

# Time to repeal outdated abortion laws in New South Wales and Queensland

Recent developments regarding abortion law in NSW and Queensland carry significant implications for doctors

In New South Wales and Queensland, abortion is a criminal offence, unless it is deemed to be lawful. The doctor who provides the termination, those who assist and the woman herself may all be prosecuted under the *Crimes Act 1900* (NSW) or the *Criminal Code Act 1899* (Qld). The question of when an abortion is lawful is unclear. In NSW, the test for lawfulness of abortion was considered in *R v Wald* in 1971.<sup>1</sup> In this case, the judge found that an abortion may be justified where:

the accused ... had an honest belief on reasonable grounds that what they did was necessary to preserve the woman involved from serious danger to their life, or physical or mental health, which the continuance of the pregnancy would entail, not merely the normal dangers of pregnancy and childbirth, and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted.<sup>1</sup>

In regard to mental health, the judge found that the doctor may take into account "the effects of economic or social stress that may be pertaining to the time".<sup>1</sup> In Queensland, the defence in section 282 of the Criminal Code allows for surgical operations on and, since 2009, medical treatment of:

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

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

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

In 1986 in *R v Bayliss and Cullen*,<sup>2</sup> a doctor and his anaesthetist assistant were charged with offences under the Queensland abortion provisions. The District Court judge interpreted the defence provision, finding that an abortion would be lawful if carried out to prevent serious danger to the woman's physical and mental health. However, unlike the ruling in the NSW case, the judge did not find that economic and social issues could be considered when determining legality in Queensland.<sup>2</sup>

Most Australian states have introduced significant legislative modifications since 2000; however, in NSW and Queensland, the legislation, and specifically the offences, are more than 100 years old and well overdue for reform.<sup>3</sup> Queensland has seen the application of the Criminal Code provisions on abortion twice in recent years. In both cases, the discrepancies between the 19th century law and 21st century medical practice have been



acutely obvious, and in both cases the emotional damage to the woman concerned has been significant.

The recent case of *Central Queensland Hospital and Health Service v Q* (the Q case) underscores the discrepancies and uncertainties inherent in the current law regarding abortion in Queensland.<sup>4</sup> In April 2016, a 12-year-old girl (Q) sought an abortion from her local general practitioner and was referred to a Queensland public hospital. Although pregnancy at the age of 12 is uncommon in Queensland, it is not rare. Data from the Children by Choice counselling service in Brisbane show that in the 12 months ending June 2016, there were consultations regarding 16 young women aged 13 years or less who presented with an unplanned pregnancy (Amanda Bradley, Coordinator, Children by Choice, Brisbane, personal communication). Fifteen of these obtained appropriate care in the private sector. The specialist obstetrician consulted by Q in the public hospital believed it was appropriate for her to have a termination because there were significant risks to her physical and mental health if the pregnancy was allowed to proceed. Q wanted an abortion, Q's mother supported her decision, a social worker who knew the family supported the decision, and the obstetrician, having discussed the case with a second specialist obstetrician, determined that Q was Gillick competent,<sup>5</sup> in that "she had a sufficient understanding and intelligence to enable her to understand fully what was proposed".<sup>6</sup>

However, despite the unanimous agreement on the appropriate response, the health service administration applied to the Queensland Supreme Court to exercise its *parens patriae* jurisdiction — the legal doctrine that grants wide powers to the court to protect the welfare of children — to authorise the abortion. This resulted in the introduction of another professional into the decision-making context — a litigation guardian who appeared for Q in the case. Q's family was also brought back into contact with the Department of Communities, Child Safety and Disability Services, which appeared as a

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friend of the court. Although Q had clearly stated that she did not want her estranged father informed of her situation, the court required him to be contacted and his approval for the termination to be sought. Q was also required to be assessed by a psychiatrist; this assessment took place by teleconference only.

The judge in the Q case found that it was appropriate for the court's *parens patriae* jurisdiction to be invoked. Then, in addressing the criminal law test in *Bayliss and Cullen*, he found that the evidence was "all one way".<sup>4</sup> He concluded: "It is clearly in Q's best interests for termination of her pregnancy to proceed. It is necessary to do so in order to avoid danger to her mental and physical health".<sup>4</sup> Although the termination then took place, the delays with further consultations and the court process itself meant that a month had elapsed since Q had first requested it, significantly increasing the stress and mental trauma for the young woman and extending the gestation period, therefore increasing the possible risks of the procedure.

The Q case has uncertain implications for medical practitioners and patients. Does the decision mean that pregnant 12-year-old young women (and perhaps also those aged 13 and 14 years) and the Queensland doctors who care for them must always apply to the Supreme Court to access or provide abortion procedures (at least to be on the safe side), even if these doctors themselves believe that the particular individual is Gillick competent? Such an approach would significantly increase the physical and mental stresses on young women and their treating doctors, extend the waiting time for the procedure (and thus the gestation at which termination would be performed) and have significant resource implications. Moreover, from the medical viewpoint, the only alternative to termination of the pregnancy would be continuing it to term and giving birth, a course of action carrying much greater risks to the young woman's health, and one it appears that Q well understood. While there are clear Queensland Department of Health guidelines setting out procedures for hospital decision making in cases like that of Q,<sup>7</sup> the decision of the health service to seek direction from the court underlines the fear and uncertainty on the part of doctors and administrators regarding the legality of abortion in Queensland.

The other recent case in which Queensland's abortion law received significant attention occurred in 2010, when a young couple were prosecuted under sections 225 and 226 of the Criminal Code.<sup>8</sup> The young woman had taken the drugs mifepristone and misoprostol to terminate a suspected pregnancy after her partner had assisted her in obtaining the drugs by mail from overseas. According to expert testimony called by the Crown, the drugs were not "noxious" (the term used in the Queensland Criminal Code) to a (pregnant) woman. The judge directed the jury

on the meaning of the term "noxious" in the relevant provisions stating that "the question of whether the thing administered was noxious must be determined in terms of whether or not it was noxious to the defendant and not to any foetus which may or may not have been present at the time she took the drugs".<sup>8</sup> As a result, the pair were acquitted. While some believed that the result suggested that doctors could be confident that medical (as opposed to surgical) termination was allowed under Queensland law, the case stands on its facts and the outcome of future charges under these provisions could be different if the facts in future cases are different.<sup>3</sup> In any event, the case has fairly limited authority, being a jury direction of a single judge of the District Court; other judges might make different findings.

Decriminalisation of abortion has already occurred in the Australian Capital Territory, Victoria and Tasmania,<sup>9</sup> and there is debate in the Northern Territory about appropriate reform.<sup>10</sup> In NSW and Queensland, Bills have been developed that, if successful, will lead to the decriminalisation of abortion in both states. In NSW, Greens MLC Dr Mehreen Faruqi has drafted the Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016, which seeks to repeal all criminal offences relating to abortion, introduce rules that clarify conscientious objection and provide for the introduction of exclusion or safe access zones for women entering clinics. The Bill has not yet been introduced into parliament but already there has been significant public engagement in it.<sup>11</sup> In Queensland, Independent MP Rob Pyne introduced the Abortion Law Reform (Woman's Right to Choose) Amendment Bill to parliament in May 2016. This Bill simply seeks to repeal all criminal offences relating to abortion. The Bill was referred to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, which tabled its report on 26 August 2016.<sup>12</sup> Although the committee stated that it could not recommend that parliament pass the Bill, it noted that a second complementary Bill had been tabled by Rob Pyne to amend health regulations regarding abortion in Queensland. Further developments are awaited. In Queensland, both the Liberal National Party and the Labor Party have committed to allowing their members to exercise a conscience vote on any Bill put forward for debate.<sup>13</sup>

It is to be hoped that both states will see abortion decriminalised in the near future<sup>14</sup> and placed in the health regulations, so that practitioners have clear guidance for abortion care.

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