Ms Leanne Linard MP
Parliament House
George Street
Brisbane Qld 4000

6 October 2016

Dear Ms Linard and Committee members,

Re: Health (Abortion Law Reform) Amendment Bill 2016

Thank you for the opportunity to make a submission on the *Health (Abortion Law Reform) Amendment Bill 2016***.**

I would like to specifically address aspects of the new Abortion Bill, however firstly I wish to recap on some of the jurisprudential and ethical issues raised in the Committee's first Abortion Bill review.

Introduction

As a Masters' student in ethics and legal studies, I followed the public hearings conducted on Mr Pyne's first Bill with interest, as some of the issues raised are fundamental to the way the criminal law is written and interpreted. For instance, the debate between legal positivism and natural Law[1] which iconically hinges on the question, "Is the law separate to morality?" was briefly mentioned[2]; the legal positivists' position being taken by the Committee in their report[3]. Yet this position disappointingly remained unexamined and merely assumed. Then it was highlighted by another witness that the Committee were biased in their belief that toleration to abortion in legislation is unavoidable, when it was raised, and I am paraphrasing here: If the ends justifies the means of abortion in certain circumstances then we need to admit that anyone who has been born can be disposable also[4]. In other words, the goal posts can be moved; no longer does society's prescription

[1] See George, R. P., (2001), "What is Law? A Century of Arguments", *First Things*. Retrieved from [redacted]

[2] See Queensland Parliament, Public Hearing—Inquiry into the Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Transcript of Proceedings, 13 July, 2016, pp. 33-34. Retrieved from http://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2016/AbortionLR-WRC-AB2016/14-trns-13July2016.pdf

[3] See Queensland Parliament, Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Report No. 24, 55th Parliament Health, Communities, Disability Services and Domestic Family Violence Prevention Committee August 2016, p. 79. Retrieved from http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1337.pdf

[4] See Queensland Parliament, Public Hearing—Inquiry into the Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Transcript of Proceedings, 1 August, 2016, p. 61. Retrieved from http://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2016/AbortionLR-WRC-AB2016/14-trns-1Aug2016.pdf

against killing hinge on morality, but on the dangerous 'might is right' doctrine inherent in utilitarianism. Indeed, the Queensland legislators in 1899 inherently knew what many today do not.

What Will this Bill Change?

If the provisions relating to abortion were to be removed, or minimised, from the *Criminal Code Act 1899* (Qld) and governed by the *Health Act 1937* (Qld) several consequences will ensue. Probably the most dramatic change will be the Parliament's effective handing over of their moral responsibility as voted representatives answerable to the people, to unelected, as Pestritto (2007) and Postell (2012) explain[5], progressively less and less accountable, administrative bodies. What better way to avoid the rule of law than through the use of the Administration?

Then rather than fishing for the other effects - which of course Mr Pyne allowed the Committee to do with his first Bill - by necessity, this time he has been more obliging with how exactly it is that the freedoms of people who believe abortion is wrong are to be stifled. Because let's face it, neither of these Bills have anything to do with helping women. Accordingly three parts of this new Bill cause concern for this group[6]. One, the conscientious objector clause, two, the 50 metre exclusion zones surrounding abortion facilities, and three, the arbitrary requirement for two doctors' approval for an abortion to proceed from 24 weeks' gestation[7]. It is to these matters which we will now proceed.

Healthcare Providers' Conscientious Objection to Abortion

The Bill seeks to enact medical practitioners be duty-bound to perform an abortion, and likewise, registered nurses assist in an abortion in the event of an emergency that threatens the life of, or risks serious physical injury to the mother despite their conscientious objection to abortion and despite being in contravention of international law[8].

Certainly there with be healthcare providers who would normally object to participating in abortion, but under these circumstances would feel that their duty towards the mother overrides their duty to the child. This Bill, therefore, will not place an undue burden on this group. However, there will remain a group who believe that their duty is equal towards both the mother and her child and that directly killing the child is always morally wrong. This it must be stated is entirely different to providing medical care to a mother which indirectly harms her child as outlined by double effect

[5] For example see Pestritto, R. J., (2007) "The Birth of the Administrative State: Where It Came From and What It Means for Limited Government", *The Heritage Foundation*. Retrieved from h[redacted] and Postell, J., (2012), "From Administrative State to Constitutional Government", *The Heritage Foundation*. Retrieved from [redacted]

[6] For a discussion on the broader aspects of abortion decriminalisation in Queensland and a critique of Mr Pyne's first Abortion Bill see Crabb, M., (2016), Submission to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee on the Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland. Retrieved from http://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2016/AbortionLR-WRC-AB2016/submissions/133.pdf

[7] See *Health (Abortion Law Reform) Amendment Bill 2016* (Qld)

[8] See Tonti-Filippini, N. (2013), "Vol. 4 - About Bioethics – Motherhood, Embodied Love and Culture", Connor Court Publishing, Ballarat. p. 153.

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reasoning. For instance, treating a mother's cancer with chemotherapy agents that may harm her unborn child indirectly as opposed to directly. It is this group whom the amendment to the *Health Act 1937* will place an undue burden.

In fact as Dr Ray Campbell told the Committee at the previous Abortion Bill's hearings, the view of a group of obstetrics and physicians who met in Dublin in 2012 was that abortion is never necessary to save the life of a woman[9]. One must ask in what type of situation then would this law apply? Perhaps a question the Committee needs to ask the medical professionals, but I will weigh in. In his forth Volume on bioethics[10], Nicholas Tonti-Filippini examined the *Abortion Law Reform Act 2008* (Vic)[11]. As s 8, ss (3) and (4) of the Victorian Act are very similar to what is being proposed in this Bill his reflection is insightful. Tonti-Filippini describes the situation of a pregnant women threatening suicide as what could constitute an emergency risking the mother's life and the effects this situation could have on a conscientious objector[12]. He relates:

> Even more troubling, however, is the situation of nurses under section 8(4) [of the *Abortion Law Reform Act 2008* (Vic)]. They are obliged to assist a registered medical practitioner in performing an abortion in an emergency where the abortion is necessary to preserve the life of a pregnant woman. It needs to be born [sic] in mind that it could be considered such an emergency because the woman may consider suicide if the pregnancy is not ended. The provisions means in practice that the judgment of the doctor overrides the judgment of the nurse, so that if the doctor considers it an emergency then the nurse must assist. There is no respect in this for the professional judgement and the professional conscience of nurses.[13]

Apart from this scenario, would not the situation where an abortion has begun but not gone according to plan necessitating either more medical staff than was foreseen, or the assistance of other medical professionals to continue with the abortion in order to save the patient, be the only other situation where this law would take effect? If so, in both cases it is not a matter of refusal to save the life of the mother that this group of conscientious objectors can be accused of (and hence be enforced to go against their conscience as a matter of professional responsibility). On the contrary, it is a refusal to go along with the ideology which allows a woman to undergo an unnecessary abortion with the aim of killing her unborn child which could also put her own life or health at risk, to which their conscience disagrees.

Thus one can see, only those who believe abortion is not problematic in this instance would expect others who disagree with them must do so in violation of their professional responsibility or on merely subjective grounds. When in reality to ask the state to force these citizens to violate their deepest beliefs because they don't gel with one's own amounts to discrimination of the highest

[9] See Queensland Parliament, Public Hearing—Inquiry into the Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Transcript of Proceedings, 1 August, 2016, p. 60. Retrieved from http://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2016/AbortionLR-WRC-AB2016/14-trns-1Aug2016.pdf

[10] Tonti-Filippini, Op. cit.

[11] Ibid pp. 151-161.

[12] Ibid p. 158.

[13] Ibid.

level. If the shoe were on the other foot, say for instance it was made a requirement for all citizens to attend a church service on Sunday with the aim that this will be of benefit to society, although no one in their right mind would propose such a draconian measure, how would this this be any different from what is being proposed here?

Tonti-Filippini I believe gets it right when he says that due to the complexity involved in balancing the life of a mother with her unborn child in an emergency situation, rather than the law prescribing abortion as the only solution - which it remains contestable as to whether it is needed at all - medical practitioners ought to be left to weigh their medical judgment with the demands of their conscience.[14]

Abortion and Exclusion Zones

There are three areas needing to be brought to light regarding exclusion zones, firstly the freedom of speech/Constitutional issues, secondly the protection afforded to persons accessing an abortion facility already provided in existing legislation, and thirdly a deeper examination of the reasons that pro-choice proponents want exclusion zones.

In an article titled, *Abortion "buffer zones", free speech and religious freedom*[15], Professor in Law, Neil Foster, examines the abortion facility exclusion zone legislation in Tasmania and the ACT, concluding that Parliaments' ought to be tread very carefully when proposing to curtail people's right to freedom of religion and freedom of speech; even going as far as saying these laws are most likely unconstitutional:

> But at the very least the weight of both free speech rights, and religious freedom rights, especially when combined in a case like this, ought to give Parliaments cause to think very carefully before enacting geographically wide, and substantively broad, limitations on the rights of those citizens who believe they are not only helping pregnant women, but also saving the lives of their children, by polite offers of counselling and assistance outside clinics.
>
> Finally, it is worth noting that this view, that wide "protest free zones" like that in Tasmania are probably constitutionally invalid...[16]

Professor Foster cites the High Court majority decision in *McCloy v New South Wales* (2015) which provides an authoritative approach to questions of implied freedom of political communication (which had previously been found by the Court to be a Constitutional implication[17]) to elaborate on the applicability of the test in justifying citizens rights to peacefully protest, counsel or pray outside an abortion facility.[18]

[14] Ibid.

[15] Foster, N, "Abortion "buffer zones", free speech and religious freedom", November 5, 2015, *Law and Religion Australia*. Retrieved from lawandreligionaustralia.wordpress.com/2015/11/05/abortion-buffer-zones-free-speech-and-religious-freedom

[16] Ibid.

[17] Ibid.

[18] Ibid.

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It is worth noting that existing legislation in the *Criminal Code Act 1899* (Qld) protects people entering into abortion facilities from undue harassment and violence. Importantly under s 359D: "Particular conduct that is not unlawful stalking", ss (c) & (e) read:

> (c) acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest;
>
> (e) reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving.

As Professor Foster explains[19] one of the main arguments from abortion advocates is that it is just another medical procedure:

> If this were any other medical procedure, there would be very little reason to allow protests designed to discourage patients from attending, to take place outside medical offices . Protests could, of course, take place outside Parliament House (as proponents of these laws have urged.) This would all be persuasive if abortion were merely, as a recent editorial in the Medical Journal of Australia put it, just like "other medical procedures". (See De Costa & Douglas, "Abortion Law in Australia: it's time for national consistency and decriminalisation" (2 Nov 2015) 203/9 MJA 349-350, at 350[20])...
>
> Those who wish to mount a quiet prayer vigil, or to offer counselling, outside abortion clinics do not do so, then, simply to "protest" the fact of the operation taking place, or because they believe the procedure is wrong and ought not to be carried out in the vast bulk of cases. They do so because they believe these things, but also because they believe that a human life is at stake in each procedure, and should be preserved.[21]

In sum, the exclusion zones proposed in the *Health (Abortion Law Reform) Amendment Bill 2016* (Qld), conflict with s 359D, ss (c) & (e) of the *Criminal Code Act 1899* (Qld), which prior to its inception in 1999 had undergone a long process to strike the right balance between genuine harassment and freedom of speech[22]. As discussed above, the exclusion zones also breach freedom of political communication rights, hence are likely to be unconstitutional[23].

Abortion and Arbitrary Line-Drawing

One thing that can be established from the Bill is Mr Pyne's personal belief or pragmatic consideration that the moral worth of an human being increases with gestational age – hence the proposal that two doctors will need to approve an abortion after 24 weeks' gestation (otherwise

[19] Foster, N, op. cit.

[20] De Costa, C. M. & Douglas, H., (2015), "Abortion Law in Australia: it's time for national consistency and decriminalisation", 203/9 MJA pp. 349-350, at p. 350. Retrieved from https://www.mja.com.au/journal/2015/203/9/abortion-law-australia-it-s-time-national-consistency-and-decriminalisation

[21] Foster, N, op. cit.

[22] For a wider discussion on the addition of Chapter 33A to the *Criminal Code Act 1899* (Qld) see Krift, S, (1999), "Stalking in Queensland: From the Nineties to Y2K", *Bond Law Review*. Retrieved from [redacted]

[23] Foster, N. op. cit.

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known as the stage of viability). This is either a true or false premise. Robert P. George contrasts the two positions:

> On one side are those who believe that human beings have dignity and rights *by virtue of their humanity*. They believe that all human beings, irrespective not only of race, ethnicity, and sex but also of age, size, and stage of development, are equal in fundamental worth and dignity. The right to life is a human right, and therefore all human beings, from the point at which they come into being (conception) to the point at which they cease to be (death), possess it.
>
> On the other side are those who believe that those human beings who have worth and dignity have them *in virtue of having achieved a certain level of development*. They deny that all human beings have worth and dignity and hold a distinction should be drawn between those human beings who have achieved the status of "personhood" and those (such as embryos, foetuses, and according to some, infants and severely retarded or demented individuals) whose status is that of human nonpersons.[24]

Some jurisdictions do limit abortion by having gestational cut-offs which can be a genuine attempt at reducing the numbers of abortions, and as far as possible, still recognises the inherent dignity and worth of the unborn, but this is not what is proposed in this bill, for here on two doctors' approval a woman can have an abortion up to birth. This Bill presupposes that pre-born human beings have no, or little dignity and worth. This is a critical change in the way our current abortion law is framed, and thus will have foreseen (and unforseen) consequences.

As I mentioned in my submission[25] to Mr Pyne's first abortion Bill, there are two main philosophical positions utilised to justify abortion, 1) consequentialism and 2) body-self dualism. Consequentialism – in that the positive consequences of having an abortion, such as not to be burdened with an unplanned pregnancy, are used to justify ending another's life; body-self dualism – in that "personhood" is separate to biological existence, therefore abortion, at certain stages, is not the ending of a human being with inherent dignity and worth. The errors in both lead to arbitrary line-drawing.

To go back to my critique of the Committee's handling of the question surrounding morality and law. As p. 79 of the Report states:

> Criminal law generally serves two purposes, one symbolic and one utilitarian.
>
> The symbolic purpose is oriented on creating policies based on collective understandings of right and wrong behaviour. What is and is not a crime will largely be determined by the law's symbolic purpose: what the community collectively holds to be wrong behaviour. Thus, what constitutes a crime varies between jurisdictions and across time.

[24] George, R. P., (2013), "Conscience and its Enemies", ISI Books, Delaware. p. 167.

[25] Crabb, M., (2016), Submission to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee on the Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland. Retrieved from http://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2016/AbortionLR-WRC-AB2016/submissions/133.pdf

> The utilitarian purpose of criminal law is future oriented and pragmatic, creating policies based on their intended consequences, such as preventing crime or reforming people. The law's utilitarian purpose will largely determine the penalty imposed for a criminal act. The penalty may act to deter an individual or the broader community from committing the crime, to rehabilitate and change the behaviour or attitudes of the offenders, or to punish the offender and protect the community.[26]

Here is the clincher, if the law is simply a symbolic exercise based on whatever the "collective understanding" of what is right and wrong is deemed to be, then human dignity must also have no concrete value, it must be relative, only needing the protection of the law in certain, changeable circumstances. To repeat what I said earlier, "the goal posts can be moved; no longer does society's prescription against killing hinge on morality, but on the dangerous 'might is right' doctrine inherent in utilitarianism."

Therefore in an abandonment of truth (which is supposedly non-existent, or perhaps seen as dictatorial), society's collapse into moral and cultural relativism has seen a movement wanting moral absolutivism replaced with enforced utilitarianism, which although is a falsehood is as much an orthodoxy, and more dictatorial than the natural law ethic our laws were based on ever was, because it coerces people to go against their conscience. What is more, laws of this kind are unjust and not law at all in the real sense – an upright citizen has a moral duty never to abide by them. As Martin Luther King Jr. famously penned from a Birmingham jail:

> I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."...
>
> Any law that uplifts human personality is just. Any law that degrades human personality is unjust.[27]

Conclusion

I urge the Committee to reject the *Health (Abortion Law Reform) Amendment Bill 2016*. My goal is to provide the Committee with a deeper understanding of the first principles involved in their task of reviewing the Bill, and to provide arguments on why several aspects of this Bill cause alarm.

Sincerely,

Mary Crabb

[26] Queensland Parliament, Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Report No. 24, 55th Parliament Health, Communities, Disability Services and Domestic Family Violence Prevention Committee August 2016, p. 79. Retrieved from [redacted]

[27] King Jr., M. L., (1963), "Letter from a Birmingham Jail", African Studies Centre, University of Pennsylvania. Retrieved from https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html

Cases

McCloy v New South Wales (2015) HCA 34

Statutes

Abortion Law Reform Act 2008 (Vic)

Criminal Code Act 1899 (Qld)

Health Act 1937 (Qld)