Submission No. 116
Received 22 June 2016

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To- Research Director

Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Parliament of Queensland

Re: *Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016.*

I make this submission as a specialist obstetrician and gynaecologist with more than 43 years' experience of caring for women in the area of reproductive health including 22 years in North Queensland. My practice has included the provision of abortion both early and late, and both medical and surgical. I also have very extensive experience of counselling women with unplanned pregnancy about their options – that is, continuing the pregnancy and either keeping the child or giving up the child for adoption, or terminating the pregnancy, and I am very familiar with the difficulties and benefits surrounding all three options. I have a longstanding professional interest in the provision of accessible abortion services for Australian women and in abortion law. I have published extensively in the medical and non-medical press on these topics and written three books on the subject of abortion.

1. **Existing legal principles that govern termination practices in Queensland (Committee Question no 2)**

Abortion law in Queensland, as members of the Committee will be well aware, is contained in the Criminal Code of 1899, in sections 224-226, and there is a defence for a person charged under these sections, contained in section 282. The wording of sections 224-226 closely resembles that of the English Offences Against the Person Act of 1861, since the Code was based on English law at the time when Queensland was a British colony. Apart from the addition in 2009 of a clause adding medical termination to 'surgical operation' in the wording of section 282 the legislation remains unchanged, and reflects 19th century medical knowledge and practice; thus a woman may be charged with the offence of abortion whether she is or is not 'with child'.

A doctor charged under these sections with providing an abortion has a defence in the McGuire judgement, written in 1986 in regard to the case of Doctors Bayliss and Cullen, who were acquitted of the charge of performing an abortion for Tracey T. in 1985. Judge McGuire stated that he believed that Dr Bayliss had held 'an honest belief on reasonable grounds that the operation was necessary' for the preservation of the physical and mental health of Tracey T. and that '…the risks of performing

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the abortion (were small) compared to those of continuing the pregnancy.'[1] The jury agreed with McGuire and found the doctors not guilty of the charge under section 224.

While Queensland doctors charged with the offence of abortion might also make reference to the Victorian Menhennitt Judgement of 1969 and the New South Wales Levine Judgement of 1971 it is the Bayliss case which would be most relevant for them. They can only perform an abortion if the physical and/or mental health of the woman is at greater risk if the pregnancy continues than if the pregnancy is terminated. However should a doctor be prosecuted and attempt to rely for their defence on the McGuire judgement, they might find another judge in another court taking a different view to that of McGuire.

Concluding his remarks to the acquitting jury in 1986 Judge McGuire was very clear on one thing: ***'This Ruling serves to illustrate the uncertainty of the present abortion laws of Queensland. It will require more imperative authority (either the Court of Appeal or Parliament) to effect changes if changes are thought to be desirable or necessary with a view to amending or clarifying the law.'***[1]

Thirty years later, with no amendment or clarification having been provided by 'a more imperative authority', the fact of abortion being a crime in Queensland, and the need to rely on case law for protection, means that many Queensland doctors are reluctant to become personally involved in the practice of abortion. Nevertheless most Queensland doctors, in particular general practitioners, wish to be able to refer women requesting termination of pregnancy to safe accessible services. [2,3,4]

I have been involved in extensive research in the area of abortion practice in Queensland and I cite here several publications, from academic medical and legal journals, written both by myself and by others, which clearly demonstrate the concerns of doctors practicing abortion in Queensland and NSW, now the only states in Australia where abortion law remains unreformed. [2,3,4,5]

In summary, the legal principles governing termination practices in Queensland date from the mid to late 19th century whereas practice, as detailed in the following section, is taking place in the 21st century and is consistent with current medical practice in most other developed countries. It is this dichotomy which urgently needs resolving by rescinding the archaic legislation of the Queensland Criminal Code.

2. **Existing practices in Queensland concerning termination of pregnancy by medical practitioners (Committee Question no 1)**

Recently published Guidelines from Queensland Health specify how, when and where abortion should be practiced in Queensland.[6] These clinical guidelines are up-to-date, comprehensive and well referenced and the practice described in them corresponds to that recommended in other Australian

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jurisdictions and in most developed nations overseas. The only difference is the need to comply with current Queensland abortion law.

Abortion may be performed using either *surgical* or *medical* methods, or a combination of these.[7]

Early abortion

Up to 14 weeks of pregnancy surgical abortion is most commonly performed in Australia using suction curettage under general anaesthesia. Surgical abortions up to this gestation in Queensland must take place in accredited premises, which may be licensed freestanding clinics or hospitals, public or private. In practice almost all surgical abortions at this gestation in Queensland take place in private clinics situated in well-populated areas; only a few are performed in hospitals. Doctors performing surgical abortion, like those performing every other kind of surgery, must be ***registered medical practitioners of good standing – registration of all medical practitioners is renewed annually and the continuing good standing of the practitioner is checked by the Australian Health Practitioner Regulation Agency (AHPRA).***

Increasingly since 2006, early abortion in Australia including in Queensland has also been performed by medical methods, that is, using licensed drugs to bring about the abortion.[8] There are two drugs licensed by the Therapeutic Goods Administration (TGA) which are used together for the purpose of medical abortion; these drugs are mifepristone (RU486) and misoprostol. The drugs are distributed by the company MS Health which is also responsible for accrediting doctors who wish to prescribe the drugs. Doctors so prescribing must either be Fellows or Diplomates of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), or must be registered medical practitioners who have satisfactorily completed an online training module. MS Health is overseen by the TGA.

Up to nine weeks of pregnancy the drugs may be supplied to a woman wishing to go through the abortion process at home, provided she meets certain medical criteria and has had appropriate consultation prior to her decision to proceed to termination, has given her informed consent, and has appropriate support during the abortion process.

All medical abortions at gestations of nine weeks or more in Queensland, like all surgical abortions at any gestation, must take place in licensed and accredited premises and be performed by registered and accredited medical practitioners. Exactly the same health departmental regulations apply to the practice of abortion as to any other recognised medical procedure; these regulations would remain in force and premises be subject to regular inspection as they now are, were abortion to be removed from the Criminal Code.

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Overseas, for example in the UK and France, early abortion is now much more commonly performed medically rather than surgically; in these countries mifepristone has been available for many years and its safety, efficacy and acceptability to women has been widely established. It is likely that this will also happen in Australia in the foreseeable future.[7]

Abortion at 14-20 weeks of pregnancy

Abortion at this stage of pregnancy is performed in Queensland in hospitals both public and private and in a small number of licensed private clinics. The Guidelines from Queensland Health provide comprehensive information about how this should occur. Doctors undertaking abortion at this gestation require greater training than those undertaking early abortion. Many of these doctors will be Fellows of RANZCOG; if not they will have had appropriate equivalent training in the techniques required. As for early abortion, regular accreditation procedures and annual renewal of registration will be in place for all doctors.

Late and 'late-term' abortion

'Late-term' has no medical meaning. Late abortion is one occurring after 20 weeks of pregnancy, generally but not always by 24 weeks. A great deal of misinformation abounds in regard to these procedures. I understand that several members of the parliamentary committee have been concerned that removing sections 224-226 of the Criminal Code would result in 'abortions' being performed up to forty weeks (fullterm) by Queensland doctors on Queensland women. I hope to allay these concerns with the following information.

Private clinics/day surgeries in Queensland do not provide termination of pregnancy above 20 weeks of gestation, and use only surgical not medical termination of pregnancy methods at 14-20 weeks. All abortions later than 20 weeks in Queensland take place in hospitals. In all cases, the care is provided by regularly-accredited and highly-trained specialist obstetricians, all of whom are Fellows of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, under the oversight of medical administrators.

In the vast majority of cases late abortion is performed because significant fetal abnormalities (physical or genetic) have been diagnosed. Currently many severe abnormalities can only be diagnosed at more than 16 weeks of pregnancy, and sometimes not until 24 weeks; in some cases also the woman does not present to the health services until late in pregnancy, delaying diagnosis. This is more likely in rural and remote areas of Queensland where women can have difficulty accessing specialist care. The other main reason for late abortion is a very significant medical problem in the woman, likely to endanger her health or life if the pregnancy continues.[9,10]

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Infants born at less than 22 weeks do not breathe, cry or show distress. These babies cannot survive – they are too premature. If these babies are born with a heartbeat, they are kept warm and in contact with parents if that is desired, and they are treated with the same respect as any baby born spontaneously at this time in pregnancy.

In some cases, termination of pregnancy may be indicated after 22 weeks of pregnancy, in situations where the baby has severe and significant abnormalities which have not been diagnosed earlier. In these situations, the mother is usually offered medication to allow the baby to pass away peacefully before birth. In situations where this is not done, and the baby is born alive, the baby is provided with whatever is needed to allow him or her to pass away without distress or pain. This is usually in circumstances where the baby has severe physical problems that cannot be treated. Some examples are babies born without kidneys, or without large parts of the brain having developed, or with severe heart malformations that cannot be corrected by paediatric surgery. Such infants have survived in the womb because the mother has provided the functions of the missing or abnormal organs during pregnancy, but they cannot survive independently. ***These situations are unusual, uncommon and subject to very significant medical and hospital oversight. In all cases, a number of doctors and other health care providers are involved to ensure that termination of pregnancy is reasonable, ethical and appropriate for the woman and the circumstances***.[7,10]

Termination of pregnancy is one of the necessary aspects of the complete care of pregnant women, particularly those with significant medical, obstetric or psychiatric problems, or with a diagnosis of fetal abnormalities. This complete care is provided by doctors in the public and private health system in Queensland within strict guidelines and oversight, for the benefit of women and their families, always with an appreciation of the fact that this is a confidential, difficult and private matter that belongs only to the people directly involved.

The continuing presence of termination of pregnancy in the Criminal Code complicates the care of women undergoing late procedures as it adds a layer of legal bureaucracy and distress to what is essentially a medical matter that should be managed between women and their health care providers. In many cases the time involved in processing such cases considerably lengthens the time until termination can be performed, causing great distress to the woman, and on occasion requiring her to travel interstate to access services.[11]

3. **The need to modernise and clarify the law (without altering current clinical practice), to reflect current community attitudes and expectations;**

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Decriminalising abortion in Queensland is not about 'abortion versus no abortion'. An estimated 14,000 abortions are performed in Queensland each year, estimated because there is no formal data collection.[12] Around 95% of these are performed in the first fourteen weeks of pregnancy. About 4-5% are performed between 14 and 20 weeks of pregnancy and only about 1% later than 20 weeks. However most abortions particularly early ones are performed in the private sector and costs are usually significant; this limits women's accessibility to abortion services, as does geographical isolation: most abortion services are only available in Brisbane or in larger towns. For most Queensland women outside the larger urban areas accessing abortion requires travel away from home and significant expense.[13]

Of particular concern is the fact that more than one hundred women travel each year ***out*** of Queensland to access abortions that they cannot obtain within the state (based on figures supplied by Children by Choice). This is particularly the case for women in whom a diagnosis of severe fetal abnormality has been made after 16 weeks of pregnancy. There are many severe and indeed lethal conditions in the fetus which can only be diagnosed currently at this time in pregnancy. Screening and testing for fetal abnormality is in principle available to all pregnant women in Queensland and the majority of pregnant women in the state choose to have this testing in some form. However services to assist those women who receive a diagnosis of severe fetal abnormality, and who make the decision to terminate the pregnancy, are much less available and accessible, and it is this group in particular who may have to travel interstate or even overseas to obtain abortion. This is expensive and extremely stressful to women who are already highly distressed by the news of the diagnosis.[13]

Furthermore, since the Criminal Code dates from a time when fetal diagnosis was unknown, there is no provision for fetal abnormality as an indication for termination of pregnancy. Consequently pregnant women and their doctors must claim psychiatric sequelae as a result of the diagnosis, in women who really wish simply to make an intelligent and private decision for themselves based on the implications for the infant and for their family as a whole. [2,3]

The continuing presence of abortion in the criminal legislation makes many doctors wary of performing or becoming involved in providing abortion, even though they personally wish to be able to refer women to safe and accessible services, as noted above. It also continues to stigmatise abortion, when in fact the provision of abortion services should be a normal part of the healthcare system, as it is in the UK and most European countries.[7]

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4. **Legislative and regulatory arrangements in other Australian jurisdictions including regulating terminations based on gestational periods**

I attach a document listing the current situations in all Australian jurisdictions. Abortion has been decriminalised in Victoria, the ACT and Tasmania and is regulated like all other medical procedures in the various Health Acts. Abortion at > 24 weeks in Victoria and >16 weeks in Tasmania requires the approval of two doctors, in all other cases only one registered medical practitioner need be involved, although there will often be more.

Abortion laws have been reformed in Western Australia (WA), South Australia and the Northern Territory. In WA abortion > 20 weeks requires the approval of a committee appointed by the Minister for Health. This system does not work well and there has been criticism of it and a parliamentary review which recommended changes. There is known to be abortion 'tourism' from WA to Victoria for terminations at greater than 20 weeks.

5. **Provision of counselling and support services for women.**

All women requesting induced abortion should have access to support and counselling ***should they wish to avail of it***. There have been several well-conducted studies looking at this question and in particular in regard to early abortion it is clear that the large majority of women requesting abortion up to 14 weeks of pregnancy present to health care professionals with their decision already quite firmly made. They do not wish or require referral to counselling services. For some women though at this gestation there will be a request for such referral, or the health professional may believe that it is indicated, and make this recommendation to the woman. There should then be timely referral to trained counsellors with appropriate expertise and experience who can provide objective advice and support to the woman.

In three recent studies cited in the guidelines to abortion practice of the Royal College of Obstetricians and Gynaecologists only 6%, 8% and 10.3% respectively of women interviewed were uncertain of their decision and requested counselling.[7]

In regard to abortions at a later stage of pregnancy it is often the case that the woman has made a decision about an intended and wanted pregnancy with an unexpected diagnosis of fetal abnormality, or that the woman herself has developed a significant medical complication. These cases require a large degree of support firstly from partners, family and friends and those health professionals involved, and often from trained counsellors and/or social workers.[7,9,10] Generally these cases will be

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terminations conducted in hospitals or clinics with dedicated services for such support, either within the institution or easily accessible to it.

In summary, I submit that:

- The current abortion laws of Queensland, promulgated in the 19th century, are completely inappropriate for the practice of abortion in Queensland in the 21st century.
- These laws cause uncertainty and sometimes fear for Queensland doctors and health administrators with the result that abortion is not easily accessible, geographically and/or financially, for many Queensland women
- Maintaining the laws in the criminal legislation instead of the health regulations shows disrespect for the women of Queensland, who in 2016 are fully independent and intelligent human beings who should be able to make their own health decisions freely and privately without the intrusion of the law.

Thank you for receiving my submission.

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SUMMARY OF ABORTION LAWS IN AUSTRALIA
February 2016

	LEGISLATION	**LEGAL POSITION**
New South Wales	*Crimes Act* 1900, sections 82-84	• Performing a procedure or administering a drug to "unlawfully" procure a miscarriage is a criminal offence. • Undergoing an abortion "unlawfully" is a criminal offence by the woman.

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		• This means the lawfulness of abortion depends on how the courts interpret the word "unlawfully" in each case; the expression lacks a certain and stable definition. • It has been held that abortion can be lawfully performed where there are economic, social or medical grounds to believe the continuation of the pregnancy would result in a serious danger to the woman's physical or mental health (*R. v. Wald,* 1972). • Can take into account risks to the woman's psychological health *after* the birth of the child (*CES v. Superclinics,*1995) • Successful prosecution of a doctor in 2006 where no evidence of counselling or other steps taken to assess the impact of the abortion on the woman (*R. v. Sood,* 2006).
Victoria	*Abortion Law Reform Act* 2008	• Abortion can be performed by a medical practitioner on request up to 24 weeks. • Registered pharmacists and nurses can supply drugs to cause an abortion to a woman who is not more than 24 weeks pregnant. • After 24 weeks, abortion can be performed if two medical practitioners reasonably believe the abortion is "*appropriate in all the circumstances."* • In deciding whether it is appropriate, must have regard to all relevant medical circumstances and the woman's "*current and future physical, psychological and social circumstances*." • Doctors have a right of conscientious objection, but must refer the woman to another doctor who is known not to have a conscientious objection. • The only offence remaining in the *Crimes Act* covers abortions performed by unqualified people.
Tasmania	*Reproductive Health (Access to Terminations) Act* 2013	• Abortion can be performed by a medical practitioner with the woman's consent up to 16 weeks. • After 16 weeks, it can be performed if two medical practitioners (one of whom must be an O&G) reasonably believe that "*the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated."* • Must have regard to the woman's physical, psychological, economic and social circumstances. • All health practitioners have a right of conscientious objection, but must provide the woman with a list of prescribed health services able to provide advice on "*the full range of pregnancy options."* • The woman is specifically exempt from any criminal liability. • It is an offence for a person to harass, intimidate, obstruct etc. a person attempting to access premises where abortions are provided. • The *Criminal Code Act* 1924 contains offences for abortions performed by anyone other than a medical practitioner or the pregnant woman herself, and abortions performed without the woman's consent.
South Australia	*Criminal Law Consolidation Act* 1935, ss81-82A (amended in 1969)	• Abortion is permitted up to 28 weeks if two medical practitioners believe that continuing the pregnancy would involve a greater risk to the physical or mental health of

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		the woman than terminating it, or where there is a substantial risk the child will be seriously handicapped. • The woman must have been resident in South Australia for at least two months. • Where the abortion is reasonably necessary to save the woman's life or prevent serious risk to her physical or mental health, the opinion of only one medical practitioner is required. • Performing an abortion not authorised by law remains a criminal offence.

Western Australia	*Criminal Code Act Compilation Act, section 199* and *Health Act* 1911, sections 334-5 (amended in 1998)	• Abortion is a criminal offence unless it is performed by a medical practitioner in good faith and with reasonable care and skill, and is "justified" under section 334 of the *Health Act.*
		• Section 334 provides that abortion is lawful up to 20 weeks if:
		  o the woman has given informed consent;
		  o the woman will suffer serious personal, family or social consequences if the abortion is not performed;
		  o serious danger to the woman's physical or mental health will result if the abortion is not performed; or
		  o the pregnancy is causing serious danger to the woman's physical or mental health.
		• Before providing informed consent, the woman must receive counselling from a doctor (other than the doctor performing the abortion) about the risks of the abortion, the risks of continuing the pregnancy to term and the availability of further counselling.
		• After 20 weeks, abortions can only be performed if two medical practitioners from a statutory panel of at least six agree that the woman or her foetus has a "severe medical condition" that justifies the procedure.
		• There is a general criminal law defence for administering surgical or medical treatment to a person, in good faith and with reasonable care and skill, where the treatment is for the person's benefit and is reasonable having regard to the patient's state at the time and all the circumstances of the case.

Queensland	*Criminal Code Act 1899*, ss224-226 and s282	• Performing a procedure or administering a drug to "unlawfully" procure a miscarriage is a criminal offence. • Undergoing an abortion "unlawfully" is a criminal offence by the woman. • This means the lawfulness of abortion depends on how the courts interpret the word "unlawfully" in each case. • There is a general criminal law defence for performing any surgical procedure or providing medical treatment for the patient's benefit where it is reasonable having regard to the patient's state at the time and to all the circumstances of the case. • Courts have held that abortion can be lawfully performed where it is necessary to prevent a serious danger to the woman's life or physical or mental health, but social and economic considerations cannot be taken into account (*R. v. Bayliss and Cullen,* 1986).

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		• A young woman was prosecuted in 2009 for unlawfully causing her own medical abortion, but acquitted by the jury possibly because of absence of evidence that the drug she took was "*noxious*" to her as distinct from the foetus (*R. v. Leach,* 2010).
ACT	Medical Practitioners (Maternal Health) Amendment Act 2002	• Abortions must be performed by a registered medical practitioner in an approved medical facility – no other restrictions on when and in what circumstances. • No person is required to assist in the carrying out of an abortion. • There are now no provisions in the ACT *Crimes Act* that cover abortion.
Northern Territory	*Criminal Code Act,* sections 208B-C, and *Medical Services Act,* section 11 (amended in 2006)	• Abortion remains a criminal offence unless it is lawful under the *Medical Services Act.* • Up to 14 weeks, abortion can be performed if two medical practitioners (one of whom must be an O&G) believe continuing with the pregnancy would cause greater risk to the woman's physical or mental health than terminating it, or if the child would be seriously handicapped. • From 14 to 23 weeks, it can be performed if a medical practitioner believes it is immediately necessary to prevent serious risk to the woman's physical or mental health. • Abortion is lawful at any time if it is necessary for the sole purpose of preserving the woman's life.

From: de Costa C, Douglas H, Hamblin J. Ramsay P. Shircore M. Abortion law across Australia- a review of nine jurisdictions. *Australian and New Zealand Journal of Obstetrics and Gynaecology*. 2015; 55(2)105-111.