

Ms Leanne Linard MP
Parliament House
George Street
Brisbane Qld 4000

24 June 2016

Dear Ms Linard and Committee Members,

Re: Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland

Thank you to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee for the opportunity to provide a submission on Mr Pyne's Private Member's Bill and related matters.

Background

I am a postgraduate Ethics and Legal Studies student with an interest in the juncture between ethics and law. From the outset I wish to say that I am against abortion at any stage and for any reason other than in cases where the conditions outlined by principle of double effect are observed.¹ Thus I am opposed to the two ethical systems on which abortion is usually justified - namely body-self dualism² and consequentialism (or proportionalism).³ In light of this fact, I believe a strong case can be made to approach beginning of life issues from the principle of non-maleficence; in other words, to do no harm. Ideally this would mean section 282 of the *Criminal Code Act 1899* (Qld) would be based on the principle of double effect and not consequentialism. However, if the committee cannot see any way to achieve this goal at present, I wish to offer an alternate way - one could call it a pluralistic approach - such that most people could agree with it, utilising the principle of beneficence. Subsequently the remainder of my submission employs this approach.

Introduction

On reviewing Mr Pyne's proposed changes to the Criminal Code, I have found issues which either require improvement, or, if this Bill were to be enacted, of which the negative effects would be exacerbated.

These inconsistencies have a direct impact on the understanding of lawful medical practice by healthcare providers and their patients as well as the process of statutory interpretation from which judicial outcomes could be hinged. The recommendations put forward will seek to establish a clearer framework for healthcare providers and their patients, as well as provide increased protections for all parties involved.

Recommendation 1

On the whole, Mr Pyne's bill is calling for protection for health practitioners and their patients from being prosecuted under the current Criminal Code. The case to remove s 225, which would see a woman serve up to 7 years imprisonment, is extremely strong given that

even prominent pro-life advocates are of the view that a woman should never face prosecution in the instance of obtaining her own abortion.⁴

Having said that, the Bill's proposal to remove s 224 is not as straight forward, as its removal would result in an unlimited right to seek an abortion only limited by, as it stands, the rather vague s 282 of the Act. Therefore, it is recommended that s 282 be amended to clearly state when exceptions to the otherwise criminality of abortion, as outlined in s 224, is allowable based on a threshold which is as narrowly drawn as achievable.

Additionally, if s 224 were to be removed the safeguard to healthcare workers who are conscientious objectors to abortion will also be removed; so too the right for medical facilities to abstain from providing treatments which go against their ethos will be put at risk. Of particular concern is how the removal of this section will not improve outcomes for women. Surely if one of the main objectives of this bill is to help women, one must ask why no safeguards have been proposed?

Accordingly, it is recommended that s 225 be removed, retaining s 224 and amending s 282 to include safeguards to protect women including, though by no means exhaustively, such items as:

- (a) the provision of independent counselling, including adoption being explored as a valid option, plus an ultrasound scan of the unborn child being performed prior to the commencement of medical treatment
- (b) a three-day cooling off period between counselling and commencement of medical treatment
- (c) parental consent obtained for patients who are minors
- (d) sex-selection abortion not being allowable
- (e) mentally handicapped patients obtaining a Court Order before commencing medical treatment

Recommendation 2

A grey area in the understanding of the current law was highlighted by a Question on Notice from Dr Robinson MP to the Health Minister, who in reply told the Parliament that 27 babies were born alive and died after late-term abortions in Queensland in 2015.

The possibility that at least some of the 27 deaths were in breach of s 282A or s 296 of the Criminal Code seems likely given that s 296 states that when someone carries out an act or omission to hasten the death of a person who is suffering from 'a disorder or disease arising from another cause', they are 'deemed to have killed that other person'.

It must be noted that an act or omission made to directly hasten a person's death is different to providing pain relief in order to relieve pain and suffering and death being hastened as a result; for this can be warranted by applying the principle of double effect, as covered by s 282A ss (2) and (3) which read:

- (2) Subsection (1) applies even if an incidental effect of providing the palliative care is to hasten the other person's death.
- (3) However, nothing in this section authorises, justifies or excuses—

(a) an act done or omission made with intent to kill another person

Therefore ss (3)(a) establishes that if a baby could otherwise be treated and survive, but is either allowed by an act or omission to die, an intent to kill exists; in other words a criminal act has taken place.

Furthermore, under s 282A subsection (4) it states:

(4) To remove any doubt, it is declared that the provision of the palliative care is reasonable only if it is reasonable in the context of good medical practice.

This leads to the question, if a baby born alive after an abortion that has failed is not given the same palliative care treatment than other babies who are born alive, but will inevitably die, a) why not?, b) what is the distinction in good medical practice that would justify variation in treatment of these cases?

Certainly if Mr Pyne's Bill in its current form was enacted into law these instances would become more frequent, the grey area would abide, and the risk to medical professionals being prosecuted would increase.

Queenslanders should have the reassurance that babies born alive after an abortion are treated in accordance with the law. Therefore in order to remove the grey area in understanding, it is recommended that 1) health professionals are made aware of their responsibilities under s 282A and s 296 of the Act, and 2) both sections be amended to replace the term "person" with the term "person including neonate", clearly stating the definition of "neonate" as taken from s 292, to read:

A neonate is a newborn child that 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.

Recommendation 3

As it stands, s 292 of the Criminal Code would prevent a Court Order being obtained for serious cases which would enable the medical needs of an unborn baby to be placed ahead of the conscientious objections of the mother. The negative consequences of this situation were highlighted in 2015 with the case of a seven-month pregnant Jehovah's Witness' mother from New South Wales who needed a blood transfusion but refused on religious grounds; ultimately this led to the death of both her and her child.⁵ As s 292 reads:

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.

It is therefore recommend that this section be removed, as its removal will in no way affect the outcomes of other illegal or legal actions, yet it will provide protection to vulnerable unborn babies, enabling healthcare workers to act when otherwise they would be unable to.

Summary

It is recommended that the following alterations be made to the *Criminal Code Act 1899* (Qld) in order to protect healthcare workers from unnecessary litigation and to improve safeguards for all parties involved.

Recommendation 1

- **Retainment of s 224, firstly as it serves as a deterrent to criminal action; secondly as it protects healthcare workers with a conscientious objection to abortion not to participate against their values, and thirdly, as it protects medical facilities from not providing abortion if it goes against their ethos**
- **Removal of s 225, as it is argued that a woman should never be prosecuted for obtaining her own abortion**
- **Amendment of s 282 to include clearly stated and narrowly drawn exemptions to s 224, as well as providing safeguards for women as outlined above**

Recommendation 2

- **Instruction of healthcare providers of their obligations under s 282A and s 296 of the Act**
- **Amendment of s 282A and s 296 to say “person including neonate” in order to specify the lawful provision of palliative care to terminally ill neonates, also defining instances when the Act recognises an intent to kill a neonate exists; lending the definition of “neonate” from s 292**

Recommendation 3

- **Removal of s 292 to enable healthcare providers to save a baby’s life when the mother would otherwise be able to overrule the provision of lifesaving medical treatment for her child**

I trust that these recommendations will be duly considered by the committee.

Yours sincerely,

Mary Crabb

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Notes

¹ Cases where the principle of double effect justifies treatment in pregnancy include circumstances to save the mother’s life, such as, the removal of fallopian tube in the event of an ectopic pregnancy or the removal of a diseased uterus. Such cases indirectly cause the death of the embryo or foetus, opposed to directly.

The following conditions must be met for the principle of double effect to apply:

1. The act itself must be morally good or at least indifferent.
2. The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary.
3. The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.
4. The good effect must be sufficiently desirable to compensate for the allowing of the bad effect (The New Catholic Encyclopaedia, p. 1021 as cited in McIntyre, 2014)

McIntyre, A., (2014), "Doctrine of Double Effect", *Stanford Encyclopaedia of Philosophy*. Retrieved from <http://plato.stanford.edu/entries/double-effect/#Formulations>

² In the context of abortion, body-self dualism is the idea that a human being comes into existence sometime after the event of conception or that they do exist at conception though "personhood" does not occur until certain attributes are acquired, for example, the ability to live independently from the mother or to possess consciousness. Therefore, it is argued, abortion is not the killing of a human being or person.

Lee and George (2005) explain the error in dualistic thinking is with the idea that we are only valuable once we acquire certain qualities; for, some of us never acquire what could be called "desirable" qualities, some of us have them in 'greater degree' than others, and some of us lose them over the course of our lives. Consequently, it is not the qualities we possess which make us valuable, but what we are from the moment of conception until we die (Lee & George, 2005).

Lee, P. & George, R.P. (2005), Dualistic Delusions, *First Things: A Monthly Journal of Religion and Public Life*. Retrieved from <http://www.firstthings.com/article/2005/02/dualistic-delusions>

³ Consequentialism is a theory that uses non-moral principles or moral considerations which are separate to the particular moral act to assess the value of the act itself (in the case of abortion, instances concerning the physical and mental health of the mother to justify the act of abortion, rather than assessing the moral value of the action itself come to mind). Grisez (1977) explains how no moral deliberation is possible with consequentialism, as the system is a subjective one. Virtually any action could be passed as being moral according to what is in the interests of the "greater good" (see Grisez, 1977).

Grisez, G. "Choice and Consequentialism", *Proceedings of the American Catholic Philosophical Association* 51:144-152 (1977)
Retrieved from <http://www.twotlj.org/OW-choice-consequentialism.pdf>

Proportionalism is similar to consequentialism in that it seeks to choose the path of lesser evil.

⁴ George, R.P. & Ponnuru, R, May 12, 2016, "Why We Shouldn't Punish Mothers for Abortion", *National Review*. Retrieved from

<http://www.nationalreview.com/article/435276/abortion-punishment-donald-trump-doctors-not-mothers-should-be-prosecuted>

⁵ Corderoy, A, April 6, 2015, "Pregnant Jehovah's Witness' decision to refuse treatment 'harrowing' for hospital staff after mother and baby die", *Sydney Morning Herald*. Retrieved from <http://m.smh.com.au/nsw/pregnant-jehovahs-witness-decision-to-refuse-treatment-harrowing-for-hospital-staff-after-mother-and-baby-die-20150406-1mf570.html>