Submission No. 773
Received 29 June 2016

SUBMISSION

BY CHERISH LIFE QUEENSLAND INC.

TO THE QUEENSLAND PARLIAMENT

HEALTH, COMMUNITIES, DISABILITY SERVICES AND DOMESTIC AND FAMILY VIOLENCE PREVENTION COMMITTEE

ABORTION LAW REFORM (WOMEN'S RIGHT TO CHOOSE) AMENDMENT BILL 2016

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We wish to respond to some of the questions posed as the frames of reference for discussion of the bill named above, and also comment on how we believe that this bill would impact upon individuals and Queensland society as a whole.

We would be pleased to receive an invitation from the Committee to speak to our submission at any public hearing the committee may hold.

Our organisation was founded in 1970 to represent those who believe in the sanctity and preciousness of human life from conception to natural death. We oppose abortion because it kills unborn human beings whom we believe should enjoy as much protection under the laws of this state as those who are born. We have always upheld the Criminal Code as it pertains to abortion because it offers this protection in theory although not necessarily in practice.

We also oppose abortion because it causes, or has the potential to cause, physical, emotional, psychological and social damage to the women involved, and to the wider society. These consequences have been well-documented, but they are frequently ignored or downplayed because it is politically expedient to do so.

We oppose this bill because it would remove all reference to abortion from the Criminal Code.

Existing practices in Queensland concerning termination of pregnancy by medical practitioners

In Queensland, the majority of abortions are performed in abortion facilities owned by private companies. They use Medicare to cover some of the costs they charge, but they frequently charge extra above that and these amounts vary from place to place. Second trimester abortions, i.e. those performed after 12 weeks gestation to 24 weeks gestation would typically cost more. We are not aware of any facilities within Queensland that routinely perform abortions beyond that time although there is no gestational period stipulated in the law after which abortion cannot be performed.

A certain but unknown number of abortions are performed in private and public hospitals. Of the latter, these abortions are more likely performed for reasons such as "maternal health" or foetal abnormality.

Contrary to popular belief, it is not legally necessarily to get a referral from a medical practitioner or family doctor in order to obtain an abortion. This would be a common source of information about, and access to, abortion if the medical practitioner is willing to refer but there is no requirement for a medical practitioner to provide a referral either.

Abortion facilities widely advertise that they provide 'legal" abortions without the need to provide any proof of this. A woman seeking an abortion need only make an appointment, and isn't required to have had any referral or assessment of their eligibility under the law.

Existing legal principles that govern termination practices in Queensland

Queensland adopted its Criminal Code in 1899. The existing clauses principally governing abortion are the subject of this bill. There are other clauses that pertain to the interpretation of the law, principally S. 282 and those covering the legal status of the unborn child being Sections 292, 294 and 313.

The concept of an encoded law is that all the provisions and exceptions to these were gathered in one place. Prior to this, they were scattered amongst many statutes. After the adoption of the Code, magistrates did not need, nor were they permitted to, go beyond the strict interpretations already given, and were to confine themselves to decisions made in Queensland courts.

The earliest test of the Code in relation to abortion was in 1955 in the decision of the Queensland Court of Criminal Appeal in R v Ross, McCarthy and McCarthy. The case involved the prosecution under S. 224 of Dr. Arthur Ross for performing an abortion on a woman in her home in Brisbane. All three defendants were found guilty as charged but appealed the decision on a range of grounds, mostly evidentiary. As part of the hearings, the appellants contended that the trial judge had misdirected the jury as to the meaning of the words "preservation of the mother's life." The Appeal court was invited to rule in favour of the (UK) Bourne case to apply to Queensland law. However, the court held to the strict meaning of "preservation of the mother's life" to mean just that, not any other physical or mental injury. [1]

The phrase "preservation of the mother's life" comes from Clause 282 of the Code. This clause has also been used to apply to abortion. It states in full:

> "A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation or medical procedure upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case."

This is the current wording as it was amended in 2009 to include so-called medical abortion.

The Queensland Criminal Code does not contain a definition of unlawful for the purposes of the provisions that criminalise unlawful abortion, but S. 282 is used as the defence. It was not originally drafted for that purpose, as it applies to procedures in general as well. [2]

By way of explanation, in brief, the R.V Bourne case in 1938 established new precedents in that country, and they were used in other countries as well. The concept of 'life of the mother' was not restricted to an immediate life or death situation, but was widened to allow a serious threat to her health. Also the onus of proof of the intention of the accused was reversed. The prosecution now had to demonstrate that the person performing the abortion was not acting in good faith to preserve the mother's life.

The Bourne ruling was used in Victoria in 1969 in R. v Davidson, usually referred to as the Menhennitt ruling. The salient part of this in relation to Queensland was a new ruling as to when abortion would be lawful. Essentially, an abortion would be lawful if the accused held an honest belief that the abortion was "necessary" and "proportionate". By "necessary", it was meant the abortion was necessary to preserve the woman from serious danger to her life or to her physical or mental health, beyond the normal risks of pregnancy and childbirth that might result if pregnancy continued.

By "proportionate", it was meant that the abortion was, in the circumstances, not out of proportion to the danger being averted.

<u>The McGuire Ruling</u>

In 1986, District court Justice McGuire ruled on the case of R. vs Bayliss and Cullen (referring to the abortionist and anaesthetist respectively). This case involved a mother of four, "Mrs. T" who felt she couldn't cope with

another pregnancy, and attended the Greenslopes abortion facility run by Doctor Peter Bayliss. He performed an abortion on her, but she was seriously injured by this, was found unconscious at home after the abortion, and required an emergency operation to save her life. This abortion became the subject of a test case.

In his decision, Justice McGuire broke the tradition of the code, and applied the Menhennitt ruling in R v Davidson to this case. However, he did not agree with the Levine ruling in R v Wald, and said, in part:

> "It is a humane doctrine derived for humanitarian purposes, but **it cannot be made the excuse for every inconvenient conception**…it is only in exceptional cases that the doctrine can lawfully apply. This must be clearly understood. **The law in this state has not abrogated its responsibility as guardian of the silent innocence of the unborn**. It should rightly use its authority to see that abortion on a whim or caprice does not insidiously filter into our society. **There is no legal justification for abortion on demand**." [3] *(Emphasis ours.)*

Justice McGuire invited dissent from his own ruling from a higher court because it was his view that the legal case advanced in R.V Davidson lacked sufficient certainty and clarity, but this didn't happen. There have been no further cases to test this ruling or amend it.

Although there was an expectation from the McGuire ruling that each request for abortion should be assessed along the lines of there being a 'serious physical or mental threat to the life of the mother', in reality there is no mechanism for this to happen. As explained in the previous section, first trimester abortion is routinely accessed through free standing abortion clinics that are never required to justify their actions to be in accordance with the law.

Currently there is in the order of 15,000 abortions performed annually in Queensland. As there is no independent source of statistics in this area other than Medicare, this is an estimate only. It is difficult to believe that in our state with an advanced medical system, good public health structures and social security that so many women would have such poor physical and mental health as to require an abortion to prevent a "serious physical or mental threat to their life."

In reality, the majority of abortions are performed in the first trimester for reasons generally termed "socio-economic." Nowadays, this would include:

- Women abandoned by their partners because they are pregnant
- Women threatened with violence on a day- to-day basis
- Women pregnant as a result of sexual assault
- Abortion to cover illegal sexual activity i.e. with minors
- Abortion for sex selection amongst certain minorities and religious groups
- Generations of young women who go from one man to another because they come from dysfunctional families and have never enjoyed a stable family life. These men often leave them because they too have never been taught responsibility or known stability (often due to the absence of their own fathers)
- Women whose pregnancy is inconvenient for herself or others
- Women who aren't aware of or who are not offered support and who feel overwhelmed.

The need to modernise and clarify the law to reflect current community attitudes and expectations

Changes in laws regulating abortion should be informed firstly by the facts about abortion. Before being encoded, our laws were carried over from England as the "Offences Against the Person Act" passed in England in 1861. Under this law, an unborn child was protected almost to the same extent as a newborn baby. The law did provide for a defence in the case that the birth of the baby would cause the physical death of the mother (often due to obstructed labour) in which case, there was no prosecution. Happily that scenario is a thing of the past in our society due to the availability of advanced health care.

It is instructive that despite the absence of any of our current knowledge of foetal development, people in those days regarded the unborn human being as equally worthy of protection as any born person. This is demonstrated in Sections 294 and 313 of the Criminal Code.

Our organisation believes this still applies, with even more vigilance now that so much more is known of their progress through even the earliest stages of development. Basic biology can now prove that they are human from the moment of conception. Surgical procedures can be performed in specialist centres upon babies in utero for their welfare and preservation of life after they are born. If our laws are to be seen as being 'modern' they must also be informed by the science of our time.

Parliamentarians also have a duty to inform themselves, rather than be swept along by the clichés that govern debate on this issue such as "a woman's right to choose." This phrase even forms part of the title of this bill! That in itself should sound an alarm bell that this bill is about *ideology* and not about practical concern for the welfare of pregnant women.

To NOT wish for that protection, and in fact to deny it totally for the first nine months of life as this bill would have happen, is to undermine justice itself i.e. **that protection can be denied because of size and lack of power. It would make an unborn human being a legal non entity in much the same way as slaves the world over.** It also inevitably presages the justification for denial of protection after birth, such as infanticide, for birth abnormalities.

We DO see a reason to modernise the Code in respect to S. 292 entitled "When a Child becomes a Human Being" which says:

> "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."

The historical reason for this section is an evidentiary one as it wasn't possible to determine if the unborn child was alive or dead at the time of the alleged offence, or even if the woman was pregnant at all. This was one of the issues in the R v Ross and McCarthy case.

However it is also used now to deprive an unborn child of a legal personality. Under Queensland law, the foetus has no right of its own until it is born and has a separate existence from its mother. This is one of the salient legal positions put forth in K v T in 1983 in which a man sought to prevent his girlfriend from having an abortion. Justice Williams stated as one of his reasons to reject the application that the 'parens patriae' power of the Crown did not extend to a foetus who lacked legal personality unless and until it is born alive.[4]

We suspect that at least some of the reason for this is a result of previous ignorance about prenatal development. If the question of legal personality isn't a practical issue anymore, S. 292 serves to create a distinction between being a "person" and being "human" and being a "child." It appears to be outdated and can be clarified without any weakening of its positive value.

Our reason for believing this is the example posed by the amendment to S. 313 in 2002 to include an assault on a pregnant woman causing the death of her unborn child. Whilst accepting this amendment, certain parliamentarians were anxious to point out that this didn't extend to abortion! In essence, it is acceptable to prosecute if the unborn child was wanted but if the same unborn child was an 'unwanted pregnancy', NO protection is offered.

Community Attitudes and Expectations

Whatever community attitudes and expectations might happen to be at any point in time, they are likely to be informed and influenced by the media, as that is the chief source of information for the majority of the populace. Whenever the issue is raised, the attitude of the media is mainly in favour of abortion. **This will influence the amount of time dedicated, if any, to airing the evidence of damage done by abortion.**

In an effort to gauge the current attitudes of the populace to abortion, a Galaxy phone poll was conducted with 400 Queensland voters between 6-8th May 2016. Of these, 200 were from Brisbane and 200 from areas outside of Brisbane. Some findings were:

- 55% believe abortion involves taking of human life
- 84% believed that abortion can harm the physical and/or mental health of the mother
- 45% opposed abortion for social and financial reasons, 38% supported abortion in those circumstances , and 17% didn't know
- **72% disapproved of abortion after 13 weeks; 85% opposed abortion after 20 weeks.** Only 6% supported abortion at any time until birth
- 39% believe the laws on abortion are too restrictive (using the McGuire interpretation not what happens in practice); 42% believed it was about right; 11% believed it wasn't restrictive enough, i.e. 53% were *against* any changes that would increase the number of abortions

For more details on the poll questions and results, please go to www.abortionrethink.org. [5]

These results do not deliver any support for total removal of laws governing abortion as would occur under the Pyne Bill, nor any changes to the law that would make access to abortion easier. Surely no one regards abortion as a social good, a great thing for women, so the question must be asked: How many abortions are enough? Because open slather will surely increase the number of women hurt by abortion.

It is interesting to compare these results with a Market Facts poll conducted amongst 1200 Australians in 2005. This poll was conducted for the Australian Federation of Right to Life groups.[6] Of the 1200, 225 came from Queensland. Comparable questions resulted in the following results:

- 54% believed that abortion involved the taking of human life
- 79% believed that abortion could harm a woman's physical and/or mental health
- 51% opposed abortion for non-medical reasons, 39% supported
- 39% approved of abortion up to 13 weeks; 13% up to 20 weeks; 34% not at all; and only 6% at any time through pregnancy

Public opinion polls will always get varying responses depending on the questions asked, how the questions are framed, what information is given to explain the questions, and naturally the number of people polled and the demographic of the polled population. We do not use these polls to inform our own position on the issue as we believe abortion is always wrong. However, considering that eleven years has passed between these two polls, there has been no swing towards a more permissive abortion law in that time in this state.

We would support any measures which would actually have the potential to impact upon the number of abortions performed in this state with the intention they be minimised. For example, documentation of each abortion, the gestational age, and the reason for the abortion request. This can be done quite easily without identifying the person, as is done in South Australia, which is the only state to keep these records. This information could be used to identify serious gaps in health care, or serious abuses such as those abortions done for sex selection and non-fatal and/or remediable foetal abnormalities.

Provision of counselling and support services for women

There would be very little disagreement with the proposal that women could benefit from these services whether or not they were considering abortion or were experiencing difficult circumstances. In the 2016 Galaxy poll quoted above, to the question: "Do you believe that before having an abortion, a woman should receive free independent counselling and information on the development of her unborn baby, the nature of the procedure, the physical and psychological risks of the operation and the alternatives of keeping the baby or adoption, so that she can make a fully informed decision?" 94% answered "Yes".

In Queensland, counselling that is aimed at providing information about abortion and alternatives is given by organisations that identify as both pro-life (anti-abortion), pro-choice (pro-abortion) and neutral pregnancy counselling services that rely upon government funding. Whilst the pro-abortion organisations also use government funding, the prolife groups have always relied upon volunteers and donations to provide their services and staff. Although abortion facilities may claim to offer counselling, since it is in their financial interest to supply abortion, their claims cannot be taken seriously.

The supporters of decriminalising abortion (i.e. removing it from the Criminal Code) and treating it as any another medical procedure are often also wary of being too much in favour of counselling. The reason for this is the content and independence of the counselling.

For any other medical procedure, it is a legal necessity to provide the person with all necessary information to make their choice. In a medical context, it is not only what the doctor decides is important for the patient to know, but all relevant information that a person could reasonably need to make an informed choice and to give informed consent. Several celebrated cases especially Rogers v Whitaker have set a high benchmark to follow. To do less would be considered medical negligence.

In the case of abortion however, resistance to this concept has always been and would be still extreme. This is because the topic of abortion, being in itself highly ideological and sensitive, makes it very susceptible to inadequate provision of information that would cast abortion itself in a bad light.

The documented adverse effects of abortion are a topic in itself, and cannot be properly covered here. It suffices to say there are organisations and individual professionals dedicated to researching and describing it

in detail. Much of this receives little if any public funding because, again, it is a political topic. We have included in the references several such organisations.[7]

It stands to reason that in order to provide thorough counselling on abortion, the service must be independent of political constraints and totally independent of the abortion providers and their referral sources who may benefit from the referrals. Some years ago in the ACT, as a result of a legislative change, the government introduced the use of an information booklet to be offered by GPs to all women soliciting an abortion. The offering was mandatory, but the acceptance wasn't i.e. women were not obliged to read the book before an abortion.

Consequences of Decriminalising Abortion

The committee website invites submissions to also consider the probable consequences of the legislation were it enacted. They are as follows:

1. The Pyne bill removes all legal prohibition of abortion in any circumstance, so abortion would be officially legal up until birth. It provides no other legal framework under which abortion could not be obtained. Not only would the majority of Australians not support such a drastic law (as demonstrated above at ref.[4] and [5]) but it would also be a barbarous proposition. The older the unborn child, the more difficult they are to kill. The more likely they will be born alive, and the more likely there is to be serious health risks to the mother.

   Our organisation doesn't agree with abortion at all, and no stage of pregnancy is considered less valuable or less worthy of protection than another. However, it is undeniable that as pregnancy advances, the unborn child becomes more recognisably human without the aid of technology such as ultrasound. Under legislation such as this, the state would be justifying killing babies equal in age to or older than those on whom we spend extremely large amounts of money to keep alive when they are born prematurely.

   Abortion for any reason less than a truly life-saving measure (which is extremely rare nowadays) automatically becomes subjective. What is a reasonable burden for one person is unacceptable to another, so any reason ends up being good enough. The general public might imagine that so called "late abortion" is only done for extremely serious reasons, but that isn't the case. Wherever it has been allowed, it also has been done for the same reasons as first trimester abortion e.g. failed relationships, women discovering they are pregnant, and the other reasons described as "socio-economic."

2. The Queensland Criminal Code on abortion, although not necessarily followed in practice as described above, still has an educative and restraining role. It "educates" the public that the law recognises unborn life as important, although unfortunately doesn't extend it the full protection of the law. The general public equate legality with morality, and this is more so as other influences in public life such as religious adherence have waned in our society. Laws do this all the time in respect of other issues e.g. wearing bike helmets, wearing seat belts, non-smoking in public areas. People's behaviour and attitudes have changed as a result of these laws, so why would abortion be different? The educational effort is slower and harder as they do not "see" abortion happening around them, as they see illness resulting from smoking.

We believe it is no coincidence that with the rising tide of violence against unborn life (for example as more Australian states have introduced more liberal abortion laws) comes a tide of violence against women and children in families. Who can argue that our society has not become more violent over the last 5-10 years? Why should the average citizen be more moral than the legislators who make their laws? It was Martin Luther King who said, in reference to racial conflict, that **while it may be true that the law cannot change the heart, it can restrain the heartless.**

Abortion laws restrain the heartless who would push women into abortion regardless of reason or stage of pregnancy. We will never know how many women have had the law to thank for their protection.

3. Laws against abortion also serve to defend medical staff who are opposed in conscience to this action. If abortion is made widely legal and redefined as a medical procedure like any other, it becomes unacceptable to the totalitarians in abortion advocacy for a medical person to deny access even by the minimalist action of declining to provide a referral. This is the case under the Abortion Law Reform Act 2008 in Victoria.

   In the recent Galaxy poll quoted previously, 79% of respondents were in favour of conscientious objection provisions to allow doctors and nurses to opt out from having to perform abortions.[8] However, most medical practitioners will never be involved in performing or assisting in abortion, but are more likely to be approached for a referral.

   A referral is not just a piece of paper. It is a considered decision that a GP makes in sending his/her patient on to another professional, often a specialist, with the intention of furthering their care. It is the GP's responsibility to be sure that the referee is someone whose competence can be relied upon. If a GP doesn't believe abortion is in the best interests of the patient, he/she should actually not refer as a matter of medical ethics. Moreover, at least in Queensland where abortion is performed in private facilities by people whose training and expertise may not be known or be substandard, the GP has every reason NOT to refer in the patient's best interests.

We certainly do believe that any medical personnel at any level of responsibility should be provided freedom of conscience not to be involved in an abortion referral.

- Dr Donna Purcell, Cherish Life Queensland vice-president

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3 *Abortion Law in Australia by Natasha Cica, Law and Bills Digest Group 31/8/1998 Research Paper No. 1*
4 *Ibid.*
5 *What Queenslanders Really Think About Abortion - Galaxy Research May 2016*
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7 *The de Veber Institute for Bioethics: www.deveber.org/womens-health-after-abortion , The Breast Cancer Prevention Research Institute: www.bcpinstitute.org*
8 *What Queenslanders et al. (as note 5 above).*