

# QUEENSLAND ABORTION LAWS: CRIMINALISING ONE IN THREE WOMEN

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*In an era where abortion is one of the safest and most common medical or surgical procedures, its criminalisation in Queensland serves no valid purpose beyond a form of oppression against women and a State attempt to dictate or influence a woman's capacity to determine whether to continue a pregnancy. Sections 224, 225 and 226 of the Criminal Code 1899 (Qld) (Criminal Code) criminalise the provision of, assistance in, and undergoing an abortion. These provisions contain no explicit rationale, defence or exemption. Criminalisation affects accessibility of services, availability of information regarding options, and implies a social condemnation of a woman's choice to access abortion. Women must be ensured autonomy to make decisions that affect their own lives and individual circumstances. Policy ensuring the safe and lawful provision of abortion should be focused on the protection and promotion of women's health and wellbeing, rather than on criminalisation and punishment.*

## I INTRODUCTION

A woman's exercise of her reproductive rights in Queensland is severely compromised by the criminalisation of abortion. Criminalisation influences the accessibility of services, the availability of information, and a woman's capacity to negotiate a system which straddles both criminal law and health services provision. It is estimated that one in three women will undergo an abortion during their lifetime, and laws that criminalise the exercise of reproductive choice undermine women's autonomy, self-determination and their right to bodily integrity.

The unstated assumption of the criminalising of abortion is that women are incapable of making the right decision for themselves and require State intervention in their lives. This article considers the current Queensland law on abortion, some of the detrimental impacts of the criminalisation of abortion, and how criminalisation serves a patriarchal purpose in restricting a woman's capacity to exercise choice and autonomy over her own reproductive life. This article explores how public policy and law regarding abortion in Queensland relegate women to the status of lesser citizens by denying them the authority to make decisions over their own bodies and lives. Consideration of the deep-seated patriarchal purposes which the criminalisation of abortion serve provides a framework for analysis to motivate meaningful law reform to ensure true gender equality and recognition in the context of reproductive rights.

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This article begins by providing an overview of the social context of abortion and the barriers Queensland women face in attempting to exercise their reproductive choices. An understanding of these factors is essential to enable understanding not only of why the exercise of all reproductive choices is so important, but also to comprehend the significant impact that Queensland's laws have upon access to abortion. Secondly, this article analyses the current abortion law in Queensland and the lack of rational argument for upholding the criminalisation of abortion. Thirdly, this article explores the detrimental impacts of both criminalisation and the failure to reform the existing laws. In analysing any purposes served by imposing legislation upon women that denies the autonomy over their own lives and bodily integrity, this article considers abortion as a form of discrimination, a human rights issue, and a feminist issue. Finally consideration is given to the alternatives to criminalisation that exist for the regulation of abortion provision. This article concludes by asserting that the criminalisation of abortion serves no beneficial purpose in an Australian era in which women are considered equal to men and therefore unrestricted by the State in any greater regard than men when considering bodily integrity, family choices, privacy and self-determination.

## II ABORTION

### A *Incidence of abortion in Queensland*

The exact incidence of abortion in Queensland is difficult to determine as criminalisation affects not only the collection of data but also Medicare reporting: the Medicare procedure code is the same as that for miscarriage, fetal death and other gynecological conditions.<sup>1</sup> Accordingly the incidence of abortion is estimated from data collected in South Australia where accurate pregnancy outcome statistics have been collected since 1970.<sup>2</sup> It is estimated that half of all pregnancies in Australia are unplanned.<sup>3</sup> Almost half of all these unplanned pregnancies end in a termination, indicating that approximately one in three Australian women will access an abortion in their lifetime.<sup>4</sup> All groups of women are represented in the statistics of those who accesses abortion: varying education levels, social classes, all reproductive age brackets; religious and cultural

<sup>1</sup> Children by Choice, *Unplanned Pregnancy in Australia* (2012) Children by Choice <<http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/unplanned-pregnancy-profiles-of-abortion-adoption-and-parenting#f3> on>.

<sup>2</sup> Angela Pratt, Amanda Biggs, and Luke Buckmaster, 'How many abortions are there in Australia? A discussion of abortion statistics, their limitations and options for improved statistical collection' (Research Brief no 9, Parliamentary Library, Parliament of Australia, 2005) Appendix One: Abortion record-keeping in Australian states and territories; Department of Health, Government of South Australia, *Pregnancy Outcome Statistics Unit* (2010) Pregnancy Outcome Statistics Unit <<http://www.health.sa.gov.au/pehs/pregnancyoutcome.htm#contact>>.

<sup>3</sup> Annabelle Chan, Wendy Scheil, Joan Scott, Ahn-Minh Nguyen, and Leonie Sage, *Pregnancy Outcome in South Australia 2009* (2011) Pregnancy Outcome Statistics Unit <<http://www.sahealth.sa.gov.au/>>.

<sup>4</sup> *Ibid*; Royal Women's Hospital, Royal Children's Hospital for Adolescent Health, Family Planning Victoria and Women's Health Victoria, 'Abortion: A Women's Health Issue' (Joint Position Statement, Royal Women's Hospital, Royal Children's Hospital for Adolescent Health, Family Planning Victoria and Women's Health Victoria, 2007) 1.

backgrounds, single and partnered women, with and without children, and those with and without paid employment.<sup>5</sup>

### B *Medical practice of abortion*

Induced abortion has been universally practiced in varying forms since the beginning of recorded history.<sup>6</sup> Today abortion is one of the safest and most common medical or surgical procedures when performed by a qualified health professional.<sup>7</sup> The majority of abortions are performed before the fourteenth week of pregnancy, the time at which pregnancy was traditionally considered to commence under historical common law.<sup>8</sup> Despite frequently being used in anti-abortion literature, terminations after 20 weeks are rare and are usually due to circumstances including late detection of the pregnancy, personal situations such as domestic violence or lack of social support, diagnosis of fetal abnormality or, most significantly, difficulty in locating a provider, inappropriate referrals, financial and geographic barriers, or other practical reasons.<sup>9</sup>

### C *Reasons for abortion*

The reasons women choose to terminate their pregnancy vary but include wanting greater financial security before having a family, relationship difficulties ranging from instability to domestic violence, family size and spacing, their own age, the pregnancy being the result of rape or incest, pregnancy health concerns for themselves or the fetus, and study or career aspirations.<sup>10</sup> Consideration of these

<sup>5</sup> Children by Choice, 'Abortion in Queensland' (Paper presented at Abortion in Queensland, University of Queensland Medical School Herston, Queensland, 17 October 2008).

<sup>6</sup> Report to the Minister of Health Western Australia, *Review of provisions of the Health Act 1911 and the Criminal Code relating to abortion as introduced by the Acts Amendment (Abortion) Act 1998* (17 June 2002) 5

<<http://www.health.wa.gov.au/publications/documents/ABORTIONREVIEWmaster180602.pdf>>.

<sup>7</sup> World Health Organisation, 'Safe Abortion: Technical and Policy Guidance for Health Systems' (2003); Caroline de Costa, 'Medical abortion in Australia' (Paper presented at Unplanned Pregnancy: Prevention, Responses and Options, Brisbane, Queensland, 17 September 2012).

<sup>8</sup> Doreen Rosenthal, Heather Rowe, Shelley Mallett, Annarella Hardiman, and Maggie Kirkman, 'Understanding Women's Experiences of Unplanned Pregnancy and Abortion' (Final Report, Key Centre for Women's Health in Society, Melbourne School of Population Health University of Melbourne, 2009)

<[http://www.cwhgs.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0006/135834/UPAP\\_Final\\_Report.pdf](http://www.cwhgs.unimelb.edu.au/__data/assets/pdf_file/0006/135834/UPAP_Final_Report.pdf)>; Royal Australian and New Zealand College of Obstetricians and Gynecologists, *Termination of Pregnancy: a Resource for Health Professionals* (RANZCOG, 2005); Rebecca J. Cook and Bernard M. Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1, 8.

<sup>9</sup> Katharine Betts, 'Attitudes to Abortion: Australia and Queensland in the Twenty-First Century' (2009) 17(3) *People and Place* 25, 26; Commentary (2013) 87 *Contraception* 3; E A Drey, D G Foster, R A Jackson, S J Lee, L H Cardenas, and P D Darney, 'Risk factors associated with presenting for abortion in the second trimester' (2006) 107 *Obstetgynocol*: 128; L B Finer, L F Fronwirth, L A Dauphinee, S Singh, and A M Moore, 'Timing of steps and reasons for delay in obtaining abortions in the United States' (2006) 74 *Contraception* 344; D G Foster, R A Jackson, K Cosby, T A Weitz, P D Darney, and E A Drey, 'Predictors of delay in each step leading to an abortion' (2007) 77 *Contraception* 289.

<sup>10</sup> Children by Choice, *Unplanned Pregnancy in Australia* (2012) Children by Choice <<http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/unplanned-pregnancy->

reasons provides understanding of how the current legal tests for provision of any lawful abortion often fall short of the reality for many women in their decision to terminate.

Ultimately no contraceptive is one hundred per cent effective and the World Health Organisation (WHO) estimates that even if contraception was used perfectly in every sexual encounter worldwide there would still be six million unintended pregnancies every year.<sup>11</sup> Consequently, unplanned pregnancies are a reality for many women and a decision to terminate is made in the context of their own insight into and expertise of their circumstances.<sup>12</sup> Women must be able to independently make these difficult decisions about if and when to parent with ‘dignity and freedom from stereotypes and stigma’, which is not currently supported by the inclusion of abortion in the *Criminal Code 1899* (Qld).<sup>13</sup>

The often-presented suggestion of adoption as a legitimate alternative to abortion minimises the burden pregnancy itself places on women and the impact pregnancy has on women’s lives.<sup>14</sup> The physical and social impact of pregnancy itself is often one of the reasons why a woman wants to access abortion.<sup>15</sup> Related considerations may include the expense of prenatal health care; caring for existing children; the impact of the pregnancy on their physical health; the emotional trauma of continuing a pregnancy resulting from rape; continuing a pregnancy in a context of domestic violence; and the impact of taking leave from a career or study plan.<sup>16</sup>

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profiles-of-abortion-adoption-and-parenting#f3 on>; Dr Robin Gregory, ‘Hardly her Choice: A history of abortion law reform in Victoria’ (2007) 19 *Women Against Violence* 63, 68.

<sup>11</sup> World Health Organisation, *Safe Abortion: Technical and Policy Guidance for Health Systems* (World Health Organisation, Geneva, 2003).

<sup>12</sup> Taskforce on Women and the Criminal Code, Parliament of Queensland, *Report of the Taskforce on Women and the Criminal Code* (2000) 354.

<sup>13</sup> Rebecca J Cook and Susannah Howard, ‘Accommodating Women’s differences under the women’s Anti-Discrimination Convention’ (2007) 56 *Emory Law Journal* 1040, 1045; Royal Women’s Hospital, Royal Children’s Hospital for Adolescent Health, Family Planning Victoria and Women’s Health Victoria, ‘Abortion: A Women’s Health Issue’ (Joint Position Statement, Royal Women’s Hospital, Royal Children’s Hospital for Adolescent Health, Family Planning Victoria and Women’s Health Victoria, 2007) 1.

<sup>14</sup> Kevin McGovern, *Adoption is better than abortion* (2011) Quadrant Online <<http://quadrant.org.au/magazine/2011/10/adoption-is-better-than-abortion/>>; Bettina Arndt, *Babies want to be born* (4 February 2008) Herald Sun

<<http://www.heraldsun.com.au/news/opinion/babies-want-to-be-born/story-e6frfif0-1111115465361>>; Audrey Marshall and Margaret McDonald, *The Many-Sided Triangle: Adoption in Australia* (Melbourne University Press, Melbourne, 2001) 256.

<sup>15</sup> Children by Choice, *Unplanned Pregnancy in Australia* (2012) Children by Choice <<http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/unplanned-pregnancy-profiles-of-abortion-adoption-and-parenting#f3> on>; Robin Gregory, ‘Hardly her Choice: A history of abortion law reform in Victoria’ (2007) 19 *Women Against Violence* 63, 68.

<sup>16</sup> Taskforce on Women and the Criminal Code, Parliament of Queensland, *Report of the Taskforce on Women and the Criminal Code* (2000) 351; Children by Choice, *Unplanned Pregnancy in Australia* (2012) Children by Choice <<http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/unplanned-pregnancy-profiles-of-abortion-adoption-and-parenting#f3> on>.

### D *Impact of forced continuation of pregnancy*

The importance of access to abortion is emphasised when considering the extensive negative impacts research continues to show when a woman is forced to continue an unwanted pregnancy to term. Forced continuation of pregnancy arises where access is highly restricted or unavailable; where the practicalities of seeking abortion, such as financial barriers, have prevented access; or where social factors such as lack of information on options, or moral pressures have worked to eliminate a woman's choice to terminate.<sup>17</sup>

Practical consequences of forced continuation of pregnancy include irrevocable changes to a woman's financial status, her physical, mental and sexual health, her self-esteem, social relationships, and her life goals.<sup>18</sup> The physical impact of pregnancy and childbirth also pose serious risks to a woman's health and wellbeing.<sup>19</sup> These negative life consequences can flow on to the child, and research has shown that children resulting from an unwanted pregnancy (distinct from unplanned pregnancy) have higher rates of mental health issues and delinquency as well as lower levels of education.<sup>20</sup> A longitudinal study by the University of California, named the "Turnaway Study", commenced in 2008 to undertake detailed research of the impact on women who are forced to continue with their pregnancy after wanting and attempting to access an abortion.<sup>21</sup> The "Turnaway Study" will compare two groups of women: those who have been turned away from abortion providers where their pregnancy has been just over the gestational limit of the clinic; and those who were able to access their abortion.<sup>22</sup> Diana Greene Foster, demographer and Associate Professor of obstetrics and gynecology at the University of California, was motivated to conduct this research as an extension of research done in Czechoslovakia (now the Czech Republic) in the 1960s (the Czech Study).<sup>23</sup> The Czech Study so conclusively showed the profound detriment caused to children where their mother had been denied a wanted abortion that the government overturned the then significant restrictions upon abortion access – which were similar to Queensland's current laws.<sup>24</sup>

<sup>17</sup> *Abortion in Queensland: A Summary of the Issues* (February 2012) Children by Choice <<http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/abortion-in-qld-issues>>.

<sup>18</sup> Taskforce on Women and the Criminal Code, above n 12, 351.

<sup>19</sup> Kat Banyard, *The Equality Illusion: The Truth About Men and Women Today* (Faber and Faber, London, 2010) 197.

<sup>20</sup> Deirdre Wulf and Patricia Donovan, 'Women and Societies benefit when Childbearing is Planned' (Alan Guttmacher Institute, New York, 2002); Henry P. David, 'Born Unwanted, 35 Years Later: The Prague Study' (2006) 14(27) *Reproductive Health Matters* 181, 187-8.

<sup>21</sup> University of California San Francisco, *Turnaway Study* (2013) *Advancing New Standards in Reproductive Health* <<http://www.ansirh.org/research/turnaway.php#intro>>; Joshua Lang, *What happens to women who are denied abortions?* (12 June 2013) *New York Times Magazine* <[www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html](http://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html)>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Henry P David, 'Born Unwanted, 35 Years Later: The Prague Study' (2006) 14(27) *Reproductive Health Matters* 181.

<sup>24</sup> *Ibid.*; Joshua Lang, *What happens to women who are denied abortions?* (12 June 2013) *New York Times Magazine* <[www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html](http://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html)>; The Prague Study found that children where a wanted abortion had been denied suffered significant disadvantages including being breast-fed for shorter periods, were slightly and consistently overweight, suffered more often of acute illness, received lower

Following the publication of the first round of the Czech longitudinal study, Czechoslovakia made first-trimester abortions available on demand.<sup>25</sup>

### III ABORTION LAW IN QUEENSLAND

Sections 224, 225 and 226 of the *Criminal Code 1899* (Qld) (*Criminal Code*) criminalise the provision of, assistance in, and undergoing an abortion. These provisions contain no explicit rationale, defence or exemption.<sup>26</sup> Despite the inclusion of abortion in the *Criminal Code*, and ten private clinics providing abortion across the State, only one woman, two doctors, and one assister have ever been prosecuted in Queensland.<sup>27</sup> While the Courts in Queensland and other Australian States have interpreted the criminal codes in their jurisdictions somewhat liberally, there is still minimal precedent due to a lack of prosecutions which has resulted in confusion and a lack of clarity as to when abortion would be considered lawful or unlawful.

#### A Common Law interpretation of Criminal Code

*R v Davidson* was the pioneering Victorian case which, when adopted in Queensland by *Bayliss and Cullen*, narrowed the application of the *Criminal Code* regarding abortion.<sup>28</sup>

*R v Davidson*, commonly known as the Menhennitt Ruling, was not the ultimate decision of the case against Dr Charles Davidson but is the decision which outlined the circumstances under which an abortion could be performed lawfully in Victoria.<sup>29</sup> Dr Davidson was charged with four counts of unlawfully using an instrument or other means with intent to procure a miscarriage, and one count of conspiring to unlawfully procure the miscarriage of a woman.<sup>30</sup> The Victorian legislation which then criminalised abortion was similarly worded to the present Queensland provisions and was also similarly adopted from the *Offences Against the Person 1861* (UK) legislation. Justice Menhennitt reasoned that the word “unlawfully” was meaningfully included in both the United Kingdom and Victorian legislation and implied that some abortions may therefore be performed lawfully; giving rise to exceptions under the legislation. Justice Menhennitt determined that lawful exceptions to offences are often adopted on grounds of

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grades in school, seemed less capable in socially demanding situations, and were less popular amongst their peers.

<sup>25</sup> Henry P David, ‘Born Unwanted, 35 Years Later: The Prague Study’ (2006) 14(27) *Reproductive Health Matters* 181, 188; Joshua Lang, *What happens to women who are denied abortions?* (12 June 2013) New York Times Magazine <[www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html](http://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html)>.

<sup>26</sup> *Criminal Code 1899* (Qld) ss 224, 225 and 226; *R v Davidson* [1969] VR 667 and *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8; George Williams, *Couple on trial in Cairns over abortion* (12 October 2010) Sydney Morning Herald <<http://www.smh.com.au/opinion/society-and-culture/abortion-law-stuck-in-the-19th-century-20101011-16fwq.html>>.

<sup>27</sup> *R v Brennan & Leach* [2010] QDC 329, 2; *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8.

<sup>28</sup> *1899* (Qld) ss 224, 225 and 226; *R v Davidson* [1969] VR 667; *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8.

<sup>29</sup> *R v Davidson* [1969] VR 667, 667.

<sup>30</sup> *Ibid.*

necessity and proportionality. With consideration to Victorian and British case law Justice Menhennitt agreed that the deliberate inclusion of “unlawfully” and the very nature of the offence created (it would be medically and socially impractical to disallow all abortions) gave rise to the appropriate application of the principle of necessity. The Menhennitt Ruling therefore determined that abortion could be performed lawfully in circumstances where an honest and reasonable belief is held that the abortion is necessary to prevent serious harm from occurring to the pregnant woman, and the abortion is not disproportionate to the harm sought to prevent.<sup>31</sup>

The Queensland case of *R v Bayliss and Cullen* similarly saw two doctors charged with unlawfully using force to a woman with intent to procure her miscarriage contrary to s 224 *Criminal Code*. Judge McGuire followed Justice Menhennitt’s reasoning and determined that the inclusion of “unlawfully” in the legislation only criminalised those procedures which had not been performed lawfully.<sup>32</sup> Judge McGuire also relied upon an earlier Queensland civil law case of *K v T* that his Honour suggested had already applied the Menhennitt Ruling as law in Queensland.<sup>33</sup> In *K v T* the applicant sought an interlocutory injunction to restrain the respondent from having an abortion.<sup>34</sup> In consideration of the application Justice Williams made reference to the Menhennitt Ruling and that it could not be presumed that the abortion would not be performed lawfully. Judge McGuire in *R v Bayliss and Cullen* suggested this reference already contributed to a formal adoption of the Menhennitt Ruling in Queensland.<sup>35</sup>

Consequently this case law has allowed that if abortion is “unlawful” there must be circumstances in which it would be lawful.<sup>36</sup> It remains ambiguous as to what constitutes a “risk” to life and mental health.<sup>37</sup> Robin West’s argument that abortion is a necessary protection for women against any detriments of pregnancy depicts the necessity of lawful abortion where continuation of the pregnancy poses a threat to the woman’s mental health, not only her physical health.<sup>38</sup> West stipulates that mental health is not a tangible concept and should include the broader concepts of ‘life’ such as fear of losing independence, or sense of self, if forced to continue with an unwanted pregnancy rather than a quantitative analysis of measuring ‘life’ in terms of life or death.<sup>39</sup>

It is important to note that while Judge McGuire in *Bayliss and Cullen* did adopt a liberal interpretation of the statute in allowing the s 282 *Criminal Code* defence to apply to abortion (see III A 1), his Honour clarified this position by stipulating

<sup>31</sup> *R v Davidson* [1969] VR 667, 672.

<sup>32</sup> *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8, 45.

<sup>33</sup> [1983] 1 Qd R 396; *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8, 45.

<sup>34</sup> *K v T* [1983] 1 Qd R 396.

<sup>35</sup> *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8, 45.

<sup>36</sup> *Criminal Code* 1899 (Qld) ss 224, 225, 226 and 282; *R v Davidson* [1969] VR 667, 671; *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8.

<sup>37</sup> Heather Douglas, ‘Abortion Reform: A State Crime or a Woman’s Right to Choose?’ (2009) 33 *Criminal Law Journal* 74; Kerry Petersen, ‘Abortion Laws and Medical Developments: A Medico-Legal Anomaly in Queensland’ (2011) 18 *Journal of Law and Medicine* 594.

<sup>38</sup> Robin West, ‘Jurisprudence and Gender’ in Frances Olsen (ed), *Feminist Legal Theories* (Temple University Press, Philadelphia, 1995) 88.

<sup>39</sup> *Ibid.*

that ‘there is no legal justification for abortion on demand’ and Queensland should continue to use its authority to ensure that abortion on ‘whim or caprice does not insidiously filter into our society’.<sup>40</sup> Consequently, women are still required to justify why they wish to access abortion in order to meet the legal test: firstly that the abortion is necessary to prevent serious danger to the woman’s physical or mental health, and secondly that the danger of the medical or surgical treatment is not out of proportion to the danger intended to be averted.<sup>41</sup> This ambiguous and arguable distinction between lawful and unlawful abortion places women and doctors at risk of criminal prosecution as recently demonstrated in *R v Brennan and Leach*.<sup>42</sup> In that matter, Tegan Leach was prosecuted for procuring her own miscarriage after sourcing misoprostol and mifepristone, the drugs used for medical termination, from the Ukraine. Her partner was also charged under s 226 for assisting her.<sup>43</sup> The jury found both not guilty after expert medical evidence suggested that the drugs were not ‘noxious’ or harmful to the pregnant woman as required under the wording of the *Criminal Code*.<sup>44</sup>

### 1 Section 282 Criminal Code Defence

The language of s 282 has become the legal test for a lawful abortion.<sup>45</sup> Although s 282 does not specifically reference abortion, it provides a defence for doctors charged with performing a surgical or medical procedure unlawfully. Parliament amended s 282 in September 2009 following the charges laid against Tegan Leach and Sergie Brennan to extend the defence to medical treatment after fears by medical practitioners that women prescribed medication terminations would be similarly charged.<sup>46</sup> The Bill was not specific to abortion so did not warrant a conscience vote, and although supported by then-Opposition members of Parliament, they stated that their support was on the grounds that this amendment would not increase the availability of abortion in Queensland but would merely clarify current practice.<sup>47</sup>

<sup>40</sup> 1899 (Qld); *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8, 45.

<sup>41</sup> *R v Davidson* [1969] VR 667, 672; *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8, 45; Queensland Maternity and Neonatal Clinical Guidelines Program, *Queensland Maternity and Neonatal Clinical Guideline: Therapeutic termination of pregnancy* (Queensland Government, Brisbane, 2013).

<sup>42</sup> *R v Brennan & Leach* [2010] QDC 329; Natasha Cica, ‘Abortion Law in Australia’ (Research Paper No 1, Laws and Bills Digest Group, 31 August 1998).

<sup>43</sup> *Criminal Code 1899* (Qld); *R v Brennan & Leach* [2010] QDC 329, Everson DCJ, 12 October 2010, 2.

<sup>44</sup> *R v Brennan & Leach* [2010] QDC 329, 2 (Professor Nicholas Fisk).

<sup>45</sup> *Criminal Code 1899* (Qld); *R v Davidson* [1969] VR 667, 672; *R v Bayliss and Cullen* (1986) 8 Qld Lawyer Reps 8, 45; Queensland Maternity and Neonatal Clinical Guidelines Program, *Queensland Maternity and Neonatal Clinical Guideline: Therapeutic termination of pregnancy* (Queensland Government, Brisbane, 2013).

<sup>46</sup> Caroline de Costa and Michael Carrette, *Legal issues lead Cairns doctors to cease medical abortion* (2 June 2009) Crikey < <http://www.crikey.com.au/2009/06/02/legal-issues-lead-cairns-doctors-to-cess-medical-abortion/>>.

<sup>47</sup> Queensland, *Parliamentary Debates, Legislative Assembly*, 3 September 2009, 2120 (Lawrence Springborg); 2121 (Mark McArdle); 2123 (David Gibson).

### B *Queensland Health Therapeutic Abortion Guidelines*

In March 2013 Queensland Health released the *Queensland Maternity and Neonatal Clinical Guideline: Therapeutic termination of pregnancy*.<sup>48</sup> These guidelines aimed to clarify the legal considerations for the provision of abortion in Queensland public hospitals and establish best medical practice.<sup>49</sup> It is already apparent that the guidelines will not serve the purpose they were designed to achieve: public hospitals across Queensland are not obliged to enact the guidelines and there is no government body to ensure that such guidelines are either established or developed appropriately in each hospital.<sup>50</sup> There is also no compulsory education program regarding either the guidelines or the processes contained within them to ensure hospital staff are aware of their capacity to perform therapeutic termination of pregnancy.<sup>51</sup> The therapeutic termination of pregnancy guidelines supplement contains recommendations of how to implement the guidelines into practice, but yet again, this is dependent upon the hospital staff being willing and able to implement and enforce these processes.<sup>52</sup>

### IV ABORTION ACCESSED REGARDLESS OF LEGALITY

The universality of abortion across history has shown that women choose to access abortion regardless of its legality in order to prevent childbirth or to control the numbers and timing of children.<sup>53</sup> Highly restrictive abortion laws are not associated with changing a woman's decision or lowering abortion rates.<sup>54</sup> One study conducted as early as 1939 in London, when abortion was still criminalised, found that 'women, law-abiding by temperament and upbringing, faced with the dreadful dilemma of an unwanted pregnancy or breaking the law, do not hesitate to break the law and in doing so, do not feel they are acting immorally'.<sup>55</sup> The same has been found today where women are just as likely to access abortion whether it is legal or not, and in countries with even stricter criminal regulation of abortion and tougher penalties women opt to face imprisonment as the price of exercising their choice.<sup>56</sup>

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<sup>48</sup> Queensland Maternity and Neonatal Clinical Guidelines Program, *Queensland Maternity and Neonatal Clinical Guideline: Therapeutic termination of pregnancy* (Queensland Government, Brisbane, 2013).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Queensland, Queensland Health, above n 48.

<sup>52</sup> Queensland, Queensland Health, above n 48, 6.

<sup>53</sup> Dr Robin Gregory, 'Hardly her Choice: A history of abortion law reform in Victoria' (2007) 19 *Women Against Violence* 63, 69; Gilda Sedgh, 'Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008' (Research Paper, Guttmacher Institute and World Health Organisation, 2012) 1343.

<sup>54</sup> *Ibid.*

<sup>55</sup> E Gruber, 'Social Study of Patients Admitted for Abortions: Royal Women's Hospital, 1 March – 31 May 1956' (Research Paper, Almoner Social Work Department Royal Women's Hospital Melbourne, 1956) 31.

<sup>56</sup> World Health Organisation, above n 7; Gilda Sedgh, 'Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008' (Research Paper, Guttmacher Institute and World Health Organisation, 2012); Victorian Law Reform Commission, Parliament of Victoria, *Final Report on the Law of Abortion* (2008).

## V THE IMPACT OF CRIMINALISATION

The ambiguity of when an abortion is lawful or not and the criminal taint of abortion in Queensland has created an adverse environment regarding information and access for many women, doctors, nurses and counsellors in navigating the practical, social and emotional aspects of abortion.<sup>57</sup> The consistent lack of abortion law reform has arguably worked to uphold a patriarchal system where women are denied choice as to when, with whom, and whether they wish to parent.<sup>58</sup> Such denial also acts to restrict women's economic and sexual self-determination, access to education, employment and health equality: core values of human rights.<sup>59</sup>

A *Current law and the impact on choice*

A major concern regarding access in Queensland is that although abortion is available safely and lawfully on a restricted basis, unsafe abortions still take place because of the limited information available.<sup>60</sup> Such was the situation in *R v Brennan and Leech* where the young couple were unaware that the same medical abortion procedure was available lawfully in Cairns if performed by a qualified medical practitioner.<sup>61</sup>

The criminalisation of abortion works as systemic coercion of women to continue an unwanted pregnancy by threatening criminal punishment.<sup>62</sup> This effect of criminalisation was given judicial consideration by the Chief Justice of Canada in a 1988 majority judgment which held that Ontario's then-restrictive criminal abortion law was unconstitutional: "Forcing a woman, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person".<sup>63</sup> The striking similarity between Ontario's 1988 abortion law and Queensland's present abortion law allows his

<sup>57</sup> Taskforce on Women and the Criminal Code, above n 12, 17, 355, 366.

<sup>58</sup> Christine Morley and Selma Macfarlane, 'The Continued Importance of a Feminist Analysis: Making Gendered Inequalities Visible Through a Critique of Howard Government Policy on Domestic Violence' (2008) 47 *Just Policy* 31, 33.

<sup>59</sup> Rebecca J Cook and Bernard M. Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1, 2-3.

<sup>60</sup> Gilda Sedgh, 'Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008' (Research Paper, Guttmacher Institute and World Health Organisation, 2012) 1343; Caroline de Costa, 'Medical abortion in Australia' (Paper presented at Unplanned Pregnancy: Prevention, Responses and Options, Brisbane, Queensland, 17 September 2012).

<sup>61</sup> *R v Brennan & Leach* [2010] QDC 329; Gilda Sedgh, 'Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008' (Research Paper, Guttmacher Institute and World Health Organisation, 2012) 1343; Children by Choice, *A list of termination of pregnancy (abortion) clinics in Queensland*, (2012) Children by Choice <<http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-queensland>>; Caroline de Costa, 'Medical abortion in Australia' (Paper presented at Unplanned Pregnancy: Prevention, Responses and Options, Brisbane, Queensland, 17 September 2012).

<sup>62</sup> Jed Rubinfeld, 'The Right of Privacy' (1989) 102 *Harvard Law Review* 737; Rebecca J Cook and Bernard M. Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1, 9.

<sup>63</sup> *Morgentaler v The Queen* (1998) 44 DLR (4<sup>th</sup>) 385, 402.

Honour's assessment to be equally applicable to both jurisdictions.<sup>64</sup> Chief Justice Dickson's assessment emphasises the discredit that the criminalisation of abortion gives to a woman's self-determination and bodily integrity.

Where women are granted control over their own body and reproductive capacity, and are not subjected to forced continuation of pregnancy, a number of positive social outcomes have been documented including the reduction of poverty, improved health, enhanced education, and societal gender equality.<sup>65</sup>

The criminalisation of abortion exacerbates potential social or emotional impacts of unplanned pregnancy and abortion for a woman.<sup>66</sup> Conclusive reputable research has shown there is limited psychological harm caused by an abortion where a woman feels unrestricted in her decision-making and receives support in her decision.<sup>67</sup> However, negotiating access to abortion adds to the stress of the decision to terminate.<sup>68</sup>

The Taskforce on Women and the Criminal Code found that while abortion remains an offence under the *Criminal Code* the stigma of abortion is aggravated by placing women under immense pressure not to actively seek abortions and to feel criminal or guilty when they do.<sup>69</sup> Women are very aware of the stigma that exists around abortion, and the divisive nature of the right to access.<sup>70</sup> Stigma inhibits access to abortion by restricting honest or factual conversations thereby compounding the perpetuation of myths about abortion, and the avoidance of

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<sup>64</sup> *Criminal Code*, RSC, 1970, c C-34, s 251 (now *Criminal Code*, RSC, 1985, c C-46, s 287) stated that lawful abortions could only be performed at accredited hospitals where a woman had been granted approval for the procedure from a therapeutic abortion committee of 3 doctors.

<sup>65</sup> Kat Banyard, *The Equality Illusion: The Truth About Men and Women Today* (Faber and Faber, London: 2010) 182; Taskforce on Women and the Criminal Code, above n 12, 355.

<sup>66</sup> Nancy E. Adler, Henry P. David, Brenda N. Major, Susan H. Roth, Nancy F. Russo, Gail E. Wyatt, 'Psychological Responses After Abortion' (1990) 248(4851) *Science* 41.

<sup>67</sup> Disparate interpretations of literature and research are due in part to the limitations of research methods and part to the political or moral influences upon the researchers. Research that gives consideration to the experience of an unplanned and unwanted pregnancy as a whole show that any severe negative response post-abortion is rare and is prefaced by a stressful decision-making process where women who have indicated negative attitudes to abortion, or difficulties in their decision making, received little or limited support in their decision. Post-abortion responses should therefore be considered in the context of the entire experience of experiencing and reacting to an unplanned and unwanted pregnancy: Vignetta E. Charles, Chelsea B. Polis, Srinivas K. Sridhara, and Robert W. Blum, 'Abortion and long-term mental health outcomes: a systematic review of the evidence' (2008) 78 *Contraception* 436; Nancy E Adler, Henry P David, Brenda N Major, Susan H Roth, Nancy F Russo, and Gail E Wyatt, 'Psychological responses after abortion' (1990) 248(4851) *Science* 41; David M Fergusson, L John Horwood, and Joseph M Boden, 'Reactions to abortion and subsequent mental health' (2009) 195 *British Journal of Psychiatry* 420.

<sup>68</sup> Nancy E Adler, Henry P David, Brenda N Major, Susan H Roth, Nancy F Russo, and Gail E Wyatt, 'Psychological responses after abortion' (1990) 248(4851) *Science* 41; Joshua Lang, *What happens to women who are denied abortions?* (12 June 2013) New York Times Magazine <[www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html](http://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html)>; Editorial, 'You Say "Regret" and I Say "Relief": A Need to Break the Polemic about Abortion' (2008) 78 *Contraception* 87.

<sup>69</sup> Taskforce on Women and the Criminal Code, above n 12, 355.

<sup>70</sup> *Ibid.*

legal or policy reform due to a perception of political risk.<sup>71</sup> Despite the existence of stigma, polls in Queensland have indicated strong community support for decriminalisation and support for women having the right to choose abortion.<sup>72</sup>

### *B Practical access to abortion in Queensland*

The presence of abortion in the *Criminal Code*, and the lack of clear legal precedent regarding when abortion is lawful, have far-reaching implications for access and service provision. Abortion is not offered in the public health system in Queensland unless it can be clearly argued as ‘therapeutic’ under the provision guidelines where the pregnancy must pose risk to the woman’s life or a severe impact on her physical health, and it is estimated that only one per cent of abortions are provided in public health facilities.<sup>73</sup> There are lengthy and difficult processes associated with public system access, and many women elect to access an abortion through the private sector to avoid these time delays and the associated consequences of potentially undergoing a late term abortion, or the continued experience of the detrimental health risks associated with their pregnancy, even if they would have met the eligibility requirements for a public system therapeutic abortion.<sup>74</sup>

Even the decision to use the private clinic system poses challenges to access. There are only ten private clinics or practitioners that provide abortions in Queensland.<sup>75</sup> Although General Practitioners are now able to prescribe the drugs for a medication termination up to 7 weeks gestation provided they undergo the necessary training and enter an agreement with a pharmacist willing and able to stock the medication.<sup>76</sup> However, there is no central register of the prescribing GPs in Queensland for women to know where or with who this option may be

<sup>71</sup> Marie Stopes International and Ipas, ‘Report of the Global Safe Abortion Conference: Whose right? Whose choice? Who cares?’ (Paper presented at Global Safe Abortion Conference, London, 23-24 October 2007); Carole Joffe, *Dispatches from the Abortion Wars: the Costs of Fanaticism to Doctors, Patients and the rest of us* (Beacon Press, Boston, 2009); Naomi Oreb, ‘Worth the Wait? A Critique of the Abortion Act 2008 (Vic)’ (2009) 17(2) *Journal of Law and Medicine* 261-9.

<sup>72</sup> Taskforce on Women and the Criminal Code, above n 12, 352; Roy Morgan Research, *Almost two-thirds of Australians approve of abortion* (3 March 1998) *The Bulletin* (Australia) <[www.roymorgan.com/news/polls/1998/3058/index.cfm](http://www.roymorgan.com/news/polls/1998/3058/index.cfm)>; Shaun Wilson, Gabrielle Meagher, Rachel Gibson, David Denemark and Mark Western ‘Australian Survey of Social Attitudes’ (Final Report, Australian National University Centre for Social Research, 2005) 22-24; Michelle Grattan, *Polls back abortion laws, but Senate control a worry* (16 February 2005) *The Age* (Melbourne) <[www.theage.com.au/National/Poll-backs-abortion-laws/2005/02/15/1108230007300.html](http://www.theage.com.au/National/Poll-backs-abortion-laws/2005/02/15/1108230007300.html)>.

<sup>73</sup> ABC Radio National, ‘Abortion on Trial in Queensland’, *Background Briefing*, 7 November 2010 (Dr Andrew Pesche); Queensland Maternity and Neonatal Clinical Guidelines Program, *Queensland Maternity and Neonatal Clinical Guideline: Therapeutic termination of pregnancy* (Queensland Government, Brisbane, 2013).

<sup>74</sup> *Ibid*; World Health Organisation, above n 7.

<sup>75</sup> Children by Choice, *A list of termination of pregnancy (abortion) clinics in Queensland*, (2012) Children by Choice <<http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-queensland>>; compared to seventeen clinics in New South Wales and ten in Victoria, significant due to smaller size of State.

<sup>76</sup> Department of Health, *Therapeutic Goods Administration* (26 October 2012) Australian Government <<https://www.tga.gov.au/hp/information-medicines-mifepristone-gymiso.htm#.U03Tu-5Arcs>>.

available.<sup>77</sup> The fact that medical practitioners still remain vulnerable to criminal prosecution based on their assessment of an abortion as ‘lawful’ has affected the willingness of doctors to perform abortions, or even develop the necessary skills.<sup>78</sup>

The limited numbers of clinics amplifies issues of geography and affordability. Only three (known) abortion service providers operate north of the Sunshine Coast, creating great difficulty in timely access for women outside South East Queensland, particularly those in remote communities.<sup>79</sup>

### *1 Cost of abortion in Queensland*

The cost of abortion in Queensland has escalated steeply in the past few years, faster and higher than interstate counterparts attributable to the small number of clinics in the State, and access essentially confined to those clinics. First trimester abortion services provided in private health facilities have out-of-pocket costs of between \$470 and \$1000, depending on the location of the clinic.<sup>80</sup> Such high costs result in some women being unable to pay for the procedure, or travel to a clinic, and are consequently faced with the prospect of continuing with an unplanned and unwanted pregnancy (see II D).<sup>81</sup>

Prices at all clinics significantly increase after 14 weeks of pregnancy and most clinics only provide abortions up to 16 weeks, with the exception of one Queensland clinic which can provide a termination up to 20 weeks gestation.<sup>82</sup> A termination from 16 to 20 weeks has an out-of-pocket cost of \$1500 to over \$3000 respectively.<sup>83</sup>

Only 20 per cent of women receive financial assistance towards the cost of the termination from the man involved.<sup>84</sup> Many women report fears of judgment or exclusion from family or friends if disclosing pregnancy and abortion to ask for financial assistance.<sup>85</sup> Women who are not able to afford the high cost of an abortion face paying bills or rent late, selling or pawning items to raise funds, applying for bank loans, or accessing emergency relief funds.<sup>86</sup> Each of these options takes significant time and emotional energy for the woman and her

<sup>77</sup> Children by Choice, *A list of termination of pregnancy (abortion) providers in Queensland* (20 March 2014) Children by Choice: Abortion Clinics Queensland <<http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-queensland>>.

<sup>78</sup> Taskforce on Women and the Criminal Code, above n 12, 17, 355.

<sup>79</sup> Children by Choice, *A list of termination of pregnancy (abortion) providers in Queensland* (20 March 2014) Children by Choice: Abortion Clinics Queensland <<http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-queensland>>; Taskforce on Women and the Criminal Code, above n 12, 17, 357.

<sup>80</sup> Children by Choice, ‘Facilitating access to abortion for disadvantaged women in Queensland: A blueprint for health and community services’ (Report, Children by Choice, March 2013).

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

support worker or support network – compounded by the potential to face judgment at each point of contact.

On 1 August 2013 the Federal Government approved the listing of mifepristone (RU486) and misoprostol on the Pharmaceutical Benefits Scheme (PBS) for medical abortion up to seven weeks gestation.<sup>87</sup> The cost of medical abortion should now be at approximately \$50, yet the price through Queensland's abortion clinics has remained unchanged and still costs around \$500.<sup>88</sup> Arguments that this lack of price readjustment is to ensure a woman's decision-making between surgical and medical procedures is not affected by price are condescending to a woman's decision-making capability and fail to grasp that a lack of finances is often a key determinant for choosing abortion at all.

### C Lack of Queensland abortion law reform

The endurance of abortion in the *Criminal Code* in the face of rational argument as to how criminalisation erodes women's rights, health and wellbeing defies logic. The inaction of the Queensland Parliament to reform the law and decriminalise abortion promotes a patriarchal system where women are regulated into the role of mother and caregiver through the removal of their choice as to when, with whom, and whether they wish to parent.<sup>89</sup> Women who choose not to conform are stigmatised and at risk of criminal charges.

The explanation offered by many politicians that abortion is a private matter between a woman and her doctor and readily available when sought, is not only incorrect but minimises the gravity of what is involved and attempts to absolve the government of any responsibility to change the law.<sup>90</sup> When considering the following it becomes clear that both the criminalisation of abortion and the refusal to act to decriminalise are patriarchal tactics to remove women's autonomy and self-determination.

<sup>87</sup> Department of Health and Ageing, *RU486 – Pharmaceutical Benefits Scheme listing* (1 July 2013) Australian Government, Department of Health Current Issues <<http://www.health.gov.au/internet/main/publishing.nsf>>.

<sup>88</sup> Children by Choice. *How much will an abortion cost?* (19 September 2013) Children by Choice <<http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/termination-costs-in-queensland>>; Children by Choice, *A list of termination of pregnancy (abortion) providers in Queensland* (20 March 2014) Children by Choice <<http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-queensland>>.

<sup>89</sup> Morley and Macfarlane, above n 58, 33.

<sup>90</sup> Heather Douglas, 'Abortion Reform: A State Crime or a Woman's Right to Choose?' (2009) 33 *Criminal Law Journal* 74, 78; ABC Radio National, 'Abortion on Trial in Queensland', *Background Briefing*, 7 November 2010 (Anna Bligh and Paul Lucas); Queensland Premier Campbell Newman stated "Some of these issues are important to people, but they're also ones that distract a government that is intent on reform as we will be – reform that matters to people. We don't want to be distracted from the task at hand." when questioned regarding abortion law reform in Daniel Hurst 'Higher pay in lean public service, Newman pledges' *Brisbane Times*, 6 December 2011 at <<http://www.brisbanetimes.com.au/queensland/higher-pay-in-lean-public-service-newman-pledges-20111205-1of5a.html#ixzz1fhojbggy>>.

Laws that restrict a woman's ability to exercise her reproductive choices suggests a patriarchal agenda through targeting her capacity to engage in the public sphere to the extent she may wish.<sup>91</sup> Pregnancy, childbirth and parenthood can impact upon a woman's engagement and re-engagement in the workplace. 49% of mothers have reported experiencing discrimination in the workplace at some point during pregnancy, parental leave or upon their return to the workplace, ranging from negative attitudes through to dismissal.<sup>92</sup> Both pregnancy and parenthood pose a disruption to the woman's engagement with her professional career path where a necessary absence from the workforce for childbirth and childcare can impact career progression and building towards a position of authority.<sup>93</sup> Restricting a woman's access to abortion therefore works to determine her level of engagement in the public sphere.

Criminal laws are the pillars of society being the ultimate declaration of what that society deems to be unacceptable behaviour.<sup>94</sup> The *Criminal Code* was heavily influenced by the English *Offences Against the Person Act 1861* (Eng) which also criminalised abortion. This Act has since been repealed, and the UK legislated for the lawful provision of abortion in 1967.<sup>95</sup> The *Offences Against the Person Act 1861* was based on historical common law systems which derived many offences, such as abortion, from religious concepts of sin, gender discrimination, exploitation and abuse.<sup>96</sup> In context, historical considerations regarded pregnancy to start at the twelfth or thirteenth week of gestation (the quickening) and abortion which occurred prior to that time was not considered criminal or liable to any punishment.<sup>97</sup> This timeframe, prior to 'the quickening', is also the time in which the majority of Australian abortions are performed.<sup>98</sup> The punishment for a traditional concept of an offence has now been broadened beyond the original intention of the legislation by criminalising abortion in the first trimester.

The Queensland offences relating to abortion are contained in the *Criminal Code* chapter 'Crimes Against Morality' alongside sexually deviant offences including incest, child molestation, and child pornography.<sup>99</sup> Such offences are criminalised because they are not only physically and psychologically harmful to the perpetrator's victim, but also because society regards those offences as socially unacceptable and worthy of harsh punishment.<sup>100</sup> The same cannot be said of abortion. Social opinion no longer condemns abortion with 4 in 5

<sup>92</sup> Australian Human Rights Commission, 'Headline Prevalence Data: National Review on Discrimination Related to Pregnancy, Parental Leave and Return to Work 2014' (Research Report, Australian Human Rights Commission, April 2014) 6.

<sup>93</sup> Ibid, 8; Taskforce on Women and the Criminal Code, above n 12, 351.

<sup>94</sup> *Morgentaler v The Queen* (1998) 44 DLR (4<sup>th</sup>) 385.

<sup>95</sup> *Abortion Act 1967* (UK).

<sup>96</sup> Cook and Dickens, above n 59, 8; Morley and Macfarlane, above n 58, 32.

<sup>97</sup> Cook and Dickens, above n 59, 8.

<sup>98</sup> Doreen Rosenthal, Heather Rowe, Shelley Mallett, Annarella Hardiman, Maggie Kirkman, 'Understanding Women's Experiences of Unplanned Pregnancy and Abortion' (Final Report, Key Centre for Women's Health in Society, Melbourne School of Population Health University of Melbourne, 2009)

<[http://www.cwhgs.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0006/135834/UPAP\\_Final\\_Report.pdf](http://www.cwhgs.unimelb.edu.au/__data/assets/pdf_file/0006/135834/UPAP_Final_Report.pdf)>.

<sup>99</sup> *Criminal Code 1899* (Qld) Chapter 22 Offences against morality.

<sup>100</sup> *Morgentaler v The Queen* (1998) 44 DLR (4<sup>th</sup>) 385.

Queenslanders being supportive of a woman's right to choose abortion, meaning that criminalisation no longer represents what society deems unacceptable.<sup>101</sup> Any 'moral' protection of women required in the context of abortion from coercive partners or incompetent practitioners can be efficiently protected through a hybrid model of legislation in health and criminal law as adopted in other Australian jurisdictions including Victoria and Western Australia (see VII A).<sup>102</sup> Political analysis has shown abortion to be of only minor electoral significance, yet politicians continue to hide behind the rhetoric that abortion law reform costs votes or support in order to avoid beginning any changes to decriminalise or legalise abortion.<sup>103</sup>

Additionally, as outlined above in section II B, abortion is one of the safest medical or surgical procedures when performed by a qualified health professional.<sup>104</sup> Medically and socially therefore there is no longer a justifiable argument for abortion to be criminalised. It then stands to reason that the refusal to amend sections 224, 225 and 226 of the *Criminal Code* serve a patriarchal purpose of criminalising a woman's choice and those who seek to assist them.

#### *D Human rights of abortion*

Abortion has been argued as a human right because access to abortion is indispensable for women to achieve economic and sexual self-determination, access to education, employment and health equality for women.<sup>105</sup> When considered in the context of the negative factors associated with forced pregnancy, it is logical to conclude that restricting access to abortion is a restriction on exercising human rights of autonomy, self-determination, bodily integrity, family life, and privacy.<sup>106</sup> Legalising abortion is important not only as a human right, but also as recognition of reproductive rights and consequently gender equality.<sup>107</sup> Decriminalisation of abortion would demonstrate respect for women's reproductive decision-making and their capacity to make their own life-affecting decisions.<sup>108</sup> Abortion must be legally legitimised as a choice when

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<sup>101</sup> Katharine Betts, 'Attitudes to Abortion: Australia and Queensland in the Twenty-First Century' (2009) 17(3) *People and Place* 25; ProChoiceQld, *Facts* <<http://prochoiceqld.org.au/facts/>>.

<sup>102</sup> Abortion Law Reform Act 2008 (Vic); Acts Amendment (Abortion) Act 1998 (WA) s 119; Health Act 1911 (WA) ss 334 and 335.

<sup>103</sup> Henry Mayer (ed), *Labor to Power: Australia's 1972 Election* (Angus and Robertson, Sydney: 1973) in n 67, 65; ABC Radio National, 'Abortion on Trial in Queensland', Background Briefing, 7 November 2010 (Anna Bligh, Paul Lucas, and Bonny Barry).

<sup>104</sup> World Health Organisation, 'Safe Abortion: Technical and Policy Guidance for Health Systems' (2003); Caroline de Costa, 'Medical abortion in Australia' (Paper presented at Unplanned Pregnancy: Prevention, Responses and Options, Brisbane, Queensland, 17 September 2012).

<sup>105</sup> Cook and Dickens, above n 59, 2-3.

<sup>106</sup> Kat Banyard, *The Equality Illusion: The Truth About Men and Women Today* (Faber and Faber, London, 2010)196-7.

<sup>107</sup> *Ibid.*

<sup>108</sup> Cook and Dickens, above n 59, 3; Dr Robin Gregory, 'Hardly her Choice: A history of abortion law reform in Victoria' (2007) 19 *Women Against Violence* 63, 67.

contraception has failed, been inaccessible, or been denied by rape or domestic violence.<sup>109</sup>

Human rights courts and tribunals across the world have developed and contributed to the frameworks of abortion law in order to recognise women's right of access to services and information.<sup>110</sup> Distinguishing abortion as a right emphasises the importance of dignity and family rights, and that any intervention of legislation by the State must not erode those rights.<sup>111</sup>

*E Abortion law is a form of discrimination against women*

Restricting access to abortion through limited service delivery, high cost, and restricted availability of information when so much is at risk (see II C and II D) is a form of oppression and discrimination as these restrictions over bodily integrity are not exercised over men.

The option to access is essential to a woman's health due to the impact that continuing an unwanted pregnancy has on a woman's physical, emotional and mental wellbeing (see II D). The decriminalisation or legalisation of abortion is of critical importance when considering the individual rights that current criminal legislation erodes.<sup>112</sup> In failing to change the Queensland abortion laws, Parliament is directly denying women reproductive freedom: one of the last fronts where women are being denied choice, self-determination, bodily integrity, and autonomy in their own life.<sup>113</sup> Criminalising abortion relegates women to a secondary class of citizenship by exerting criminal responsibility to her for a factor of biology.

Criminalised abortion as a form of discrimination against women is also highlighted by the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), to which Australia is a signatory. CEDAW Articles 12.1 and 16.1(e) state that all parties must work to eliminate discrimination in access to health care including family planning, and that men and women have the same rights to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable to them to exercise these rights".<sup>114</sup> Australia has not exercised any reservations regarding these Articles.<sup>115</sup> The current barriers to accessing abortion in Queensland (see V) show that Queensland government laws, systems and policies do nothing to uphold these obligations. Yet as a signatory to

<sup>109</sup> Cook and Dickens, above n 59, 2-3.

<sup>110</sup> Ibid, 5; Kerry Petersen, 'Abortion in Australia: A Legal Misconception', (2005) 29(2) Australian Health Review 142, 145.

<sup>111</sup> Cook and Dickens, above n 59, 6.

<sup>112</sup> Taskforce on Women and the Criminal Code, above n 12, 353.

<sup>113</sup> Naudine Taub and Elizabeth M. Schneider, 'Women's Subordination and the Role of Law' in Frances Olsen (ed), *Feminist Legal Theories* (Temple University Press, Philadelphia, 1995) 11.

<sup>114</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13.

<sup>115</sup> United Nations, *Convention on the Elimination of All Forms of Discrimination against Women Status* (2012) United Nations Treaty Collection  
<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#3](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#3)>.

CEDAW, Australia holds obligations to end all forms of discrimination against women.

By keeping abortion in the *Criminal Code* the Queensland Parliament is failing to recognise abortion as a legitimate health service or reproductive choice as other Australian jurisdictions have done.<sup>116</sup> Equal citizenship necessitates that a woman's choices for self-determination be legally respected, not criminalised.<sup>117</sup> A woman cannot access other fundamental rights if her health, including her reproductive life, is beyond her own control.<sup>118</sup> All women need to be able to control if, when, and with whom she has sex with; if, when, and how many children she has; the age at which she begins and stops child-bearing; her total number of pregnancies; the social and economic circumstances that are within her control in which she wants to raise children; and being able to care for her children without suffering social penalties.<sup>119</sup> To uphold CEDAW, women must be granted the same legal right to manage their own bodies as has been granted to men.<sup>120</sup>

## VI FEMINIST ANALYSIS OF ABORTION LAWS IN QUEENSLAND

Robin West describes abortion as a necessity for women to defend themselves from fetal invasion.<sup>121</sup> West's somewhat radical reframing rightly shifts the focus of abortion clearly onto the pregnant woman and her decision-making context, facilitating an understanding of the challenges the erosion of free choice creates. The criminalisation of abortion demonstrates State failure to recognise a woman's entitlement to independence from the 'intrusion which heterosexual penetration and fetal invasion entails'.<sup>122</sup>

Historically, women have legally been excluded from participating in the public sphere of politics and employment.<sup>123</sup> Gradual legislative changes have seen women granted suffrage, access to professions they had previously been denied

<sup>116</sup> *Acts Amendment (Abortion) Act 1998* (WA); *Crimes (Abolition of Offence of Abortion Act) 2002* (ACT); *Abortion Law Reform Act 2008* (Vic); International Women's Health Coalition, *Access to Safe Abortion is a Human Right* (2008) IWHC on Health and Rights <[http://www.iwhc.org/storage/iwhc/docUploads/Safe%20Abortion\\_FINAL.pdf?documentID=420](http://www.iwhc.org/storage/iwhc/docUploads/Safe%20Abortion_FINAL.pdf?documentID=420)>; Royal Women's Hospital, Royal Children's Hospital for Adolescent Health, Family Planning Victoria and Women's Health Victoria, 'Abortion: A Women's Health Issue' (Joint Position Statement, Royal Women's Hospital, Royal Children's Hospital for Adolescent Health, Family Planning Victoria and Women's Health Victoria, 2007) 1.

<sup>117</sup> Cook and Dickens, above n 59, 3.

<sup>118</sup> Kat Banyard, *The Equality Illusion: The Truth About Men and Women Today* (Faber and Faber, London: 2010) 181-2; Public Health Association of Australia, 'Time for a National Sexual and Reproductive Health Strategy for Australia' (Background Paper, Public Health Association of Australia, 2008) <[www.phaa.net.au/documents/SRH\\_background\\_paper.pdf](http://www.phaa.net.au/documents/SRH_background_paper.pdf)>; Taskforce on Women and the Criminal Code, above n 12, 351.

<sup>119</sup> Kat Banyard, *The Equality Illusion: The Truth About Men and Women Today* (Faber and Faber, London, 2010) 181-2; United Nations 'Report of the Fourth World Conference on Women' (Fourth World Conference on Women, Beijing, 4-15 September 1995) Resolution 95, 36.

<sup>120</sup> Cook and Dickens, above n 59, 7.

<sup>121</sup> Robin West, 'Jurisprudence and Gender' in Frances Olsen (ed), *Feminist Legal Theories* (Temple University Press, Philadelphia, 1995) 88.

<sup>122</sup> *Ibid.*

<sup>123</sup> Taub and Schneider, above n 113, 11.

entry such as law and medicine, able to hold property in their own right, the introduction of sex discrimination laws, legal recognition of rape and domestic violence, and progress towards equal pay for equal work.<sup>124</sup> However, legislation which controls women's choices of when and if to have children also serves to exclude women from this public sphere by restricting women to the roles of child-bearer or criminal.<sup>125</sup>

Feminist analysis has routinely outlined the problems that can arise from the male dominance of Parliament, and the criticism that women politicians receive when they are regarded to be advancing women's causes, such as domestic violence and abortion.<sup>126</sup> This social silencing and exclusion of women's voices from parliamentary debate has resulted in parliamentary failure to recognise abortion as an important women's health issue and right.<sup>127</sup> Previous recognition of issues affecting women such as domestic violence and rape have been conceptualised in terms men would understand such as 'assault'; this reframing cannot capture the gender-specific harm experienced from an unwanted pregnancy as there is no male, or gender-neutral equivalent.<sup>128</sup>

The State is upholding an investment in women's fertility and sexual behaviour through maintaining sections 224, 225 and 226 of the *Criminal Code*.<sup>129</sup> Restricting reproductive choice imposes the harms of continuing an unwanted pregnancy on that jurisdiction's women (see II D) as well as fear-mongering that the only acceptable outcome of an unplanned pregnancy is to continue to full-term. Both these factors reinforce the traditional values of prescribing a woman to motherhood and compelling her to restrain her sexual activities unless prepared for pregnancy. The restriction of access to abortion through criminalisation reinforces socially conservative discourses by institutionally relegating a woman's role to that of a mother, regardless of individual circumstances and aspirations.<sup>130</sup>

## VII ALTERNATIVES TO CRIMINALISATION

### A *Statutory reform and health legislation*

Progressively, other State jurisdictions of Australia have introduced statutory reform to the regulation of abortion. Queensland remains the only State that has not initiated any bill for the decriminalisation of abortion.

At the time of writing, Tasmania is the latest Australian jurisdiction to introduce a Bill to make abortion lawful.<sup>131</sup> The Bill has been approved by the Lower House, but no date has been set as to when the third and final reading of the bill will be

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Morley and Macfarlane, above n 58; Lena Dominelli, *Feminist Social Work Theory and Practice* (Palgrave, New York, 2002) 105.

<sup>127</sup> Robin Gregory, 'Hardly her Choice: A history of abortion law reform in Victoria' (2007) 19 *Women Against Violence* 63, 67.

<sup>128</sup> West, above n 121, 95; Robin West argued that a pregnancy could be argued as an invasion of the body, which a woman needs the right to self-defence for.

<sup>129</sup> Gregory, above n 127, 63.

<sup>130</sup> Morley and Macfarlane, above n 58, 36.

<sup>131</sup> Reproductive Health (Access to Terminations) Bill 2013 (Tas).

occur in the Senate.<sup>132</sup> The bill will remove abortion from the *Criminal Code Act 1924* (Tas) and regulate abortion through health legislation: if approved, abortion, both surgical and medical, will be available upon request until 16 weeks gestation and following then upon the support of two appropriately-qualified doctors.<sup>133</sup>

In 2008 Victoria passed the *Abortion Law Reform Act 2008* (Vic) decriminalising abortion. This legislation removed abortion from the criminal legislation and allowed for lawful abortion on demand until 24 weeks gestation when performed by a qualified medical practitioner.<sup>134</sup> After 24 weeks gestation, a second medical practitioner must agree that the abortion is in the pregnant woman's best interests.<sup>135</sup> Any abortion performed by an unqualified person remains a crime.<sup>136</sup> This statutory change to the criminal law brought the practice of abortion in Victoria into line with existing clinical practice and community attitudes.<sup>137</sup>

Queensland's criminal law has been praised for remaining constant through the radical era of the 1960s which saw the decriminalisation of abortion across other Westminster jurisdictions.<sup>138</sup> In reality the maintenance of abortion in criminal law, rather than its transition to health law, leaves Queensland's systems outdated and no longer representative of the views of the population or reflective of practice.<sup>139</sup>

With the exception of the Australian Capital Territory, all Australian jurisdictions that decriminalised abortion have done so through use of both criminal and health legislations.<sup>140</sup> These hybrid models of abortion regulation still criminalise unlawful abortion but provide clear statutory provisions regarding lawful abortion and when specific processes or additional checks may need to be made (usually indicated by gestation). Such legislative frameworks provide clear grounds for both women and medical practitioners through allowing abortion unless specific clearly identifiable circumstances arise. This is in contrast to the common law formulation that Queensland currently relies upon that stipulates the converse: the abortion cannot be performed unless specific criteria are met.<sup>141</sup>

### *B Any law reform must be rational process*

<sup>132</sup> Parliament of Tasmania, *Reproductive Health (Access to Terminations) Bill 24 of 2013* (27 September 2013) Bills <[http://www.parliament.tas.gov.au/bills/Bills2013/24\\_of\\_2013.htm](http://www.parliament.tas.gov.au/bills/Bills2013/24_of_2013.htm)>.

<sup>133</sup> *Criminal Code Act 1924* (Tas) ss 134, 135, 164 and 165; *Reproductive Health (Access to Terminations) Bill 2013* (Tas) ss 4, 5.

<sup>134</sup> *Abortion Law Reform Act 2008* (Vic) s 4.

<sup>135</sup> *Abortion Law Reform Act 2008* (Vic) s 5.

<sup>136</sup> *Crimes Act 1958* (Vic) s 65.

<sup>137</sup> Alissar El-murr, 'Representing the Problem of Abortion: Language and the Policy Making Process in the Abortion Law Reform Project in Victoria, 2008' (2010) 33 *Australian Feminist Law Journal* 121, 136.

<sup>138</sup> Harry Gibbs, 'The Queensland Criminal Code: From Italy to Zanzibar' (Speech delivered at the Opening of Exhibition, Supreme Court Library Brisbane, 19 July 2002).

<sup>139</sup> Heather Douglas, 'Abortion Reform: A State Crime or a Woman's Right to Choose?' (2009) 33 *Criminal Law Journal* 74, 74.

<sup>140</sup> *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT); *Abortion Law Reform Act 2008* (Vic); *Criminal Law Consolidation Act 1935* (SA) ss 81 and 82; *Acts Amendment (Abortion) Act 1998* (WA) s 119; *Health Act 1911* (WA) ss 334 and 335; *Medical Services Act* (NT) s 11.

<sup>141</sup> *R v Bayliss and Cullen* (1986) 8 *Qld Lawyer Repts* 8, 45.

Queensland has never commenced any process to decriminalise abortion.<sup>142</sup> The modern-day medical safety of both surgical and medical abortions, the predominant community support for a woman's right to choose abortion, and the significance of self-determination for women's bodily integrity, demonstrates the rationality of decriminalising or legalising abortion. Discussions around abortion are often steeped in emotional sentiment and language, which itself has been a barrier to law reform.<sup>143</sup> Abortion must be seen as an issue of equity in access to health services and life choices, rather than personal or moral views.<sup>144</sup> Adopting a pragmatic and realistic approach to abortion law allows for consideration of the reasons abortion is a necessary health service for many women, including all the reasons outlined above.<sup>145</sup>

Abortion is only one element of reproductive health. The United Nations *International Conference on Population and Development Cairo* considered that being of reproductive health is having a 'satisfying and safe sex life and that [women] have the capacity to reproduce and the freedom to decide if, when and how often to do so'.<sup>146</sup> Implicit in this last condition is the right of men and women to be informed and have access to safe, effective, affordable and acceptable methods of family planning of their choice.<sup>147</sup> Therefore strategies for systemic support access to abortion and reproductive services must also include a government commitment for policies around access to contraception, education around safe sex practices, and other proactive measures to reduce the overall necessity for abortion.<sup>148</sup>

## VIII CONCLUSION

The argument of this article is that sections 224, 225 and 226 of the *Criminal Code* must be repealed in order to guarantee women's reproductive rights. Continuing to regulate abortion through criminal legislation serves a purpose of denying women an active role in decision-making and authority systemically and individually. In order to ensure that women are granted the autonomy to make decisions that affect their own lives and individual circumstances, abortion legislation and policy should be focused on the protection and promotion of women's health and wellbeing, rather than on criminalisation and punishment.<sup>149</sup>

<sup>142</sup> Explanatory Memorandum, Criminal Code Bill 1995 (Qld) 75.

<sup>143</sup> El-murr, above n 137, 121.

<sup>144</sup> Ibid; Taskforce on Women and the Criminal Code, above n 12, 366.

<sup>145</sup> Ibid.

<sup>146</sup> United Nations, 'Report of the International Conference on Population and Development' (International Conference on Population and Development, Cairo, 5-13 September 1994) Chapter VII 7.2.

<sup>147</sup> Ibid.

<sup>148</sup> Royal Women's Hospital, Royal Children's Hospital for Adolescent Health, Family Planning Victoria and Women's Health Victoria, 'Abortion: A Women's Health Issue' (Joint Position Statement, Royal Women's Hospital, Royal Children's Hospital for Adolescent Health, Family Planning Victoria and Women's Health Victoria, 2007) 1.

<sup>149</sup> Cook and Dickens, above n 59, 12; Royal Women's Hospital, above n 148, 1; Public Health Association of Australia Inc, *The Regulation of Abortion in Australia: Public Health Perspectives* (1997), Canberra, Fact Sheet 1.