Submission of Professor Michael Quinlan to the Health, Communities, Disability Servicers and Domestic and family Violence Prevention Committee re the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld)

The *Health (Abortion Law Reform) Amendment Bill 2016* (Qld) seeks to amend the *Health Act 1937* (Qld) in a number of ways. This Submission argues that those changes ought to be rejected and that implementing them would do nothing to improve the circumstances of women who find themselves facing an unwanted or unexpected pregnancy in Queensland.

Providing support for women

As a State, Queensland provides inadequate financial, emergency housing, counselling and information about alternatives to abortion and as to the effects that abortion has, on the mental and physical health of some women, and other support for pregnant women who are in financial, emotional, psychological or financial distress during their pregnancy.

Whilst it is difficult to obtain accurate statistics about the numbers of abortions in Australia because collection of abortion data in Australia varies for each state and territory Loane Skene suggests abortion numbers of 100,000 in Australia every year[1] Whatever the correct numbers they are large. It is equally difficult to obtain statistics in relation to the numbers of women who are adversely effected by the procedure but clearly some are. One high profile example is the late Charlotte Dawson who linked her "first experience with depression" with an abortion.[2] In her very emotional book *Redeeming Grief: Abortion and its Pain* (Freedom Books, 2013), post abortion counsellor Anne R Lastman reflects on over 17 years of studying and counselling abortion grief. It would appear that for Charlotte Dawson and for many of the patients treated by Anne Lastman, abortion has resulted in depression, grief and other trauma.

A number of bodies challenge the view that abortion presents a significant mental health issue for women. For example, in a report which the Tasmanian government referenced in support of the amendments to their abortion laws to remove any counselling pre-requisites to access the procedure the Tasmanian Department of Health and Human Services said that "there is no scientific evidence that a

[1] Loane Skene, *Law & Medical Practice* (Lexis Nexis Butterworths, 3rd ed,2009) 21.1
[2] She did so in an article published in *The Australian Women's Weekly* in October 2012 and in her autobiography *Air Kiss and Tell* where she revealed that she became pregnant to her then husband, Scott Miller, in 1999 but that she had an abortion as the birth of a child at that time could have interfered with her husband's preparations for the 2000 Olympics: see Monica Doumit, "Pro-lifers who do their cause no favours" *The Catholic Weekly*, Vol 73, No 4717, 2 March, 2014 10; Amy Harris, "Charlotte Haunted By Her Inner Demons" *The Telegraph*, Sunday February 23 4-5

termination causes negative health outcomes."[3] The Royal Australian and New Zealand College of Obstetricians and Gynaecologists suggest that "there is mainly improvement in psychological wellbeing in the short term after termination of pregnancy" and that "there are rarely immediate or lasting negative consequences."[4]

These observation are to be contrasted with Anne Lastman's observations and with the findings of P K Coleman's review of *Abortion and Mental Health: A Quantitative Synthesis and Analysis of Research Published from 1995-2009* in the *British Journal of Psychiatry.*[5] This review found that there were moderate to high increased risks of mental health problems after abortion. An added difficulty is that for some women it appears that the adverse consequences of the termination of a pregnancy may not evidence for many years after the event and that the stage of gestation appears not to be determinative of the risks of adverse effects.

Women facing an unexpected or unplanned pregnancy are entitled to support during and after their pregnancy. Providing information about the costs and availability of abortion but not providing real alternatives and not providing information about those alternatives and about the adverse consequences of abortion for some women[6] is not providing women with real choice. As a State, Queensland should be doing more to help women in this circumstance and reform in this area should focus on providing assistance to women in this vulnerable position. The *Health (Abortion Law Reform) Amendment Bill 2016* (Qld) provides no such reform.

Prohibition of behaviour in relation to abortion facilities

As a State, Queensland highly values political liberty. This is so much a feature of life in Queensland that the *Criminal Code Act 1899* (Qld) by s78 creates the offence of interfering with political liberty as follows:

> (1) Any person who by violence, or by threats or intimidation of any kind, hinders or interferes with the free exercise of any political right by another person, is guilty of a misdemeanour, and is liable to imprisonment for 2 years.
> (2) If the offender is a public officer, and commits the offence in abuse of the offender's authority as such officer, the offender is liable to imprisonment for 3 years.

As a nation, Australia also highly values freedom of political communication, so much so that the High Court of Australia has found that that right is implied in the

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[3] as quoted by Monica Doumit, "Pro-lifers who do their cause no favours" *The Catholic Weekly*, Vol 73, No 4717, 2 March, 2014 10

[4] as quoted by Monica Doumit, "Pro-lifers who do their cause no favours" *The Catholic Weekly*, Vol 73, No 4717, 2 March, 2014 10].

[5] Accessible [redacted]

[6]

Commonwealth Constitution and applies throughout the nation: *Coleman v Power* (2004) 220 CLR 1. Of course enjoying life free from threats of violence and intimidation is also important to Queenslanders and all Australians. This is why Queensland already criminalises the threats and the use of violence or Intimidation. For example s70 and s75 of the *Criminal Code Act 1899* (Qld) provide as follows:

> **70 Forcible entry**
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> (1) Any person who, in a manner likely to cause, or cause reasonable fear of, unlawful violence to a person or to property, enters on land which is in the actual and peaceable possession of another commits a misdemeanour.
> Maximum penalty—2 years imprisonment.
> (2) It is immaterial whether the person is entitled to enter on the land or not.
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> **75 Threatening violence**
> (1) Any person who—
> (a) with intent to intimidate or annoy any person, by words or conduct threatens to enter or damage a dwelling or other premises; or
> (b) with intent to alarm any person, discharges loaded firearms or does any other act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to property; commits a crime.
> Maximum penalty—2 years imprisonment.
> (2) If the offence is committed in the night the offender is guilty of a crime, and is liable to imprisonment for 5 years.

The *Health (Abortion Law Reform) Amendment Bill 2016* (Qld) seeks to significantly curtail the freedom of persons opposed to abortion by specifically identifying a range of conduct which it defines as "prohibited behaviour" in s24. The need for specific legislation in relation to the operation of abortion facilities, in addition to existing legislation which operates across the State, which seek to make it a criminal offence for persons to engage in a range of conduct well beyond threats of violence and intimidation is not made out. The proposed provisions specifically criminalise "protest by any means…relating to the performance of abortions in the facility."

In apparent support of the proposed s24 of the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld), the Explanatory Note refers to s85 of the *Health Act 1993* (ACT). Such exclusion zones have also been put in place recently in Tasmania and in Victoria. These laws have not been used to ensure that women can access lawful terminations. In the ACT they have been used to fine a 75 year old man $750 for praying the rosary too close to an office block which houses a clinic where terminations are conducted.

In Tasmania, the legislation has been used to prosecute three elderly Christians for holding a placard with a picture of a foetus and holding some leaflets too close to an abortion clinic.[7] The motivations of the "protestors" prosected in Hobart are illustrative of the problem that such legislation creates – it criminalises the behaviour

[7] *Police v Preston and Stallard* [2016] TASMC

of otherwise law abiding citizens for seeking to peacefully live according to their principles and their religious faith with no animus and posing no threat of violence or intimidation to anyone. The Tasmanian decision explains the motivation of the three "criminals" who were found by a Magistrate to have breached the Tasmanian exclusion zone as follows:

> 58. Mr Preston and the Stallards gave evidence on the hearing as to their religious beliefs. Mr Preston said that he lives in Brisbane that he is a Christian and that he and his family attends a Baptist church in South Brisbane. He has been a Christian since he was 14 and he believes that human life has been created in the image of God uniquely and that human life is of absolute importance as referred to in the Scriptures. That God knows us even when we are growing in our mother's womb and in particular he believes in the incarnation of Jesus as God coming into the world born in his mother's womb and that that validates human life at every stage. Mr Preston explained that t the Bible teaches people to care for one another and in particular ro help those who are most vulnerable or defenceless. He consider that a child in the womb would be probably the most vulnerable category of human beings and that they are completely defenceless. He believes that it is right and necessary that people come to the aid of those who are vulnerable and defenceless which includes unborn children.
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> 59. Those beliefs motivated his actions on 5 and 8 September 2014 and on 14 April 2015. Mr Preston said that he made the placard, P3, that he had bought the photograph of an eight week pre-born foetus and attached it the cardboard. On the placard he included some writing some the UN Convention on the Rights of the Child and Mr Preston gave evidence that he believes the UN Convention on the Rights of the Child support his Christian position on the value of human life. Essentially the proposition is that every child has the right to life.
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> 64. Mrs Stallard believes that because every life is sacred that each life should therefore be preserved and that people needed to be protected before they were born as they do not have a voice and she wanted to be one of the voices for the people who do not have a voice. Mrs Stellard said that religion plays a place every single day of her life and it is in her waking, her sleeping, her working, her attitudes and she regards every part of her life as being governed by her Christian beliefs. During her evidence Mrs Stallard was asked what role religion played in her taking part in the protest on 14 April 2015 and she said that the word of God was directing her to speak up, to protect the poor, to protect those who have no voice for themselves and to stand in affray for them. Further Mrs Stallard said that the word of God is also a reference to the Bible and that God speaks to her through his word each day as she reads it in the Bible.
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> 65. Essentially as I understood Mrs Stallard's evidence she regards herself as a practicing Christian, and as part of her Christian beliefs she believes that every life is sacred, that an unborn life does not have a voice, and that as part of her Christian beliefs she needs to stand up for people without a voice which led her to protest with Mr Preston. Mrs Stallard also said that through her actions on 14 April 2015 she wanted to convey to all Tasmanians which includes politicians that they need to think

> about what sort of families people want to have and that the State should be full of people who live and work and then it would be a better State.

As Justice Kirby observed in *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47, 70 "termination of pregnancy is a subject which is prone to engender very strong feelings." It is a practice about which there are divergent views in society and this position is not likely to change. The views of people who, for reasons of conscience or religion, seek to peacefully pray or peacefully protest ought not to lead to them being treated as criminals and is unlikely to lead to them changing their convictions. In relation to those motivated by religious beliefs as Laycock and Berg have observed:

> [C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.[8] No religious believer can change his understanding of divine command by any act of will…Religious beliefs can change over time…But these things do not change because government says they must, or because the individual decides they should. [T]he religious believer cannot change God's mind.[9]

This has been shown to be the case in Tasmania, the ACT and Victoria where prayer and "protests" in the vicinity of abortion clinics continue. The experience of such persons demonstrates that prayer, providing women with information about alternatives to abortion and about, what they consider to be, the reality of abortion, in proximity to abortion clinics, does lead to some women changing their mind and being afforded with alternatives.[10] This fact was a significant factor in the United States Supreme Court's decision against the Massachusetts' exclusion zone in *McCullen*.

Australia is a free society. Existing Queensland law already deals with violence, intimidation and harassment. Prohibiting certain protests in certain areas of Queensland in relation to one controversial subject on which views vary is not warranted. Section 24 of the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld) should not become law.

Abortion at 24 weeks

Proposed s21 would make abortions lawful, under certain specified conditions, at and after 24 weeks' gestation. Presumably the stage of gestation that has been

[8] Douglas Laycock and Thomas Berg, *Same-Sex Marriage and Religious Liberty* 99 VIR. L.REV 1.[2013] at 3
[9] *Id.* at 4.
[10] See e.g. *McCullen v Coakley, Attorney General of Massachusetts* 573 US (2014) (*McCullen*). For a summary Michael Quinlan, "The United States' Supreme Court considers the legality of exclusion zones around abortion clinics" *On the Case*: Issue 11 h[redacted]

proposed has been selected for some reason but that reason is not identified in the Explanatory Notes or by Mr Pyne when he introduced the Bill into the Parliament on 17 August 2016. If the reason is that, at 24 weeks of gestation (but not before) the life growing within the pregnant woman has developed some entitlement or right to some form of protection at law, this is not evident in the draft which makes no mention of that embryonic life. Nor is it evident in the drafting that the provision would operate in a way which might afford any level of protection or consideration to the embryonic life given the intention of the legislation revealed by the note to the section. Whilst, as the Explanatory Note correctly observes, there are other States in Australia with legislation which treats abortion differently depending on the stage of gestation, there are serious difficulties which confront this approach to abortion and it was properly abandoned in the nineteenth century before it re-emerged in the United States of America via the *Roe v Wade* decision[11] and in various States and Territories of Australia..

Before contemplating abortion law reform of the type proposed in the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld) the law and enforcement approach to abortion in Queensland ought to be reconsidered on a reasoned and rational basis. This means confronting the fact that, although our society likes to consideritself to be willing and able to accept scientific evidence and to act upon the consequences of that evidence, in this area, Western societies choose to ignore that evidence.

A reasoned approach to abortion

Whilst this Submission earlier set out the religious views of two Christians who were arrested for "protesting" about abortion in Tasmania, it is important to recognise that concern about abortion is not restricted to religious people. For example, Dr Bernard Nathanson who was instrumental in the liberalisation of the abortion laws of the United States but later changed his position on this issue to become a pro-life advocate whilst he was an atheist. [12]

In their book *God is Back*[13] Micklethwait and Woodbridge describe Italy's best-known pro-lifer – Giuliano Ferrara. Ferrara is an atheist and he admits that in his twenties three of his partners had abortions. Ferrara edits *Il Folio* and has unsuccessfully campaigned for the UN to pass a global moratorium on abortion similar to its nonbinding one on the death penalty.[14] Austen Ivereigh suggests that:

[11] *Roe v Wade* (1973) SCUS 70-18

[12] Bernard Nathenson, "Confessions of an ex-abortionist"

[13] John Micklethwait and Adrian Wooldridge, *God is Back* (Allen Lane, 2009)

[14] Ibid 330.

> [Y]ou don't need to believe in God to think that life should be preserved. It is an observable, scientific fact that life begins in the womb. The question is what value should be placed on unborn life relative to other lives. The notion that every human life is intrinsically precious, and not of greater or lesser value according to its stage of development (or other characteristics) is a basic tenet of human rights doctrine."[15]

Professor Finnis is an internationally acclaimed academic and natural law theorist.[16] In a passage from his famous *Natural Law and Natural Rights* Professor Finnis observes that:

> All human societies show a concern for the value of human life; in all, self-preservation is generally accepted as a proper motive for action, and in none is the killing of other human beings permitted without some fairly definite justification.
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> All human races regard the procreation of human life as in itself a good thing unless there are special circumstances....All treat the bodies of dead members of the group in some traditional and ritual fashion different from their procedures for rubbish disposal. [17]

Although Professor Finnis does not make reference to Western society's endorsement of liberalised abortion laws in this section of his book, the treatment of the bodies aborted embryonic life does raise real questions about the nature of Western societies.[18] Specifically in relation to the status which ought to be accorded by reason to the pre-born, Professor Finnis observes the:

> [E]xtremely elaborate and specifically organized structure of the sperm and ovum, their chromosomal complementarity, and the typical, wholly continuous self-directed growth and development of the even more elaborate and specifically organized embryo or embryos from the moment of insemination of the ovum...[T]he specifically human, rational (and sensitive and vegative) animating from and act..- and therefore personhood- can be and doubtless is present from that moment."[19]

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[15] Austen Ivereigh, *How To Defend The Faith Without Raising Your Voice* (Our Sunday Visitor,2012) 93

[16] Natural law theory involves using reason to identify the self-evident goods of human nature – these are the universal human values which are based on the "basic forms of human good."

[17] Professor John Finnis *Natural Law and Natural Rights* 81-64 extracted in Sam Blay, 'The Nature of International Law' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi, *Public International Law: An Australian Perspective* (Oxford University Press, 2nd ed, 2005) 16.

[18] See for example, Mark Hemingway "Congress Uncovers Startling Evidence of Planned Parenthood Selling Fetal Parts" *The Weekly Standard*, Apr 22, 2016 | [redacted]

[19] Professor John Finnis, *Aquinas: Moral, Political and Legal Theory* 186 as quoted in Swana Yako The University of Notre Dame Australia Honours Thesis :"In light of natural law theory is abortion morally permissible?" (unpub) 2012

Finnis observes that:

> If one asks oneself about one's own personal origins, one can go back to one's earliest memories, and then to the earliest photographs, earlier that one's surviving memories but showing one as a centre of personal life before birth that was scarcely or not at all conscious, but is recorded perhaps in those ultrasound photos which show you, a white male thumb-sucker, or a vigorous female Chinese thrower of punches, or whatever. Now we are only a couple of months from our conception. But it is certain that we began before."[20]

Finnis argues further that:

> Human life is indeed the concrete reality of the human person. In sustaining human bodily life, in however impaired a condition, one is sustaining the person whose life it is. In refusing to choose to violate it, one respects the person in the most fundamental and indispensable way."[21]

Finnis says that:

> [T]he many bio-ethicists who want to justify the non-voluntary killing of small, weak or otherwise impaired people but, for some ill-explained reason are reluctant to accept that such killing puts to death persons [expose] the arbitrariness in which these bioethicists attempt to draw a line between living human beings deemed to be persons and living human beings deemed to be not yet or no longer or never persons."[22]

In short, if we are to be honest in our analysis of the scientific evidence – that evidence and the ever increasing clarity of ultrasound technology in which now clear 3D images of life within the womb, tells us when human life begins.[23] As Dr Joseph DeCook, executive director of the American Association of Pro-life Obstetricians and Gynaecologists, observes:

> There's no question at all when human life begins. When the two sets of chromosomes get together, you have a complete individual. It's the same as you and I but less developed.[24]

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[20] Professor John Finnis, "The other F word", *The Human Life Review*, Vol 38:4,2010, 26 quoted in Yako ibid 38
[21] Professor John Finnis quoted in John Keown (ed) *Euthanasia Examined:Ethical, Clinical & Legal Perspectives* 31 as quoted by Yako ibid 39
[22] ibid
[23] See e.g.
h[redacted]

[24] Madison Park - CNNhealth.com Writer/Producer, Miriam Falco - CNN Medical Managing Editor "Medical Views When does human life begin?" 7 November 2011 *The Chart*
[redacted]/

Our human reason then tells us that life begins at conception and that the destruction of human life at any stage of development is not ethically or morally right. This may be an uncomfortable reality for legislatures and, even for many members of the general population, but it is inescapable.

A gestational approach to abortion

According to Ronald Dworkin mental life is required for something to have value. He has asserted that during the first two trimesters of pregnancy a foetus could feel no pain or have experiences and therefore a foetus had no ability of its own to value its life. The reference to trimesters is a common reference particularly in the United States to the stages of pregnancy. It refers to the First trimester (week 1-week 12), the Second trimester (week 13-week 28); and the Third trimester (week 29-week 40).[25]

Some of the difficulties with a gestational approach to abortion, whether it follows the trimester approach or it picks a time reference such as 24 weeks, as proposed in the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld), are the fact that, like the lives of babies after birth, embryonic lives do not develop within the womb in a completely consistent time period. Some lives develop at a more rapid pace and some at a slower pace within and outside the womb. Our knowledge of when pre-born babies feel pain or are capable of mental thought or are capable of being born alive is constantly developing. If the law comes to the wrong answers to these questions it will permit the termination of pre-born lives which can (for example, if this is the criteria employed) feel pain or (if this is the criteria employed) think or could survive outside the womb if allowed to be born (if this is the criteria employed). Getting these dates wrong for any individual life undermines the entire foundation of such a time period. In her book *Unplanned*, Abby Johnson describes how she left her senior role and her career at Planned Parenthood as the result of participating in an ultrasound guided suction abortion and seeing an embryo of 13 weeks gestation squirm and recoil from the vacuum tube suction.[26] According to *The Biology of Prenatal Development* an embryo has a hormonal stress response to the insertion of a needle by 16 weeks and the embryo is considered to be viable because it can breathe air by 21 to 22 weeks.[27] In these circumstances, setting any fixed time period but certainly setting such a period as late as 24 weeks, as the time at which legislation will provide some level of additional consideration of the circumstances in which abortion will be lawfully permitted to occur, is not rational.

The historical and sensible abandonment of a gestational approach

[25] h[redacted]l

[26] Abby Johnson, *Unplanned*,(Ignatius Press,2010) 5

[27] The Endowment for Human Development, *The biology of Prenatal Development*,(National Geographic 2006) , 16 h[redacted]

Abortion was an offence under the common law. The early common law drew a distinction between abortion which occurred before and after "quickening" (which was when a child was "animated" or moving about). When a woman would feel this movement and when a child would actually move would vary. *The Biology of Prenatal Development* suggests that a pregnant woman first senses foetal movement between 14 and 18 weeks so our modern scientific inquiry tells us that it can vary by about a month.[28] In earlier times there was uncertainty about when a foetus was actually alive as a medical, philosophical, theological and civil law matter.[29] So, for example, the eminent English legal jurist Sir William Blackstone (1723-1780) wrote that:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.

On this view, using the latest science available to us today, human life would begin somewhere between 14 and 18 weeks of a pregnancy. This common law distinction between abortion, which occurred before quickening and after quickening, also appeared in the first criminal abortion statutes in the UK.[30] It was based on a pre-scientific understanding of when life began which was as basic and as primitive as this: life is taken to begin when the child can be felt to move. As medical science improved understanding of human development within the womb that distinction disappeared in English criminal law.[31] Later legislation such as s 58 of the *Offences Against the Person Act, 1861* (Imp) provided that:

> whosoever, with intent to procure the miscarriage of any woman … shall unlawfully use any instrument or other means whatsoever … shall be guilty of felony, and being convicted thereof shall be liable … to be kept in penal servitude for life.

This legislation was the inspiration for the language used in legislation in relation to abortion throughout much of the common law. Such legislation drew its inspiration from this and earlier English Acts from which the earlier common law distinction between a foetus which was quickened or animated and a foetus at an earlier stage of development had been removed so that distinction is irrelevant to their interpretation. An unusual feature of these acts is that they did not proscribe all abortions but only those which were "unlawful" and they provided no legislative guidance as to what that term meant. This is not so surprising when account is taken of the fact that when s58 of the *Offences Against the Person Act 1861* (UK) (and its

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[28] Ibid 15

[29] See discussion in *Roe v Wade* 410 US 113 VI 3.

[30] *Lord Ellenborough's Act*, 43 Geo. 3 c 58 (1803) and 9 Geo 4 c 31 s 13 (1828). These provided that abortion post-quickening was a capital crime offence but that abortion pre-quickening whilst still a felony carried lesser penalties

[31] 1837 with 7 Will 4 and 1 Vict c 85 s 6

various precursors which used the same "unlawful" term) was written, the draftsperson would have known what "unlawful" meant, because abortion had long been a grave crime under the common law.[32] The common law had always provided that steps taken to preserve the life of the mother from immediate danger to her life were lawful. The nineteenth century English legislature showed wisdom in removing the distinction between the abortion law pre and post the quickening because it has no rational foundation in medical science.

Particularly given the medical evidence as to when human life begins, the continually developing knowledge of the period at which an embryo might be reasonably expected to survive outside the womb, feel pain, have sensation and so on, the introduction of a legislative approach founded on any period of gestation, despite its adoption in the United States of America and in other Australian States and territories, would be a retrograde step, adopting an approach sensibly abandoned in the United Kingdom in the nineteenth century.

Conclusion

For reasons including those set out above, in my submission, the Queensland Parliament Health Committee should recommend against the enactment of the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld).

5 October 2016

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[redacted]

[32] *R v Bourne* [1939] 1 KB 687, 690