21 February 2018

Your ref: 581452/1; #4077216
Our ref: (HealthCrim/VK-BDS)

The Secretary
Queensland Law Reform Commission
PO Box 13312
Brisbane QLD 4003

By email: LawReform.Commission@justice.qld.gov.au

Dear Secretary

Review of termination of pregnancy laws in Queensland

Thank you for the opportunity to provide comments on the review of termination of pregnancy laws in Queensland. The Queensland Law Society (QLS) appreciates being consulted on this issue.

This response has been compiled with the assistance of the Health and Disability Law Committee and the Criminal Law Committee, whose members have substantial expertise in this area. The Queensland Law Society is the peak professional body for the State’s legal practitioners. We represent and promote nearly 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

As a membership organisation, the QLS is cognisent that there are varied and strongly held beliefs amongst its members in respect to the issues surrounding termination of pregnancy laws.

QLS remains respectful of these beliefs and therefore will confine any comments to observations to the legal issues raised in the Consultation Paper.

Threshold Issue - Criminalisation

The Consultation Paper is predicated on a threshold question about whether the termination of pregnancy should be an offence at all, and if so, with what legal exemptions. While the Consultation Paper does not ask this question directly, discussion of the consultation material must stem from this issue.

The purpose of the criminal law is to protect society from harm by protecting individuals from injury of some kind. Individual criminal offences are usually based on an over-riding public interest which is easily discernible in the case of assaults, frauds or conduct presenting physical danger to the public. Where the conduct is private to the individual, the public interest
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is less discernable and can be heavily based on social values and expectations of the day (such as the previous criminalisation of consensual homosexual intercourse).

Fundamentally, the decision to decriminalize any particular conduct is a matter for the Parliament and is at its heart a political question. Having said that, when the prohibition of private conduct originally stemmed from social values and expectations of a particular time it is possible for there to be a disconnect between the contemporary public interest and the state of the law. In these situations, it is an exercise of promoting good law to align legislation with changing public expectations. Most recently this was demonstrated in the amendment of the Marriage Act 1968 (Cth) to permit marriage between two people or the legalization of marijuana for medicinal purposes.

The Queensland Parliamentary Health, Communities, Disability Services and Domestic Family Violence Prevention Committee report on the Abortion Law Reform (Woman’s Right to Choose) Amendment Bill 20161 noted the changing public attitudes to the termination of pregnancy as demonstrated by the Australian National University review of Australian Election Study 1987 – 2013 data. This showed increasing support for ready access to termination of pregnancy from 52.5% in 1990 to 65.7% in 2013. More recent releases of the report have shown a continuation of this trend, showing2:

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<tr>
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<th>1990</th>
<th>2013</th>
<th>2016</th>
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<tr>
<td>Ready Access</td>
<td>52.5%</td>
<td>65.7%</td>
<td>69%</td>
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<td>Access in special circumstances</td>
<td>41.2%</td>
<td>30%</td>
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<td>Ban</td>
<td>6.3%</td>
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The Criminal Law and Health and Disabilities Law Committees of the Society have also noted the removal of s.225 of the Criminal Code would mirror the law in the majority of Australian jurisdictions. Seeking or obtaining the termination of a pregnancy is not a criminal offence in the Australian Capital Territory, Victoria, Tasmania or the Northern Territory. The New South Wales government is currently considering legislation that will decriminalise the termination of a pregnancy.

Decriminalisation is also consistent with a number of United Nations treaties, all of which have been ratified by the Australian Government. These include:

- The International Convention on the Elimination of all forms of Discrimination Against Women;
- The Universal Declaration of Human Rights;
- The International Covenant on Economic, Social and Cultural Rights; and
- The International Covenant on Civil and Political Rights.

1 Report no 24, Queensland 55th Parliament, August 2016, page 50
We now make the following comments based on the questions set out in the Consultation Paper:

Who should be permitted to perform or assist in performing terminations?

1. **Who should be permitted to perform, or assist in performing, lawful terminations of pregnancy?**

QLS considers that the question of who should be permitted to perform or assist in performing the lawful termination of a pregnancy is most appropriately determined and monitored by the State's health care regulatory framework. QLS considers that this ought to be restrained to a person who is a relevantly experienced and qualified health practitioner as defined by the Health Practitioner Regulation National Law (Queensland), acting in accordance with the protocols, guidelines and policies set down by the regulatory framework.

During the review of the 2016 Queensland Bill dealing with this issue, the Queensland peak body for medical professionals, the Australian Medical Association Queensland (AMAO) stated:

“AMA Queensland believes the Queensland’s current laws which criminalise termination of pregnancy are a barrier to a doctor’s first duty – best patient care.”

2. **Should a woman be criminally responsible for the termination of her own pregnancy?**

While decriminalization is primarily a political issue, the application of criminal responsibility for a woman who is responsible for the termination of her own pregnancy would contribute little to advancing the public interest in a health care framework lead assessment of the proper and lawful termination of pregnancy. Given the highly emotive nature of the circumstances surrounding the termination of pregnancy there is likely to be little, if any deterrent effect in criminalisation of this conduct and accordingly the legal efficacy of such a prohibition is likely to be nugatory or counter-productive from a health and safety perspective.

**Gestational limits and grounds**

3. **Should there be a gestational limit or limits for a lawful termination of pregnancy?**

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3 AMA Queensland, Submission to the health, Communities, Disability Services and Domestic Family Violence Prevention Committee, Abortion Law Reform (women’s Right to Choose) Amendment Bill 2016, 30 June 2016
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As set out in response to question 1, QLS considers that any discussion of a limitation should be determined and regulated in accordance with the State’s health care regulatory framework.

4. If yes to Question 3, what should the gestational limit or limits be? For example:
   a) An early gestational limit, related to the first trimester of pregnancy;
   b) A later gestational limit; related to viability;
   c) Another gestational limit or limits?

QLS has reviewed the position in other Australian jurisdictions as it relates to the imposition of gestational limits, which vary depending on the reasons for which the termination is sought.

QLS reiterates the view that any decision to terminate ought to be made in conjunction with a registered health practitioner, who acts in accordance with good medical practice and in adherence to the relevant healthcare regulatory framework, and that the question or appropriateness of the imposition of a gestational limit should be considered in this context.

It would be inappropriate for QLS to suggest the imposition of arbitrary gestational limits which are not grounded in appropriately evidenced health policy and regulation, and which are not informed by the circumstances of the affected woman.

5. Should there be a specific ground or grounds for a lawful termination of pregnancy?

QLS has reviewed the position in Australian jurisdictions and in international law as it relates to a requirement that certain grounds must be established in order for a termination to be lawful.

QLS notes the approaches which have been adopted in the Australian Capital Territory or Victoria, in which the limitations and reasoning applied to a termination of pregnancy are determined in accordance with the State’s healthcare regulatory framework, policies and guidelines and which are not otherwise limited by specific grounds such as gestational age or other reasoning should be closely considered to give best effect to the law.

6. If yes to Question 5, what should the specific ground or grounds be? For example:
   a) A single ground to the effect that termination is appropriate in all the circumstances, having regard to:
      (i) All relevant medical circumstances;
      (ii) The woman’s current and future physical, psychological and social circumstances; and
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(iii) Professional standards and guidelines;

b) One or more of the following grounds:

(i) That it is necessary to preserve the life or the physical or mental health of the woman;

(ii) That it is necessary or appropriate having regard to the woman’s social or economic circumstances;

(iii) That the pregnancy is the result of rape or another coerced or unlawful act;

(iv) That there is a risk of serious or fatal fetal abnormality?

We refer to our response to question 5.

7. If yes to Question 5, should different ground or grounds apply at different stages of pregnancy?

We refer to our response to question 5.

Consultation by the medical practitioner

8. Should a medical practitioner be required to consult with one or more others (such as a medical practitioner or health practitioner), or refer to a committee, before performing a termination of pregnancy?

We refer to our response to question 1, and reiterate that the framework governing a medical or health practitioner’s ability to provide healthcare associated with a termination and/or performing a termination should be determined by the State’s health care authority.

QLS contends that this authority, informed by and in consultation with appropriately qualified medical practitioners and in accordance with governing legislation such as the Private Health Facilities Act 1999, the Hospital and Health Boards Act 2011 and the Health Boards Regulation 2012, is best placed to create the protocols and guidelines applied in clinical practice.

If yes to Question 8:

9. What should the requirement be? For example:

(a) Consultation by the medical practitioner who is to perform the termination with:

(i) Another medical practitioner; or

(ii) A specialist obstetrician or gynaecologist; or
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(iii) A health practitioner whose specialty is relevant to the circumstances of the case; or

(b) Referral to a multi-disciplinary committee?

We refer to our response to question 8.

10. When should the requirement apply? For example:
(a) For all terminations, except in an emergency;
(b) For terminations to be performed after a relevant gestational limit or on specific grounds?

We refer to our response to question 8.

Conscientious objection

11. Should there be provision for conscientious objection?
12. If yes to Question 11:
(a) Are there any circumstances in which the provision should not apply, such as an emergency or the absence of another practitioner or termination of pregnancy service within a reasonable geographic proximity?
(b) Should a health practitioner who has a conscientious objection be obliged to be refer or direct a woman to another practitioner or termination of pregnancy service?

QLS refers to the guidelines with respect to conscientious objection which are included in Australian codes of conduct and ethical standards for medical and health care practitioners, which requires an objecting practitioner to ensure that a patient's access to care is not impeded. This may place special requirements on health practitioners in circumstances of emergencies and locations with access to a limited number of health care providers who are qualified to perform terminations to ensure that the doctor's first duty of best patient care is paramount. Whether this can be truly effective in the interpretation of various guidelines should be very carefully considered and it may require legislative clarification to set consistent benchmarks.

Counselling

13. Should there be any requirements in relation to offering counselling for the woman?
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QLS refers to the Queensland clinical guideline which sets out clinical standards for information and counselling in relation to termination of pregnancy. QLS supports the continuation of these guidelines as the appropriate authority to determine the requirement for and protocols associated with offering counselling services to patients.

Protection of women and service providers and safe access zones

14. Should it be unlawful to harass, intimidate or obstruct:
   
   (a) A woman who is considering, or who has undergone, a termination of pregnancy; or
   
   (b) A person who performs or assists, or who has performed or assisted in performing, a lawful termination of pregnancy?

QLS supports measures, including legislative measures, which protect a woman who is seeking or who has accessed termination services from harassment, intimidation or shame, and from behavior or action which attempts to obstruct a woman from accessing health care services related to terminating a pregnancy. The same protection must apply to a health care practitioner who performs or assists in the lawful termination of pregnancy.

15. Should there be provision for safe access zones in the area around premises where termination of pregnancy services are provided?

QLS notes that various provisions to protect the safety, dignity and well-being of women, support persons and staff who need to access health care facilities where terminations are carried out are in force in the Australian Capital Territory, the Northern Territory, Tasmania and Victoria. New South Wales is also considering a proposal to introduce similar legislation.

The Summary Offences Act 2005 (Qld) provides that behaviours which are disorderly, offensive, threatening or violent, and which interferes or is likely to interfere with another’s peaceful passage through or enjoyment of a public area, is unlawful. While existing Queensland laws address some of the unwanted behaviours exhibited in the vicinity of facilities, feedback from members of our Criminal Law Committee was that while some harassment is already illegal under present laws, it is unlikely to provide adequate protection.

QLS supports additional measures which promote the ability of women, support persons and health care staff to safely access these facilities. QLS suggests that in relation to ensuring safe and dignified access to health care, and to respecting freedom of political communication as they relate to premises which perform termination services, a fair balance may exist with the introduction of an appropriate access zone. We advise that the description of any offence ought to be carefully constructed to ensure that the intention of protecting patients and healthcare practitioners is appropriately restrained to facilities which carry out termination and related services.
If yes to Question 15:

16. Should the provision:
   (a) Automatically establish an area around the premises as a safe access zone? If so, what should the area be; or
   (b) Empower the responsible Minister to make a declaration establishing the area of each safe access zone? If so, what criteria should the Minister be required to apply when making the declaration?

QLS considers that, if a safe access zone is to be implemented, the first option is appropriate. We note that an area of 150 metres around the premises where terminations are provided has been implemented in most other Australian jurisdictions.

17. What behaviours should be prohibited in a safe access zone?

QLS suggests that the Victorian model should be considered to determine which behaviours should be prohibited.

The Victorian definition of 'prohibited behaviour' within the defined exclusion zone around a facility is as follows:

**Prohibited behaviour** means –

(a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or
(b) subject to subsection (2), communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety; or
(c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided;
(d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access or leaving premises at which abortions are provided, without that other person’s consent’ or
(e) any other prescribed behaviour.

QLS suggests that the Public Health Act 2005 (Qld) be amended to include similar drafting.

18. Should the prohibition on behaviours in a safe access zone apply only during a particular time period?

Given that a particular facility will only operate during certain hours, it seems redundant to specify that the prohibited behaviours, if adequately defined, will only constitute an offence during a particular time period. Further, this may confuse the issue of whether
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an offensive behaviour is caught by the legislation – for example, if an offensive sign is erected within the safe zone outside of the designated time period but remains there (though the person who erected it may not) until the time period commences.

19. Should it be an offence to make or publish a recording of another person entering or leaving, or trying to enter or leave, premises where termination of pregnancy services are performed, unless the recorded person has given their consent?

QLS supports the general principle that a person ought to be able to access health care privately and without fear or risk of ridicule, humiliation or publication. QLS notes that similar legislation making these behaviours an offence that has been enacted in the Australian Capital Territory, the Northern Territory, Tasmania and Victoria. We also note that provision to do so is included in the current New South Wales bill.

Having protections in place for persons from these behaviours is consistent with the findings of United Nations treaty bodies, including the Special Rapporteur.

Collection of data about terminations of pregnancy

20. Should there be mandatory reporting of anonymised data about terminations of pregnancy in Queensland?

QLS does not support mandatory reporting of data relating to terminations of pregnancy. A mandatory obligation would place an excessive burden on medical practitioners and is unnecessary as adequate information for funding and planning purposes can be obtained voluntarily.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Advocacy Manager, Ms Binny De Saram on b.desaram@qls.com.au or (07) 3842 5889 or Senior Policy Solicitor Ms Vanessa Krulin on v.krulin@qls.com.au or (07) 3842 5872.

We would welcome any further particular questions from the Commission.

Yours faithfully

Ken Taylor
President