EVIDENCE: ISSUES WITH CURRENT ABORTION LAW IN QUEENSLAND

IT’S UNCLEAR

Although abortion remains in our Criminal Code (s224-226), it is generally accepted to be lawful if performed to protect a woman’s life or prevent serious harm to her physical or mental health.19

This understanding rests on case law from 1986 (R v Bayliss and Cullen) and on section 282 of the Criminal Code which attempts to define a lawful abortion:

A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill a surgical operation on or medical treatment of:

a) a person or unborn child for the patient’s benefit; or

b) a person or unborn child to preserve the mother’s life;

if performing the operation or providing the medical treatment is reasonable, having regard to the patient’s state at the time and to all circumstances of the case.20

The existence of s282 is often pointed to as evidence that the law is not in need of reform. However:

- McGuire’s ruling in R v Bayliss and Cullen, while laying out grounds for when an abortion is supposedly lawful, was the decision of one judge in one court. It provides no guarantee that a different judge in a different court would come to the same decision in a similar case.

- Section 282, the section on which doctors providing abortion would rely for a defence were they to be charged under s224, provides no clarity around when an abortion is lawful other than when the provider deems it ‘reasonable, having regard to the patient’s state at the time and to all circumstances of the case’. No further legal grounds to be met are specified.

- Doctors would need to be charged and brought before a court in order to invoke s282, so it provides no legal protection against prosecution, but only makes it slightly easier for doctors to defend themselves against such a charge before a court. Prevailing opinion in legal and political circles may be that s282 is clear enough to enable doctors to practice, but the scarcity of providers and the reluctance of hospitals to offer the procedure points to doctors themselves not having the same belief.

- Justice McGuire himself said his ruling in R v Bayliss and Cullen served to ‘illustrate the uncertainty of the present abortion laws of Queensland’ and stated that a ‘more imperative authority (either the Court of Appeal or Parliament)’ would be needed to make changes to clarify the law.21

---

21 R v Bayliss and Cullen (1986). 9 Qld Lawyer Reports 8 (Dist Court) McGuire J at 45
• Neither s282 nor a similar defence is available for a woman charged under s225. If charged with an unlawful abortion, she is not able to make a legal defence argument that she formed a reasonable belief that an abortion ‘reasonable’ given her circumstances.

As pointed out in the key points of this submission, Queensland is one of only three Australian jurisdictions where a woman can be charged for having an abortion, and Queensland is the only state which has charged a woman for abortion in the 21st century (*R v Leach and Brennan*, 2010).

Tegan Leach and Sergei Brennan were charged under sections 225 and 226 respectively, in Cairns in 2009. When the case finally came to trial in October 2010, the court heard that on discovery of the pregnancy, the couple had decided they were too young to become parents and decided to have an abortion. Leach was reportedly nervous of a surgical procedure, so Brennan arranged for his sister in the Ukraine to send medical abortion drugs to the couple through the mail. The couple were acquitted by the jury after less than an hour’s deliberation, on the grounds that the medications could not have been considered noxious to Leach.22

Contrary to much of the media commentary around this case, the couple were not charged with importing the medications themselves, or with using them without professional medical oversight. They were charged with the fact of the abortion itself. The case and the resulting judgement prompted some discussion over whether this effectively decriminalised the use of medical abortion drugs in Queensland, but this has never been clearly resolved.23

For a better understanding of how the law impacts abortion practice we highly recommend ‘Manufacturing mental illness (and lawful abortion): doctors’ attitudes to abortion law and practice in new South Wales and Queensland’. This study based on interviews with 22 doctors providing abortion in Queensland and New South Wales to explore their knowledge and application of relevant abortion laws in their jurisdiction:

> All respondents to some degree expressed concern about the implications different interpretations of case law might have for them if they were charged with the crime of abortion; this was aptly summed up in the words of one respondent that ‘case law is a dangerous way to decide things and it’s very unsatisfactory’. Most reported having given some thought to the possibility of their personally being charged with a crime.24


IT VIOLATES HUMAN RIGHTS

Human rights groups around the world continue to advocate for the removal of laws criminalising abortion. Amnesty International has urged all countries still holding these laws to repeal them. Human Rights Watch continues to document the result of criminalised abortion and lack of abortion access.

Significant barriers to abortion access have recently been found by the United Nations to violate women’s human rights. The Committee may be aware of a June 2016 ruling by the UN’s human rights committee that Ireland’s restrictive abortion legislation subjects women to cruel, inhuman and degrading treatment. The committee examined the case of one woman who was forced to travel to the UK to have an abortion in 2011, even though the fetus she was carrying had anomalies that were incompatible with life – ie, would die during the pregnancy or shortly after birth. They ruled that the fact she had to ‘travel to another country, at personal expense, was separated from the support of her family, and return while not fully recovered’ violated her human rights. The committee further ruled that Ireland should ‘amend its law on voluntary termination of pregnancy...to ensure compliance with the covenant [on civil and political rights], including effective, timely and accessible procedures for pregnancy termination in Ireland.’

In late 2011, United Nations Special Rapporteur for Health Anand Grover released a report examining the interaction between the right to health and criminal laws relating to sexual and reproductive health. In it, he stated that the right to sexual and reproductive health is a fundamental part of the right to health. He also stated that criminal and other legal restrictions on abortion violate the right to health, and that the application of such restrictions as a means to achieving public health outcomes is ‘often ineffective and disproportionate’. The report urged all UN member states to decriminalise abortion.

The World Health Organisation recognises that

women are frequently denied access to sexual and reproductive health care and services in developing and developed countries. This is a human rights violation that is deeply engrained in societal values about women’s sexuality.

While Australia has no national human rights mechanism, Victoria and the Australian Capital Territory both have instruments designed to protect the human rights of those within their jurisdictions. In the ACT, this is the Human Rights Act 2004,\footnote{Human Rights Act 2004 is available online at http://www.legislation.act.gov.au/a/2004-5/current/pdf/2004-5.pdf.} in Victoria, the Charter of Human Rights and Responsibilities 2006.\footnote{Victoria’s Charter of Human Rights and Responsibilities is available online at http://www.humanrightscommission.vic.gov.au/index.php/the-charter.} Interestingly, these were the first two jurisdictions in Australia to decriminalise abortion.

**IT’S DISCRIMINATORY**

The principle of non-discrimination inherent in international human rights mechanisms (including the Convention on the Elimination of All Forms of Discrimination Against Women, to which Australia is a signatory), characterises the refusal of medical procedures that only women require, such as abortion, as sex discrimination.\footnote{R Cook, B Dickens (2003) ‘Human Rights Dynamics of Abortion Law Reform’ Human Rights Quarterly 25 (2003) 1-59, John Hopkins University Press.}

This is probably unsurprising due to the fact that when our abortion laws were promulgated in 1899 women did not yet have the right to vote, and the concept of the right to freedom from discrimination was still some decades from being promoted, let alone legislated.

As the law also heavily influences access to services, women already experiencing disadvantage are worse off. This includes women in rural and remote areas of the state, and women living in poverty, in particular.

In relation to long travel distances for rural women seeking abortion, a GP who has spent over 20 years working in rural and remote communities across far north Queensland writes:

>This law was not designed to limit access to vital health services for women from remote areas, but now it does. It discriminates heavily against women in remote and regional areas. One in three Queensland women has had an abortion and this is a choice that must be available to all women, equally. The law as it stands effectively limits the access of rural and remote women to abortion services and ensures that abortion is only a choice for those who have sufficient funds to travel.

*I have no end of examples of why women end up in situations requiring abortion, but suffice to say humans are not perfect, contraception is not perfect and there will always be a requirement for abortion. I am ashamed - and feel that legislators should share this shame - when women quite literally beg for an abortion. Why are Queensland women in this position, where they feel they must beg for the most common of gynaecological procedures?*

*Keeping this straightforward and necessary procedure in the outdated 1899 Criminal Code means I spend a great deal of my time explaining case law to*
frightened women and how it applies to an individual, rather than discussing contraception and where it has gone wrong for each woman.

It seems the powers that be are quite happy for pregnant women and doctors to bear the fear and risk associated with managing pregnancy termination under current legislation in Queensland.

Typically, rural women who want to terminate an unplanned pregnancy find that either their procedure is significantly delayed, or that they are forced to carry the pregnancy to term. The implications of this, in terms of education and employment opportunities, are life-long.

Please, let medical practitioners discuss all the options for managing unplanned pregnancy with our patients without the fear and stress of illegality, so that we can spend our time on prevention, not legal jargon and ramifications.

In Queensland, the near impossibility of accessing public abortion services means most women must access a private clinic, and for rural and remote women this presents additional challenges along with the high cost of procedures. The map below shows the locations of all Queensland abortion providers known to Children by Choice. Several of these are GPs providing medical abortion (and therefore only available for women with pregnancies less than nine weeks gestation), and not all are publicly listed as abortion providers, so even women living in those locations may not be aware there is an abortion providing doctor nearby. It’s clear that for women in many parts of the state, long travel distances are necessary to reach a provider, particularly those in western or central Queensland, or the Gulf communities.
One survey of women living in rural and remote New South Wales who had had an abortion reported that:

*Rural women in this study experienced many barriers to accessing an abortion. Women travelled 1–9 hours one way to access an abortion in clinics. Several women borrowed money for the abortion fee. Five themes were identified: finding information about the provider; stigma, shame and secrecy; logistics involved in accessing the clinic related to travel, money and support; medical and surgical abortion; and ways rural women could be better supported in this process. Suggestions to improve rural women’s access to abortion services included more affordable services that were ‘closer to home’ as a way to reduce travel and cost, and to normalise abortion as a women’s health rights issue.*

**IT PERPETRATES STIGMA**

These access issues are not things we expect law reform to affect. What we can confidently predict, however, given feedback from GPs who do provide through their practice, is that decriminalising abortion will encourage more doctors to start offering medical abortion – thereby making early abortion more accessible for women in their local communities, which is surely preferable to them undergoing a surgical procedure at a later gestation away from home at considerable expense.

As one doctor puts it:

*‘In Queensland where we’ve radicalised termination because we don’t make it a normal part of practice. If we trained in - if everyone here trained in Britain then obviously it’s a normal part of your day to day practice. You would accept making a choice to do O&G that you would look after bad outcomes or unwanted pregnancy as well as good outcomes and wanted pregnancy. Or anything in the middle. We’ve allowed abortion to be radicalised in Queensland. It is radicalised. I don’t think most people training in O&G or working in O&G realise they themselves have allowed a perception of it being a radical act to creep in.’*

Another, a GP providing medical abortion on the Gold Coast, writes:

*Now with the availability of medical termination (the taking of tablets that induce a miscarriage at an early stage, and always before 9 weeks), this option would potentially be far more accessible to those that need it, but is hindered by the fact that uptake by doctors remains extremely low which is largely due to concerns over the current legal position on termination in Queensland.*

---
