

Reform of Queensland's Abortion Laws

1. Current law regarding abortion

Current abortion law in Queensland makes any person who attempts to carry out, assist with or obtain an abortion guilty of a criminal offence and liable to imprisonment for up to 14 years.¹ However, a defence to these offences provides a person will not be criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation or medical treatment on a person or an unborn child if it is for the patient's benefit or to preserve the mother's life, being reasonable and having regard to all the circumstances of the case.² This defence is only available for those providing a termination and is not available for women seeking one.

This legislative framework has not been properly addressed since the passing of the 1899 Queensland Criminal Code, leaving abortion law unchanged for well over 100 years.³ The cases prosecuted under these sections do not provide sufficient clarity as to when abortion is, and is not, defensible. To date, a procedure will be considered lawful where it is necessary to prevent serious danger to the women's life or physical or mental health, but not where it is considered necessary because of social and economic considerations.⁴ Moreover, in order to be guilty of abortion offences in the case of medical terminations, in one case the judge directed that it must be proved that the drugs ingested were in fact noxious to the woman, and not the fetus.⁵

2. Current practice and opinion in Queensland

It is estimated that around one quarter of Australian women will have an abortion at some time during their reproductive years, correlating to over 80,000 abortions each year.⁶ The reasons for elective abortions are broad, including lack of readiness to have children and diagnosis of a fetal abnormality.⁷ Neither is abortion necessarily linked to mere failure to use contraception – a South Australian study found that 67% of women who presented for an abortion were using contraception at the time of conception.⁸

It is currently the case, and has been for at least the last 30 years, that a substantial majority of Australians are in support of women's rights to liberal access to abortion.⁹ Research has suggested that around 80% of Australians support access to abortion under 'any circumstances' or 'in circumstances where it is proven that the pregnancy will cause psychological or medical harm to the mother.'¹⁰ Despite concern that pro-choice politicians will suffer at the ballot box, the last 25+ years have demonstrated that the electorate rewards politicians who support a woman's right to choose.¹¹ Research in Queensland has shown that most local voters, regardless of any political leaning, support decriminalisation of abortion.¹²

3. Issues with current Queensland abortion law

a) Results in a limited pool of doctors prepared to provide abortions

The criminality of abortion materially affects the willingness of medical practitioners to take part in pregnancy terminations.¹³ Abortions are regarded as outside the scope of mainstream gynaecological care, and as such there is virtually no access to such procedures or treatments through the public hospital system in Queensland, save in certain exceptional circumstances.¹⁴ The uncertain access to abortion in Queensland hospitals has forced doctors to adopt new prescription and treatment practices, putting themselves at legal risk, in order to assist their patients.¹⁵

b) Abortion is difficult to access, especially for women in rural areas

Consequently, the majority of women are referred to private abortion providers, which results in concerns about access and affordability. This has particularly grave consequences on women in rural areas, as outside southeast Queensland access to privately provided pregnancy termination is limited to only three regional centres. Additionally, doctors have admitted to advising women in the later stages of their pregnancies to travel interstate in order to access termination services, despite acknowledging that such an experience could be traumatic without the usual supports, counselling and follow-up systems that would exist at home.¹⁶ Moreover, the cost of

obtaining an abortion is prohibitive for many women, with out of pocket expenses ranging from \$300 to \$10,500, depending upon the period of gestation and the woman's location.¹⁷ Finally World Health Organisation research consistently shows that unsafe abortions correspond most highly with regions where it is criminalised, even as restrictive abortion laws fail to decrease the number of abortions sought.¹⁸

c) Law on abortion unclear for fetal abnormality

The Queensland law does not make provision for the state of the fetus, meaning gestational age and pre-natal screenings are not valid considerations as the defensibility focuses only on the preservation of the mother's life.¹⁹ Modern improvements in technology have allowed birth abnormalities including chromosomal or structural abnormalities to be identified during the pregnancy.²⁰ Research has found that over 80% of pregnant women in Victoria were routinely screened for chromosomal abnormalities, and that in those cases where Down syndrome was detected, 95% of women chose to terminate the pregnancy.²¹

d) Ethical and practical issues for doctors

In order to satisfy the defence provision under the Queensland legislation, many doctors have accepted as part of their role the construction of an appropriate narrative that justifies the patient's termination. Medical practitioners feel compelled to coach women into making certain statements about their mental health concerns in order to adhere to legal thresholds when seeking an abortion.²² Doctors do so as they perceive criminal prosecution as a real risk, but also feel an obligation to continue to provide abortion procedures. Additionally, the practice of referring abortion cases to medical ethics committees (as is the case in several Queensland hospitals) places medical professionals in the position of being legal gatekeepers, as opposed to unbiased providers of care.²³

4. The model that should be considered for Queensland

a) Victoria Reforms (2008)

The Victorian position is that abortion is now lawful on request up to 24 weeks gestation. The decision is now essentially made by a woman in consultation with a health professional. After 24 weeks gestation, abortions are allowed where the medical practitioner believes that abortion is appropriate in all the circumstances, and where the medical practitioner has consulted at least one other medical practitioner who also believes the abortion is appropriate in all the circumstances.²⁴ In deciding what is appropriate, doctors must have regard to all relevant medical circumstances and the woman's 'current and future physical, psychological and social circumstances.' Doctors have a right of conscientious objection to abortion, unless the abortion is required as a medical emergency to prevent a woman's death or serious injury, but must refer the woman to another doctor who is known not to have a conscientious objection. It is only unlawful for anyone who is not a 'qualified person' to perform an abortion on another person.

b) Tasmania Reforms (2013)

As of 2013, the position in Tasmania is that abortion is available on request to 16 weeks gestation. Beyond that point, it is available with the agreement of two doctors. The *Reproductive Health (Access to Terminations) Act* decriminalised abortion in Tasmania, and also included provisions disallowing threatening or harassing behaviour within 150m (the 'access zone') of a premises which provides abortion. The *Act* also provides that medical practitioners may conscientiously object to providing an abortion, unless the abortion is required to as a medical emergency to prevent death or serious injury.

c) Proposed Queensland Reform

The models above should be the basis for reform in Queensland. They allow abortion to be a matter between a doctor and the woman seeking an abortion, as is the case with all other medical issues. It provides the appropriate safeguards for conscientious objection and further medical opinion, but does so by keeping abortions safe, accessible and decriminalised.

5. Summary of recommendations

1. Abortion should be removed as an offence from the *Criminal Code (Qld) 1899* and governed solely by relevant health legislation
2. With a woman's consent, abortion can be performed up to 24 weeks by a registered medical practitioner, or by another health professional acting under the supervision of a medical practitioner in the case of medical abortion
3. After 24 weeks abortion may be performed after seeking the opinion of a second medical practitioner that the abortion is appropriate in all the circumstances
4. Premises which provide abortions should be subject to exclusion zones of 150m, to prevent harassment and intimidation of women and their support persons attending clinics
5. Unless medically necessary, doctors should not be obliged to perform abortions. However, they must refer patients seeking an abortion to a medical practitioner not known to have a conscientious objection.

NOTES

This brief was prepared by C Bennett and B Landers (UQ Pro Bono Centre) in consultation with Children by Choice, Professors Heather Douglas and Caroline de Costa.

¹ *Criminal Code 1899 (Qld)* s 224, 225, 226 (*Criminal Code*).

² *Criminal Code* s 282(1).

³ See *Criminal Code* s 224, 225, 226.

⁴ *R v Bayliss and Cullen (1986)* 9 Qld Lawyer Reps 8; confirmed in *Veivers v Connolly [1995]* 2 Qd R 326.

⁵ *R v Brennan and Leach*

⁶ H Douglas, K Black, C de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) *Journal of Law and Medicine* 20, 560-576.

⁷ H Douglas, K Black, C de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) *Journal of Law and Medicine* 20, 560-576.

⁸ J Dickinson 'Confusion, inequity and inconsistency: Abortion in Australia' (2015) 55(2) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 103, 104.

⁹ H Pringle, 'Urban Mythology: The Question of Abortion in Parliament' (2007) *Australasian Parliamentary Review* 22(2), 5-22.

¹⁰ Karvelas, P. 2004a. 'Female Nat MP calls for review of abortion law', *Australian*, 6 November, 4.

¹¹ Beaumont, M., 'The Myth: Politicians suffer at the ballot box if they are pro-choice in relation to women's access to termination of pregnancy services', (September 2010) *Victorian Women's Health Services*

¹² K Betts, 'Attitudes to Abortion: Australia and Queensland in the Twenty-First Century.' (2015) 17 (3) *People and Place* 25, 29.

¹³ C de Costa, H Douglas, J Hamblin, P Ramsay and M Shircore, 'Abortion law across Australia – A review of nine jurisdictions' *Australian and New Zealand Journal of Obstetrics and Gynaecology*, (2015) 55(2): 105-111. doi: 10.1111/ajo.12298

¹⁴ H Douglas, K Black, C de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560-576.

¹⁵ *Medical Board (Qld) v Freeman [2010]* QCA 93

¹⁶ H Douglas, K Black, C de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560-576.

¹⁷ C de Costa, H Douglas, J Hamblin, P Ramsay and M Shircore, (2015) Abortion law across Australia – A review of nine jurisdictions. *Australian and New Zealand Journal of Obstetrics and Gynaecology*, 55(2): 105-111. doi: 10.1111/ajo.12298

¹⁸ G Sedgh et al. 'Induced Abortion: estimate rates and trends worldwide.' (2007) 370 *The Lancet* 1338, 1344.

¹⁹ Compared to South Australia and the Northern Territory, refer to *Criminal Law Consolidation Act 1935 (SA)*, s 82A(1)(b) and *Medical Services Act (NT)*, s 11(1).

²⁰ H Douglas, K Black, C de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560-576.

²¹ L De Crespigny and J Savulescu J, "Pregnant women with Fetal Abnormalities: The Forgotten People in the Abortion Debate" (2008) 188(2) *MJA* 100 at 100.

²² H Douglas, K Black, C de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560-576.

²³ K Black C de Costa and H Douglas, 'Women's Access to abortion after 20 weeks' gestation for fetal chromosomal abnormalities: Views and experiences of doctors in New South Wales and Queensland.' (2015) 55 *Australian and New Zealand Journal of Obstetrics and Gynecology* 144

²⁴ *Abortion Law Reform Act 2008 (Vic)*.