From: [redacted]
To: Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Cc: [redacted]
Subject: ss. 292, 294, 313(1) and 224, 225 and 226 of Criminal Code Act 1899 and Common Law
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Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

s. 292 When a child becomes a human being
s. 294 Death by acts done at childbirth
s. 313(1) Killing unborn child
s. 18 proposed repeal sections 224, 225 and 226 of *Criminal Code Act 1899*.

The Queensland Law Reform Commission's (QLRC's) "*Review of termination of pregnancy laws Report*" has addressed the question of when the unborn child is a person, to whom the *Criminal Code Act 1899* applies, in Chapter 2 *Termination: An overview*

For advocating abortion, it is an important distinction to establish that "[g]*enerally, termination should be treated as a health issue rather than as a criminal matter*" [QLRC]

To this end, the QLRC relies the Common Law "born alive" rule This appeal appears in the Chapter 2 section "Unlawful killing of a child born alive: sections 292 and 294"

However, in *R v Iby* [63] [2005] NSWCCA 178 the full court described the "born alive" rule as:

> "63 The born alive rule is, as I have indicated above, a product of primitive medical knowledge and technology and of the high rate of infant mortality characteristic of a long past era There is a strong case for abandoning the born alive rule completely " (Empahsis added)

The full court in R v Iby have fully acknowledged the strong medical and scientific evidence that exists for supporting international considerations for deeming life beginning at signs of foetal heartbeat, at conception, and so on

S. 292 When a child becomes a human being

The court in R v Iby held reservations with the "born alive" paradigm in relation to the New South Wales s 20 of the *Crimes Act 1900*,

> "53 In New South Wales s20 of the *Crimes Act 1900* provides that a child is taken to have been born alive if "it has breathed and has been wholly born into the world" This is a specific provision confined in its application to a trial for murder of the child There is no warrant for applying this modification of the common law to other crimes "

The equivalent Queensland *Criminal Code Act 1899* provision is s 292 When a child becomes a human being

> *A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.*

Applying the principle in R v Iby to s 292 a case may be made for repealing the Queensland *Criminal Code Act 1899* provision is s 292 and replacing it with a code that acknowledges modern developments that clearly indicate an earlier stage for when life begins for the unborn child

The court in R v Iby cited the incongruous situation whereby the born alive rule has never encompassed a requirement of viability in the sense of the physiological ability of a newly born child to survive as a functioning being

> "54 The born alive rule has never encompassed a requirement of viability in the sense of the physiological ability of a newly born child to survive as a functioning being The case usually cited as authority for this proposition is *R v West* (1848) 2 Car & P 784, 2 Cox CC 500, 175 ER 329, where the trial judge directed the jury that it could convict of murder where an attempt at abortion had led to a premature birth and the baby died because it was too weak to survive (See Taylor supra at 413-414, Atkinson supra at 135; Barry supra at 356; Forsythe supra at 569-570 "

> "30 There is a body of commentary on the born alive rule upon which I have drawn to identify the relevant case law and to understand the development, scope and purpose of the rule (In addition to the references set out above, I have had regard to Taylor, *Medical Jurisprudence* (7th ed) John Churchill, London 1861; Atkinson, "Life, Birth and Live Birth" (1904) 20 *LQR* 159; Davies, "Child Killing in English Law" (1937) 1 *Mod L Rev* 203; Barry, "The Child en Ventre sa Mère" (1941) 14 *ALJ* 351; Winfield, "The Unborn Child" (1942-1944) 8 *Cambridge LJ* 76; Glanville Williams, *The Sanctity of Life and the Criminal Law* Forbes, London 1958 pp 19-23; Louise Westerfield, "The Born Alive Doctrine: a Legal Anachronism" (1976) 2 *Southern Uni L Rev* 149)"

Intentional killing

Furthermore, the (QLRC's) "*Review of termination of pregnancy laws Report*" has reported at s 18 the proposal for repeal of sections 224, 225 and 226 of *Criminal Code Act 1899* Although these provisions relate to intentional attempts to unlawfully procure the miscarriage of a woman, there remain those cases similar to *R v Waigana* [2012] QSC 202, *Bowditch v McEwan & Ors* [2001] QSC 448 and is *R v West* (1848) 2 Car & P 784, 2 Cox CC 500, 175 ER 329, cited in R v Iby

Notwithstanding, there remains the *Criminal Code Act 1899* Provision s 293 Definition of killing

> Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person

In *R v Waigana* Henry J considered " *where the defendant was charged with killing an unborn child under s 313(2) of the Criminal Code 1899 (Qld) – whether the foetus that was destroyed was a "child" within the meaning of that offence provision – whether it was necessary for the foetus to be an unborn child capable of being born alive*"

Henry J also held "*The use of the word child in section 313(2) when looked at in context is obviously a reference to the life form with which the female is pregnant. That much is made plain by the use of the words 'female pregnant with a child' in the first limb of the section and the words 'child before its birth' in the second. In this context the use of the word child to describe the life form with which the mother is pregnant does not suggest the life form must be capable of existence independently of the mother.*"

Notably, Henry J did not progress the argument "*In the course of submissions, there was a philosophical argument advanced that to interpret the section as applying to the unborn child without reference to some stage of advancement has the consequence that it applies to the unborn child effectively from the moment of conception.*"

The decision in *Bowditch v McEwan & Ors* is

> "ORDER: The answer to the question "Did the first defendant, as the admitted driver of the Datsun sedan referred to in paragraph 3(a)(i) of the statement of claim, owe to the plaintiff a duty of care, breach of which would afford the plaintiff a cause of action in negligence for his injuries, if any, sustained as a result of the collision admitted in paragraph 2 of the amended defence?" is "Yes" "

Furthermore, in *Bowditch v McEwan & Ors*, White J held:

> 42 Where, as here, a woman has no rights of autonomy or privacy, whatever their content, which would be disregarded if a duty of care were imposed in circumstances where the special relationship with the foetus does not of itself subsist then there is no basis for declining to impose a duty of care The common law is able, in my view, to approach this issue in a principled way

Prenatal injury duty of care

Turning on these aspects are further allied Common Law principles relating to the duty owed by health care providers to take reasonable care In *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52 at [71] - [72] Kirby J held that

> 66 *An established duty category exists*: Originally, the common law accepted a principle that, because legal personality arises at birth, duties cannot be owed to a person before that person is born[138] However, it is now established that health care providers owe a duty to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury Such a duty has been held to exist even before conception[139] Once the child is born, the damage accrues in law and the child is able to maintain an action for damages Unless some disqualifying consideration operates, the present case falls within the duty owed by persons such as the respondent to take reasonable care to prevent pre-natal injuries to a person such as the appellant

[138] See, eg, *Watt v Rama* [1972] VR 353
[139] *X and Y (By Her Tutor X) v Pal* (1991) 23 NSWLR 26

Kirby J further held that:

> 71 The duty owed by health care providers to take reasonable care to avoid causing pre-natal injury to a foetus is sufficiently broad to impose a duty of care on the respondent in this case In order to discharge that duty, the respondent did not need to engage in conduct that was significantly different from conduct that would ordinarily be involved in a medical practitioner's fulfilling the pre-natal injury category of duty Furthermore, the damage involved immediate, discernible physical damage, which the duty relating to pre-natal injuries ordinarily encompasses This is not a case involving pure economic loss or another type of loss which is distinguishable from physical damage that could take this case outside the ambit of the pre-natal injury duty of care
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> 72 Subject to what follows, therefore, the appellant's case on the duty issue is an unremarkable one in which she sues a medical practitioner for failure to observe proper standards of care when she was clearly within his contemplation as a foetus, *in utero* of a patient seeking his advice and care She was thus in the standard duty relationship for such a case She evidenced the important "salient feature" of vulnerability to harm (in the event great harm), should the respondent not observe proper standards of case with respect to her Denying the existence of a duty amounts, in effect, to the provision of an exceptional immunity to health care providers The common law resists such an immunity[149]

[149] *Lanphier v Phipos* (1838) 8 Car & P 475 at 479 [173 ER 581 at 583]

In *Harriton*, Crennan J explained at [223]

> " claims based on negligent medical advice or diagnosis prior to conception concerning the possible effect of treatment administered to the mother[335], contraception or sterilisation[336], or genetic disability[337], and contradistinguishes such claims from "wrongful birth" claims by parents for the costs of raising a child whether healthy[338] or disabled[339], whose unplanned birth occurs as a result of medical negligence There have been numerous instances where claims of wrongful birth and wrongful life have been brought concurrently "

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[335] *Lacroix v Dominique* (2001) 202 DLR (4th) 121; *Harbeson v Parke-Davis Inc* 656 P 2d 483 (1983)
[336] For example, in Australia, *Edwards v Blomeley* [2002] NSWSC 460; in the United States of America, *Elliott v Brown* 361 So 2d 546 (1978); *Speck v Finegold* 439 A 2d 110 (1981); *Pitre v Opelousas General Hospital* 530 So 2d 1151 (1988)
[337] For example, in Australia, *Waller v James* [2006] HCA 16; in Canada, *Jones (Guardian ad litem of) v Rostvig* (1999) 44 CCLT (2d) 313; in Singapore, *JU v See Tho Kai Yin* [2005] 4 SLR 96; in the United States of America, *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 (1980); *Turpin v Sortini* 182 Cal Rptr 337 (1982); *Nelson v Krusen* 678 SW 2d 918 (1984); *Bruggeman v Schimke* 718 P 2d 635 (1986); *Lininger v Eisenbaum* 764 P 2d 1202 (1988); *Viccaro v Milunsky* 551 NE 2d 8 (1990); *Kush v Lloyd* 616 So 2d 415 (1992); *Schloss v The Miriam Hospital* unreported, Rhode Island Superior Court, 11 January 1999; *Moscatello v University of Medicine and Dentistry of New Jersey* 776 A 2d 874 (2001); *Johnson v Superior Court of Los Angeles County* 124 Cal Rptr 2d 650 (2002); *Paretta v Medical Offices for Human Reproduction* 760 NYS 2d 639 (2003); in Israel, *Zeitsov v Katz* (1986) 40(2) PD 85 The claim was denied in all cases except *Turpin v Sortini*, *Curlender v Bio-Science Laboratories* and *Zeitsov v Katz*
[338] *Cattanach v Melchior* (2003) 215 CLR 1
[339] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266

Although the QLRC proposes the repeal of ss 224, 225 and 226, there still remains these Common Law precedents that hold a duty of care liability for the medical practitioner who causes harm through negligence This duty of care applies to anyone, under Common Law, for any harm caused by that person's negligence, whether intentional or not There is nothing to be gained by repeal of ss 224, 225 and 226 They should remain to capture any criminally intended negligence As Kirby J held in Harriton at 101:" *A medical practitioner who has been neglectful and caused damage escapes scot-free. The law countenances this outcome. It does nothing to sanction such carelessness. It offers no sanction to improve proper standards of care in the future.*"

s. 294 Death by acts done at childbirth

In the "*Review of termination of pregnancy laws Report*", the QLRC's words "*2.9 Section 294 further provides that, where a child is born alive but dies from acts done or omitted to be done before or during its birth, the child is deemed to have been 'killed'.*[12]" is in serious error

[[12] Section 294 has not been amended since its enactment in Queensland in 1899.]

The correct provision is the *Criminal Code Act 1899* s 294 (Death by acts done at childbirth)

> *When a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child.*

The provision does not state "*where a child is born alive but dies*" Furthermore, Henry J in to *R v Waigana* held that in relation to s 313(2) "*In this context the use of the word child to describe the life form with which the mother is pregnant does not suggest the life form must be capable of existence independently of the mother.*" This principle holds for the analogous s 294

Organ harvesting

The U S parent company, Planned Parenthood (PP), use[redacted], which is identical to the 18 U S Code 1531 illegal Partial-Birth Abortion procedure
The Queensland *Criminal Code Act 1899* s 292 provides that the child is not a human being at this point

The PP procedure entails an abortionist, guided by ultrasound,[redacted]

The abortionist[redacted] This avoids a felony pursuant to 1 U S Code 8

This is a criminal act, if caught, pursuant to s 294 However, the ALRC state "*2.10 If section 292 or 294 applies, the killing of the child is unlawful unless it is authorised, justified or excused by law.*[13]"

[[13] Criminal Code (Qld) s 291.]

If practiced in Australia, this PP procedure would contravene the current ss 313(1) (Killing unborn child) provision

[redacted]

[redacted]

CONCLUSION

S. 292 When a child becomes a human being

The Common Law principles are a strong basis for a case being made for repealing the Queensland *Criminal Code Act 1899* provision is s 292 and replacing it with a code that acknowledges modern developments that clearly indicate an earlier stage for when life begins for the unborn child

This proposed amendment may counter the intent of the *Criminal Code Act 1899* Provision s 293 Definition of killing The Common Law principles in *R v West*, *Bowditch v McEwan & Ors*, *R v Waigana*, and *Harriton v Stephens* duty of care cases also holds Criminality is not required for there to exist a civil claim for anyone causing harm to another, despite all the well-intentioned good faith, reasonable care and skill

The Common Law is succinctly clear that with advances in scientific medical knowledge, amendment of the *Criminal Code Act 1899* s 292 (When a child becomes a human being) requires amendment to redefine a human being

Section 294

Not only does the *Criminal Code Act 1899* s 294 (Death by acts done at childbirth) apply "*before or during its birth*" but the Common Law duty of care principles do not allow s 291 for any capricious *authorised or justified or excused* killing of human beings S 313(1) must be retained

To prevent organ harvesting pursuant to ss 219, 292, 293, 294 and 131(1), then s 292 (When a child becomes a human being) requires amendment to align with the Common Law without the "Born Alive Rule" S 313(1) must be retained

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