

## Queensland abortion law

In Queensland, abortion is generally regarded as lawful if performed to prevent serious danger to the woman's physical or mental health, despite abortion being contained in the Criminal Code. Women and doctors can be criminally prosecuted for unlawfully accessing or providing abortion [\[1\]](#).

### Legislation

**Queensland Criminal Code 1899, sections 224, 225 and 226**[\[2\]](#).

**Section 224.** Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.

**Section 225.** Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for 7 years.

**Section 226.** Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.

Section 282 of the Criminal Code attempts to define a lawful abortion and is used as a defence to unlawful abortion. The wording was amended in September 2009 to include medication abortion:

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

- a. *a person or unborn child for the patient's benefit; or*
- b. *a person or unborn child to preserve the mother's life;*

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

Under section 313 (2), it is crime to unlawfully to assault a pregnant woman and destroy the life of, do grievous bodily harm to, or transmit a serious disease to, "the child" before its birth. The penalty for this offence is life imprisonment.

It is unclear whether section 313 (2) could be applied in the context of medical abortion. Arguably the word "unlawfully" in section 313 (2) would limit its application in that context to those medical abortions that are

already prohibited under the Queensland provisions that make unlawful abortion a crime, and thus to abortions that do not satisfy the test in *R v Bayliss and Cullen*.

### **Case Law: *R v Bayliss and Cullen***

In May 1985 the Queensland police under the Bjelke-Petersen government raided the Greenslopes Fertility Control Clinic which had opened in 1976 and had undergone political pressure since that time. Police interrogated women and took away 20,000 confidential patient files to be copied and studied. In June 1985, the Full Court ruled that the search warrants used by the police in the raid on the clinic were invalid, and ordered the files to be returned [3].

The then Director of Prosecutions, Mr Des Sturgess, made a public plea for any person dissatisfied with the Greenslopes clinic to come forward. A 21-year-old mother of three children made a complaint about a termination of pregnancy performed in January 1985. As a result, Doctors Bayliss and Cullen were charged with procuring an illegal abortion contrary to Section 224 of the Criminal Code, and with inflicting grievous bodily harm.

The presiding judge at that trial - *R v Bayliss and Cullen* - was Justice McGuire. He based his ruling on the celebrated English case *R v Bourne* in 1939 and a Victorian ruling by Justice Menhennit in *R v Davidson* (1969). The Menhennit ruling defined an abortion as lawful when a doctor had formed a reasonable belief that an abortion was:

*necessary to preserve the woman from a serious danger to her life or physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of pregnancy would entail; and in the circumstances not out of proportion to the danger to be averted.*

Judge McGuire expressed the firm opinion that the *R v Davidson* ruling also represented the law in Queensland with respect to sections 224 and 282, ie that s282 of the Criminal Code provides the accepted defence to a charge of unlawful abortion under s224.

It would appear from the stance taken by Judge McGuire that a prosecution under s224 will fail unless the Crown can prove the abortion was not performed upon the unborn child “for the preservation of the mother’s life” and was not “reasonable having regard to the patient’s state at the time and to all the circumstances of the case”.

In the court proceedings, Judge McGuire stated:

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

Judge McGuire indicated that the present abortion law in Queensland was uncertain, and that more imperative authority, either the Court of Appeal or Parliament, would be required to effect changes to clarify the law. At the conclusion of the trial, Doctors Bayliss and Cullen were found not guilty on both counts. The basis for lawful abortion in Queensland currently rests on Judge McGuire’s decision.

Since 1986, the law on abortion remained largely untested, with prosecuting authorities turning a blind eye – with the glaring exception of the Cairns case of 2010 (see below). The Queensland Parliament has not yet acted

to address Judge Maguire's concern around the uncertainty of the law.

### **Case law: R v Leach and Brennan**

In April 2009, a 19-year-old Cairns woman was charged under section 225 in the Queensland Criminal Code, for procuring her own miscarriage. Her partner was charged under section 226 for assisting her. The case was heard in the Cairns District Court in October 2010, where the jury brought down not guilty verdicts in both charges [4],[5],[6].

Police alleged the couple arranged for a relative to send a supply of the drugs misoprostol and mifepristone, used in medical abortions, to Australia from the Ukraine. It is further alleged the woman used the drugs successfully to terminate her pregnancy at 60 days, after the couple decided they were too young to parent. Police claim the couple made no inquiries about the availability of abortion in Cairns.

The court heard a day and a half of evidence and witness statements from the prosecution, including three doctors from Cairns that the young woman consulted about the pregnancy, an obstetrics and gynaecology specialist from the University of Queensland, police officers present during the search of the couple's home or subsequent interviews with them, and video footage of those interviews. The court heard that the couple had decided they weren't ready to have a child, and that accounts of surgical abortion had persuaded them they did not want to choose that for themselves. They decided to have a medication abortion, using the same drugs the young man's sister in the Ukraine had used for an abortion some years previously.

In the summing up, the prosecution urged the jury to remember they were in a 'court of law, not a court of morals', and that if they had views on the law of abortion they should 'make them known at the ballot box'. The Crown prosecutor argued that the abortion in question was a 'lifestyle choice', and that because it had not been carried out to protect the woman's life or health, that it was unlawful. He further argued that the central issue in the case was the lack of medical supervision of the use of the drugs, and that there was an inherent risk involved in taking the medication which the couple did nothing to mitigate. He argued that the law was in place to provide protection and that just because no apparent harm had come of the abortion, that did not make it right under the law.

Defense counsel summed up with two main arguments: despite the Crown's emphasis on the couple's lack of medical supervision, they had not been charged with using drugs without a prescription or anything similar - they had actually been charged with the abortion itself; and that as the Crown had based their case on their assertion that the drugs in question were 'a noxious substance', this was not borne out by the evidence presented in court and if the jury had any doubt as to this point, they had a duty to acquit the couple on all counts.

The judge reiterated in his summing up that if the jury had any doubts as to the noxious nature of the drugs in question, they must acquit both defendants (also stating that due to the wording of the charge, the drugs had to be considered noxious to the woman herself, and that the effect on a fetus may not be taken into account). He reminded the jury of the testimony of Professor Fisk, the obstetrics and gynaecology specialist, who had stated that the drugs were not harmful to the person taking them, were taken by thousands of women around the world every year, were recommended medicines for developing countries and that in this particular case there was seemingly no ill-effect on the young woman.

The jury was out for less than an hour before returning with not guilty verdicts for both defendants.

### **Legislative Amendments: Changes to s282 of the Criminal Code**

The charges in the Cairns case caused two Cairns doctors providing medication abortion to cease doing so in

June 2009, for fear their patients would be similarly targeted [7]. This led to more doctors across the state following suit, including those doctors providing abortion within public hospitals. It was this withdrawal of public services [8], only offered to women seeking termination after a diagnosis of severe fetal abnormality, fetal death or maternal illness, which forced the Queensland Government to reexamine abortion law.

The Queensland Government introduced changes to section 282 of the Criminal Code in September 2009.

Section 282 of Queensland's Criminal Code does not relate specifically to abortion, but provides a defence for doctors charged with performing a procedure unlawfully. It is the defence on which doctors would rely, were they charged over providing abortion. The old text of s282 is as follows:

*A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.*

The concern of providers was that 'surgical operation' was specified, and that medical abortion could not really be defined as a surgical operation. This grey area existed for many years and was repeatedly raised as a concern by doctors. To resolve this issue after these concerns were elevated following the Cairns prosecution, the Government committed to reforming this section of the Code to allow for the provision of medication - which they argued was also applicable to treatments such as chemotherapy. The revised section now reads:

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

- a. *a person or unborn child for the patient's benefit; or*
- b. *a person or unborn child to preserve the mother's life;*

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

There is also an added clause stating that if a person has been lawfully supplied (or believes they have been lawfully supplied) with a substance then it is legal for them to use it — thereby arguably offering a small amount of protection to women seeking medication abortion.

**The sections pertaining specifically to abortion, s224-226, remain in the Code, and were not examined or altered in any way.** They set out penalties for doctors, women and support people.

The parliamentary debate over the Government's amendments to s282 of the Criminal Code was brief - only nine MPs spoke on the bill. The amendments were voted on along party lines, as the bill was not specifically abortion-related and therefore did not require a conscience vote. The Opposition pledged their support to the changes, with members stating several times that their support was based on the fact this would not increase the availability of abortion in Queensland, but would serve only to clarify current practice. The changes were passed on 3rd September 2009, with only Independent Gladstone MP Liz Cunningham voting against [9].

## **The law and service provision**

Statewide guidelines now exist for public abortion provision, under the 2013 [Queensland Health Maternity and Neonatal Clinical Guideline for the Therapeutic Termination of Pregnancy](#). The Guideline recognises that

termination of pregnancy is lawful in Queensland where there is a serious risk to the woman's physical and/or mental health if the pregnancy continues. According to the Guideline, hospitals are obliged to assess women presenting for termination to determine whether they are eligible for a procedure. When assessing the risk of harm, the medical practitioner may consider the social, medical and economic factors impacting on the woman's life and health. In addition, risk/s that may not be present at the time of assessment by the doctor but that could arise during the pregnancy or following the birth of a child can be considered, as per court rulings summarised on page 7 of the Guidelines.

Supporting women to access termination through a public hospital is a complex and time-consuming process. Hospital staff and decision-makers frequently have differing levels of knowledge of the Guideline and how it may be implemented in their hospital. Some hospitals have fully implemented the Guideline, others have not. We continue to work to improve implementation of the Guideline across Queensland.

However, despite the release of the Guideline, publicly provided termination procedures are still rare, and most women in Queensland will access an abortion through a private day surgery or a small number of GPs. These services provide high quality, safe and professional procedures, but have a high out-of-pocket cost attached which some women find prohibitive. For more information see our page about the cost of termination in Queensland. Geographic isolation is also a barrier for some women, as most of the ten private clinics which exist in Queensland are situated in the southeast corner of the state. Location info is available [here](#).

Medical abortion using mifepristone is also now available through GPs, if they complete an online training course and become a certified prescriber of the medication. However, no public list of GP providers exists, so locating a GP can be difficult for women wishing to access a medical abortion using her local general practice. There is still an out-of-pocket cost attached also. We are working with GPs to expand provision through this model.

#### References:

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