



## POLICY NOTE, October 2018: *Termination of Pregnancy Bill 2018 (QLD)*

### EXECUTIVE SUMMARY

The current abortion law in Queensland is certain. It is lawful for women to undergo an abortion where it is necessary to prevent serious danger to their life, physical or mental health.

The *Termination of Pregnancy Bill 2018 (the Bill)* seeks to remove abortion from the *Criminal Code Act 1899 (the Code)* (except in the case of an unqualified person performing an abortion), require doctors with a conscientious objection to refer for abortion and instate 'safe access zones' around clinics performing abortions.

The Bill is counter-productive to women's health, removes protections for women, unborn children, medical professionals and citizens, and is a radical departure from the current law. The Bill:

- purports to make abortion a 'health issue' yet effectively treats it as a non-health issue, by making it an elective procedure, available 'on request', without any health/medical reason required, and ignores the negative health risks of abortion for women.
- makes lawful abortions for any reason, including for discriminatory reasons such as disability or sex selection or other social reasons.
- permits late term abortions, including abortions of viable babies up until full term.
- removes protections for women against abortion coercion. When abortion is permitted for any reason, women are even more vulnerable to pressure from their partners, family, or others.
- fails to address the support women facing abortions really need.
- provides no safeguards to ensure that women are giving informed consent.
- by introducing safe access zones, it denies support and informed choice to vulnerable women when they need it most.

Abortion is a very serious issue. Whether one attributes moral significance or human rights to the unborn child, the biological reality is that abortion deliberately ends the life of a developing human being in its mother's womb. It is appropriate that the law includes deterrents for something as serious as this.

Women's Forum Australia is, in principle, against the criminalisation of women who have had an abortion. We consider that there are systemic issues which mean that women are not provided with all the necessary support or information to make a real choice, and due to various pressures, often feel like abortion is their only choice.

Even though no woman has ever been found guilty under the current law, a simple amendment could be made to the Code to reflect something similar to section 183(2) of the *Crimes Act 1961* in New Zealand, which holds that a woman or girl will not be charged as a party to an offence in relation to abortion. The legalisation of abortion on demand under the current Bill is not the answer. Women deserve better than this.

## Current law

In Queensland today, it is legal to have an abortion to protect a woman from serious danger to her life, physical or mental health. As one of the most common medical procedures in Australia, with 1 in 3 women experiencing an abortion, and around 14,000 being performed in Queensland each year, it is also readily accessible.

Under sections 224-226 of the Code, abortion is a crime only if it is performed unlawfully. The Code does not define when an abortion would be considered lawful or unlawful and this has been left to the interpretation of the courts.

Section 282 of the Code has been interpreted by the courts to provide a defence from criminal responsibility for a person who performs a surgical or medical abortion in certain circumstances. Current case law on section 282 provides that an abortion will be lawful where it is necessary to prevent serious danger to the woman's life, physical or mental health and is not out of proportion to the danger intended to be averted (*R v Bayliss and Cullen* (1986) 9 Qld Lawyers Reps 8).

Despite claims to the contrary, there is no uncertainty in the current law. In addition to clearly ruling on when an abortion is lawful in *R v Bayliss*, Judge McGuire also made the following statement:

*"it is only in exceptional cases that the doctrine can lawfully apply. This must be clearly understood. The law in this State has not abdicated its responsibility as a guardian of the silent innocence of the unborn. It should rightly use its authority to see that abortion on whim or caprice does not insidiously filter into our society. There is no legal justification for abortion on demand."*

The articulation of the current law could not be clearer. It just does not say what those wanting abortion on demand would like it to.

There have only been two cases concerning abortion under the Code in recent years, one concerning a woman who had taken abortion drugs she had obtained in the mail from overseas (*R v Brennan and Leach* [2010] QDC 329 (27 Aug 2010)) and the other concerning a 12-year-old girl and an application to the Supreme Court to authorise the abortion (*Central Queensland Hospital and Health Service v Q* [2016] QSC 89 (26 Apr 2016)). Both cases arose out of regard for the safety of the women involved and neither support the radical departure from the current law proposed by the Bill.

## Proposed law reform

The objectives of the Bill are (section 3):

- to enable reasonable and safe access by women to terminations; and
- to regulate the conduct of registered health practitioners in relation to terminations.

The Bill:

- repeals the offences relating to abortion in sections 224-226 of the *Criminal Code* (section 22);
- clarifies that despite any other Act, a woman is protected from criminal responsibility (section 10);
- legalises abortion 'on request' up until 22 weeks gestation (section 5);
- legalises abortion up until full term with minimal safeguards (section 6);
- requires doctors with a conscientious objection to refer for abortion (section 8);
- instates 150m 'safe access zones' around clinics performing abortions (sections 11-17).

The Bill raises the following (non-exhaustive) issues:

1. it purports to make abortion a 'health issue' yet effectively treats it as a non-health issue;
2. it makes lawful abortions for any reason;
3. it permits late term abortions, including abortions of viable babies up until full term.
4. it removes protections for women against abortion coercion;
5. it fails to address the support women facing abortions really need;
6. it provides no safeguards for informed consent;
7. by introducing safe access zones, it denies support and informed choice to vulnerable women when they need it most.

Each of these will be addressed below.

### **1. Abortion effectively treated as a non-health issue**

Making abortions lawful for non-medical reasons fails to recognise that abortion itself carries with it risks of physical and psychological harm,<sup>1</sup> and unnecessarily puts women at risk. It also gives the green light for women to undergo an abortion based on their current circumstances – such as work/study pressures, lack of emotional or financial support, domestic violence and so on – without actually addressing these underlying issues.

The Bill is being promoted to further women's health and yet is both counter-productive to women's health and only seeks to reform the law to allow abortions for non-health related reasons. While the Bill purports to make abortion a 'health issue' it effectively treats it as a non-health issue by making abortion available on request without the need for any medical grounds at all.

### **2. Abortion lawful for any reason**

Abortion is currently lawful on health grounds in Queensland, to prevent serious danger to a woman's life, physical or mental health.

As well as making abortion lawful for non-medical/social reasons, which poses harm to women for the reasons noted above, by allowing abortion 'on request' up until 22 weeks, the Bill makes abortion lawful for *any reason* whatsoever. This includes discriminatory reasons such as terminating children with disabilities or terminating children who are not the desired sex.

#### *Disability selective abortion*

Disability selective abortions are already performed in Queensland,<sup>2</sup> but unless the child's disability poses a serious risk to the health of the mother, such abortions are not lawful on this ground alone. However, even if something is already happening, does not mean it should be enshrined in law. It is important for us to assess whether disability selective abortion is something Queenslanders really want and for the Queensland Parliament to legislate accordingly.

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<sup>1</sup> Fergusson D.M., Horwood L.J. and Boden J.M. (2008), Abortion and mental health disorders: evidence from a 30-year longitudinal study, *The British Journal of Psychiatry* Vol 193, No 6, p 449.

<sup>2</sup> Queensland Mothers and Babies 2014 and 2015, Report of the Queensland Maternal and Perinatal Quality Council 2017, State of Queensland (Queensland Health), February 2018.

Mothers of children with Down syndrome and other disabilities already feel pressure from health professionals and wider society to abort.<sup>3</sup> If abortions are lawful for any reason, such pressure will only increase and unborn children with disabilities will be further targeted. In a society that is meant to be fighting against discrimination and working towards greater inclusiveness for persons with disabilities, this is a grave step backwards.

### *Sex selective abortion*

Sex selective abortion is a well-known problem in China and India, where son-preference cultures have resulted in extremely skewed sex ratios. Sex discrimination carried out via abortion is well documented and has resulted in millions of “missing” girls in some societies.<sup>4</sup> The number of girls and women missing from the global population is estimated to be more than 160 million, with sex selection being a major culprit.<sup>5</sup> The practice of sex selection has been widely condemned.<sup>6</sup>

There is evidence that sex selective abortion is already occurring in some parts of Australia.

Take for example, the high-profile case of Dr Mark Hobart who refused to perform a sex-selective abortion in Victoria,<sup>7</sup> or the investigation by SBS that found a higher number of boys than girls being born in some ethnic communities in Australia.<sup>8</sup> There is also the more recent study from La Trobe University which indicates that in Victoria – a state which ‘reformed’ its abortion laws to allow abortion on request for any reason in 2008 – sex selective practices are taking place within certain migrant communities, with a higher than expected number of boys been born than girls.<sup>9</sup>

In a system where abortion is available on request for any reason, there is no protection against prenatal sex discrimination and amongst son-preference cultures residing in Australia, it is by and large females who stand to bear the brunt of discrimination, in keeping with international trends.

### **3. Removal of protections for women and unborn children against late terms abortions**

The Bill removes protections for late term abortions, including abortions on viable babies up until full term.

Section 6 of the Bill legalises abortion after 22 weeks (with no upper limit) where two medical practitioners consider that in all the circumstances the abortion should be performed – that is, all relevant medical circumstances, the woman’s current and future physical, psychological and social circumstances and the

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<sup>3</sup> Miller, B., “Down syndrome: Parents say they feel pressured to terminate pregnancy after diagnosis”, 22 November 2016: [http://www.abc.net.au/news/2016-11-22/down-syndrome-parents-pressured-to-terminate-pregnancy/8033216\\_](http://www.abc.net.au/news/2016-11-22/down-syndrome-parents-pressured-to-terminate-pregnancy/8033216_)

<sup>4</sup> Hvistendahl, M., 2011, *Unnatural Selection: Choosing Boys Over Girls and the Consequences of a World Full of Men*, Public Affairs Publishing. See also: “It’s a girl”: <http://www.itsagirlmovie.com>; The Economist, “The War on Baby Girls”, 4 March 2010: <http://www.economist.com/node/15606229>; United Nations Population Fund, “Gender-Biased Sex Selection”: <http://www.unfpa.org/gender-biased-sex-selection>.

<sup>5</sup> Above n4, Hvistendahl.

<sup>6</sup> See for example: Agreed Conclusions on the Elimination of All Forms of Discrimination and Violence Against the Girl Child, Commission on the Status of Women, 51st Session (26 February – 9 March 2007), resolving that we should, “Eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection, which may have significant repercussions for society as a whole.”: [http://www.unwomen.org/~media/headquarters/attachments/sections/csw/51/csw51\\_e\\_final.pdf](http://www.unwomen.org/~media/headquarters/attachments/sections/csw/51/csw51_e_final.pdf).

<sup>7</sup> Devine, M., “Doctor risks his career after refusing abortion referral”, 5 October 2013: <http://www.heraldsun.com.au/news/opinion/doctor-risks-his-career-after-refusing-abortion-referral/news-story/a37067e66ed4f8d9a07ec9cb6fd28cf5>.

<sup>8</sup> SBS, “Could gender-selective abortions be happening in Australia?”, 28 August 2015: <http://www.sbs.com.au/news/article/2015/08/17/could-gender-selective-abortions-be-happening-australia>.

<sup>9</sup> Edvardsson K., Axmon A., Powell R. and Davey M. (2018), Male-biased sex ratios in Australian migrant populations: a population-based study of 1 191 250 births 1999–2015, *International Journal of Epidemiology*: <https://doi.org/10.1093/ije/dyy148>; Dow, A., “The ‘missing girls’ never born in Victoria”, 12 August 2018: [https://www.theage.com.au/national/victoria/the-missing-girls-never-born-in-victoria-20180811-p4zwx.html?\\_ga=2.153057081.1038406648.1539284571-2039037577.1506596324](https://www.theage.com.au/national/victoria/the-missing-girls-never-born-in-victoria-20180811-p4zwx.html?_ga=2.153057081.1038406648.1539284571-2039037577.1506596324).

practitioner's professional standards and guidelines. This 'single broadly expressed ground' is not any *clearer* than the current law, it is just far wider. It is arguably so broad as to be meaningless, effectively allowing abortions up until full term for any reason, just like the highly criticised Pyne bills.

Under the current law abortions can only lawfully be performed on health grounds when there is a serious danger to a woman's life, physical or mental health. This would normally preclude late term abortions as not only do such procedures themselves pose serious dangers to women, but they would not be medically necessary if the baby was at a gestation where it could be delivered and born alive. Under the Bill, there is no legal reason not to perform an abortion right up until full term.

Removing protections against late term abortions is dangerous for women and for a Bill that seeks to 'modernise' the current law, it is out of step with common practice in other jurisdictions,<sup>10</sup> with medical knowledge of foetal viability and pain,<sup>11</sup> and with medical advances including progress in neonatal care.<sup>12</sup> Recently there was a viral video circulating on social media of a baby born at 22 weeks being discharged from a hospital in Alabama.<sup>13</sup> The current bill would allow babies of the exact same gestation to be aborted 'on request' and for even older babies to be aborted with minimal safeguards.

There are some who insist that allowing late-term abortions is important for women who are particularly vulnerable, such as those who are suicidal, those who are pregnant as a result of sexual violence, or those who have been unable to access support earlier due to family violence or other complex personal circumstances. However, these complex circumstances are not resolved by late-term abortion. If anything, they are exacerbated.

For example, abortion itself puts women at risk of psychological harm (not to mention physical harm), including depression, anxiety, suicidal behaviours and substance use disorders.<sup>14</sup>

The tragic circumstances of women who are victims of sexual, family or other violence, are also not alleviated by abortion. Abortion in these circumstances potentially conceals or even legitimises acts of violence. Instead of offering women a traumatic procedure that puts their health and well-being at further risk, health practitioners and others involved in providing support should be attempting to address the root causes that lead women to seek an abortion in these situations.

#### **4. Removal of protections for women against abortion coercion**

Much has been said by advocates of the Bill about how greater access to abortion will help women experiencing domestic violence. What they fail to mention is that the Bill provides no protections for women who are coerced into having abortions, that abortion does not in any way undo or address domestic violence, and that in the case of women suffering domestic violence, abortion heaps further violence and trauma upon these women.

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<sup>10</sup> In many European countries, abortion is only allowed up until 10-12 weeks, after which there are strict conditions that need to be met for an abortion to be performed (<http://www.euronews.com/2016/04/14/europes-abortion-rules---no-single-policy/>). In the UK, abortion is only allowed up until 24 weeks to prevent physical or mental health risks to the woman or her other children. It is only allowed after 24 weeks under strict conditions (Abortion Act 1967 (UK), s 1(1)).

<sup>11</sup> Doctors on Fetal Pain, [www.doctorsonfetalpain.com](http://www.doctorsonfetalpain.com).

<sup>12</sup> Salter J., "Premature babies: How 24 week-old babies are now able to survive", *The Telegraph* (17 November 2014), <http://www.telegraph.co.uk/women/womens-health/11121592/Premature-babies-How-24-week-old-babies-are-now-able-to-survive.html>; "Premature babies", Better Health Channel, <https://www.betterhealth.vic.gov.au/health/healthyliving/premature-babies#>.

<sup>13</sup> USA Children's & Women's Hospital, [www.goo.gl/UMnqtq](http://www.goo.gl/UMnqtq).

<sup>14</sup> Fergusson D.M., Horwood L.J. and Boden J.M. (2008), Abortion and mental health disorders: evidence from a 30-year longitudinal study, *The British Journal of Psychiatry* Vol 193, No 6, p 449.

In fact, by making abortion lawful for any reason, the Bill removes protections for women against abortion coercion. Whereas now abortions can only lawfully be performed on health grounds, under the Bill where abortion is permitted for any reason, women are even more vulnerable to coercion from their partners, family or others. In light of the recent NRL scandals where it was found that players had coerced their girlfriends into having abortions,<sup>15</sup> we should be seeking to implement more protections for women, not to take away the limited ones that exist.

## **5. Failure to address the real issues often facing women who seek abortion**

The Bill seeks to 'modernise the law', yet does not make any attempt to understand and address the present-day societal issues, which might make women view abortion as their only choice. Women who abort often cite reasons such as fear of intimate partner violence,<sup>16</sup> coercion from their partner or others, study or career pressures, and a lack of financial and emotional support.<sup>17</sup>

Instead of simply providing women with the so-called "choice" of abortion on demand, we need to do far more as a society to address the underlying causes and provide them with positive alternatives that are not going to expose them to further harm.

This includes progressing real alternatives for women facing unplanned pregnancies, and addressing issues of domestic violence, access and affordability of child care, flexible workplace and study arrangements and access to pregnancy and counselling support. Any bill that seeks to reform abortion law should address these issues as a matter of priority.

## **6. No safeguards for informed consent**

Given the pressures and lack of support that often drive women to seek an abortion, as well as the physical and psychological risks inherent in abortion, safeguards to ensure women are giving fully informed consent are also palpably absent from a bill that seeks to modernise abortion laws.

Safeguards such as the provision of counselling independent of abortion providers; information about the risks of abortion and the support available to women who want to continue their pregnancies; and the opportunity to view ultrasounds – these are all critical to ensure that women can give fully informed consent when it comes to abortion.

Obtaining informed consent from patients should be a standard part of all good medical practice, however there is anecdotal evidence that informed consent is nevertheless often not obtained from women. It is also an issue of such grave importance to women that it should be addressed by Parliament and enforced.

## **7. Denies support and informed choice to vulnerable women when they need it most**

In accordance with the Law Reform Commission's report, one of the principles underlying the Bill is that women's autonomy and health should be promoted, but there is reason to believe that the Bill could in fact be counter-productive to such a goal.

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<sup>15</sup> Wong, R., "Abortion coercion: the NRL still has a long way to go in its treatment of women", 20 March 2017: [www.onlineopinion.com.au/view.asp?article=18914](http://www.onlineopinion.com.au/view.asp?article=18914).

<sup>16</sup> Taft A.J. and Watson L.F. (2007), Termination of pregnancy: associations with partner violence and other factors in a national cohort of young Australian women, *Australian and New Zealand Journal of Public Health* Vol 31, No 2, pp 135-142.

<sup>17</sup> Finer L.B., Frohwirth L.F., Dauphinee L.A., Singh S. and Moore A.M. (2005), Reasons U.S. women have abortions: quantitative and qualitative perspectives, *Perspectives on Sexual and Reproductive Health* Vol 37, No 2, pp 110-118.

By introducing 'safe access zones' around abortion clinics, the Bill would remove potential support systems for women, such as side-walk counsellors, who inform women of alternatives to abortion and offer practical assistance to women who may feel as if abortion is their only choice (including financial, emotional, medical, legal and other practical support such as housing or baby items). This would effectively reduce choice for women, while reinforcing a "choice" that is known to carry with it risks of physical and psychological harm.

Safe access zones could prevent vulnerable women from accessing support or information in the very situation which they might need it most. Discussions about the abortion between a woman and her partner, relative or friend, or other person seeking to offer her support close to the clinic would become a crime. This isolates a woman intending to have an abortion by cutting her off from any support at all.

Support is crucial in a situation in which women often make the decision to abort for the very reason that they are lacking in financial, emotional, or psychological support, or otherwise feel they have no other choice.

### **Protection of women from criminal responsibility**

Abortion is a very serious issue. Those on both sides of the abortion debate agree that it is not something women take lightly and that it is often one of the most difficult decisions they will make.

Whether one attributes moral significance or human rights to the unborn child, the biological reality is that abortion deliberately ends the life of a developing human being in its mother's womb. It is appropriate that the law includes deterrents for something as serious as this, and this is also recognised in offences such as 'child destruction', which aptly holds that it is a criminal offence for a person to assault a pregnant woman and kill or harm her unborn child.<sup>18</sup>

Women's Forum Australia is, in principle, against the criminalisation of women who have had an abortion. We consider that there are systemic issues which mean that women are not provided with all the support or information available so that they can make a real choice, and due to various pressures, often feel like abortion is their only choice. In our view, it will generally be counter-productive and unjust to charge women under such desperate circumstances, particularly in light of the suffering that many women also experience after abortion.

However, for the reasons noted above, abortion on demand is not the answer.

If abortion is undertaken unlawfully, any prosecution should be directed at the abortion provider, not the woman seeking the abortion. Even though no woman has ever been found guilty under the current law, a simple amendment could be made to the Code to reflect something similar to section 183(2) of the *Crimes Act 1961* in New Zealand, which holds that a woman or girl will not be charged as a party to an offence in relation to abortion.

### **Conclusion**

Advocates of the Bill claim that it clarifies the current law and aligns it with current clinical practice, promotes women's health, and brings the law into the 21<sup>st</sup> century. In reality however, the Bill is a radical departure from the current law, is counter-productive to women's health, and falls far short of legislation that is suitable for our society today. It removes important protections afforded to women and children under the current law and fails to address the very real issues women are struggling with.

In light of the points we have raised, we do not support this Bill. In 2018, we must do better than this for women, children and our community.

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<sup>18</sup> *Criminal Code Act 1899* (Qld), s. 313(2).