

Queensland Family and Child Commission Submission

To: The Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

Date: 28 June 2016

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

Submission summary:

This submission aims to provide the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (Parliamentary committee) with information and advice to inform the Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016.

The Queensland Family and Child Commission strongly encourages the Parliamentary Committee to progress to a full and comprehensive review of the law governing termination of pregnancy in Queensland.

Queensland Family and Child Commission

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The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee's (Parliamentary Committee) inquiry into the Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 (the Bill).

Due to the complexities of this issue, the QFCC strongly encourages the Parliamentary Committee to consider a full inquiry into the reform of laws governing the termination of pregnancy in Queensland to allow full and meaningful consultation with medical professionals, health services and the community. The QFCC is particularly concerned about the lack of consideration of gestational limits in the current Bill.

This submission provides a comparative review of abortion law reform across all jurisdictions in Australia. This review identifies the inconsistencies in abortion law across all jurisdictions, particularly the regulations guiding gestational limits. This submission also identifies, and encourages the use of, the successful model of reform employed in Victoria. The evidence to support these recommendations is discussed in the body of the submission.

Contextualising abortion law in Queensland

In Queensland abortion is a criminal offence for the woman undergoing the abortion, the person performing the abortion and anyone knowingly supplying medication, drugs or implements for an abortion¹. The Criminal Code does, however, provide statutory defence in section 282 stating criminal responsibility will not apply if the abortion was for the preservation of the mother's life, performed in good faith, with reasonable care and skill and has regard for the patient's state at the time and all circumstances of the case².

Similarly, existing Queensland case law means abortion is generally regarded as lawful if performed to prevent serious danger to the woman's physical or mental health. However, social and economic factors cannot be considered when assessing the woman's risks of continuing the pregnancy³.

Given that abortion is currently illegal in Queensland, there are no rules governing when abortions can be performed in terms of gestation period. The Bill in its current iteration does not provide any guidance on gestational periods for abortion. This is not consistent with other jurisdictions across Australia that have carried out abortion law reform.

Contextualising abortion law nationally

Queensland and New South Wales (NSW) are the only jurisdictions in Australia where abortion remains a crime. Other Australian jurisdictions have either liberalised or decriminalised abortion making it legal when performed under certain circumstances.

This section of the submission outlines the current laws governing the termination of pregnancy in all jurisdictions in Australia.

NSW

In NSW abortion is a criminal offence under the *Crimes Act 1958*⁴, however relies on a defense provision. Similarly to Queensland, abortion is generally regarded as lawful to prevent serious danger to the woman's physical or mental health. Case law has also established certain circumstances where an abortion is lawful. Unlike Queensland however, economic and social

¹ *Criminal Code 1899* (Qld), ss. 224-226

² *Criminal Code 1899* (Qld), s. 282

³ *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8

⁴ *Crime Act 1958* (NSW) ss. 82-84

pressures can be considered when determining whether the pregnancy will pose significant risk to the woman's mental health.

Australian Capital Territory (ACT)

The ACT has removed all criminal sanctions for abortion and is the only jurisdiction in Australia without any gestational limits⁵. In the ACT abortion is regulated under the *Medical Practitioners (Maternal Health) Amendment Act 2002*.

Victoria

Abortion has been decriminalised in Victoria and a doctor can terminate a pregnancy up to 24 weeks, with the woman's consent. Agreement from a second doctor is needed for an abortion after 24 weeks⁶ (and up to full term, though this is very rare).

Tasmania

Like Victoria and the ACT, abortion in Tasmania has been decriminalised. A doctor can perform an abortion up to 16 weeks, with the woman's consent. After 16 weeks an additional doctor's agreement is necessary prior to the procedure⁷.

South Australia (SA) and Western Australia (WA)

While there has been legislative reform in SA and WA, abortion has not been completely decriminalised.

In WA a doctor can perform an abortion up to 20 weeks with the woman's consent. After 20 weeks, a statutory panel of six must agree a woman or the foetus has a severe medical condition to justify an abortion⁸.

SA was the first jurisdiction in Australia to liberalise abortion law and the procedure is now available under certain prescribed circumstances. Two medical practitioners must agree that continuing the pregnancy involves greater risk to the woman's life, physical or mental health; or there is substantial risk the child, if born, would suffer from a severe handicap, such as physical or mental abnormality⁹. Abortions can be carried out up to 22 weeks gestational age, and must be carried out by 28 weeks for it to be considered legal. The woman must also have resided in SA for at least two months before the abortion¹⁰.

Northern Territory (NT)

Abortion remains in the Northern Territory's (NT) Criminal Code¹¹ (as it does in Queensland). The *Medical Services Act* states abortion is lawful up to 14 weeks on agreement from two medical practitioners there is a greater risk to the woman in continuing the pregnancy or if the child would be '*seriously handicapped because of physical or mental abnormalities*'¹². Abortion is lawful up to 23 weeks gestation if a doctor deems it is necessary to prevent grave injury to the woman's physical or mental health¹³.

⁵ *Crime (Abolition of Offence of Abortion) Act 2002* (ACT)

⁶ *Abortion Law Reform Act 2008* (Vic), s. 4 para 4-5

⁷ *Reproductive Health (Access to Terminations) Act 2013* (Tas.), ss. 4-5

⁸ *Acts Amendment (Abortion) Act 1998* (WA), s. 7 para. 7

⁹ *Criminal Law Consolidation Act 1935 (Amended 1969)* (SA), ss. 81-82

¹⁰ *Criminal Law Consolidation Act 1935 (Amended 1969)* (SA), s. 82(A) para (2)

¹¹ *Criminal Code Act* (NT), ss. 208B, 208C

¹² *Medical Services Act* (NT), s. 11(1)

¹³ *Medical Services Act* (NT), s. 11(3)

Conduct a full inquiry into laws governing termination of pregnancy in Queensland

Recommendation

The QFCC recommends a full review and inquiry into abortion law reform in Queensland.

The QFCC does not disagree with the notion that all Australian women should be able to access safe abortions and this access should not be dependent on where they live. An inquiry should consider the application of abortion laws in jurisdictions across Australia, particularly in regards to gestational limits.

Given the complexities with abortion law, the QFCC recommends further research and consultation, particularly with medical professionals and the community, to inform decision making processes associated with the Bill. The limited timeframes used within Parliamentary Committee inquiries for consultation and reporting to Parliament may not offer full opportunity for consultation similar to that which has been achieved elsewhere in Australia, such as in Victoria.

The QFCC strongly believes a full inquiry is needed to establish an effective and purposeful legislative environment, through which abortion law can be reformed in Queensland.

Queensland Law Reform Commission (QLRC)

The QLRC is an independent statutory body established under the *Law Reform Commission Act 1968*. The QLRC's functions are to review and make recommendations on areas of law in need of reform in Queensland¹⁴.

The QFCC suggests the Parliamentary Committee approach the QLRC to conduct a full and comprehensive review and inquiry into laws governing the termination of pregnancy in Queensland. Through this process the QLRC would be able to facilitate the necessary consultation with the community, academics and experts in the field of maternal health and abortion.

Independent law reform agencies are characteristically, and not uncommonly, given morally complex social policy issues to review¹⁵. For example, the QLRC is currently conducting the review of expunging criminal convictions for historical gay sex offences and has recently completed a review of mandatory reporting laws for the early childhood education and care sector¹⁶.

Engaging an independent law reform commission to review abortion regulation is also consistent with reviews conducted in other jurisdictions in Australia.

¹⁴ *Law Reform Commission Act 1968* (Qld), s. 10.

¹⁵ J Morgan, 'Abortion Law Reform: The Importance of Democratic Change', *UNSW Law Journal*, vol. 35, no.1, 2012, pp. 159

¹⁶ Queensland Law Reform Commission, 'Review of expunging of criminal convictions for historical gay sex offences', Consultation Paper, 2016; Queensland Law Reform Commission, 'Review of Child Protection Mandatory Reporting Laws for the Early Childhood Education and Care Sector', Report, 2015.

Victoria's reform of abortion law

The Victorian Law Reform Commission (VLRC) has completed the most comprehensive review of abortion regulation in Australia to date with experts and academics highlighting the success of the reforms¹⁷. Subsequent legislative reforms in Victoria have also been identified as a model of reform for other jurisdictions around Australia¹⁸.

In September 2007, the Victorian Government provided terms of reference to the VLRC seeking legislative advice on the reform of abortion laws. The terms of reference required the VLRC to provide legislative options to decriminalise abortion which considered current clinical practice, legal principles, community standards, and legislative and regulatory arrangements in other Australia jurisdictions¹⁹.

The referral was made to the VLRC following a Private Member's Bill, introduced by Legislative Council Member Candy Broad to decriminalise abortion²⁰. This Bill caused widespread community debate in Victoria on the issue of abortion law reform. Following the referral to the VLRC, Ms Broad withdrew her Bill. In WA, abortion law reform was also preceded by a Private Member's Bill. This was followed by lengthy debate in Parliament resulting in the reforms discussed previously. Similarly in 2013 when the Tasmanian Parliament decriminalised abortion, the controversial and emotive nature of the reform was identified as, in part, a reason for the long and difficult passage of the legislation²¹.

The VLRC deliberated and consulted with stakeholders over a period of six months. During this six months an information paper was published by the VLRC (September 2007) attracting over 500 submissions.

The VLRC also conducted stakeholder consultations with 36 groups and individuals. These consultations included faith groups, public and private abortion providers, academics, health service providers, women's organisations and peak medical bodies²². As part of the process, the VLRC also convened a panel of experts with backgrounds in gynaecology, obstetrics, paediatrics, genetic science, midwifery and counselling to provide advice on current clinical practice. Two academic lawyers also acted as consultants during the inquiry²³.

In the final report tabled in Parliament on 28 May 2008, the three legislative options recommended by the VLRC reflected both the terms of reference and community views on decriminalisation of abortion.

The final Bill was tabled four months after the VLRC published their report and the Bill passed in October 2008.

The current terms of reference guiding the public consultation in Queensland are similar to those investigated by the VLRC in 2007. However, the VLRC were also directed by the Victorian

¹⁷ C de Costa & H Douglas, 'Abortion law in Australia: It's time for national consistency and decriminalisation', *MJA*, vol. 203, no. 9, 2015, pp. 350. See also J Morgan, 'Abortion Law Reform: The Importance of Democratic Change', *UNSW Law Journal*, vol. 35, no.1, 2012, pp. 142-174.

¹⁸ C de Costa & H Douglas, *MJA*, pp. 350. See also C de Costa, H Douglas, J Hamblin, P Ramsay & M Shircore, 'Abortion law across Australia – A review of nine jurisdictions', *Australian and New Zealand Journal of Obstetrics and Gynaecology*, vol. 55, 2015, pp. 105-111.

¹⁹ Victorian Law Reform Commission, *Law of Abortion: Final Report*, 2008, pp. 5.

²⁰ See Victoria, Parliamentary Debates, Legislative Council, 18 July 2007, 2120.

²¹ R Sifris, 'Tasmania's Reproductive Health (access to Terminations) Act 2013: An analysis of conscientious objection to abortion and the "obligation to refer"', *Journal of Law and Medicine*, vol. 22, no. 2, 2015.

²² Victorian Law Reform Commission, pp. 12.

²³ Victorian Law Reform Commission, pp. 13.

Government to remove the offence of abortion from the *Crimes Act 1958* (Vic)²⁴. Due to the success of the Victorian law reforms, these terms of reference could be used to guide effective reform in Queensland through a full inquiry.

The concern is whether a short consultation process can capture, meaningfully understand and find balance in the complex and contentious nature of abortion which causes widespread community debate. The reforms undertaken in Victoria provide Queensland with a successful model for law reform which should be considered to allow all aspects and impacts of the laws governing the termination of pregnancy to be considered.

²⁴ Victorian Law Reform Commission, pp. 5