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To the Committee Secretary
Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Parliament House, George Street
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Termination of Pregnancy Bill 2018 (Qld)

Submission to: Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

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Table of Contents

EXECUTIVE SUMMARY

In response to the Termination of Pregnancy Bill 2018 (Qld) (**the Bill**), this submission addresses three key aspects:

1. the legal principles and lawfulness of abortion in Queensland;
2. late term abortion; and
3. Registered Health Practitioners' rights to conscientious objection with regard to the provision of abortion services.

Recommendations

1. Sections 224-226 of the *Criminal Code 1899* (Qld) (**Criminal Code**) should be repealed and laws around abortion be replaced with the Bill, in order to:
    a. clarify and modernise the law with relation to modern clinical practice;
    b. remove stigma around abortion;
    c. provide safer access to abortifacient drugs for women in Queensland; and
    d. provide legal certainty for women and doctors who both seek and provide abortion services in Queensland.

2. The provisions of the Bill relating to late term abortion appropriately deal with the issue by placing the decision in the hands of medical practitioners who may have regard to a range of medical, psychological, and social factors. The provisions of the Bill are proportionate and appropriate in light of modern clinical practice and current evidence relating to late term abortion and should remain unamended.

3. Rights of conscientious objection are important freedoms however they must not altogether restrict the access of womens health services. The Provisions of the Bill relating to Registered Health Practitioners' rights of conscientious objection are drafted in a manner that adequately accommodates and balances Registered Health Practitioners' rights to conscientiously object to providing abortion services against Queensland womens' rights to seek and access those services.

SUMMARY OF KEY POINTS

- The thirty-year-old personal views of a single judge of the District Court that forms the basis for lawful abortion in Queensland is a disturbingly unsatisfactory legal precedent for what is such a critical women's health issue. Legal clarity is therefore needed to provide Queensland women with access to what many unknowingly expect is a legal, available health service.
- Queensland remains one of only two states to retain abortion within a criminal model and a more predictable statutory model is required that does not provide a 'defence' to abortion as a criminal offence, but provides for lawful abortion as a starting point for women seeking such services.
- The legal situation in Queensland has created a perception that abortion is not only illegal but also a 'radical' health service. Queensland doctors feel frustrated by the compulsion to behave misleadingly and unethically in order to behave 'legally', by unnecessarily focussing on mental health in what is also a physical health issue. Queensland law requires urgent modernisation to synchronise it with health developments, provide reliable access to abortifacient drugs, remove stigma within the medical profession, and end the need for abortion tourism.
- Late term abortions make up approximately 1% of abortions and chiefly occur following the late diagnosis of a significant foetal abnormalities, or where the mother faces catastrophic health risks if the pregnancy proceeds. There is simply no data or evidence to substantiate the claims made by opponents of the Bill that there will be an influx of late term abortions for 'social reasons' or 'sex selection' should it be enacted and late term abortions should therefore be viewed as a health issue dealt with by medical specialists.
- Conscience is a burden that belongs to the doctor and patients should not have to shoulder it. Recognising conscientious objection as an absolute right, risks a practice of 'value-driven medicine' which undermines women's access to reproductive services.

LEGAL PRINCIPLES AND DETERMINATION OF LAWFULNESS

Existing practices

Around one-quarter of Australian women will have an abortion during their lifetime.[1] It is estimated that over 80,000 Australian women undergo an abortion each year,[2] a quarter of which take place in Queensland.[3] Despite this, abortion remains a criminal offence in Queensland.[4]

Ironically, most abortions taking place in Queensland are publicly funded in part by Medicare,[5] which is possible through abortions being made 'lawful' by satisfying a statutory defence, supplemented by common law.[6] Many doctors seem to accept that their role in providing abortion services is to 'construct' an appropriate narrative to justify a lawful termination, engendering frustration at the need to manufacture mental illness out of what is frequently emotional distress.[7] It is not however clear when abortion is, and is not, defensible and it is argued that this lack of certainty drives many doctors away from providing abortion services.[8]

Because of the current legal uncertainty due to abortion laws being enshrined in the Criminal Code, there is virtually no access to abortion through the public hospital system in Queensland, aside from exceptional circumstances.[9] The current criminal legal model also

[1] Caroline De Costa et al, 'Abortion Law Across Australia–A Review of Nine Jurisdictions' (2015) 55 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 105, 105; Heather Douglas, Kirsten Black and Caroline De Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560, 560.
[2] Annabelle Chan, Leonie Sage, 'Estimating Australia's Abortion Rates' (2005) 182 *Medical Journal of Australia* 447.
[3] Drabsch T, *Abortion and the Law in New South Wales* (NSW Parliamentary Library Research Service, Sydney, 2005), 4.
[4] *Criminal Code 1899* (Qld) ss 224-226.
[5] Kelly Petersen, 'Early Medical Abortion: Legal and Medical Developments in Australia' (2010) 193 *Medical Journal of Australia* 26, 26.
[6] Queensland Law Reform Commission (QLRC), Review of Termination of Pregnancy Laws: Report No. 76 (June 2018) 15-19; *Criminal Code 1899* (Qld) s 282.
[7] Douglas, Black and De Costa, above n 1, 568.
[8] Ibid, 561.
[9] Ibid.

causes inequity in rural areas where access to health care providers who provide abortion services is limited to sparse regional centres across Queensland's northern coast.[10]

Uncertainty surrounding the existing legal framework sees only limited numbers of abortions being performed in teaching hospitals and opportunities for students are rare,[11] creating responsibility for individual clinics to perform procedures and train doctors, further splintering access to women.[12] In general, doctors providing abortion services report great concern that existing practice has contributed to a loss of relevant skills surrounding abortion procedures.[13]

Existing legal principles

The key existing legal principles governing abortion in Queensland are set-out in detail in the Queensland Law Reform Commission's (**QLRC**) report, '*Review of Termination of Pregnancy Laws*' (**the Report**).[14]

The statutory defence making abortion lawful in Queensland,[15] was considered in *R v Bayliss and Cullen,*[16]. Bayliss and Cullen were charged, pursuant to s224 of the Criminal Code and pleaded not guilty on the basis that the abortion was necessary for the preservation of the mother's life. McGuire DCJ found that the Menhennit ruling of *R v Davidson*,[17] represented the law of Queensland,[18] and although his honour acknowledged Levine DCJ's more expansive interpretation of the Menhennit ruling in the NSW case *R v Wald*,[19] – that socio-economic factors were relevant in deciding 'necessity to present a serious risk to a mother's life' –

[10] See: Children by Choice (Queensland), *Queensland Abortion Providers*, [redacted] (2017) 41(3) *Australian and New Zealand Journal of Public Health* 309, 313.
[11] Barbara Baird, 'Happy Abortionists' (2014) 29:82 *Australian Feminist Studies* 419, 423.
[12] Ibid, 424.
[13] Douglas, Black and De Costa, above n 1, 574.
[14] Queensland Law Reform Commission, above n 6, 9-20.
[15] *Criminal Code 1899* (Qld) s 282.
[16] (1986) 9 Qld Lawyer Reps 8.
[17] [1969] VR 667.
[18] *R v Bayliss and Cullen* (1986) 9 Qd R 8, 45.
[19] (1971) 3 DCR (NSW) 25.

McGuire DCJ did not follow the expanded test.[20] Rather than clarify the test for Queensland, McGuire DCJ provided only a general definition for 'serious'.[21]

Bayliss was not appealed to the level of the Supreme Court has left great ambiguity around the validity of that precedent.[22] The thirty-year-old personal views of a single judge of the District Court – that there was no legal justification for 'abortion on demand'[23] – forms the basis for lawful abortion in Queensland which is a disturbingly unsatisfactory precedent for what is such a critical women's health issue.

Subsequent Queensland cases have not clarified the legal test in any significant way.[24] In *Queensland v B*,[25] the court considered access to abortion for a 12-year-old girl who was 18 weeks pregnant.[26] Rather than discuss s282, the court relied on its *parens patriae* jurisdiction and that of s286 of the Criminal Code.[27] In *Central Queensland Hospital and Health Service v Q*,[28] although the revised version of s282 was acknowledged, the case again dealt with a pregnant 12-year-old and the risk of health was so obvious, no in depth discussion was required to provide modern clarity to what makes abortion lawful in Queensland.[29]

These uncertain legal principles mean that doctors in Queensland operate as gatekeepers to lawful abortion and could in certain circumstances deny a woman's request for an abortion.[30]

[20] *R v Bayliss and Cullen* (1986) 9 Qd R 8, 26-27.
[21] Ibid at 45, where 'serious' was defined to mean 'grave', 'irreparable', or 'permanent'.
[22] Douglas, Black and De Costa, above n 2, 573.
[23] *R v Bayliss and Cullen* (1986) 9 Qd R 8, 45.
[24] Douglas, Black and De Costa, above n 1, 563.
[25] [2008] 2 Qd R 562.
[26] Ibid [14], [23].
[27] Ibid [21].
[28] [2016] QSC 089.
[29] Ibid [17], [28].
[30] Heather Douglas, 'Abortion Reform: A State Crime or a Woman's Right to Choose?' (2009) 33 *Criminal Law Journal* 74, 78.

Legal clarity is therefore needed to provide Queensland women with access to what many unknowingly expect is a legal, available health service.[31]

Need to modernise and clarify the law

Archaic Law

Current Queensland laws are based on the *Offences Against the Person Act 1861* (UK),[32] and are now enshrined in Chapter 22 of the Criminal Code: 'Offences Against Morality', having received no revision since 1899. When the English law was passed over 150 years ago, abortion techniques were crude, and basic antiseptic discoveries were not yet implemented.[33] A century-and-a-half later, women's role in society has changed tremendously and obstetric techniques and abortion technologies have altered the situation drastically.[34] Queensland remains one of only two states to retain abortion within a criminal model.[35]

s282 defence

Queensland Parliament amended s282 in 2009 to ensure that medical terminations,[36] were treated in the same way as surgical terminations to protect providers of such treatment from prosecution under s224.[37] The amendment was passed because of concerns raised by Queensland medical practitioners about the potential criminal liability in providing medical abortions.[38]

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[31] Baird, above n 11, 430.
[32] Modelled on s 58.
[33] *Roe v Wade* (1973) 410 US 113, 149.
[34] Kerry Petersen, 'Abortion Laws and Medical Developments: A Medico-legal Anomaly in Queensland' (2011) 18 *Journal of Law and Medicine* 594, 595.
[35] The other state being New South Wales.
[36] A medical termination is once where drugs are used to induce the abortion. See: Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), *The Use of Mifepristone for Medical Termination of Pregnancy* (November 2007), 3
[redacted]
[37] *Criminal Code (Medical Treatment) Amendment Act 2009* (Qld).
[38] Criminal Code (Medical Treatment) Amendment Bill 2009 (Qld) (Explanatory Notes) 1-2.

Despite the amendment covering modern medical practices, the heavily-relied-on s282 defence is an anomaly of the Criminal Code; Chesterman J commenting that *"[t]he doctrine [of necessity] is…a creature of the common law and finds only a very limited role in the Code*."[39] The scope of s282 is uncertain in many respects and calls for specific clarification regarding its application to abortion.[40] A more predictable statutory model is required that does not provide a 'defence' to a criminal offence, but provides for lawful abortion as a starting point for women seeking such services.

s226, Brennan v Leach, and safer access and use of abortifacient drugs

The case of *R v Brennan & Leach*,[41] illustrates that Mifepristone will not be a 'noxious' drug for s226. The clarification that 'noxious' pertains to the health of the mother is welcomed, however the section is now more incoherent in respect of what 'noxious' means under s226 and the need to repeal the section is more pressing than ever to remove the risk of others facing prosecution for obtaining health care.[42] Several Queensland doctors have commented that Leach's prosecution had not clarified the law with respect to abortion and that doctors had become increasingly concerned about the risk of prosecution.[43]

Mifepristone is in mainstream usage across the world. [44] Leach's prosecution has raised publicly how easy it is to access these drugs from irregular sources,[45] and demonstrates not only the perviousness of Australia's borders in respect to importation, but also women's ingenuity in obtaining abortifacient drugs.[46] Anecdotal evidence suggests that abortifacient drugs are being bought over the internet on possibly a large scale in Australia,[47] therefore an

[39] *State of Queensland v Nolan* [2002] 1 Qd R 454 [17].
[40] Rob O'Regan QC, Surgery and Criminal Responsibility Under the Queensland Criminal Code (1990) 14 *Criminal Law Journal* 73, 83.
[41] (Unreported, District Court of Queensland 2010, Everson J, October 2010).
[42] De Costa et al, above n 1, 109; Petersen, above n 34, 599.
[43] Douglas, Black and De Costa, above n 1, 573.
[44] Petersen, above n 34, 596.
[45] Ibid, 599.
[46] Barbara Baird, 'Medical Abortion in Australia: A Short History' (2015) 23 *Reproductive Health Matters* 169, 172.
[47] Caroline De Costa, Darren Russell, Michael Carrette, 'Abortion in Australia: Still to Emerge from the 19th Century' (2010) 375 *The Lancet* 804, 805; Baird, above n 11, 426.

intelligent regulatory response is required,[48] keeping in mind that legal interventions which attempt to control the traffic of abortifacient drugs are destined to be ineffective in a world of national and global networks.[49]

The evidence of women employing new means of medical technology for their own purposes needs to be done away with. Reliable access to Mifepristone via legally predictable and regulated processes would have such effect. Section 226 of the Criminal Code should therefore be repealed. An argument may remain that s226 could still function to catch 'other' drugs used to induce abortion however this would again turn on the definition of 'noxious'. It is hard to envisage women needing to turn to such means when reliable access to Mifepristone is available however.

Legal rights of the foetus

Legal definition of the foetus is complex.[50] This is highlighted in by McGuire J's acceptance of the distinction between the killing of an unborn child and the potentially defensible killing of a "microscopic fertilised ovum".[51]

Current Queensland criminal law pertaining to abortion is silent about the status of the foetus, as s282 is focused on the preservation of the mother's life.[52] The Criminal Code provides no further certainty as s292 states that a child becomes a person capable of being killed when 'completely proceeded from mother',[53] yet s313(1) provides an offence for killing an unborn child where the 'child is about to be delivered'. Section 313 imports notions of foetal viability and the explanatory notes for the 1996 amendment evidences legislative

[48] Petersen, above n 34, 599.
[49] Ibid, 595.
[50] Talat Uppal et al, 'The Legal Status of the Fetus in New South Wales' (2012) 20 *Journal of Law and Medicine* 178, 183.
[51] *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8.
[52] Compare with South Australian law where serious foetal abnormality provides a ground for termination: see *Criminal Law Consolidation Act 1935* (SA), s 82A(1)(b); similarly in the Northern Territory see *Medical Services Act (NT)*, s 11(1).
[53] See also: *R v Castles* [1969] QWN 36, where to constitute homicide death must occur after birth.

intention that had the woman been pregnant for 24 weeks or more, a prima facie assumption arises that the child was capable of being born alive.[54] It is therefore suggested that foetal age *is* relevant to defining 'about to be delivered' for s313(1) and the offence could be applied in some situations of late-term abortion.[55] Accordingly, there continues to be uncertainty in Queensland law regarding the lawfulness of late-term abortion.

Some argue that foetuses should be offered protection by the criminal law from the moment of conception,[56] however Australia, like most countries, does not expressly acknowledge foetal rights to life.[57] The legal position is therefore maintained that a child becomes a 'legal person' only upon being born alive.[58]

[54] Beanland D, *Explanatory Notes Criminal Law Amendment Bill Qld* (1996) p 12.
[55] Douglas, above n 30, 76.
[56] Patrick Ferdinands, 'How the Criminal Law in Australia Has Failed to Promote the Right to Life for Unborn Children: A Need for Uniform Criminal Laws on Abortion Across Australia (2012) 17 *Deakin Law Review* 43, 46.
[57] In contrast see the recently repealed article 40.3.3 of the *Constitution of Ireland* (Ireland 1937) which provided that the 'State acknowledges 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'. After Ireland's recent referendum, Malta is now the only European country in the European Union completely prohibit abortion at law.
[58] *Watt v Rama* [1972] VR 353.

Late term abortion

Terminations after 20 weeks' gestation comprise around only 1% of all abortions in Australia and chiefly occur following the late diagnosis of a significant foetal abnormalities, or where the mother faces catastrophic health risks if the pregnancy proceeds.[59] Approximately 78% of terminations performed at 20 weeks gestation or more are performed at public hospitals,[60] further highlighting the seriousness of the health scenarios that necessitate these late gestation terminations. There is simply no data or evidence to substantiate the claims made by opponents of the Bill that there will be an influx of late term abortions for 'social reasons' or 'sex selection' should it be enacted. As stated by Professor Caroline de Costa, (Professor - Obstetrics and Gynaecology, James Cook University): "*women don't get to 24 weeks pregnant and suddenly decide 'I've made a huge mistake'*".[61]

The committee *must* focus its inquiry in this regard on the submissions and evidence of peak medical bodies such as the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), the Australian Medical Association (AMA), and doctors who practise in the area of obstetrics and gynaecology, not on extreme hypothetical scenarios espoused by fringe interest groups that have no basis in fact or evidence, or reflect what is occurring in clinical practice with regard to late term abortion.

The controls around late term abortion (beyond 22 weeks gestation) proposed by s6 of the Bill properly reflects the broad range of factors doctors must consider when agreeing to perform such a procedure and contemplates the complexities surrounding late term abortion. Over-prescription of legal regulation around gestational limits discriminates against the most vulnerable of women and women in the most difficult clinical circumstances.[62] Often

[59] Kirsten Black, Heather Douglas, and Caroline De Costa, 'Women's Access to Abortion After 20 Weeks' Gestation for Fetal Chromosomal Abnormalities: Views and Experiences of Doctors in New South Wales and Queensland' (2015) 55 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 144, 144.
[60] Queensland Law Reform Commission, above n 6, 40.
[61] Abortion Law Reform: Expert Panel Seminar, Queensland University of Technology, P512, 17 August 2016.
[62] Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), Media statement: '*Queensland Abortion Law Reform*' (15 February 2017) [redacted].

disadvantaged women may not access diagnosis of lethal or serious anomalies until later gestations.[63] Summarily, late term abortion should therefore be viewed as a health issue dealt with by medical specialists. Legislation should reflect this.

Medical stigma and the medical profession

Evidence exists that retaining abortion as a criminal offence significantly affects the practice of doctors and their willingness to provide abortion services, meaning that abortion is not part of mainstream gynaecological care.[64] Doctors are additionally often unwilling to challenge the stigma attached to abortion.[65]

The criminal stigma attached to being an abortion provider continues to be a major disincentive for general practitioners, especially in small rural communities. [66] The stigma also extends to the medical community at large with abortion providers facing disapproval,[67] and fear retribution from within the profession for performing terminations.[68]

Doctors are ordinary people who make day-to-day decisions about how to inform their lives and practice.[69] Providers who perform abortions draw on a range of discursive resources to justify their practice such as liberal rationality, feminism, defiance, and outrage.[70] The only resource doctors should be drawing on however is patient-focused professional healthcare. Removal of the criminal abortion provisions will remove the stigma and allow doctors to focus solely on patients.

[63] Black, Douglas, de Costa, above n 59.
[64] De Costa et al, above n 1, 109.
[65] Baird, above n 11, 430.
[66] Baird, above n 46, 173.
[67] Baird, above n 11, 424.
[68] Ibid, 425.
[69] Ibid, 422.
[70] Ibid, 431.

Medical developments

Medical developments of the past thirty years have seen routine Medicare-funded testing for foetal abnormalities being available to all pregnant Australian women. The clinical implication of such tests is that women may choose to terminate the pregnancy if an abnormality is detected.[71] Such abnormalities comprise a significant proportion of terminations,[72] and in Victoria where 80% of women are routinely screened for chromosomal abnormalities, 95% of women chose to terminate the pregnancy where abnormalities are detected.[73] Queensland abortion laws have not kept pace with these developments with no reference made to foetal abnormality,[74] compared with other states adopting health-based models.[75]

Abortion tourism

Although exact figures are imprecise,[76] the result of Queensland's legal silence regarding foetal abnormality results in a continued and extensive abortion tourism market.[77] Particularly when doctors are required to construct a 'bogus framework' of mental health issues for women pregnant with abnormal foetuses.[78] This is even required in the public health sector where 'therapeutic termination' for foetal abnormality is the only ground available to women.[79]

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[71] De Costa et al, above n 1, 109; Caroline De Costa, Heather Douglas, Abortion Law in Australia: It's time for National Consistency and Decriminalisation (2015) 203 *Medical Journal of Australia* 349, 349.

[72] Robert Mangione et al, 'Outcome of Fetuses with Malformations Discovered before 14 Weeks. Where the Discovery is Revealed by Echography During the First Trimester, Is It Responsible for the Voluntary Termination of the Pregnancy? Comparison Before and After July 2001' (2008) 37 *Journal de Gynécologie Obstétrique et Biologie de la Reproduction* 154, reporting on a study involving 336 foetuses with malformations, 75% resulted in a medical termination of the pregnancy.

[73] Lachlan J de Crespigny, Julian Savulescu, 'Pregnant Women with Fetal Abnormalities: The Forgotten People in the Abortion Debate' (2008) 188 *Medical Journal of Australia* 100, 100.

[74] De Costa and Douglas, above n 71, 350.

[75] Compare with South Australian law where serious foetal abnormality provides a ground for termination: see *Criminal Law Consolidation Act 1935* (SA), s 82A(1)(b); similarly in the Northern Territory see *Medical Services Act* (NT), s 11(1)(b)(ii).

[76] De Costa and Douglas, above n 71, 350.

[77] Ibid.

[78] Douglas, Black and De Costa, above n 1, 572.

[79] Queensland Health, Queensland Maternity and Neonatal Clinical Guidelines Program, *Therapeutic Termination of Pregnancy* Guideline No. MN13.21-V1-R18 (2013) [redacted].

Douglas et al report that on occasion, some Queensland doctors have advised women in the later stages of pregnancy to travel interstate for a termination (usually Victoria) because of Queensland's legal uncertainty regarding late term abortion.[80] It is highly unsatisfactory that Queensland doctors feel obligated to advise patients accordingly as women travelling interstate for abortion face increased financial costs, and absence of their local support structures can make the termination a particularly traumatic experience.[81]

Other Australian jurisdictions

NSW

The main difference between abortion laws in New South Wales and Queensland is the question of whether abortion is defensible in Queensland where the woman seeking treatment claims that socio-economic grounds underpin her request.[82] The expanded test from *Wald* must be adopted in Queensland but legislatively enshrined for certainty.

Victoria

Since major reform in 2008,[83] Victorian abortion laws offer a clear approach to dealing with all abortion, including late-term, and essentially treats first trimester abortion as an elective procedure allowing women autonomy. The Victorian legislation offers an aspirational model for Queensland to work towards.[84]

[80] Douglas, Black and De Costa, above n 1, 574.
[81] Ibid.
[82] Ibid, 563.
[83] See: Victorian Law Reform Commission, *Law of Abortion: Final Report* (1 March 2008); *Abortion Law Reform Act 2008* (Vic).
[84] Douglas, above n 31, 86.

Conclusion

The legal situation in Queensland has created a perception that abortion is not only illegal but also a 'radical' health service.[85] Queensland doctors feel frustrated by the compulsion to behave misleadingly and unethically in order to behave 'legally', by unnecessarily focussing on mental health in what is also a physical health issue.[86]

Queensland law requires urgent modernisation to synchronise it with health developments, provide reliable access to abortifacient drugs, remove stigma within the medical profession, and end the need for abortion tourism.

Recommendation

Queensland's abortion laws are extremely outdated.[87]

1. Sections 224-226 of the *Criminal Code 1899* (Qld) (**Criminal Code**) should be repealed and laws around abortion be replaced with the proposed Bill, in order to:
    a. clarify and modernise the law with relation to modern clinical practice;
    b. remove stigma around abortion;
    c. provide safer access to abortifacient drugs for women in Queensland;
    d. provide legal certainty for women and doctors who both seek and provide abortion services in Queensland.
2. The provisions of the Bill relating to late term abortion appropriately deal with the issue by placing the decision in the hands of medical practitioners who may have regard to a range of medical, psychological, and social factors. The provisions of the Bill are proportionate and appropriate in light of modern clinical practice and current evidence relating to late term abortion and accordingly should remain unamended.

[85] Douglas, Black and De Costa, above n 2, 576.
[86] Ibid, 574.
[87] Ibid, 74.

CONSCIENTOUS OBJECTION

Existing practices and legal principles

Given abortion's criminal enshrinement in Queensland no specific legal principles exist. Generally however, there exists no positive requirement for medical practitioners to make referrals if they are opposed to doing so.[88] Specifically in relation to women's reproductive services, RANZCOG's codes of ethics recognises practitioners' moral convictions but states that these are subject to the law.[89]

Need to modernise and clarify the law

When broadly defined, laws around conscience can result in rules that know no bounds.[90] Conscientious objections may vary from person to person, and procedure to procedure.[91] Pregnancy, even when welcomed, constitutes a major life event which can cause immense discomfort and disruption.[92] Women therefore need all medical choices, referrals, and treatments presented to them in a way that is factual and not randomised by individual morality.[93]

Some argue conscientious objection to be a core value of liberal-democratic society, and 'a moral right' in itself,[94] enabling holders of beliefs to pursue their life goals in accordance with

[88] Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia* 2010, s 2.4.6 [redacted]

[89] Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), *The RANZCOG Code of Ethical Practice* (May 2006), 3 [redacted]

[90] Julie D Cantor, 'Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine' (2009) 360 *The New England Journal of Medicine* 1484, 1485.

[91] Ibid.

[92] Peter West-Oram, Alena Buyx, 'Conscientious Objection in Healthcare Provision: A New Dimension' (2016) 30 *Bioethics* 336, 338.

[93] Cantor, above n 90, 1485.

[94] Edmund Pellegrino, 'The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective' (2002) 30 *Fordham Urban Law Journal* 221, 226, 239.

such beliefs thus enjoying equal status as autonomous members of society.[95] However, this must be balanced against women's rights to contraception treatments.[96]

Recognising conscientious objection as an absolute right, risks a practice of 'value-driven medicine' which undermines women's access to reproductive services.[97] Reproductive healthcare is an area where conscientious objection must receive the highest scrutiny given that it jeopardises women's effective enjoyment of rights and freedoms connected to reproductive health.[98]

Granting legislative concessions to ideologically motivated providers of healthcare is unjustifiable as such concessions infringe on the rights held by others,[99] namely, for women to exercise autonomy over their fertility.[100] This point can be made with reference to the expression that one's freedom to swing one's arms ends 'where the other man's nose begins'.[101] Practitioners demanding rights to conscientiously object to abortions are 'demanding a right to throw punches in a crowded room'.[102]

[95] West-Oram and Buyx, above n 92, 337.
[96] Ibid, 337-338.
[97] Social, Health and Family Affairs Committee, Council of Europe, *Women's Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection* (Report, Doc No 12347, 20 July 2010), 5.
[98] Adriana Lamačková, 'Conscientious Objection in Reproductive Health Care: Analysis of *Pichon and Sajous v France*' (2008) 15 *European Journal of Health Law* 7, 8.
[99] West-Oram and Buyx, above n 92, 342.
[100] Ibid, 338.
[101] Ibid, 343.
[102] Ibid.

Other Australian jurisdictions

Even at the highest levels of international law, conscience is not absolute.[103] Laws covering the right to claim conscientious objection are found in most Australian states and generally provide that no person is under a duty, to perform a termination to which they have a conscientious objection, subject to emergency.[104] Notably, the conscience clause in Western Australia is extended to cover hospitals and health institutes.[105]

The *ALRA* (Vic) provides that a conscientious objecting practitioner *must* refer a woman to a non-objecting practitioner,[106] and imposes a duty to perform an abortion in emergency.[107] This accords with RANZCOG's ethical guidelines. [108] The purpose of the Victorian referral requirement is to promote women's rights to autonomy and access to the highest attainable standard of healthcare, and is crafted to strike a balance between this and healthcare providers' rights to conduct themselves in accordance with their beliefs.[109]

Imposing a positive referral obligation is observed by some to 'go too far',[110] and still yields a morally disagreeable result for the objector given the practical clinical outcome is likely to be the procurement of an abortion.[111] The AMA suggests however that practitioners should not form the views that an abortion will result from the referral or of tacit complicity.[112] Some

[103] See: Article 18(1) of the *International Covenant on Civil and Political Rights* ('ICCPR') which states that '[e]veryone shall have the right to freedom of thought, conscience and religion.' However, article 18(3) allows 'such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.
[104] *See Criminal Law Consolidation Act 1935* (SA) s 82A(5); *Criminal Code Act 1924* (Tas) s 164(7); *Health Act 1911* (WA) s 334(2); *Health Act 1993* (ACT) s 84; *Medical Services Act (NT)* s 11(6).
[105] *Health Act 1911* (WA) s 334(2).
[106] *Abortion Law Reform Act 2008* (Vic) s 8(1).
[107] Ibid s 8(3).
[108] Royal Australian and New Zealand College of Obstetricians and Gynaecologists, above n 89, 6.
[109] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 August 2008, 2953–4 (Maxine Morand).
[110] Mike Davis, 'Conscientious Objection to Abortion — an Ethical and Professional Balancing Act' (2014) 22 *Australian Health Law Bulletin* 36, 38.
[111] Ibid, 36.
[112] AMA Victoria, *Abortion — Conscientious Objection Template and Information for GPs,* Legal Services Fact Sheet [redacted] Davis, above n 110, 36.

practitioners opposed the Victorian legislative inclusion on the basis that even the act of referral itself goes against the conscience of the objector.[113] Conversely, supporters of the clause suggest that referral to a non-objecting practitioner does not altogether disregard the conscientious objection.[114]

Referral is not in fact morally onerous and the word 'refer' should be given its ordinary meaning: to 'send or direct'.[115] Simply suggesting the woman consult her local community health centre would satisfy the requirement to refer.[116] Other practice fact sheets suggest practitioners treat their moral objections as conflicts of interest notifying patients by posters visible in waiting rooms that they would "not be able to provide advice or assistance concerning abortion" and simply provide contact details of local family planning clinics.[117] This is considered to be an uncomplicated and effective referral while balancing competing interests.[118]

Conscience is a burden that belongs to the doctor and patients should not have to shoulder it.[119] A point comes where tolerance of conscience breaches the standard of medical care, and modern medicine must embrace ethical professionalism that demands less self-interest, not more.[120] Health care providers should choose specialties that are not 'moral minefields' for them.[121] Ultimately, if practitioners are morally conflicted by abortion, they should not practice women's health.[122]

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[113] Victorian Law Reform Commission, above n 83, 114.
[114] Ibid.
[115] Wendy Larcombe, *Rights and Responsibilities of Conscientious Objectors under the Abortion Law Reform Act 2008* (Paper presented at W(h)ither Human Rights, University of Sydney, 10–12 December 2012), 6.
[116] Ibid.
[117] AMA Victoria, above n 112.
[118] Letter to Members of the Legislative Council from Julian Burnside QC, 8 October 2008; Anne O'Rourke, Lachlan De Crespigny, Amanda Pyman, 'Abortion and Conscientious Objection: The New Battleground' (2012) 38 *Monash University Law Review* 87, 108.
[119] Cantor, above n 90, 1485.
[120] Ibid.
[121] Ibid.
[122] Ibid.

Recommendation

Rights of conscientious objection are important freedoms, however they must not altogether restrict the access of women's health services.[123] The Provisions of the Bill relating to Registered Health Practitioners' rights of conscientious objection are drafted in a manner that adequately accommodates and balances Registered Health Practitioners' rights to conscientiously object to providing abortion services against Queensland womens' rights to seek and access those services.

[123] Bernard Dickens 'Conscientious Objection and Professionalism' (2009) 4 *Expert Review of Obstetrics & Gynecology* 97, 97.

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