 In 1994 the UN Human Rights Committee decided in the case of *Toonen v. Australia*[284] (the "Toonen case") that Tasmania's sodomy laws violated Articles 17 (privacy) and 26 (non-discrimination) of the International Covenant on Civil and Political Rights. In so doing, it rejected Tasmania's public morality justification. Since Toonen, the Human Rights Committee and other UN treaty bodies have repeatedly urged States parties to decriminalise consensual same-sex sexual conduct.

8.18 The Toonen case concerned a challenge to laws in the Australian State of Tasmania criminalising consensual same-sex sexual conduct. The Committee found that it was "undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'" under Article 17 of the International Covenant on Civil and Political Rights. It did not matter that Mr. Toonen, the author of the communication, had never been prosecuted. The mere existence of the criminal law "continuously and directly interferes with the author's privacy."[285] Under Article 17, individuals are protected against "arbitrary or unlawful interferences" with their privacy. An "arbitrary interference" can be one provided for by law that does not meet the requirements of being "in accordance with the provisions, aims and objectives of the Covenant" and of being "reasonable in the particular circumstances."[286]

8.19 The Committee in the Toonen case interpreted "the requirement of reasonableness to imply that the interference with privacy must be proportional"[287]. It concluded that the laws in Tasmania were neither proportional nor necessary. They did not

[284] *Toonen v Australia*, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994.
[285] Ibid, at para. 8.2.
[286] Human Rights Committee, General Comment No. 16 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation).
[287] *Toonen v Australia*, at para. 8.3.

achieve the aim of protecting public health and they were not necessary to protect public morals, as demonstrated by the fact that laws criminalising homosexuality had been repealed in the rest of Australia and were not enforced in Tasmania.

8.20 Since the Toonen case was decided, United Nations human rights treaty bodies have repeatedly urged States parties to reform laws criminalising homosexuality or sexual conduct between partners of the same sex and have also welcomed the legislative or judicial repeal of such laws.[288] For example, in the case of Chile, the Committee stated —

> *"The continuation in force of legislation that criminalises homosexual relations between consenting adults involves violations of the right to privacy protected under Article 17 of the Covenant and may reinforce attitudes of discrimination between persons on the basis of sexual orientation. Therefore: The law should be amended so as to abolish the crime of sodomy as between adults.".*[289]

8.21 As the Committee observed in the Toonen case, an individual's privacy and non-discrimination rights are violated even if the law in question is never enforced. In its concluding observations on Ethiopia, the Committee stated that "The Committee's concerns are not allayed by the information furnished by the State party that the provision in question is not applied in practice."[290]

(ii) Canada

8.22 In Canada, the offence of buggery carried a maximum punishment of 10 years' imprisonment.[291] The offence was declared unconstitutional because it

[288] Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law, United Nations Human Rights. See Concluding observations of the Human Rights Committee on Togo (CCPR/C/TGO/CO/4), at para. 14; Uzbekistan (CCPR/C/UZB/CO/3), at para. 22; Grenada (CCPR/C/GRC/CO/1), at para. 21; United Republic of Tanzania (CCPR/C/TZA/CO/4), at para. 22; Botswana (CCPR/C/BWA/CO/1), at para. 22: St. Vincent and the Grenadines (CCPR/C/VCT/CO/2); Algeria (CCPR/C/DZA/CO/3), at para. 26; Chile (CCPR/C/CHL/CO/5), at para. 16; Barbados (CCPR/C/BRB/CO/3), at para. 13; United States of America (CCPR/C/USA/CO/3), at para. 9; Kenya (CCPR/C/CO/83/KEN), at para. 27; Egypt (CCPR/CO/76/EGY), at para. 19; Romania (CCPR/C/79/Add.111), at para. 16; Lesotho (CCPR/C/79/Add.106), at para. 13; Ecuador (CCPR/C/79/Add.92), at para. 8; Cyprus, (CCPR/C/79 Add.88), at para. 11; United States of America (A/50/40), at para. 287. Concluding observations of the Committee on Economic, Social and Cultural Rights on Kyrgyzstan (E/C.12/Add.49), at paras. 17, 30; Cyprus (E/C.12/1/Add.28), at para. 7. Concluding observations of the Committee on the Elimination of Discrimination against Women on Uganda (CEDAW/C/UGA/CO/7), at para. 43-44; Kyrgyzstan (A/54/38), at paras. 127, 128. Concluding observations of the Committee on the Rights of the Child on Chile (CRC/C/CHL/CO/3), at para. 29.

[289] Concluding observations of the Human Rights Committee on Chile (CCPR/C/79/ Add. 104), at para 20.

[290] CCPR/C/ETH/CO/1.

[291] Criminal Code (R.S.C., 1985, c. C-46).

discriminated on the grounds of age as well as sexual orientation and marital status which violated section 15 of the Canadian Charter of Rights and Freedoms. However, individuals continued to be charged for buggery.[292]

8.23 In 2001, the Attorney General of Canada and others were sued for bringing discriminatory charges under section 157 of the *Canada Criminal Code*.[293] Minister of Justice, Hon Jody Wilson-Raybould stated section 157 of 'unfairly discriminated against the LGBTQ' and introduced *Bill C-32*, an Act related to the repeal of section 159 of the *Canada Criminal Code*.[294]

8.24 Clause 1 of *Bill C-32* repeals section 159 of the *Canada Criminal Code* so that anal intercourse is treated the same way as other forms of sexual activity,[295] with a uniform age of consent. Non-consensual anal intercourse could still be the object of other charges, such as sexual assault under sections 271 to 273 of the *Canada Criminal Code*. The age of consent is raised to 18 years where there is a relationship of trust, authority or dependence, or where the sexual activity is exploitative.[296]

(iii) India

8.25 Section 377 (unnatural offences - sodomy of the *Indian Penal Code* provided that "Whoever, voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".[297]

8.26 On 2 July 2009, the Delhi High Court gave a liberal interpretation to this section and laid down that this section cannot be used to punish an act of consensual sexual intercourse between two same sex individuals.[298]. On 11 December 2013, the Supreme Court of India overruled the judgment given by the Delhi High Court in

[292] R. c. D.G. 2016; Department of Justice, Questions and Answers – An Act related to the repeal of section 159 of the Criminal Code [Questions and Answers]. See <https://journals.sagepub.com/doi/full/10.1177/0964663918822150>.
[293] Lucas v Toronto Police Service Board [2001] CanLII 27977 (ON SCDC).
[294] Bill C-32, An Act related to the repeal of section 159 of the Criminal Code. Publication No. 42-1-C32-E, 11 January 2017. See <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c32-e.pdf>.
[295] Ibid, p 9.
[296] Criminal Code, s 153.
[297] India Penal Code, s 377.
[298] "Delhi High Court strikes down Section 377 of IPC". The Hindu. 3 July 2009. ISSN 0971-751X. Retrieved 24 September 2018.

2009 and clarified that "section 377, which holds same-sex relations unnatural, does not suffer from unconstitutionality". The Bench in that case said that "We hold that section 377 does not suffer from unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable[299]." The Bench also said that "Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting section 377 from the statute book or amend it as per the suggestion made by *Attorney-General G.E. Vahanvati*."[300]

8.27 On 8 January, 2018, the Supreme Court agreed to reconsider its 2013 decision and after much deliberation agreed to decriminalise the parts of Section 377 that criminalised same-sex relations on 6 September 2018[301] and overruled the judgment of *Suresh Kumar Koushal v Naz Foundation*[302].

(iv) England and Wales

8.28 In England and Wales the offence of sodomy was found to discriminate against persons who even acknowledge being involved in a same-sex relationship. In March 1952, Alan Turing was convicted for gross indecency because he admitted to being in a homosexual relationship with Arnold Murry[303]. He was sentenced to a one year probation period and was required to undergo hormone therapy known as "chemical castration" at the Manchester Royal Infirmary.[304] Sadly, Turing committed suicide 2 years later.[305]

8.29 In 1957, the Wolfenden Committee issued a report ("Wolfenden Report")[306] recommending that the United Kingdom should decriminalise homosexual conduct in private. The Wolfenden Report reflected a theory of the relationship between criminal law and morality that was first popularised by the political philosopher

[299] A bench of Justices G.S. Singhvi and S.J. Mukhopadaya.
[300] B.M.Gandhi. Indian Penal Code. EBC. pp. 1–796. ISBN 978-81-7012-892-2.
[301] Venkatesan, J. (11 December 2013). "Supreme Court sets aside Delhi HC verdict decriminalising gay sex". The Hindu. ISSN 0971-751X. Retrieved 24 September 2018.
[302] *Suresh Kumar Koushal v Naz Foundation*, Civil Appeal No. 10972 of 2013.
[303] See <https://educationhub.blog.gov.uk/2021/02/19/lgbt-history-month-alan-turing-and-his-enduring-legacy/>.
[304] Nigel Cawthorne, 'Alan Turing: The Enigma Man', Arcturus Publishing Limited, 2014.
[305] Ibid.
[306] The Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, after Sir John Wolfenden, the chairman of the committee) was published in the United Kingdom on 4 September 1957 after a succession of well-known men, including Lord Montagu of Beaulieu, Michael Pitt-Rivers, and Peter Wildeblood, were convicted of homosexual offences.

J.S. Mill and later by H.L.A. Hart. In the words of the Wolfenden Report: "Unless a deliberate attempt be made by society through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".[307] In other words, the function of the criminal law should be to prevent harm, not to legislate moral values.

8.30 The Wolfenden Report marked a turning point. The United Kingdom followed its recommendations by amending the *Sexual Offences Act* in 1967 to legalise homosexual acts, on the condition that they were consensual, in private and between two men who had attained the age of 21. The Act applied only to England and Wales. The law was extended to Scotland by the *Criminal Justice Act 1980* and to Northern Ireland by the *Homosexual Offences Order 1982*.

8.31 Excerpts from the Wolfenden Report appeared in the case *Dudgeon v. United Kingdom* [1981][308], in which the European Court of Human Rights struck down laws in Northern Ireland that prohibited all sexual activity between men, on the grounds that they violated the right to privacy guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The case effectively made legislative repeal mandatory in all Council of Europe countries.

8.32 Further, the *Criminal Justice and Public Order Act 1994*[309] provided for uniformity in the age of consent to engage in sexual intercourse and reduced the age of consent first to 18 years old and then in 2001 to 16 years old to engage in same-sex sexual relations. Later, the *Sexual Offence Act 2003*[310] repealed gross indecency and buggery[311] in the Sexual Offences Acts of 1993, 1956, 1967 and 1999.

8.33 In 2017[312] the English Government enacted section 166 of the *Policing and Crime Act 2017*[313] which is commonly referred to as the Alan Turing Law, in order to

[307] Wolfenden Report, 1957. See <https://www.bl.uk/collection-items/wolfenden-report-conclusion>.
[308] *Dudgeon v. United Kingdom* 7525/76 [1981] ECHR 5 (22 October 1981) <https://www.bailii.org/eu/cases/ECHR/1981/5.html>.
[309] Criminal Justice and Public Order Act 1994.
[310] Sexual Offence Act 2003.
[311] <https://www.justis.com/2017/07/06/50-years-of-lgbt-legal-landmarks/>.
[312] February 23, 2017.
[313] Policing and Crime Act 2017, s 166.

issue 49,000 posthumous pardons to deceased gay and bisexual men who were convicted under these laws.[314] It also extends statutory pardon to remove convictions from records of living persons that have been convicted.[315]

(c) Comments and recommendations regarding the prohibition on sexual activity between consenting adults of the same sex

8.34 The criminalisation of sexual practices between consenting adults of the same sex provided for in sections 144 and 145(5) of the Penal Code raises human rights compatibility issues with the fundamental right to be free from discrimination enshrined in section 16 of the Bill of Rights, in Articles 2 and 7 of the Universal Declaration and in Articles 2 and 26 of the International Covenant on Civil and Political Rights as well as other core international human rights treaties.

8.35 Sections 144 and 145(5) of the Penal Code also raise compatibility issues with an individual's right to private and family life enshrined in section 9 of the Bill of Rights, Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights. Further section 144 of the Penal Code raises compatibility issues with the right to personal liberty enshrined in section 5 of the Bill of Rights, Article 9 of the Universal Declaration and Article 9 of the International Covenant on Civil and Political Rights.

8.36 A further discrimination occurs with the provision in the Order in Council of 13th December 2000 that the age of consent to engage in homosexual relations is 18 years as the age of consent to engage in heterosexual relationship is 16 years.[316] Therefore, where the age for consent is not equal, it is discriminatory.

8.37 Even if prosecutions are no longer available under sections 144 and 145(5) of the Penal Code because of the Oder in Council of 13th December 2000, the Commission is of the view that the provisions should be removed from the Penal Code. Accordingly, the Commission recommends that the provisions in sections 144 and

[314] The Law Library of Congress - Clare Feikert-Ahalt, 'England & Wales: Thousands receive a posthumous pardon for homosexual convictions, 2017.
[315] Subject to persons giving consent being 16 years and the offence is not under s 71 of the Sexual Offence Act.
[316] Penal Code (2019 Revision), s 132(2) and 145(2).

145(5) of the Penal Code that prohibit sexual activity between consenting same sex adults should be repealed.

Recommendation 6: That the provisions in section 144 and 145(5) of the Penal Code that prohibit sexual activity between consenting same sex adults are repealed.

9. INDECENT ASSAULT

(a) Current Law

9.1 The Penal Code contains the offences of indecent assault of a woman (section 132)[317] and indecent assault of a man (section 145).[318] These offences prohibit non-consensual sexual acts which do not involve penetration.

9.2 The Grand Court in *CT v R*[319] found a disparity between the two indecent offences, namely that indecent assault committed on a male contrary to section 145 of the Penal Code, is a Category A offence triable only on indictment. On the other hand, indecent assault committed on a female contrary to section 132 of the Penal Code, is a Category B offence triable in either Summary or Grand Court.[320] Due to the fact that the offences deal with a general offence of indecent assault, there is no justifiable reason why there should be a difference in the mode of trial. This difference amounts to discrimination on the grounds of sex.

9.3 The term indecent assault is not defined in the Penal Code which creates ambiguity.

9.4 The Commission considered the laws in Jamaica and Australia for comparative purposes.

(i) Jamaica

9.5 In Jamaica, any person who carries out an act of indecent assault on another person commits an offence of assault. Such a person is liable to imprisonment for a term

[317] Penal Code (2019 Revision), s 132.
[318] Ibid, s 145.
[319] *CT v R* [2016 (2) CILR 376].
[320] Ibid. See <https://cilr.judicial.ky/Judgments/Cayman-Islands-Law-Reports/Cases/CILR2016/CILR162376.aspx>.

not exceeding three years on conviction in the Resident Magistrate's Court or is liable to imprisonment for a term not exceeding fifteen years on conviction in a Circuit Court.[321]

9.6 However, the term "indecent assault" is also undefined and assaults made by an offender of the same sex are not included.[322]

(ii) Australia

9.7 A review of the Australian territories[323] show that they have included a definition that includes direct and indirect touching, attempts to apply force, and threats by actions or gestures to apply force if the person making the threat appears to be able to carry out the threat.[324]

9.8 In *R v Nazif*[325] the courts held that the term indecent is an ordinary word in the English language and it is for the jury to decide whether the facts of a case amount to indecency.[326] This led the MCC to define the term "indecent" as "indecent according to the standards of ordinary people" and to provide that "indecency is a matter for the jury to decide."[327]

9.9 The wide use of the language in this offence distinguishes cases that involve penetration and involve touching.[328] Therefore, the gentle holding of a hand is capable of being an indecent assault without showing there was a kiss or sexual contact. This is because the offence is only concerned with whether an unlawful indecent assault took place, and if intent to indecently assault the other person was done without the victim's consent.

[321] Sexual Offence Act of 2009, s 13 (enacted 20th Oct 2009) came into effect (except for Part VII Sex offender Register and Sex Offender Registry) on June 30, 2011.
[322] Ibid.
[323] Western Australia (WA), Queensland (Qld), and North Territory (NT).
[324] Criminal Code (Qld), s 245; Criminal Code (NT) s 187; Criminal Code (WA) s 222.
[325] *R v Nazif* [1987] 2 NZLR 122 (CA).
[326] It has also been said that 'indecent' conduct is conduct which would be considered indecent by 'right minded people' or 'so offensive to contemporary standards of modesty or decency as to be indecent; R v Court [1989] AC 28, 42, per Lord Ackner.
[327] MCC, MCCOC Report (1999), Appendix 2,5.2.2.
[328] [2013] WASCA 274; touch a child age 7 breast; record a child age 13 taking a shower; digitally penetrate a woman age 37 years with fingers and vibrator.

(b) Conclusion and Recommendations

9.10 The Commission concludes that reform is needed by replacing the two different offences with a general offence of indecent assault. This would enable the offence to be clear about the nature of the offence and be gender neutral.

9.11 The Commission recommends that a definition be included which is flexible enough to cover a broad range of conduct and to that end, supports the approach taken by Australia.

Recommendation 7

Repeal section 132- Indecent assault on a woman

Recommendation 8

Repeal section 145- Indecent assault on a man.

Recommendation 9

Enact a general offence of Indecent assault.

Recommendation 10

Define the term indecent as follows -

(1) A person commits an act of indecent assault against another person if the first-mentioned person, without the consent of the second-mentioned person and knowing that the second-mentioned person does not consent, intentionally —

(a) sexually touches the second-mentioned person;

(b) incites the second-mentioned person to sexually touch the first-mentioned person;

(c) incites another person to sexually touch the second-mentioned person; or

(d) incites the second-mentioned person to sexually touch another person.

(2) "Sexual touch" means a person touching another person —

(a) with any part of the body;

(b) with any object; or

(c) through anything, including anything worn by the person doing the touching or by the person being touched,

in circumstances where a reasonable person would consider the touching to be sexual.

(3) The matters to be taken into account in determining whether a reasonable person would consider a touch to be sexual include —

(a) whether the area of the body touched or doing the touching is the person's genital area, anal area, breasts or lips; or

(b) whether the person doing the touching does so for the purpose of obtaining sexual arousal or sexual gratification; or

(c) whether any other aspect of the touching on the body makes it sexual.

(4) A person who commits an offence of indecent assault is liable on conviction on indictment to imprisonment for ten years.

10. INCEST

10.1 Incest is defined as human sexual activity between family members or close relatives. This typically includes sexual activity between people in consanguinity

(blood relations), and sometimes those related by affinity (marriage or stepfamily), adoption, clan, or lineage.[329]

(a) Cayman Islands legislation regarding incest

10.2 The Penal Code contains two offences addressing incest, namely incest by males provided for under section 146 of the Penal Code and incest by females provided for under section 147 of the Penal Code. These offences prohibit sexual intercourse between persons who are related to each other through lineal relations, and who have knowledge of the relationship.

10.3 For incest committed by a male, the lineal relationship includes grand-daughter, daughter, sister or mother relationships.[330] For incest committed by a female, the lineal relationship includes grandfather, father, brother or son relationships.[331]

10.4 Where incest is committed by a male, he is liable to imprisonment. If the female is under thirteen years of age, the period of imprisonment is ten years. In other instances, the period of imprisonment is seven years.[332] The male offender remains liable for incest, despite receiving consent from the female to engage in sexual relations.[333] Where incest by a female is proven, she is liable to imprisonment for ten years.[334] It is a defence for a female offender to show that she received consent from the male to engage in sexual relations.[335] Consequently, a female offender can use the defence of consent to avoid liability for incest but a male offender cannot.

10.5 Another cited problem is that both offences fail to provide protection to victims who are abused by same-sex offenders.[336] Further, both offences limit the nature of incest to carnal knowledge and do not consider other sexual inferences and sexual assault elements which may involve the anus and mouth. Sections 146 and 147 of

[329] See <https://www.unodc.org/documents/southernafrica//Publications/CriminalJusticeIntegrity/GBV/UNODC_SOPS_HANDBOOK_WEB_VERSION.pdf> p 10.
[330] Penal Code (2019 Revision), s 146(1).
[331] Ibid, s 147.
[332] Ibid, s 146(3).
[333] Ibid, s 146(2).
[334] Ibid, s 147.
[335] Ibid.
[336] Penal Code (2019 Revision), ss 146 and 147.

the Penal Code therefore raise human rights compatibility issues with the right to protection from discrimination.

10.6 Further, section 146 and 147 of the Penal Code do not reflect the modern family structure of the Cayman Islands which includes step-parents[337] and adoptive parents.[338]

(b) Brief outline of legislation in other Jurisdictions

10.7 The Commission considered the laws in Canada, Jamaica and New Zealand for comparative purposes.

10.8 Canada, Jamaica and New Zealand all enact a general offence of incest.[339] However, in Canada the offence is worded in such a way as not to distinguish between person based on their sex or gender. The use of the term "everyone" in the provision enables the offence to be read widely to capture different types of offenders, including male, female, homosexual, transgender or non-binary.

10.9 Therefore, in Canada, everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for a term not exceeding 14 years and, if the other person is under the age of 16 years, to a minimum punishment of imprisonment for a term of five years.[340] However, an accuser will not be found guilty if they were under restraint, duress or fear of the person with whom the accused had the sexual intercourse at the time the sexual intercourse occurred.[341]

10.10 A cited problem in Jamaica and Canada is that the linear relation is restricted to only blood relations, including half relations that are in direct blood line.[342] However, in New Zealand the linear relationship is extended to include adoptive parents but not step-parents.[343]

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[337] Children Act (2012 Revision), s 2, provides that parent includes a step parent.
[338] Adoption of Children Law (2003 Revision), s 15(11); Smellie CJ in Watler Cardwell (as Personal Representative of the Estates of W.W. Watler, Snr. and W.W. Watler, Jnr., deceased) v. Fish [1999 CILR 232] observed that a child is viewed as the natural child of her adoptive parents and not of the natural father.
[339] Sexual Offence Act 2009, s 7 (Jamaica), Criminal Code (R.S.C., 1985, c. C-46), s 151 (Canada), Crimes Act 1961 (New Zealand), s 130.
[340] Criminal Code (R.S.C., 1985, c. C-46 (Canada), s 15(2).
[341] Ibid, s 151(3).
[342] Criminal Code (R.S.C., 1985, c. C-46 (Canada), s 151(1) and Sexual Offence Act 2009 (Jamaica), s 2 and 3.
[343] Adams on Criminal Law CA 130. 08. *R v Stanley* (1903) 23 NZLR 378(CA).

10.11 In Canada and New Zealand, consent is not an element of the offence of incest. McLachlin C.J. and Major, Binnie, Fish and Charron JJ observed in the Canadian Court of Appeal in *R v G. R*[344] that incest is not concerned with the age or consent of the partner.[345]

(c) Comments and recommendations

10.12 The Commission concludes that reform is needed by replacing the two different offences with a general offence of incest that applies to all individuals. This would ensure that there is a clear understanding of the nature of the offence, would remove human rights compatibility issues and would allow for gender neutrality.

10.13 The Commission supports the approach followed in New Zealand and recommends that the scope of the offence of incest should be extended so that the linear relationships include adoptive parents. The Commission also recommends that the scope of the offence of incest should be extended so that the linear relationships include step-parents, persons with parental responsibility and guardians.

Recommendation 11: That section 145 (Incest by males) and section 146 (Incest by females) of the Penal Code are repealed and substituted by a general offence of incest.

11. CONCLUSION

11.1 The Penal Code plays a fundamental role in defining the rules governing some of our most important relationships as a society. There can be little doubt that a review and reform of many of its provisions are long overdue. There can also be little doubt that it is necessary that the provisions of the Penal Code should conform with the standards of human rights prescribed by our Bill of Rights.

[344] *R. v. GR*, 2005 SCC 45 (CanLII), [2005] 2 SCR 371; A father was accused of committing incest with his daughter age 5-9 years. However, as she could not see what he was doing, it could not be determined if he penetrated her vagina with his fingers, penis or another object.
[345] Ibid, per Per McLachlin C.J. and Major, Binnie, Fish and Charron JJ.

11.2 It is the view of the Commission that it is preferable that this review and reform is done in a manner which is structured and comprehensive, and which allows for public participation, rather than for society to wait for the issues to be addressed through a series of constitutional challenges before the courts. This Paper is the first stage of a very significant process.

11.3 The review in this Paper of the provisions of the Penal Code on the age of criminal responsibility, compulsion by spouse, insulting the modesty of a woman, abortion, unnatural offences, indecent assault and incest suggests that these offences need to be amended and in some cases repealed to remove issues of incompatibility between the Bill of Rights in the Constitution and the Penal Code. The Commission in each case recommends that the relevant provision of the Penal Code be amended or repealed as appropriate. The Commission however invites submissions from the public in response to the specific questions raised in this Paper and will make its final recommendations only after considering the public input which this Paper invites.

Cayman Islands Law Reform Commission

APPENDIX 4

SURVEY RESULTS

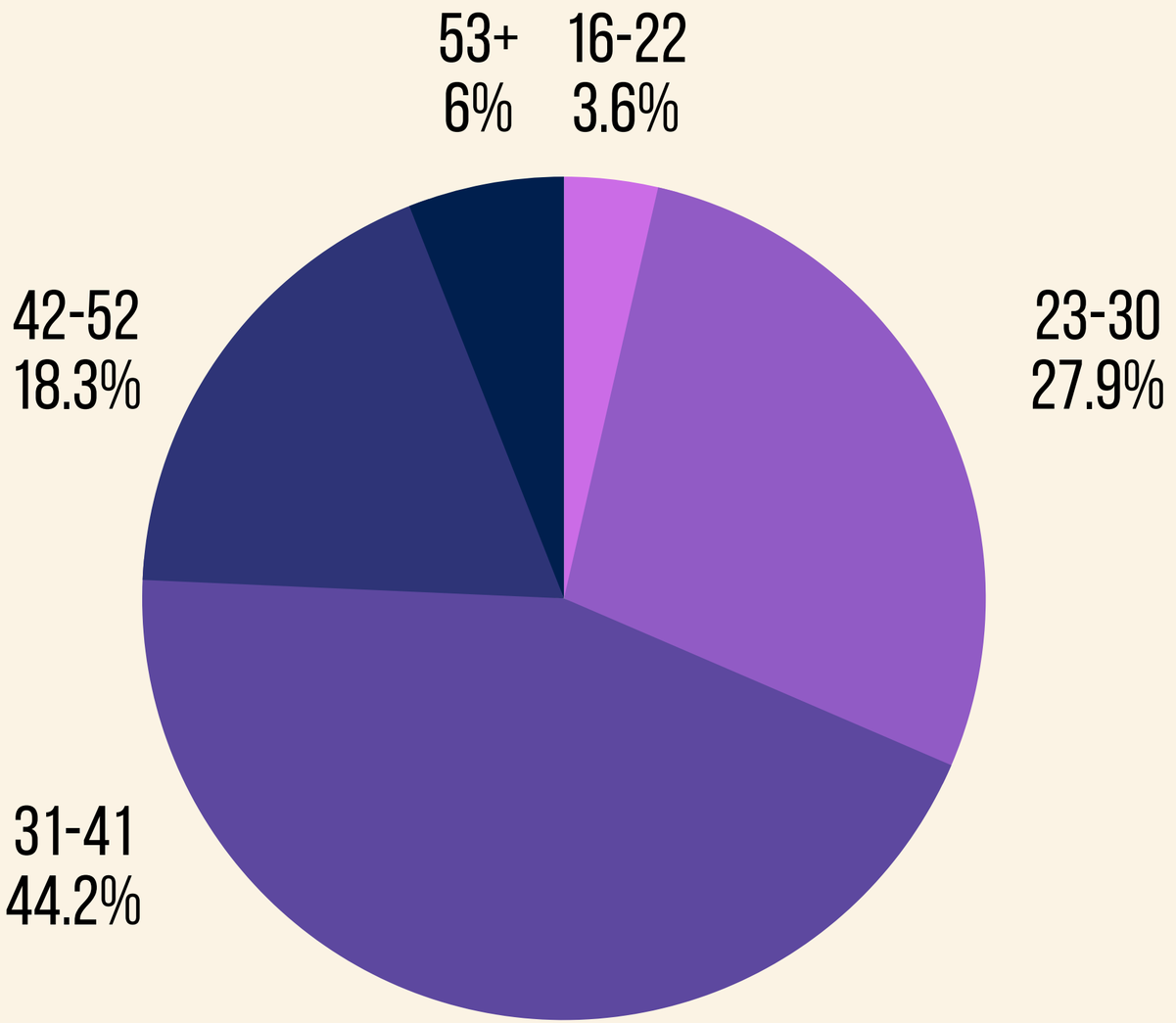
RESTRICTED ABORTION ACCESS: OPINIONS ABOUT ABORTION AMONG REPRODUCTIVE-AGE WOMEN IN THE CAYMAN ISLANDS (BARNETT, 2022)

Restricted Abortion Access:

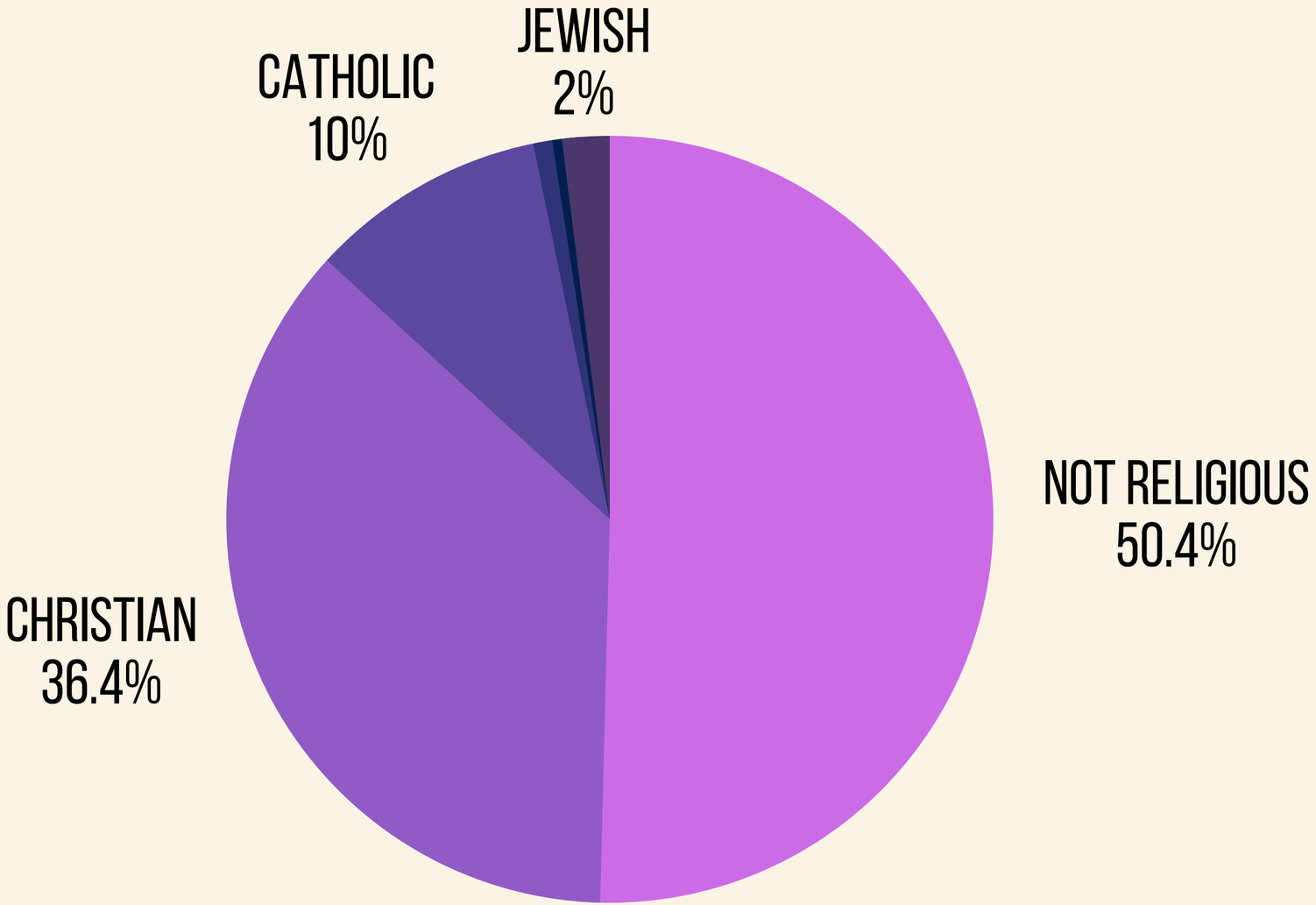
OPINIONS ABOUT ABORTION AMONG REPRODUCTIVE-AGE WOMEN IN THE CAYMAN ISLANDS

BY ESTEFANIE BARNETT

DEMOGRAPHICS



DEMOGRAPHICS



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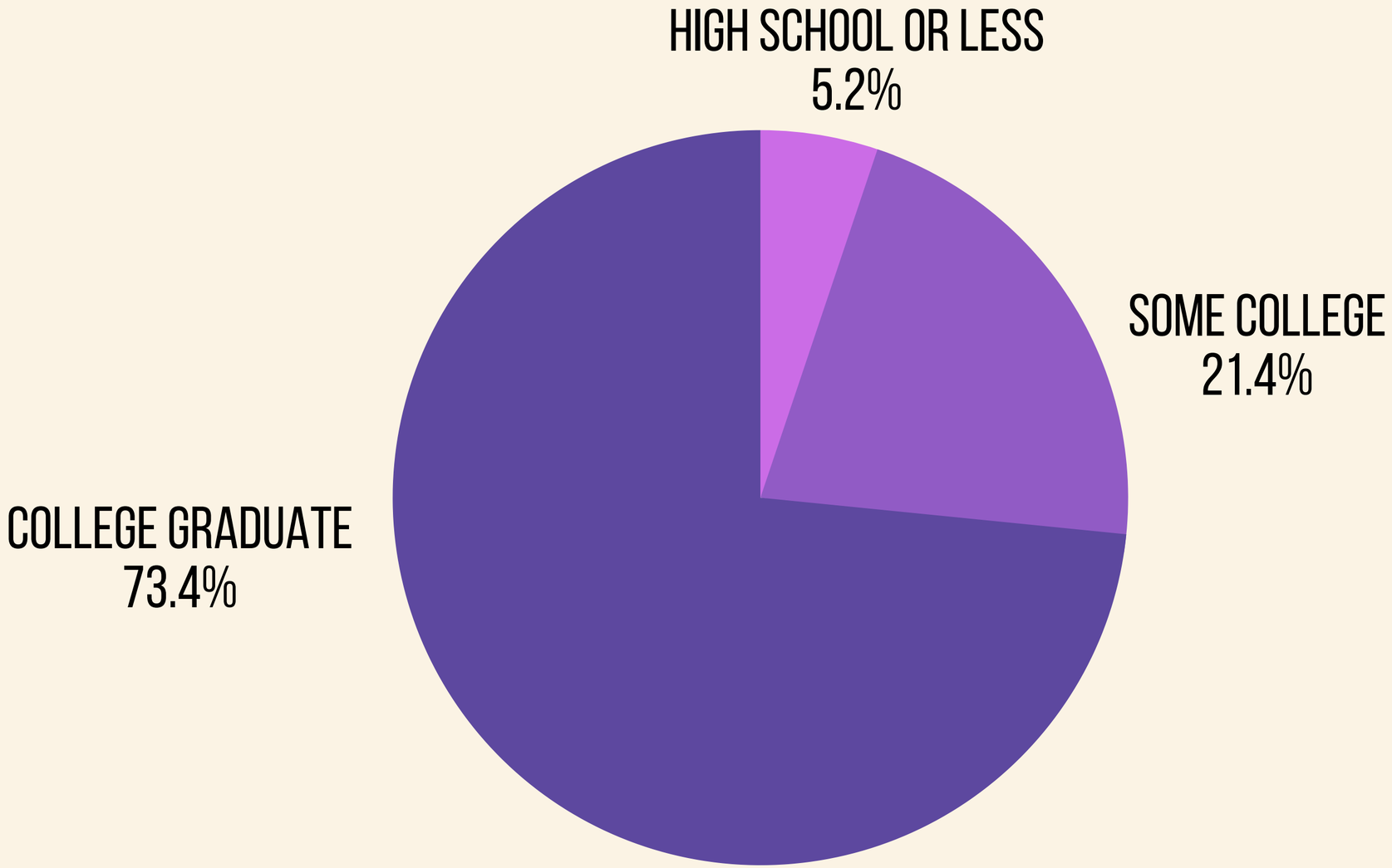

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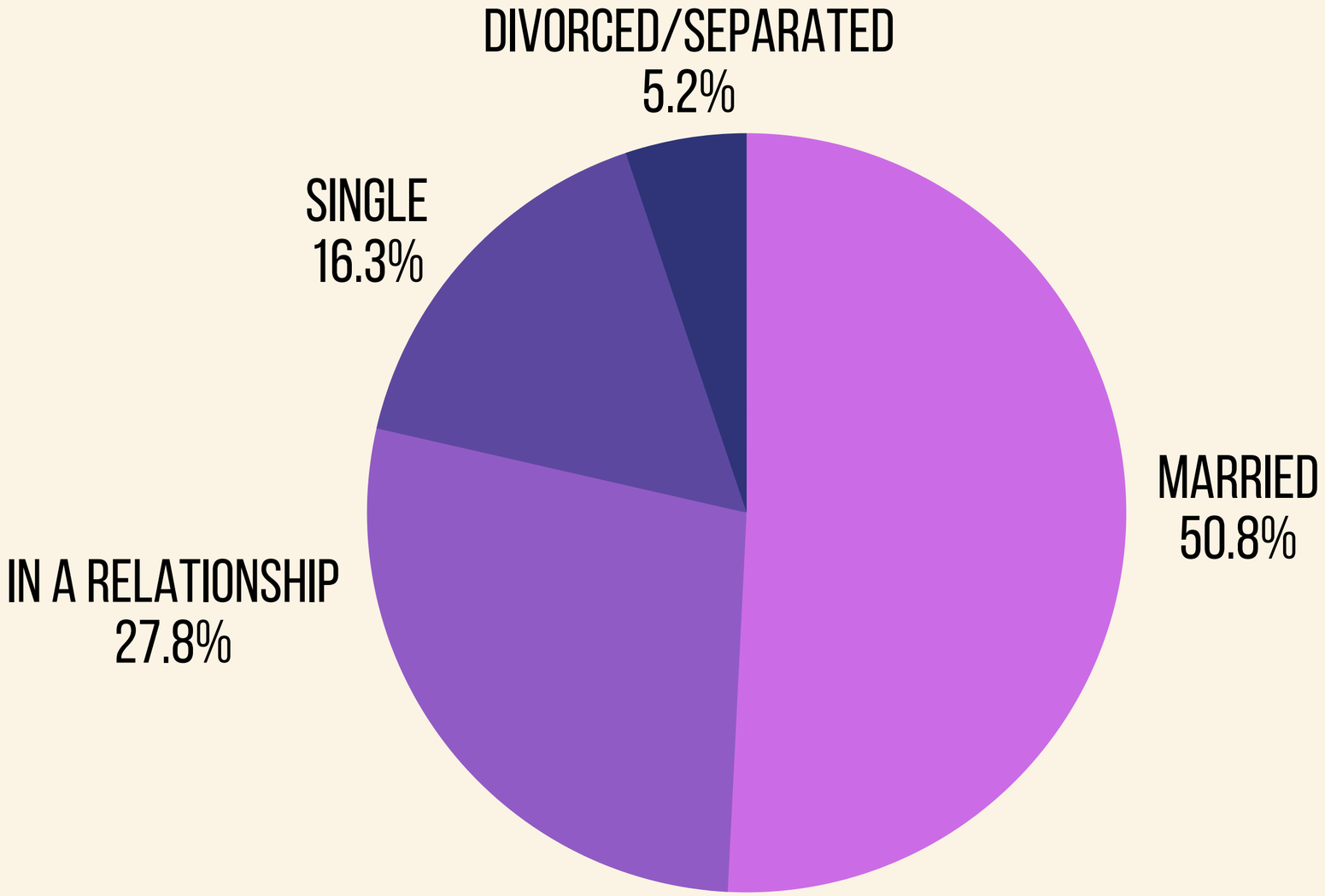
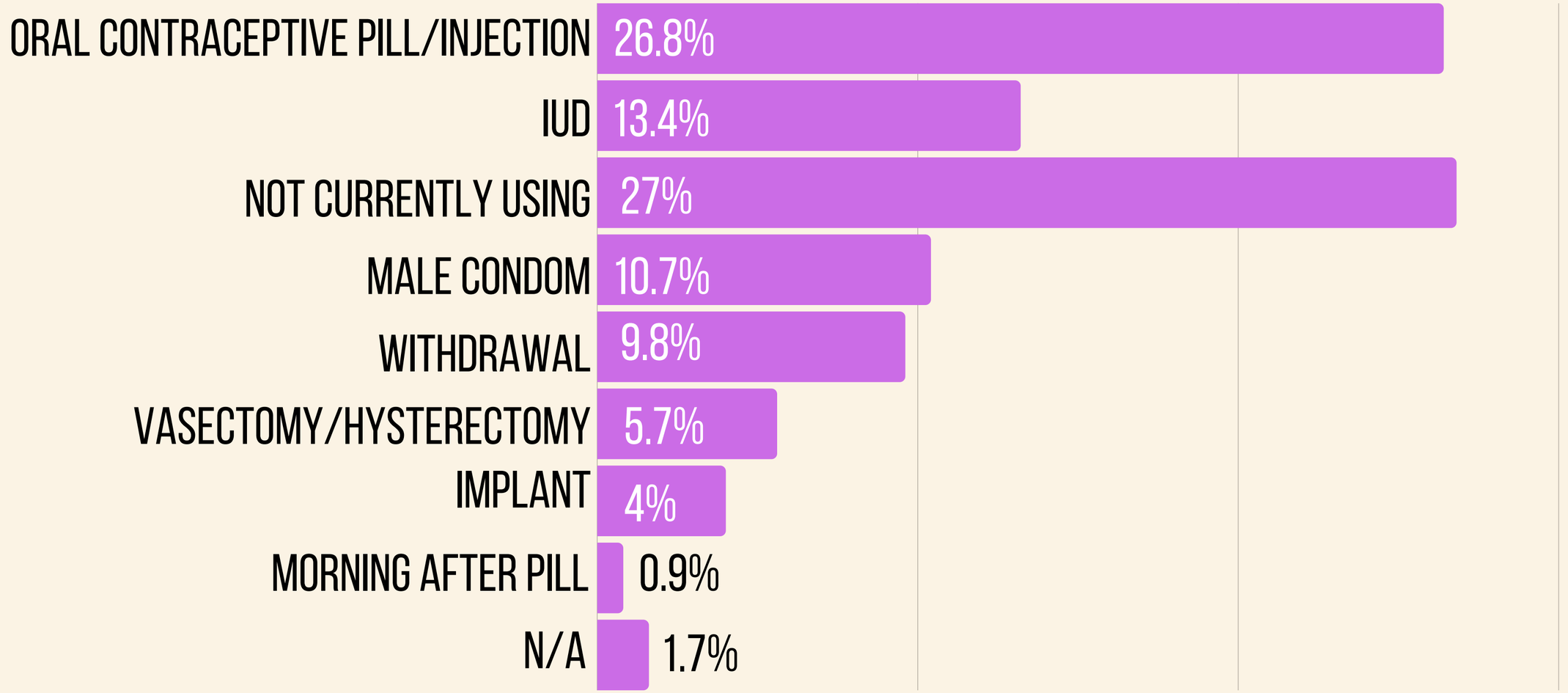
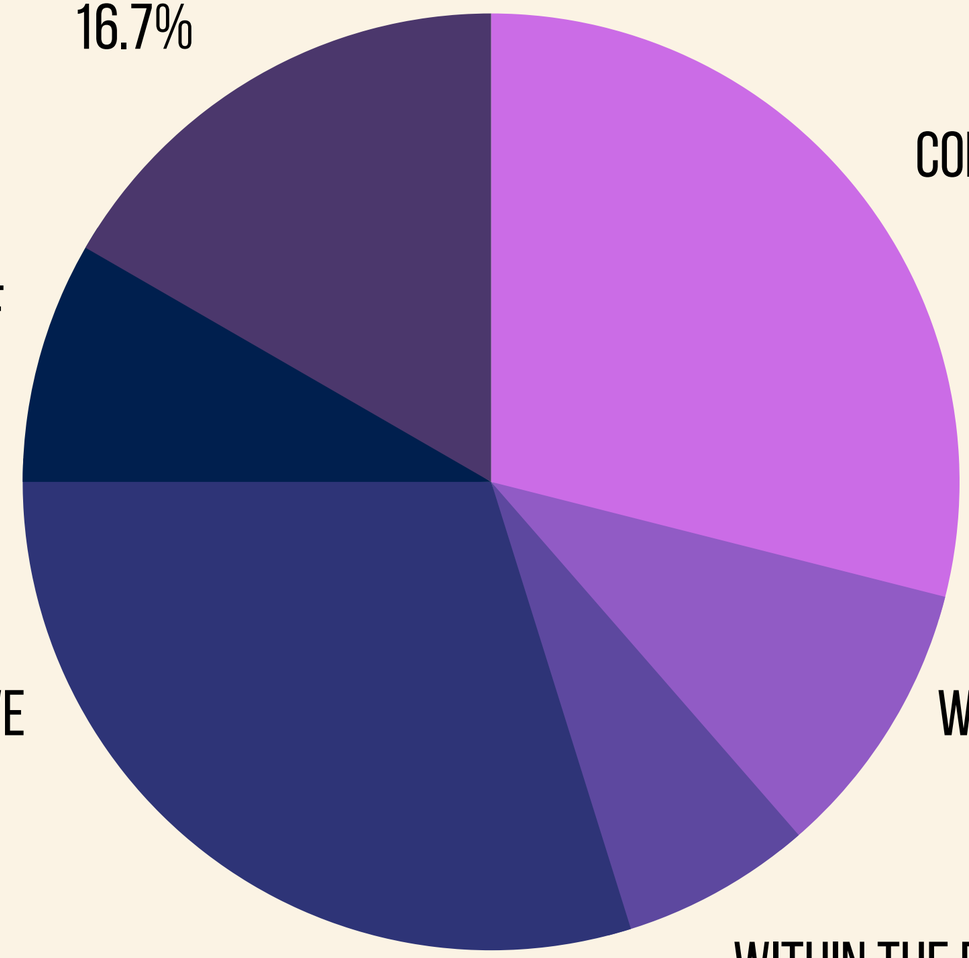


CURRENT CONTRACEPTIVE METHOD USED



DO YOU BELIEVE HUMAN LIFE BEGINS AT

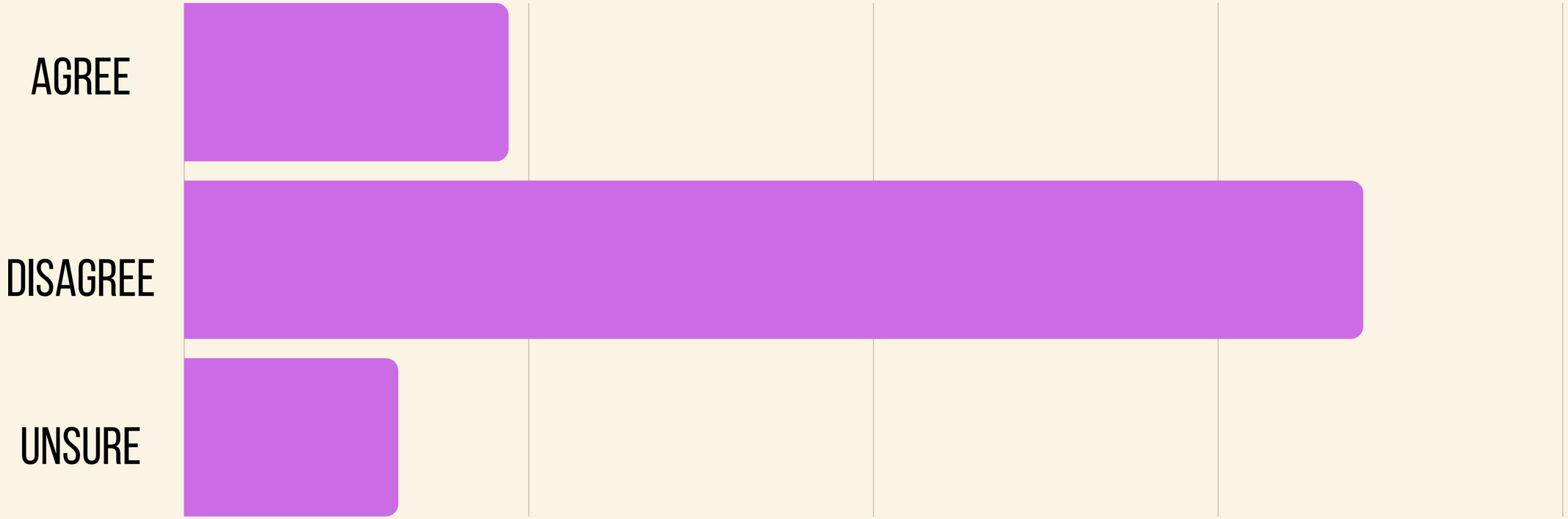


ARE YOU FAMILIAR WITH THE ABORTION SECTION IN THE CAYMAN ISLANDS PENAL CODE (2019 REVISION)

58.2% OF PARTICIPANTS ARE NOT FAMILIAR WITH THE ABORTION PROVISIONS IN THE PENAL CODE

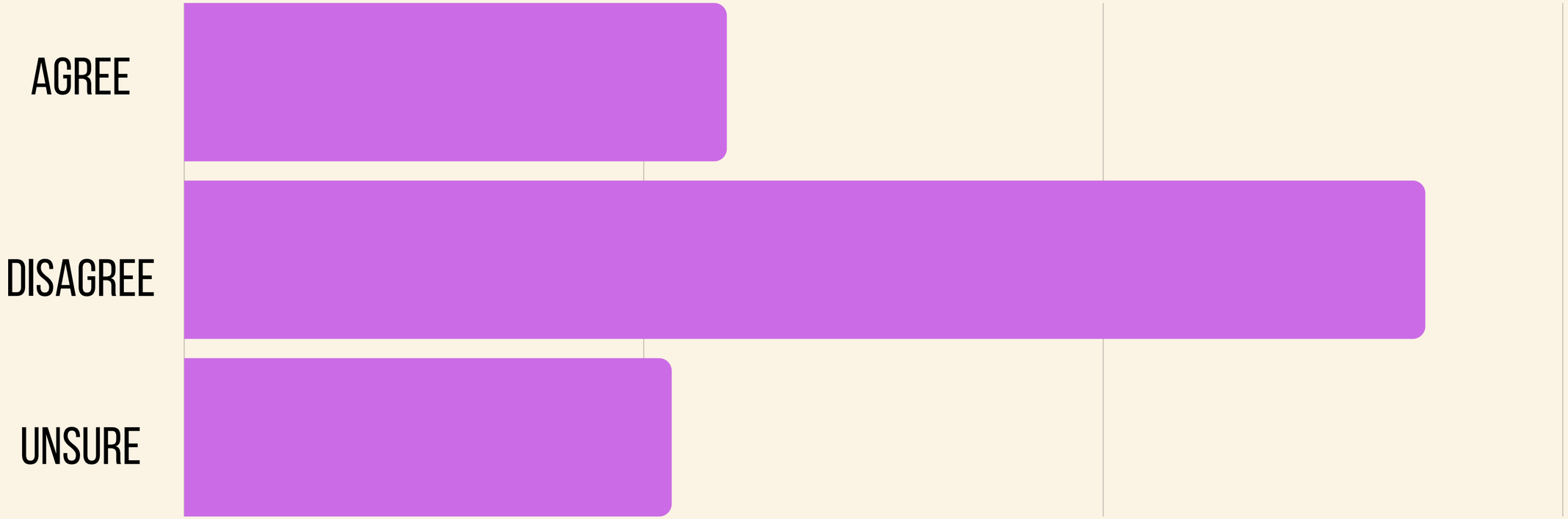
DO YOU AGREE OR DISAGREE WITH SECTION 141 (1)

A PERSON WHO WITH INTENT TO PROCURE THE MISCARRIAGE OF A WOMAN, WHETHER SHE IS OR IS NOT WITH CHILD, UNLAWFULLY ADMINISTERS TO HER ANY POISON OR OTHER NOXIOUS THING, OR USES ANY FORCE OF ANY KIND, OR OTHER MEANS WHATSOEVER TO THAT PURPOSE COMMITS AN OFFENSE.



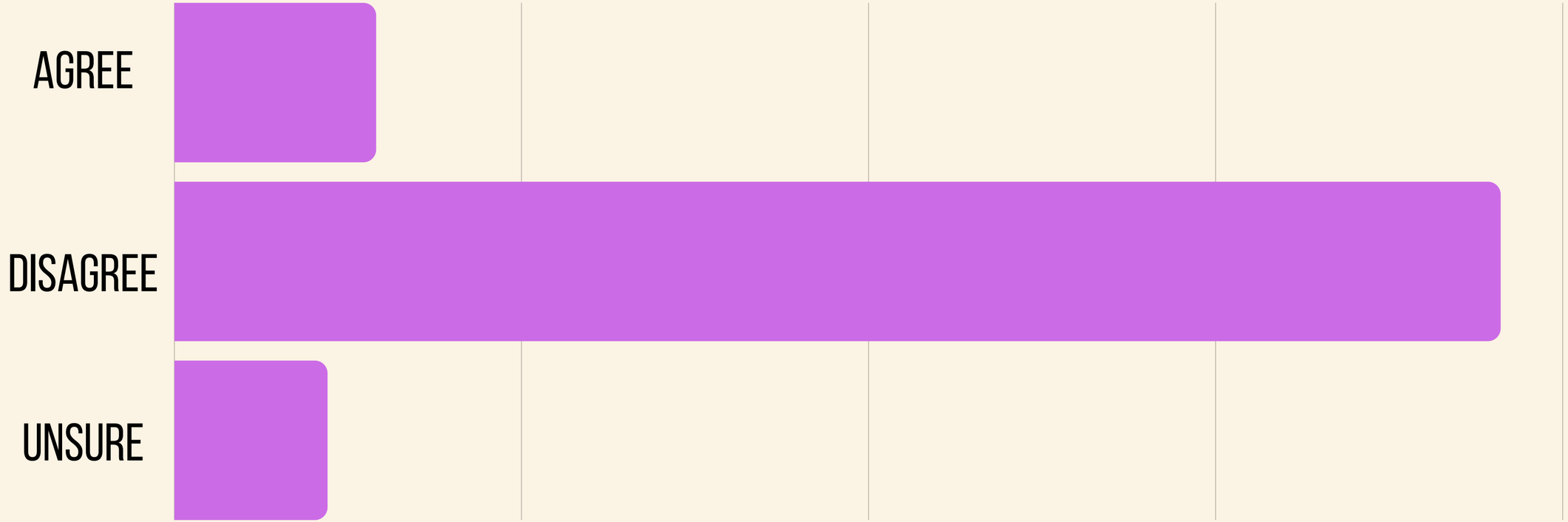
DO YOU AGREE OR DISAGREE WITH SECTION 141 (2)

NOTWITHSTANDING SUBSECTION (1) NO PERSON COMMITS SUCH OFFENSE UNLESS IT IS PROVED THAT THE ACT ALLEGED TO CONSTITUTE THE OFFENCE WAS NOT DONE IN GOOD FAITH FOR THE PURPOSE ONLY OF PRESERVING THE LIFE OF THE MOTHER.



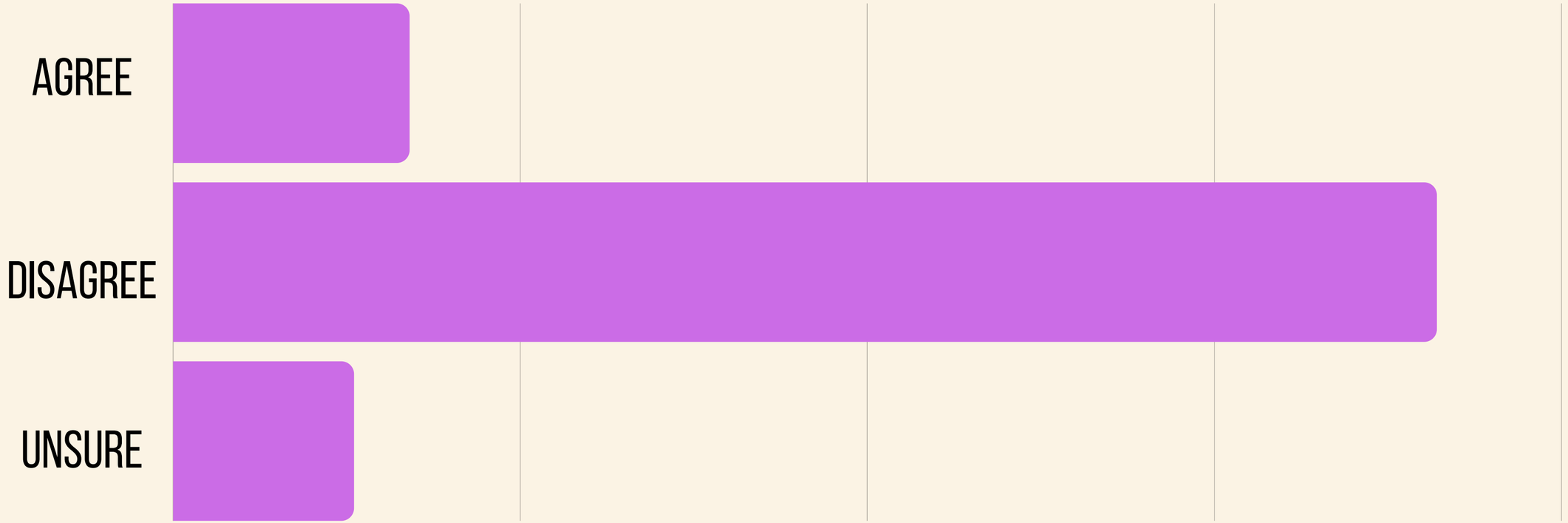
DO YOU AGREE OR DISAGREE WITH SECTION 142

ANY WOMAN WHO, BEING WITH CHILD, WITH INTENT TO PROCURE HER OWN MISCARRIAGE, UNLAWFULLY ADMINISTERS TO HERSELF ANY POISON OR OTHER NOXIOUS THING, OR USES ANY FORCE OF ANY KIND, OR USES ANY OTHER MEANS WHATSOEVER TO THAT PURPOSE, OR PERMITS ANY SUCH THING OR MEANS TO BE ADMINISTERED TO HER COMMITS AN OFFENSE.



DO YOU AGREE OR DISAGREE WITH SECTION 143

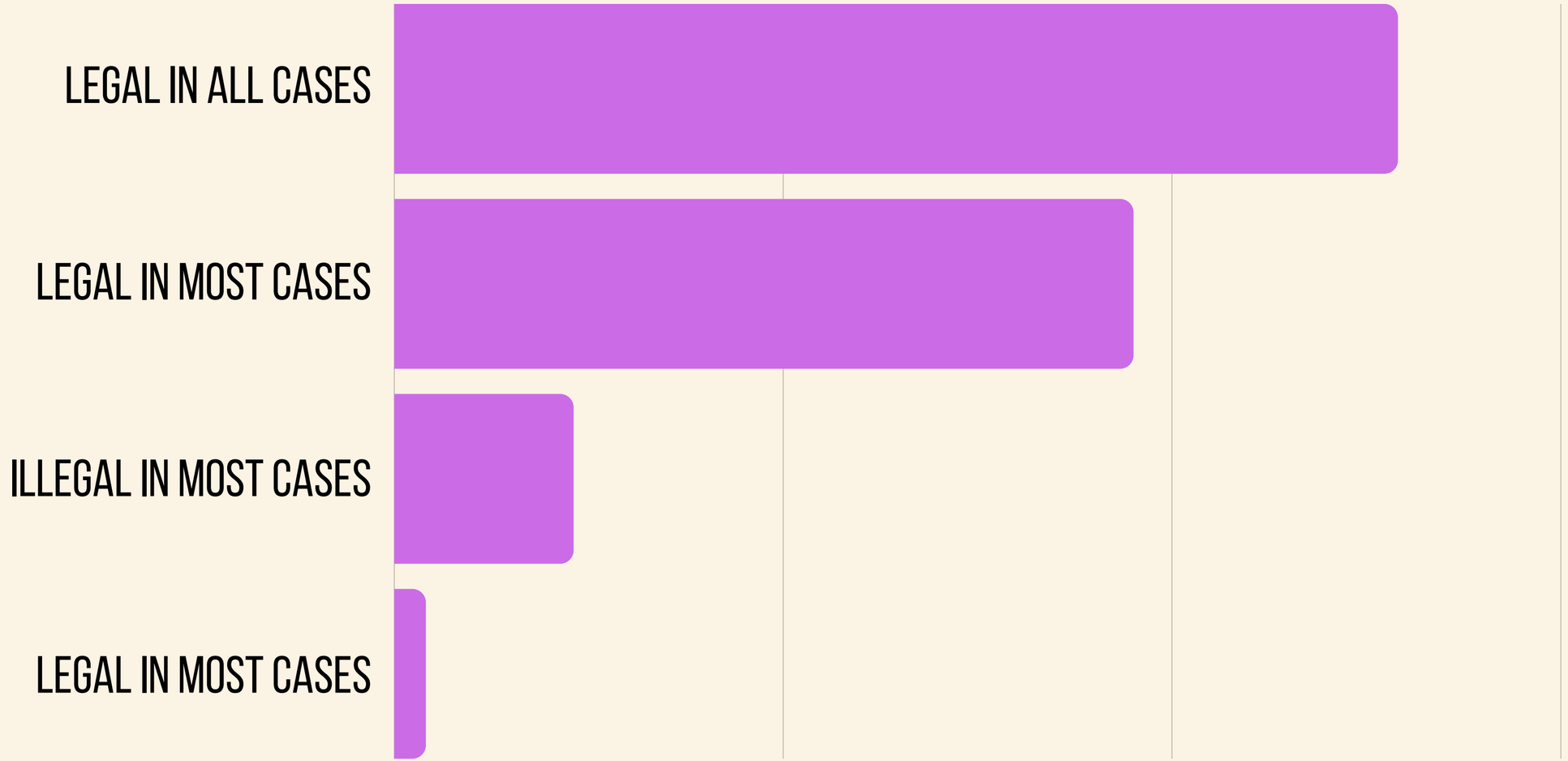
A PERSON WHO UNLAWFULLY PROCURES FOR OR SUPPLIES TO ANY PERSON ANY THING WHATSOEVER, KNOWING THAT IT IS INTENDED TO BE UNLAWFULLY USED TO PROCURE THE MISCARRIAGE OF A WOMAN, WHETHER SHE IS OR IS NOT WITH CHILD, COMMITS AN OFFENSE.



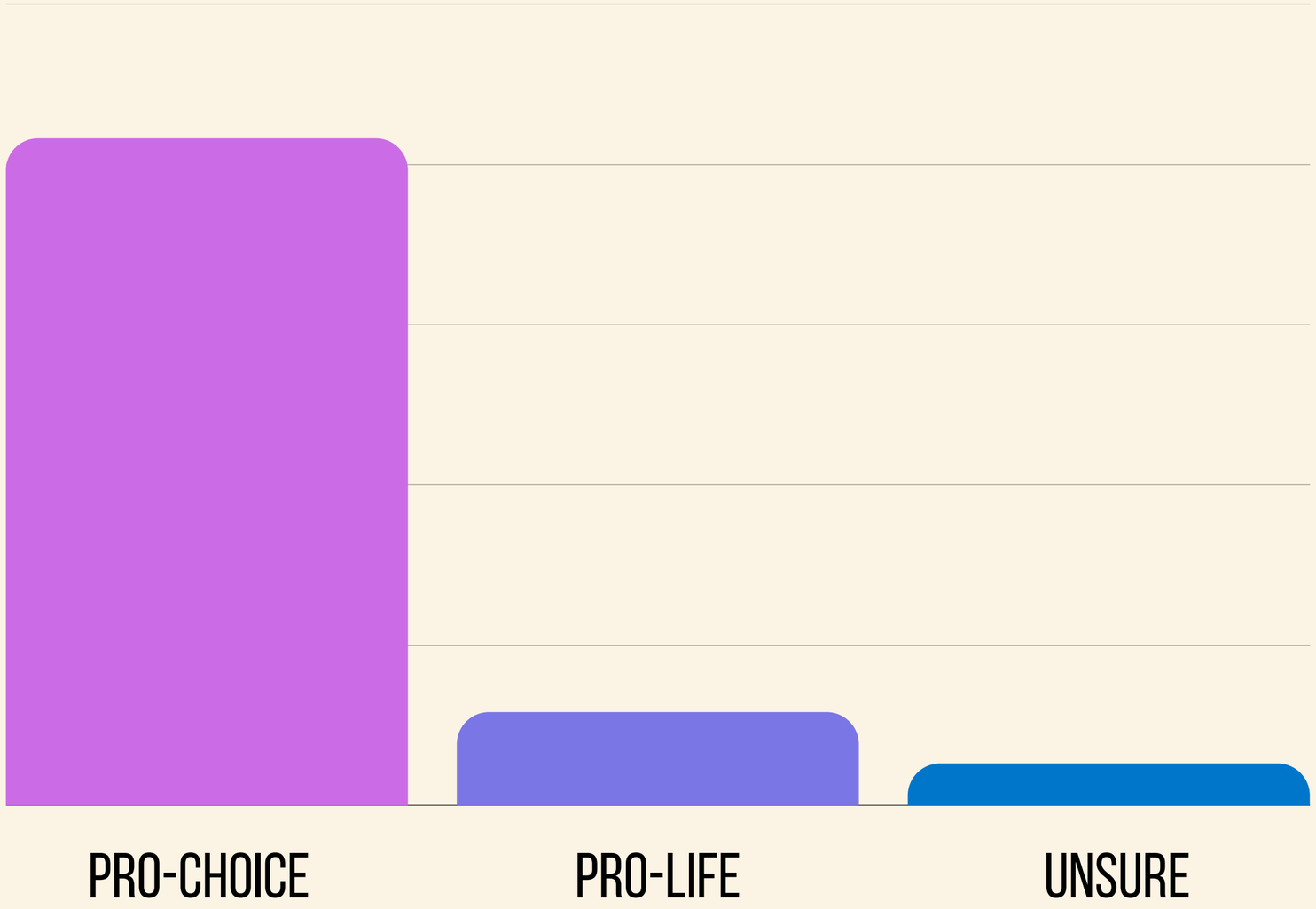
SHOULD WOMEN HAVE THE RIGHT TO HAVE A LEGAL AND SAFE ABORTION METHODS IN THE CAYMAN ISLANDS?

90.4% OF PARTICIPANTS AGREE THAT WOMEN SHOULD HAVE THE RIGHT TO LEGAL AND SAFE ABORTION METHODS.

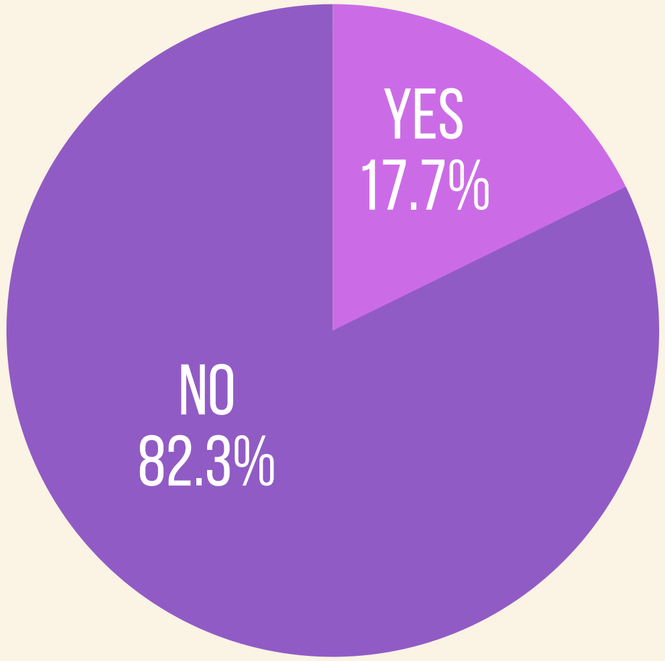
SHOULD ABORTION BE...



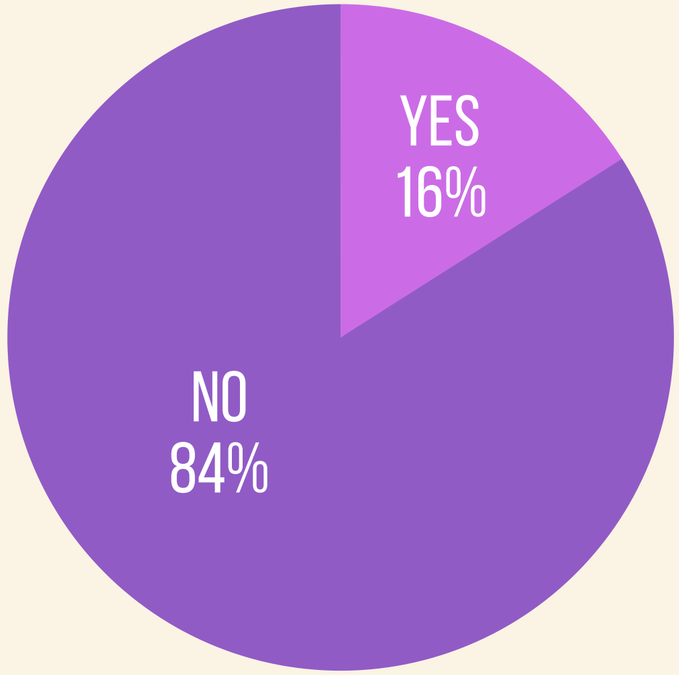
REGARDING ABORTION, DO YOU CONSIDER YOURSELF



OPINIONS ON ABORTION

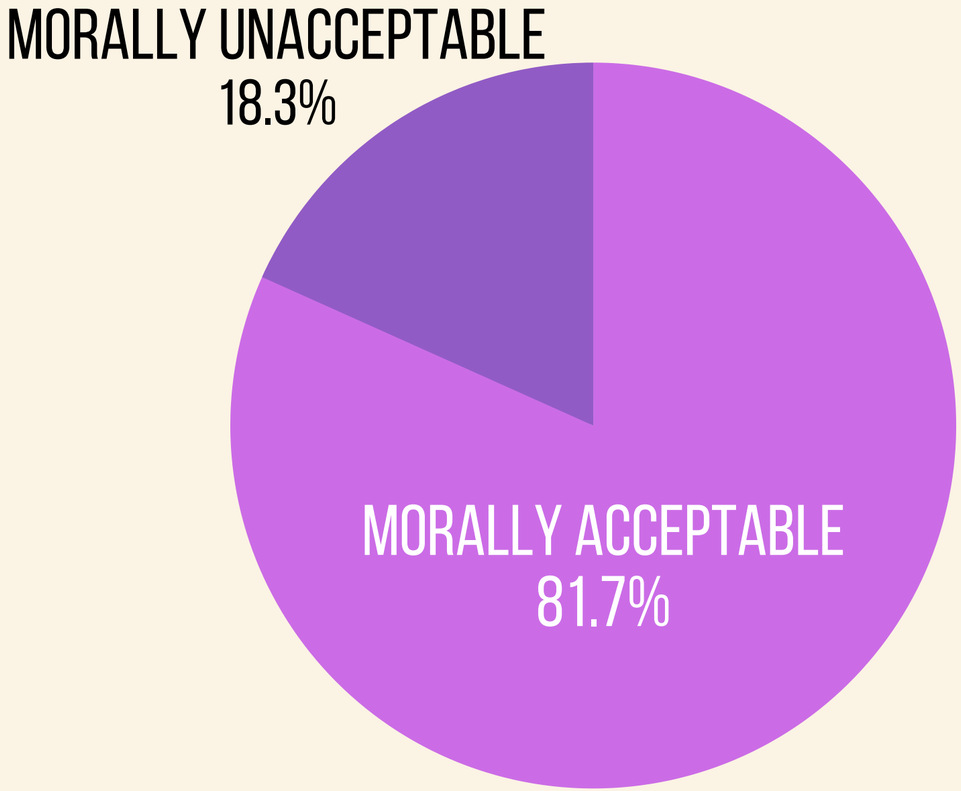


DO YOU THINK ABOTION IS A SIN?

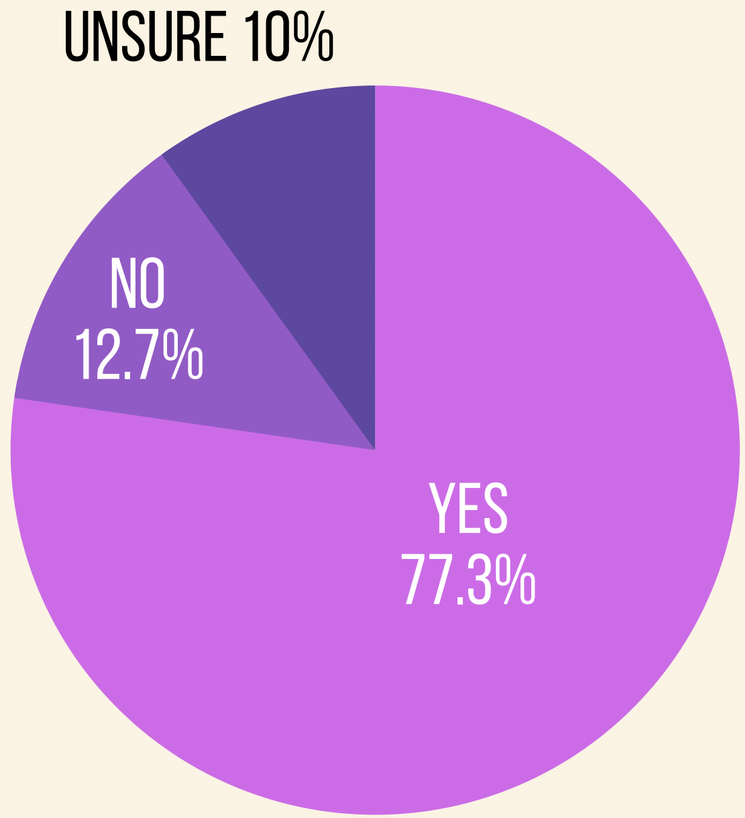


DO YOU THINK ABORTION IS MURDER?

OPINIONS ON ABORTION



DO YOU CONSIDER ABORTION TO BE MORALLY ACCEPTABLE OR MORALLY UNACCEPTABLE?



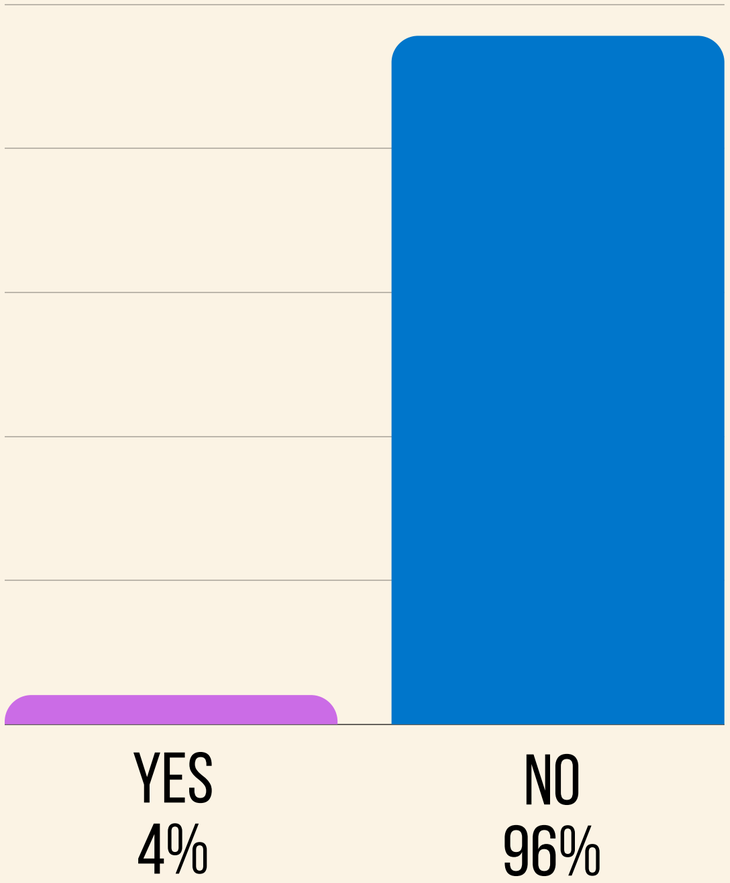
DO YOU FEEL AS IF YOUR BASIC HUMAN RIGHTS ARE BEING DENIED BECAUSE ABORTION IS ILLEGAL IN THE CAYMAN ISLANDS?

WOULD YOU SUPPORT OR OPPOSE A LAW THAT SUPPORTS OR OPPOSE ABORTION IF...

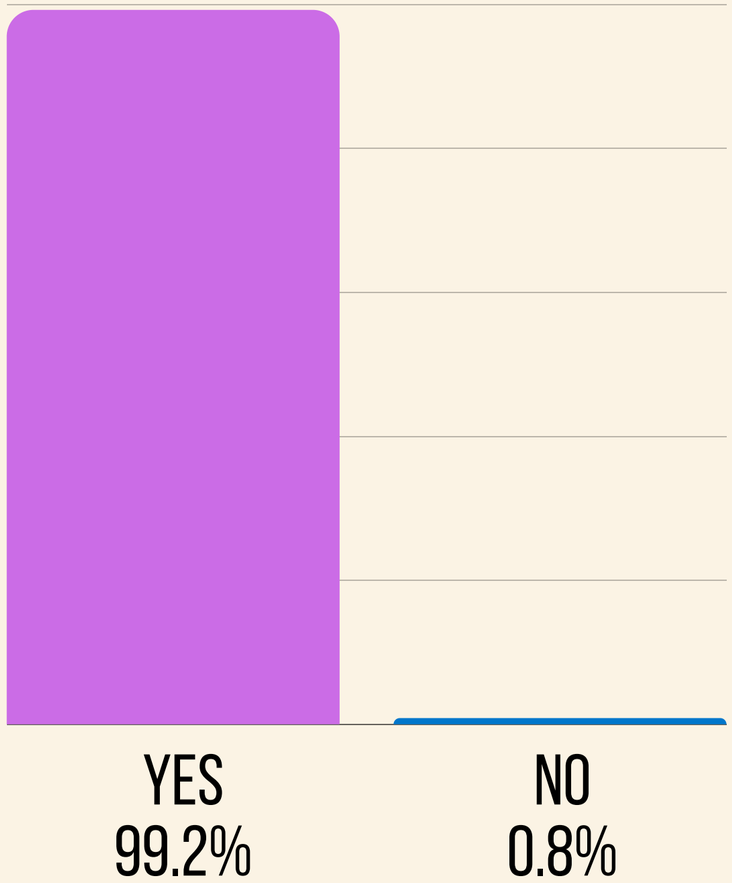
230 23 At any rime during pregnancy if its necessary to protect the life or health of the woman.	**237 13** If the pregnancy is the result of rape or incest.	**200 52** If the woman/girl have a very low income and is unable to afford the pregnancy/baby.
197 55 If the woman/girl has no support or is alone?	**208 43** As a matter of personal choice.	**220 31** In the case of abnormality.

SEX EDUCATION IN SCHOOLS

DO YOU THINK SCHOOLS ARE PROVIDING ENOUGH SEX EDUCATION TO HIGH SCHOOL STUDENTS?

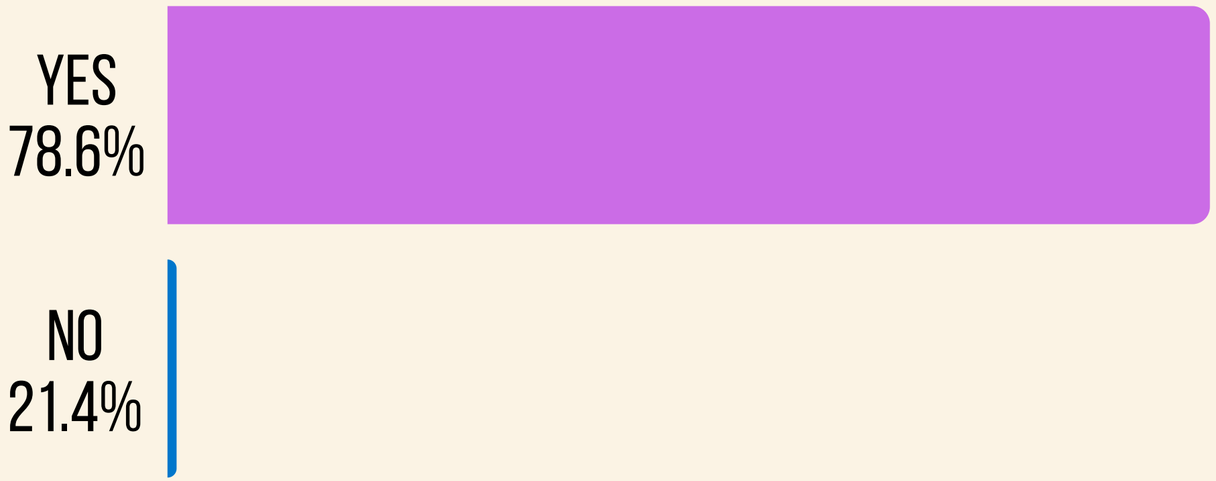


DO YOU BELIEVE A MORE IN-DEPTH CURRICULUM REGARDING FEMALE SEXUAL AND REPRODUCTIVE LIFE AND HEALTH SHOULD BE AVAILABLE IN HIGH SCHOOLS ACROSS THE ISLANDS?



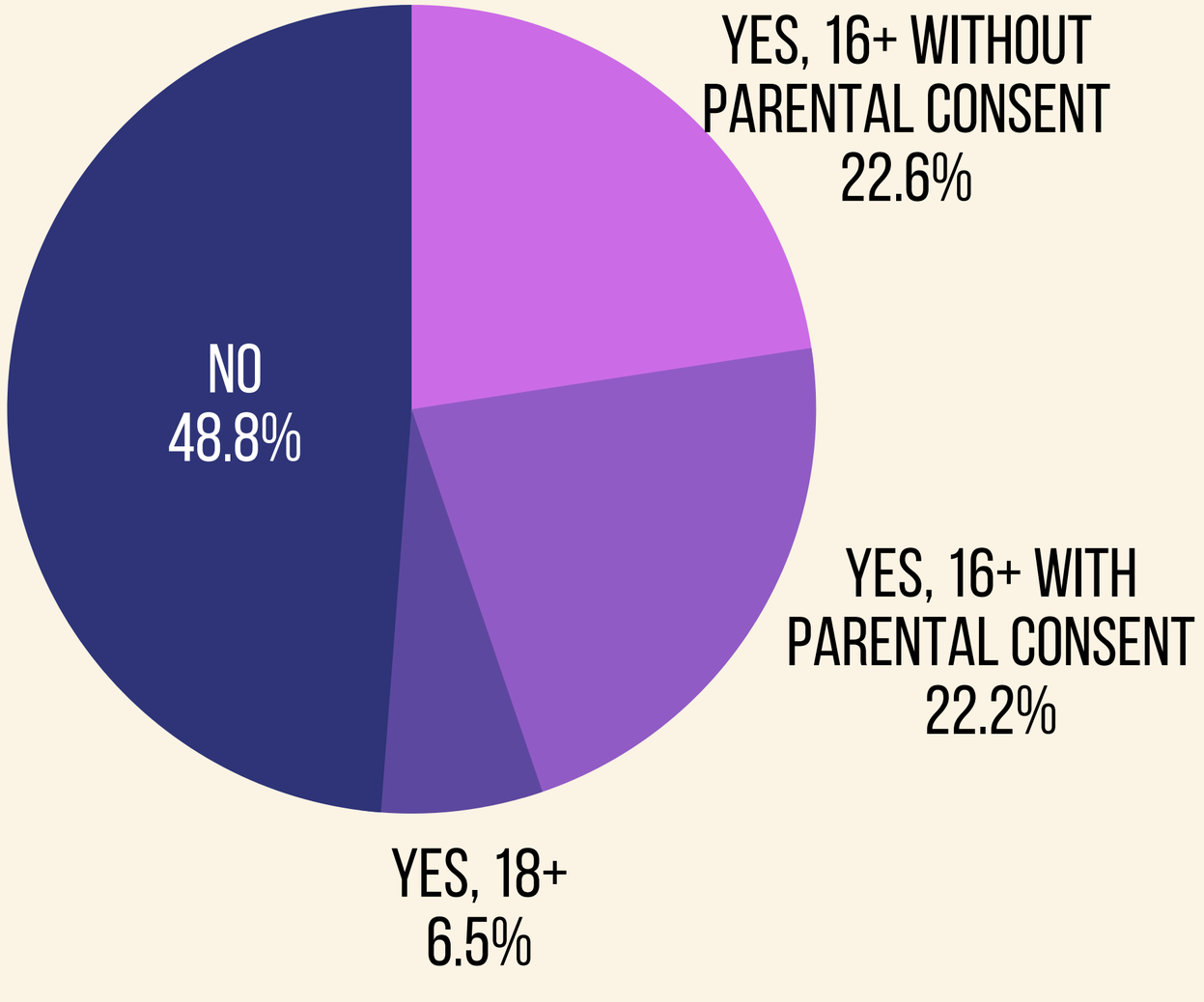
SHOULD ABORTION BECOME LEGAL...

SHOULD ABORTION COSTS BE COVERED BY INSURANCE COMPANIES?



SHOULD ABORTION BECOME LEGAL...

SHOULD THERE BE AN AGE LIMIT ON WHO CAN ACCESS THE SERVICES?



HAVE YOU HAD AN ABORTION BEFORE?

31% OF PARTICIPANTS HAVE HAD AN ABORTION

REASONS WHY PARTICIPANTS HAD ABORTIONS

144 NOT APPLICABLE	46 UNWANTED PREGNANCY	5 FINANCIAL REASONS
4 MEDICAL REASONS	4 ACADEMIC/CAREER REASONS	11 OTHER

METHODS USED TO PROCURE ABORTIONS

144 NOT APPLICABLE	**39** TRAVELED OVERSEAS TO PROCURE ABORTION	**13** DONE LEGALLY IN THE US
14 ILLEGAL ABORTION IN THE CAYMAN ISLANDS THROUGH INGESTION OF MEDICATION.	**6** DONE LEGALLY IN THE UK	**6** DONE LEGALLY IN CANADA

WOULD IT BE EASY TO ANNOUNCE AN ABORTION TO YOUR FRIENDS AND FAMILY?

82.1% OF PARTICIPANT WOULD FIND IT DIFFICULT TO ANNOUNCE AN ABORTION TO FRIENDS AND FAMILY