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# Manufacturing mental illness (and lawful abortion): Doctors' attitudes to abortion law and practice in New South Wales and Queensland

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*Around one-quarter of Australian women will have an abortion during their lifetime but access is affected by the way health care providers interpret the law about abortion. In Queensland and New South Wales abortion is a criminal offence although it is defensible in certain circumstances. Drawing on interviews with 22 doctors who provide abortion services to women in New South Wales and Queensland, this article examines doctors' responses to two common scenarios in which women may request an abortion. The two scenarios discussed in this article are a request for a first trimester abortion in circumstances where the woman does not feel ready to have a baby; and a request for abortion in the second trimester where the fetus has been diagnosed with an abnormality. This article explores doctors' understanding of the law related to the provision of abortion in these two States and their views about the effect of the law on their practice.*

## INTRODUCTION

Around one in four Australian women will have an abortion at some time during their reproductive years.<sup>1</sup> According to recent Victorian research, they will do so for a variety of reasons, including lack of readiness to have children and diagnosis of a fetal abnormality.<sup>2</sup> While reliable figures on abortion are unavailable,<sup>3</sup> there are at least 80,000 abortions in Australia each year,<sup>4</sup> and around a half of these abortions take place in Queensland and New South Wales.<sup>5</sup> Most abortions that take place in New

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<sup>1</sup> Smith A, Rissel C, Richters J, Grulich A and de Visser R, "Sex in Australia: Reproductive Experiences and Reproductive Health Among a Representative Sample of Women" (2003) 27 *Australia and New Zealand Journal of Public Health* 204; Healey J, "The Abortion Issue" (2005) 213 *Issues in Society* 41.

<sup>2</sup> Rowe H, Kirkman M, Hardiman E, Mallet S and Rosenthal D, "Considering Abortion: A Twelve Month Audit of Records of Women Contacting a Pregnancy Advisory Service" (2009) 190(2) *MJA* 69 at 71; Cannold L, "Reply to 'The Other Abortion Myth – The Failure of the Common Law'" (2009) 6(129) *Bioethical Enquiry* 129. See also Rosenthal A, Rowe D, Mallet H, Hardiman S and Kirkman A, *Understanding Women's Experiences of Unplanned Pregnancy and Abortion* (Key Centre for Women's Health in Society, Melbourne, 2009) p 17: in interviews carried out with 60 women in Victoria in 2009 about why they sought an abortion, researchers found reasons were often overlapping and contingent. Half of the interviewees in that study identified youth and immaturity as their reason for seeking an abortion.

<sup>3</sup> Chan A and Sage L, "Estimating Australia's Abortion Rates 1985-2003" (2005) 182 *MJA* 447.

<sup>4</sup> Pratt A, Biggs A and Buckmaster L, *How Many Abortions are There in Australia? A Discussion of Abortion Statistics, Their Limitations, and Options for Improved Statistical Collection* (Research Brief No 9, 2004-2005, Parliamentary Library, Parliament of Australia, Canberra, 2005); Chan and Sage, n 3 at 447.

<sup>5</sup> Family Planning Queensland, *Abortion Statistics, 2005*, [http://www.fpq.com.au/pdf/Abortion\\_statistics.pdf](http://www.fpq.com.au/pdf/Abortion_statistics.pdf) viewed 11 July 2012); Drabsch T, *Abortion and the Law in New South Wales* (NSW Parliamentary Library Research Service, Sydney, 2005) p 4.

South Wales and Queensland are publicly funded, in part, by Medicare.<sup>6</sup> Research suggests that around 80% of Australian people agree that a woman should have the right to terminate a pregnancy.<sup>7</sup> Health practitioners also support the availability of abortion. A study published in 2005 by Marie Stopes International considered general medical practitioners' attitudes to abortion and found that 82% of them believed that women should have access to abortion services.<sup>8</sup> Despite the high numbers of terminations taking place in New South Wales and Queensland and the prevailing attitudes of doctors and private citizens alike, the provision of abortion by doctors is a criminal offence in New South Wales and Queensland, although it is defensible in certain circumstances. The difficulty for doctors in providing abortion services in these two States lies in the fact that it is not always clear when abortion is, and is not, defensible and it has been argued that this lack of clarity may drive many doctors away from providing abortion services.<sup>9</sup> The uncertain legal status of abortion may also make the regulation of practice and the appropriate qualification of practitioners more difficult to achieve.<sup>10</sup> Research has suggested that the reduced availability of providers, along with problems associated with regulation, has implications for women's access to abortion services.<sup>11</sup> For example, at least partly as a result of the current legal uncertainty, there is virtually no access to abortion through the public hospital system in Queensland, save in certain exceptional circumstances.<sup>12</sup> While Australia-wide figures state that up to 34% of abortions are carried out by private practitioners,<sup>13</sup> in New South Wales and Queensland the figure is much higher.<sup>14</sup> In rural areas in Queensland access to health care providers who will provide abortion services is understood to be limited to some regional centres on Queensland's northern coast<sup>15</sup> and there are similar service limitations in rural areas in New South Wales.<sup>16</sup> Prior to reforms to abortion law in Victoria, research in that State found that one in five Victorian women reported that they had difficulty accessing abortion-related services;<sup>17</sup> this is likely to be exacerbated in Queensland and New South Wales where the populations are more dispersed.

<sup>6</sup> Petersen K, "Early Medical Abortion: Legal and Medical Developments in Australia" (2010) 193(1) MJA 26 at 26.

<sup>7</sup> Victorian Law Reform Commission (VLRC), *Law of Abortion: Final Report* (Victorian Law Reform Commission, Melbourne, 2008) p 58; Betts K, "Attitudes to Abortion: Australia and Queensland in the Twenty-First Century" (2009) 17(3) *People and Place* 25 at 36; Read C, "The Abortion Debate in Australia" (2006) 35(9) *Australian Family Physician* 699.

<sup>8</sup> Marie Stopes International, *General Practitioners: Attitudes to Abortion* (Published by Marie Stopes International and prepared by Quantum Market Research, 2005) p 5.

<sup>9</sup> Cannold, n 2 at 129.

<sup>10</sup> Duxbury A and Ward C, "The International Law Implications of Australian Abortion Law" (2000) 23(2) UNSWLJ 1 at 8.

<sup>11</sup> Office of Women's Policy (Qld), *Report of the Taskforce on Women and the Criminal Code* (Office for Women, Queensland Government, Brisbane, 2000) p 355, <http://www.communities.qld.gov.au/women/resources/resource-types/women-and-the-criminal-code> viewed 11 July 2012; Dixon N, *Abortion Law Reform: Overview of Current Issues* (Queensland Parliamentary Library, Research Publications and Resources, Brisbane, 2003) p 17.

<sup>12</sup> Portman C, "Royal Brisbane Women's Hospital, Therapeutic Abortion Provision" in *Abortion in Queensland* (forum notes), (Brisbane, 2008), <http://www.fpq.com.au/pdf/AbortionFinalReport.pdf> viewed 11 July 2012.

<sup>13</sup> Nickson C, Smith A and Shelley J, "Intention to Claim a Medicare Rebate Among Women Receiving Private Victorian Pregnancy Termination Services" (2004) 28 *Journal of Public Health* 120.

<sup>14</sup> Petersen P, "The Public Funding of Abortion Services: Comparative Developments in the United States and Australia" (1984) 33(1) *International and Comparative Law Quarterly* 158. Although it is noted that collecting statistics about abortion is very difficult, see Grayson N, Hargreaves J and Sullivan E, *Use of Routinely Collected National Data Sets for Reporting on Induced Abortion in Australia* (Australian Institute of Health and Wellbeing, Sydney, 2005) pp 4, 26, 27.

<sup>15</sup> See Children by Choice, *A List of Termination of Pregnancy (Abortion) Clinics in Queensland*, <http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-queensland> viewed 11 July 2012.

<sup>16</sup> See Abortion Providers' Federation of Australasia, *Member Organisations NSW*, <http://www.apfa.org.au/member-organisations.html> viewed 11 July 2012.

<sup>17</sup> This research was conducted prior to 2008 Victorian reforms when the law was similar to the current law in Queensland: see Rosenthal et al, n 2, p 13.

Abortion law in New South Wales and Queensland is a neglected area for law reform.<sup>18</sup> Based on the English *Offences Against the Person Act 1861* (UK),<sup>19</sup> the legislative framework has not been properly addressed in New South Wales since 1900<sup>20</sup> or in Queensland since 1899.<sup>21</sup> While case law has provided some guidance to the interpretation of this anachronistic legislation in a limited way, mainly over 30 years ago in the 1970s and 1980s,<sup>22</sup> the core elements of abortion law outlined in New South Wales and Queensland legislation are over 100 years old. The research presented in this article contributes to our understanding of how the apparent illegality of most abortions in New South Wales and Queensland can be reconciled with the high numbers of abortions that are carried out in these States.<sup>23</sup> Drawing on qualitative interviews with 22 medical doctors who provide abortion services,<sup>24</sup> this article explores how the law of abortion in New South Wales and Queensland is understood and interpreted by doctors who regularly perform abortions. While doctors in the study were asked to consider 10 different scenarios, this article examines doctors' responses to two of the most common scenarios presented. Doctors were asked to consider a scenario where a woman seeks a first trimester abortion because of social stress and a scenario where a woman seeks a second trimester abortion because the fetus has been diagnosed with a common, non-life-threatening abnormality.<sup>25</sup> The article considers how doctors interpret the phrase "preservation of the mother's life" in these contexts<sup>26</sup> and doctors' personal reflections about how the law affects their practice. The next section of the article briefly overviews the law on abortion in New South Wales and Queensland. This is followed by an explanation of the method used in this study and a consideration of some of the study's findings. The concluding section attempts to reconcile the law and the medical practice of abortion in these two States.

## NEW SOUTH WALES AND QUEENSLAND ABORTION LAW

The law on abortion in New South Wales and Queensland has been the subject of significant academic and media attention.<sup>27</sup> Until 2008, when Victorian law was significantly reformed,<sup>28</sup> the statutory provisions in Victoria, New South Wales and Queensland were very similar and the key provisions in the criminal statutes in these States were modelled on s 58 of the *Offences Against the Person Act*

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<sup>18</sup> Significant law reform has taken place in most other Australian jurisdictions in the past 20 years: see the overview in VLRC, n 7, Ch 2; *Abortion Law Reform Act 2008* (Vic).

<sup>19</sup> Drabsch, n 5, pp 14-15.

<sup>20</sup> See *Crimes Act 1900* (NSW), ss 82, 83, 84.

<sup>21</sup> See *Criminal Code 1899* (Qld), ss 224, 225, 226.

<sup>22</sup> *R v Wald* (1971) 3 DCR (NSW) 25; *Re Bayliss* (unrep, Sup Ct, Qld, OS No 376 of 1985, 24 May 1985); *R v Bayliss*; *R v Cullen* (1986) 9 Qld Lawyer Reps 8.

<sup>23</sup> For an examination of the history of abortion law and the relationship between law and practice see de Costa C, "Abortion Law, Abortion Realities" (2008) 15 JCU L Rev 6 at 9.

<sup>24</sup> Doctors identified themselves as follows: four were maternal fetal medicine specialists, four were sexual health physicians, 10 were abortion providers in private clinics, three were specialist obstetricians and gynaecologists and one worked in family planning.

<sup>25</sup> de Crespigny L, Chervenak F, Coquel P, Ville Y and McCullough L, "Practicing Prenatal Diagnosis Within the Law" (2004) 24(5) *Ultrasound in Obstetrics & Gynecology* 489.

<sup>26</sup> Beaumont M, "Abortion Law Needs Change" (2008) 16(1) *Australian Nursing Journal* 20.

<sup>27</sup> Douglas H, "Abortion Reform: A State Crime or a Woman's Right to Choose?" (2009) 33 *Crim LJ* 74; Pesce A, "Abortion Laws in Australia: Time for Consistency" (2006) 29 *UNSWLJ* 224; de Crespigny L and Savulescu J, "Abortion: Time to Clarify Australia's Confusing Laws" (2004) 181(4) *MJA* 201; Beaumont, n 26; Bird S, "Abortion and the Law in Australia" (2006) 35(11) *Australian Family Physician* 905; Betts, n 7; de Costa C, *Never, Ever Again: Why Australian Abortion Law Needs Reform* (Boolarong Press, Salisbury, 2010); Fisk N and Douglas H, "Obsolete Laws Fail to Reflect the Community's Position on Abortion", *Courier-Mail* (6 December 2011) p 5.

<sup>28</sup> Since 2008 abortion in Victoria is essentially a matter governed by civil rather than criminal law. See generally *Abortion Law Reform Act 2008* (Vic) which was enacted as a response to the VLRC report, n 7. For a good overview of the process of reform see Morgan J, "Abortion Law Reform: The Importance of Democratic Change" (2012) 35(1) *UNSWLJ* 142.

1861 (UK).<sup>29</sup> Victoria's pre-reform legislation, s 65 of the *Crimes Act 1958* (Vic), stated:

Whosoever ... with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of a felony, and shall be liable to imprisonment for a term of not more than fifteen years.

In 1969, in *R v Davidson* [1969] VR 667, a Victorian doctor, Kenneth Davidson, was prosecuted in Victoria's Supreme Court for abortion-related offences. In this case Menhennit J considered the role of the word "unlawfully" in the Victorian offence provision. He found (at 671) that the word suggested that, in some circumstances, abortions might be lawful. Drawing on English case law that had considered abortion<sup>30</sup> and cases that had examined the defence of necessity,<sup>31</sup> Menhennit J directed the jury (at 672) that:

For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not merely the normal dangers of pregnancy and childbirth) which the continuation of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.

Davidson was found not guilty of five charges relating to providing abortions. This direction has become known as the *Menhennit* ruling and according to this ruling, women's physical and mental health could be considered when determining whether an abortion was necessary to preserve her life. Two years after Menhennit J's ruling in Victoria, the same issue was tested in the New South Wales District Court in *R v Wald* (1971) 3 DCR (NSW) 25 when five people<sup>32</sup> were charged with unlawfully performing, or assisting to perform, pregnancy terminations. Drawing on the *Menhennit* ruling, Levine DCJ commented (at 29):

In my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her mental or physical health. It may be that an honest belief be held that the woman's mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy.<sup>33</sup>

The five people were acquitted. Levine DCJ appeared to expand Menhennit J's ruling, finding that social and economic factors were also relevant in a doctor's consideration of whether an abortion is lawful in New South Wales. Levine DCJ's judgment also suggested that the assessment about the woman's health should be made in consideration of the "whole" of the pregnancy, and relevant dangers may be predicted rather than actual.<sup>34</sup>

In Queensland an attempt to carry out, assist with or obtain an abortion may be a criminal

<sup>29</sup> Mendelson D, "Decriminalisation of Abortion Performed by Qualified Health Practitioners Under the Abortion Law Reform Act 2008 (Vic)" in "Legal Issues" (2012) 19 JLM 651 at 654; Rankin M, "Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion" (2001) 27 Mon LR 229.

<sup>30</sup> Menhennit J specifically referred to *R v Bourne* [1939] 1 KB 687 and to Glanville Williams' discussion of the case. For a discussion of this case see de Costa, n 23 at 10-12; Haigh G, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, Melbourne, 2008) pp 135-136.

<sup>31</sup> See *R v MacKay* [1957] VR 560.

<sup>32</sup> Those charged included the surgeon, the anaesthetist, the orderly, the person who referred the patient and the person who owned the premises.

<sup>33</sup> See also *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47, the first appellate-level decision that effectively endorsed *R v Wald* (1971) 3 DCR (NSW) 25. *R v Wald* was also endorsed in *R v Sood* [2006] NSWSC 1141.

<sup>34</sup> In the case of *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47, CES sued for damages for the loss of opportunity to terminate the pregnancy; her pregnancy had remained undiagnosed until it was too late to safely terminate it. The trial judge dismissed her claim, holding that CES was not entitled to damages because her case depended on a claim that she had lost an opportunity to do something he determined was illegal (ie abortion). On appeal, Kirby ACJ and Priestley JA found that the abortion would have been lawful in the circumstances. Meagher J, dissenting, determined the abortion would have been illegal. See also Graycar R and Morgan J, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law – A Note on *CES v Superclinics*" (1996) 18 Syd LR 323.

offence.<sup>35</sup> However, s 282(1) of the *Criminal Code* (Qld) states:

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 the circumstances of the case.

The Queensland Parliament amended s 282 in 2009 in an attempt to ensure that medical terminations were treated in the same way as abortion carried out via surgical operation. The italicised text in the provision above identifies the 2009 additions to the provision. The Explanatory Notes for the text in the expanded provision state that the reform “does not extend the set of circumstances in which a treatment, including a termination, may be lawfully administered”<sup>36</sup> so cases decided before 2009 remain relevant. The application of s 282 of the *Criminal Code* was considered in *R v Bayliss; R v Cullen* (1986) 9 Qld Lawyer Reps 8.<sup>37</sup> In 1986, Dr Peter Bayliss and an anaesthetist, Dawn Cullen, were charged with attempting to procure an abortion, pursuant to s 224 of the *Criminal Code*. They pleaded not guilty in the District Court, on the basis that the abortion was necessary for the preservation of the mother's life.<sup>38</sup> McGuire DCJ found that the *Menhennit* ruling represented the law of Queensland (at 45), and although he was well aware of Levine DCJ's decision in *R v Wald* (1971) 3 DCR (NSW) 25, McGuire DCJ decided not to follow the expanded test (at 26-27).<sup>39</sup> He was also very clear that in his view (at 45) there was no legal justification for abortion on demand.

Subsequent New South Wales and Queensland cases involving abortion have not clarified the limits of these tests in any significant way.<sup>40</sup> In *Queensland v B* [2008] 2 Qd R 562 (at [14], [23]) the court was asked to consider access to abortion for a 12-year-old girl who was 18 weeks pregnant. The court concluded (at [21]) that in the specific case doctors could rely on the duty of a person who has care of a child under 16 to “avoid danger to the child's life, health or safety” which is specified in s 286 of the *Criminal Code*. Section 282 of the *Criminal Code* was not considered.

In 2010 the prosecution of Tegan Leach and her partner Sergie Brennan for abortion-related offences resulted in a jury acquitting the pair of the charges.<sup>41</sup> Of interest in the case was Everson J's direction to the jury on the meaning of the term “noxious” in the relevant provisions. He directed 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 Leach and not to any foetus which may or may not have been present at the time she took the drugs”.<sup>42</sup> Leach had taken the drugs Mifepristone and Misoprostol

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<sup>35</sup> See *Criminal Code* (Qld), ss 224, 225, 226.

<sup>36</sup> *Criminal Code Medical Treatment Amendment Bill* (Queensland Government, 2009), Explanatory Notes, p 2.

<sup>37</sup> For a detailed discussion of this case see de Costa, n 27, pp 81-92.

<sup>38</sup> Pursuant to the now reformulated s 282 of the *Criminal Code* (Qld).

<sup>39</sup> Rankin M, “Contemporary Australian Abortion Law: The Description of a Crime and the Negligence of a Woman's Right to Abortion” (2001) 27(2) Mon LR 229.

<sup>40</sup> In New South Wales see *R v Sood* [2006] NSWSC 1141 where Sood was found guilty of abortion-related offences (although not guilty of manslaughter which was also charged). At the time of the offence Sood was a doctor and assisted a woman 22-24 weeks pregnant to have a medical termination. After taking the medications prescribed by Sood, the woman subsequently went into labour and a baby was born at the woman's home. Both the woman and the baby were taken to hospital and the baby was subsequently pronounced dead at the hospital. The sentencing judge, Simpson J, explained that the “gist of Ms Sood's offences was to take steps towards the termination of the pregnancy in the absence of a belief that it was necessary to do so” (at [26]). Sood was convicted and ordered to enter a good behaviour bond for two years.

<sup>41</sup> Pursuant to ss 225 and 226 of the *Criminal Code* (Qld); *R v Brennan and Leach* (unrep, Dist Ct, Qld, 12-14 October 2010, Everson J). See Petersen K, “Abortion Laws and Medical Developments: A Medico-legal Anomaly in Queensland” (2011) 18 JLM 594 for an overview of this case.

<sup>42</sup> *R v Brennan and Leach* (unrep, Dist Ct, Qld, 12-14 October 2010, Everson J), summing up, p 4.

which, according to expert testimony called by the Crown,<sup>43</sup> were not noxious to a (pregnant) woman. As a result, some claimed that doctors performing medical abortions in Queensland could be confident that medical (as opposed to surgical) termination was allowed under Queensland law. However, many doctors were concerned that the fact that Leach and Brennan had been prosecuted at all suggested that the legal situation continued to be very uncertain<sup>44</sup> and a number of doctors working in public hospitals in Queensland withdrew their abortion services for a period of time in 2010.<sup>45</sup> The main difference between the law regarding abortion in New South Wales and the law in Queensland is centred on the question of whether abortions are defensible in Queensland in cases where the woman seeking an abortion claims that economic and social grounds underlay her request.

Since the mid-20th century when the key criminal case law precedents<sup>46</sup> on abortion were decided in New South Wales and Queensland, there have been great improvements in the technologies available for identifying birth abnormalities and many of these tests are now routinely offered to pregnant women.<sup>47</sup> While information provided by screening may help parents prepare for potential learning and behavioural difficulties,<sup>48</sup> a significant proportion of pregnancies are terminated because of the detection of a fetal chromosomal or structural abnormality.<sup>49</sup> In the United Kingdom it is estimated that between 1 and 2% cent of abortions take place for this reason.<sup>50</sup> In 2008 de Crespigny and Savulescu reported that over 80% of pregnant women in Victoria were routinely screened for chromosomal abnormalities, primarily Down syndrome,<sup>51</sup> and that in those cases where Down syndrome was detected, 95% of women chose to terminate the pregnancy.<sup>52</sup> A United Kingdom study published in 2008 found that the prevalence of pregnancies affected by Down syndrome increased significantly between 1985 and 2004; the authors speculated that this was primarily due to the increasing numbers of older women becoming pregnant. However, because of the termination of many of these pregnancies, there was no overall change in the number of live births affected by Down syndrome.<sup>53</sup> Down syndrome is one of the most common chromosomal fetal abnormalities currently detected antenatally. However, many of those born with Down syndrome go on to live productive and independent lives.<sup>54</sup> In New South Wales and Queensland the criminal law on abortion has nothing to

<sup>43</sup> Dr Nicholas Fisk, a Brisbane fetal-maternal medical specialist and Crown expert witness, gave evidence to this effect: *R v Brennan and Leach* (unrep, Dist Ct, Qld, 12-14 October 2010, Everson J), trial transcript day 2, pp 2-4.

<sup>44</sup> De Costa C, "Cairns Abortion Trial: Guarded Optimism for Reform Process" *Crikey* (15 October 2010), <http://www.crikey.com.au/2010/10/15/cairns-abortion-trial-guarded-optimism-for-reform-process> viewed 11 July 2012.

<sup>45</sup> Andersen B, "Qld Women Forced Interstate for Abortions", *ABC News Online* (8 September 2009), <http://www.abc.net.au/news/2009-08-31/qld-women-forced-interstate-for-abortions/1412338> viewed 11 July 2012; O'Shea E, "Making Law and Making Social Change", *Right Now: Human Rights in Australia* (10 March 2011), <http://rightnow.org.au/writing-cat/feature/making-law-and-making-social-change-the-case-of-abortion-law-reform> viewed 11 July 2012.

<sup>46</sup> *R v Wald* (1971) 3 DCR (NSW) 25; *R v Bayliss*; *R v Cullen* (1986) 9 Qld Lawyer Reps 8.

<sup>47</sup> Loane M et al, "Twenty-year Trends in the Prevalence of Down Syndrome and Other Trisomies in Europe: Impact of Maternal Age and Prenatal Screening" (2013) 21 *European Journal of Human Genetics* 27.

<sup>48</sup> Boyd P, Loane M, Garne E, Khoshnood B and Dolk H, "Sex Chromosome Trisomies in Europe: Prevalence, Prenatal Detection and Outcome of Pregnancy" (2011) 19 *European Journal of Human Genetics* 231 at 234.

<sup>49</sup> Boyd et al, n 48; Mangione R, Fries N et al; "Outcome of Fetuses with Malformations Discovered before 14 Weeks. Where the Discovery is Revealed by Echography During the First Trimester, Is It Responsible for the Voluntary Termination of the Pregnancy? Comparison Before and After July 2001" (2008) 37(2) *Journal Gynecol Obstet Biol Reprod* 154, reporting on a study involving 336 fetuses with malformations, 75% resulted in a medical termination of the pregnancy.

<sup>50</sup> Templeton A and Grimes D, "Clinical Practice: A Request for Abortion" (2011) 365(23) *NEJM* 2198 at 2198.

<sup>51</sup> Down syndrome is a developmental disorder caused by an extra copy of chromosome 21 (which is why the disorder is also called "trisomy 21").

<sup>52</sup> de Crespigny L and Savulescu J, "Pregnant Women with Fetal Abnormalities: The Forgotten People in the Abortion Debate" (2008) 188(2) *MJA* 100 at 100.

<sup>53</sup> Irving C, Basu A, Richmond S et al, "Twenty-year Trends in the Prevalence and Survival of Down Syndrome" (2008) 16 *European Journal of Human Genetics* 1336 at 1338-1339.

<sup>54</sup> Irving, Basu, Richmond et al, n 53.

say about the state of the fetus,<sup>55</sup> as the test for the defensibility to abortion charges is focused on the preservation of the mother's life. The lawfulness of abortion in response to fetal abnormality was considered in the 1995 Queensland case of *Veivers v Connolly* [1995] 2 Qd R 326. A child was born with congenital rubella embryopathy and was profoundly disabled. The plaintiff claimed that her doctor had been negligent in not carrying out certain blood tests. The plaintiff argued that had she had the test to determine whether she had rubella, her doctor would have advised her about the possibility of termination which she may have pursued. Justice de Jersey found for the plaintiff. He reasoned (at 329) that:

[C]ontinuing with a pregnancy which would so likely result in the birth of a severely affected rubella baby, entailed a serious danger to the first plaintiff's mental health, albeit a danger which would not fully afflict her in a practical sense until after the birth.<sup>56</sup>

Justice de Jersey's comments emphasised the connection in the specific case between the diagnosis of fetal abnormality and the danger, or potential danger, to the pregnant women's mental health. Thus the case law, limited though it is, suggests that diagnosis of a fetal abnormality alone will be insufficient to justify abortion.

Neither the New South Wales nor the Queensland legislation says anything about when, in terms of the gestational age of the fetus, it may be lawful for a doctor to carry out a termination. The case law is also unclear. McGuire DCJ did address the issue in *R v Bayliss; R v Cullen* (1986) 9 Qld Lawyer Reps 8; he observed (at 11) that at common law an abortion that took place before quickening, when movement of the fetus can be felt – from around 14-18 weeks gestation – was not an indictable offence. Later in the case McGuire DCJ seemed to suggest that gestation before 20 weeks was a kind of limit point. After discussing child destruction provisions he commented (at 40): “[i]n the present case we are concerned with an abortion performed well before the viability of the unborn child, taking viability to arise not before the end of the twentieth week of pregnancy.” Like other aspects of abortion, the relationship between the gestation period and legality of abortion remains unclear in New South Wales and Queensland.<sup>57</sup>

## THE NEW SOUTH WALES AND QUEENSLAND STUDY

### Methodology

The jurisdictions of New South Wales and Queensland were selected for this study because, while there has been significant reform to abortion law in all other Australian States, the law in New South Wales and Queensland continues to reflect 19th century law. This research uses qualitative semi-structured interviews to investigate the current understanding of doctors who provide abortion services to women. Doctors were approached on the basis that they were known to provide abortion services to women in New South Wales and Queensland and thus will have considered the law on abortion and will have given thought to a range of circumstances where a request for an abortion may be made.<sup>58</sup> Several doctors were initially identified; however, initial subjects were also asked to identify appropriate referrals to generate additional subjects.<sup>59</sup> Ultimately 15 Queensland doctors and seven New South Wales doctors were asked to comment on 10 scenarios where women may request

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<sup>55</sup> Compare with South Australian law where serious fetal abnormality provides a ground for termination: see *Criminal Law Consolidation Act 1935* (SA), s 82A(1)(b); similarly in the Northern Territory see *Medical Services Act* (NT), s 11(1).

<sup>56</sup> The woman was awarded money for the extra costs that would be incurred because of the child's disabilities but not damages for wrongful birth.

<sup>57</sup> Note extra-uterine viability is not generally possible until 23-24 weeks gestation; however, what does occur at 20 weeks is the change from the pregnancy being considered a miscarriage to it to be defined as a (still)birth. See *Births, Deaths and Marriages Registration Act 2003* (Qld), Sch 2 definition of “child” includes stillborn child and “stillborn child” is defined as a child who has been gestated for 20 weeks or more. See also *Births, Deaths and Marriages Act 1995* (NSW), s 4.

<sup>58</sup> Twenty-one doctors provided abortion as part of their normal practice and one was a family planning physician involved in abortion referral.

<sup>59</sup> A technique often referred to as “snowball sampling”: Salganik M and Heckathorn D, “Sampling and Estimation in Hidden Populations Using Respondent-driven Sampling” (2004) 34 *Sociological Methodology* 193. Ethical approval for this study was obtained from the Ethics Committees at the University of Queensland, James Cook University and The University of Sydney.

an abortion. The scenarios were based on the clinical experiences of two of the researchers (Black and de Costa). Interviewees were asked about the legality of abortion in the contexts presented in the scenarios. Interviews lasted for approximately 45 minutes and were recorded and transcribed. The qualitative data yielded from the transcripts are discussed below. The limitations of this approach must be conceded at the beginning. The findings reported here are based on accounts of doctors who currently provide abortions to women in New South Wales and Queensland. While their views cannot be understood as a literal description of the positions or approach of all doctors in these States,<sup>60</sup> the sample is highly representative of doctors carrying out abortions in these two States. It is beyond the scope of this article to discuss all of the scenarios that doctors were asked to address. For the purposes of this article, two of the most common scenarios are considered. The scenarios are reproduced in the next sections and comments from the interview transcripts are then presented. This section ends with some general comments made by some of the interviewees concerning their views about the broader effects of the current legal situation in New South Wales and Queensland.

### Abortion in the first trimester: Scenario A

Doctors were asked to comment on the following scenario:

A woman aged 19, pregnant for the first time, attends an abortion service requesting abortion at 6 weeks gestation. She is a law student and feels unable to cope with pregnancy. She is single and has no continuing relationship with the man responsible for the pregnancy. She has no health problems either physical or psychological and no major financial problems.<sup>61</sup>

In response to this scenario one interviewee commented: “[S]he’s got no leg to stand on. End of story.”<sup>62</sup> However, all of the other interviewees agreed that the woman in this scenario would be able to obtain an abortion in New South Wales and Queensland but they had different reasons for explaining why and, despite agreeing that they would provide an abortion, not all agreed that it would be defensible pursuant to the law.

Some of the doctors interviewed emphasised that the central question for them was whether the woman wanted a termination. These doctors saw access to termination as a right for those women who requested it, regardless of the law, and as doctors they saw it as their role to deliver the service. Their position was focused on protecting women’s autonomy. For example:

Well once again if she requests it she should be able to get it from my perspective. Legally it’s more tricky because she’s not in any distress. But if she couldn’t access it she probably would be distressed and then she could access it.<sup>63</sup>

Once again I would interpret the law as saying that she does not want to continue this pregnancy. She’s clearly able to make that decision and I would offer her the choice that would suit her most ... For me really the threshold where I work is if that’s what she requests ... women are quite able to decide what is best for them and their families ... and if they feel they can’t continue, that’s to their benefit and to the benefit of their mental health.<sup>64</sup>

One doctor justified provision of abortion in this scenario on the basis that women who sought an abortion were inevitably not of sound mind. This doctor said:

[W]omen don’t approach you and ask for a termination of pregnancy in completely sound mind. I don’t think I’ve ever really done a termination of pregnancy for someone who’s not ... affected by that process.<sup>65</sup>

This doctor’s comment suggests that once women engage with the process of obtaining an abortion, their mental health is inevitably affected. Several doctors based in New South Wales believed that the context in which abortions are legal in New South Wales is wide enough to cover almost all

<sup>60</sup> Dingwell R, “Accounts, Interviews and Observations” in Miller G and Dingwell R (eds), *Context and Method in Qualitative Research* (Sage, Thousand Oaks, 1997) pp 52, 54.

<sup>61</sup> This was originally Scenario No 8 of 10 in the scenarios presented to interviewees.

<sup>62</sup> Queensland Interview No 15, p 13.

<sup>63</sup> Queensland Interview No 7, p 19.

<sup>64</sup> Queensland Interview No 8, p 7.

<sup>65</sup> New South Wales Interview No 1, p 11.

situations where there is a request for a termination. For example, one stated:

[B]ecause of all of the different categories that you can fit it into as to social, economic or physical harm to the woman then I think you can always – if a woman wants to have a termination then you can cover the legality of it through one of those avenues.<sup>66</sup>

In contrast, a Queensland doctor specifically commented that economic hardship was not relevant in assessing whether abortion could be justified in Queensland, so reverted back to the question of mental health:

So the law in Queensland in relation to abortion doesn't allow you to take in financial circumstances in relation to, or economic hardship as a factor in the reason for a lawful medical termination ... But again, it's up to the doctor to determine whether he or she believes that the pregnancy poses harm to her mental health.<sup>67</sup>

Some doctors suggested that an abortion would be defensible in this scenario because the pregnant woman had expressed an inability to cope. For example, one doctor said: “[I]t’s a very good indication for an abortion for a patient like this who obviously can’t cope ... yes not coping easily.”<sup>68</sup> Another doctor explained that the reference to being unable to cope indicated “psychological distress” and that in his view this “met the criteria”<sup>69</sup> for a lawful abortion. Some interviewees focused on potential future problems, suggesting that even though the woman in this scenario did not think there were any physical, psychological or economic problems associated with her current situation, she may develop health problems in the future. One doctor explained: “[S]he may not have any pre-existing mental health problem but she might develop one if she continues on with her pregnancy.”<sup>70</sup> Another interviewee commented: “[S]he would have [financial problems] if she continued the pregnancy ... As a single mother. You’re protecting her psychological health in the future.”<sup>71</sup> Such an approach, while concerned with supporting a woman’s autonomy, ironically relies on the doctor behaving protectively in order to devise legal reasons to justify the request for abortion.

A number of doctors found that, despite the views of the woman in this scenario that she believed she was not physically or mentally at risk, they could nevertheless construct a case for lawful abortion. For example, a New South Wales doctor commented, “[L]ook ... it would be nice to see the laws changed but you can get around them because of ... basically ... your wording.”<sup>72</sup> Similarly, a doctor in Queensland commented:

By the wording of my medical opinion on her case notes, I can make it legal ... the way I see it, the way I work, that her mental health, not just now but in the future. I mean her whole career is at stake. She doesn't want the child and no, I would have no qualms putting that she – her mental health will be jeopardised if she were to continue with that pregnancy.<sup>73</sup>

While many doctors seemed to accept that part of their role was to construct an appropriate narrative to justify a termination, many were frustrated that this was required. A New South Wales doctor commented on the need to establish a case of mental illness to justify abortion:

[We] manufacture mental illness out of what is frequently distress, but not mental illness ... There has to be a threat mental health-wise. There has to be – I think under the law in NSW the concern that it might amount to more than distress in the long run ... This is a thing that concerns lots of doctors

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<sup>66</sup> New South Wales Interview No 3, p 4 (general comment made – this doctor said that an abortion could be performed in response to all the scenarios presented); similarly see also New South Wales Interview No 4, p 4 (general comment made – this doctor said that an abortion could be performed in response to all the scenarios presented); see also New South Wales Interview No 7, p 9.

<sup>67</sup> Queensland Interview No 17, p 22; see also Queensland Interview No 13, p 13.

<sup>68</sup> Queensland Interview No 5, pp 9-10; see also New South Wales Interview No 8, p 16.

<sup>69</sup> Queensland Interview No 6, p 11.

<sup>70</sup> Queensland Interview No 3, p 8.

<sup>71</sup> Queensland Interview No 4, p 16.

<sup>72</sup> New South Wales Interview No 8, p 11 (general response to law question).

<sup>73</sup> Queensland Interview No 9, p 19. See also Queensland Interview No 10, p 9.

working in NSW. The legal position is quite vague here, and we would like to have much clearer laws – something along the lines of what they now have in Victoria.<sup>74</sup>

Several medical practitioners accepted that it would be possible for the woman to obtain an abortion in this scenario but at the same time suggested that the termination of pregnancy was not legal.<sup>75</sup> One doctor observed that even though abortion was a common procedure in response to similar circumstances, the abortion could not take place in a public hospital in Queensland and criminal prosecution was a real risk:

Well, she can go down to an abortion clinic and get sorted out. But she'd only get it done there ... It's not legal. Even though there's 14,000 or whatever it is done in Queensland every year none of it's legal, I don't think. I don't think that you could be 100 per cent sure that in – if we got an ultra, right wing, rampant Catholic government in or something, that they wouldn't start saying, right we're going to knock off some of these people. I don't think you could say that.<sup>76</sup>

While on balance more New South Wales doctors than Queensland doctors believed that socioeconomic considerations would justify abortion, generally there were not significant differences between the approaches of doctors working in the two jurisdictions. An interesting consideration, as suggested by the earlier quotation, is whether termination of pregnancy in this scenario would be carried out in a public hospital or a private clinic. Doctors working in Queensland public hospitals observed that the termination requested in this scenario would not be performed in a public hospital but would routinely be performed in a private clinic. For example, a doctor working in a Queensland public hospital commented:

This is what we consider to be a social decision and we are going to suggest that she presents herself to a private clinic where she will be attended to much quicker with minimal sort of assessment. Chances are that any assessment that we make in a public hospital is likely to result in a no ... it wouldn't occur in a public hospital because [public hospitals] have identified themselves as being more of a tertiary service ... If the assessment is that this person's future is ... affected significantly by being pregnant right now, then there's no reason it wouldn't be considered lawful from my perspective.<sup>77</sup>

The comment identifies a distinction between “social” abortions and “tertiary” abortions. According to this interviewee, while the latter may be able to take place in a public hospital, social abortions would generally take place in private clinics in Queensland. A similar kind of distinction seems to be made in New South Wales.<sup>78</sup> However, despite the distinction between “social” and “tertiary”, the legal test would still need to be satisfied and the distinction between social and tertiary abortion is unclear.

### **Fetal abnormality and second trimester gestation: Scenario B**

Doctors were asked to comment on the following scenario:

A woman aged 38, pregnant for the second time, is referred by her general practitioner to a large public women's hospital with a request for abortion at 14 weeks gestation. A diagnosis of Down syndrome has been made, following first trimester screening with abnormal results and chorionic villus biopsy. The pregnancy was unplanned although she had intended to continue it if early testing had produced normal results. She is requesting tubal ligation following the abortion as she is certain she wants no further pregnancies. She is a teacher; she has one child aged five and is in good physical health; she denies that the diagnosis poses any threat to her mental health.<sup>79</sup>

This scenario is significantly different to scenario A for at least two reasons. The first is that in this scenario a termination is sought on the basis of fetal abnormality, in this case Down syndrome, and the second is that the request for abortion is being made in the second trimester at 14 weeks gestation

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<sup>74</sup> New South Wales Interview No 4, p 4 (general overview – yes to all scenarios).

<sup>75</sup> For example, Queensland Interview No 14, p 13.

<sup>76</sup> Queensland Interview No 11, p 14; see also Queensland Interview No 2, pp 12-13.

<sup>77</sup> Queensland Interview No 12, p 9.

<sup>78</sup> New South Wales Interview No 4, p 4; New South Wales Interview No 7, p 7.

<sup>79</sup> This scenario was originally Scenario No 3 of 10 in the scenarios presented to doctors.

when it is possible “quickening” may have already been felt by the pregnant woman. Despite these two differences to the first scenario, doctors’ responses overall were similar to their responses to scenario A. Most of the doctors believed that the woman would be able to obtain an abortion in both New South Wales and Queensland but, again, they had different views about the justification for abortion and whether the termination could take place in a public hospital. One doctor responding to this scenario pointed out that some women have certain expectations in relation to obtaining a termination after routine tests reveal a fetal abnormality:

Obviously we’re referring more and more for prenatal diagnosis and we just have to be very clear about what happens in these situations ... But in terms of whether that’s lawful, then yes. I think there is an expectation that it could occur in a lawful situation – that you could undertake an abortion in that situation ... It’s a highly distressing situation.<sup>80</sup>

However, despite the fact that routine fetal tests may give rise to women expecting that an abortion may be available if desired, doctors responding to this scenario were generally of the view that fetal abnormality alone was not a sufficient ground to justify abortion. One doctor from New South Wales stated this explicitly: “[I]f you’re telling me she’s requesting a termination of her pregnancy on fetal grounds and there are no issues to maternal health, it’s not legal.”<sup>81</sup> Another New South Wales doctor explained:

Well the law is you can’t have it just because of fetal abnormalities. You’ve got to say this is going to distress me to raise a child with fetal abnormalities ... That’s all I need ... things like how it’s going to impact on her family, which is going to distress her. Like there isn’t enough room, you know we don’t have enough money, all that stuff ... she doesn’t have to be suicidal.<sup>82</sup>

However, similar to responses to scenario A, a number of doctors saw it as their duty to provide an abortion simply because it was requested. For example, one practitioner stated: “[M]y overriding belief is that if she’s seeking termination for that reason that she should [get it].”<sup>83</sup> Another described the provision of abortion in this context as part of the medical obligation to provide holistic care: “I don’t find it comfortable or pleasant in any way, but I feel it’s an obligation. It’s a part of what we do. It’s the whole of women’s care.”<sup>84</sup>

A New South Wales doctor emphasised the flexibility of the legal test in New South Wales. He commented:

I understand that legally women are not to have on-call abortions, that we have this – but we do have this flexible situation ... I feel it is not my place to judge whether what they’re telling me is correct or not.<sup>85</sup>

In contrast, a Queensland doctor found the scenario fell short of disclosing evidence to justify a legal abortion. This doctor observed:

Well it’s illegal if it’s not done to preserve her life... The law says to preserve the mother’s life ... If you look at the intention of those words in 1860 it certainly didn’t include social and psychological and economic sequelae.<sup>86</sup>

Two other Queensland doctors suggested that sufficient concerns about mental health were raised in the scenario and this could justify a pregnancy termination even though the concerns fell far short

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<sup>80</sup> New South Wales Interview No 4, p 5.

<sup>81</sup> New South Wales Interview No 1, p 4.

<sup>82</sup> New South Wales Interview No 7, pp 4-5.

<sup>83</sup> Queensland Interview No 2, p 4.

<sup>84</sup> Queensland Interview No 2, p 6.

<sup>85</sup> New South Wales Interview No 2, p 12.

<sup>86</sup> Queensland Interview No 14, p 3.

of presenting a “serious danger”<sup>87</sup> to the woman’s mental health. One Queensland doctor commented that “maternal anxiety is a perfectly good risk factor irrespective of mental health”,<sup>88</sup> while another doctor from Queensland relied on a concept of “psychosocial distress” to justify abortion in this context:

[P]sychosocial distress, it can be pretty broadly interpreted ... I think in the law it does have physical, it does have mental, but since the '80s I believe they put psychosocial in and that's what we're all relying on and that's what the majority of abortions in Queensland would be done under, psychosocial.<sup>89</sup>

One Queensland doctor was of the view that a prediction of future negative mental health of the woman could be a relevant consideration in determining the legality of the abortion:

It's my decision. I thought her mental health – so mental health is such a broad term. Even though ... this woman in the case might feel that her mental health is fine. That's not to say that if she went ahead with the pregnancy and gave birth to a Down syndrome child at the age of 38. That might be when her mental health gave out on her.<sup>90</sup>

A different approach was suggested by a New South Wales doctor who found that the existing child’s health could also be considered:

[S]he is eligible to have an abortion. She may not consider that there will be an emotional impact on her but she may be considering the possibility of a financial impact. One of the things that we're talking to them about is not just her emotional – the question of her emotion but also the impact that it's likely to have on ... the existing child in that family.<sup>91</sup>

Similar to responses to scenario A, some doctors suggested that women could be coached to say the requisite words so that the requirements for a lawful abortion could be satisfied. For example, one doctor explained:

I believe that given the right scenario and environment and coaching, a woman can always be induced to say the words that are required to make the abortion legal on Levine and Menhennit grounds. Which is basically what Freddie McGuire said we should follow ... So essentially any woman, if they're told that you've got to say this, will say it and that's sufficient grounds to make it legal to have an abortion.<sup>92</sup>

Another doctor took a similar approach but expressed frustration with the scenario presented because it suggested that the woman seeking a termination had been given an opportunity to deny that her mental health would be affected by a continuation of the pregnancy. This doctor said:

Why would she deny that? Who's asked her that specific question? I wouldn't do that ... But that's where we have to use terminology on our paperwork to say that her mental health would be affected ... we don't pose the question. [We ask them] why are you not going ahead with this pregnancy? ... So then you paraphrase that for them and you put it on the paper: “Their mental health would be in jeopardy if she was to continue with this pregnancy.” You put the words in their mouth, or you put the words on the paper. But because ... of the wording of the Code, I feel that in Queensland if ever my files were pulled and I was taken to court to defend, I need to have on her file that I felt her mental health [was a problem].<sup>93</sup>

Another doctor referred to the specific forms that had been developed within her practice to deal with the requirements. She commented:

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<sup>87</sup> *R v Bayliss; R v Cullen* (1986) 9 Qld Lawyer Reps 8 at 45.

<sup>88</sup> Queensland Interview No 5, p 6.

<sup>89</sup> Queensland Interview No 6, p 5; similarly see also New South Wales Interview No 8, p 9.

<sup>90</sup> Queensland Interview No 9, p 11.

<sup>91</sup> New South Wales Interview No 2, p 5.

<sup>92</sup> Queensland Interview No 1, p 6; see also Queensland Interview No 3, p 4; Queensland Interview No 9, p 11.

<sup>93</sup> Queensland Interview No 8, p 10.

It has to be written in the lines that I believe that her health would be in jeopardy if she did not take – if she was not to receive this termination. Which is not – and you're obviously stretching the truth all the time there. Because [in] very few cases have I provided an abortion where the mother's physical health was in jeopardy.<sup>94</sup>

Frustration was also expressed by several doctors working in Queensland public hospitals in relation to this scenario that, because of the combination of fetal abnormality and the second trimester gestation, a medical report from a psychiatrist would be required:<sup>95</sup>

What the hospital were doing, what the gynaecologists were doing, was sending people off to get one or two, depending on their whim, psychiatrists' opinion. But that's foolish on a number of grounds. You don't need a psychiatrist to see if someone's distressed.<sup>96</sup>

In this context several doctors were clearly exasperated about the requirement to produce psychiatric evidence in order to identify mental illness in perfectly healthy women in order to provide abortion within the law. For example, doctors commented:

But people are doing it where you've got to build this, in some ways, a bogus framework around it by having people say, well, you've got to go and get psychiatric opinions and so on which really, I think, is demeaning and distressing for the women.<sup>97</sup>

They would ask her if she's ever been depressed or upset or thought suicidal thoughts and a lot of psychiatrists are fed up with doing this because it manufactures mental illness ... So it's almost got to the stage are you upset that this baby's got Down syndrome? Of course you're upset. You feel teary and depressed about it, yes, of course you do. So that's an issue about the manufacture of mental illness.<sup>98</sup>

What I find particularly annoying about the law is you can make someone – because you have to produce this case of defence, so a person can be of sound mind and say this is going to drive me mad. I won't be able to cope and they're of sound mind making their decision, but in a sense you have to make them sound like they're going mad and that's offensive but that's the reality of it all.<sup>99</sup>

While there was a diversity of views expressed by doctors about how (and whether) the abortion could be justified, what evidence would be required to support the decision and whether it could take place in a public hospital, almost all of the doctors who responded to this scenario were of the view that the woman could obtain an abortion. However, in discussing the scenarios many doctors raised concerns about the risk of prosecution and other concerns related to the illegality of abortion. This is discussed further below.

### **Abortion in the shadow of criminal prosecution**

In response to general questions about how they understood the legal situation in relation to abortion, many doctors stated that they perceived criminal prosecution was a real possibility that could result from their normal practice. For example, one doctor explained: “[T]he perception overall is that it's illegal and that anything we do is under the guise of the law with the hope that nobody will catch us.”<sup>100</sup> This view was prevalent, but for a variety of reasons outlined above, doctors often expressed an obligation to continue to provide abortions despite the perceived risks. For example, one New South Wales doctor equated his abortion practice as responding to the needs of vulnerable women:

[W]orking here in a public institution, looking after women that don't have anywhere else to go, that's what my job is, and at some stage, I will be in court, I think. No doubt ... I'm not looking forward to

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<sup>94</sup> Queensland Interview No 9, p 2; similarly see also New South Wales Interview No 1, p 5.

<sup>95</sup> Note in this context one doctor expressly emphasised the need for counselling before she would be willing to carry out an abortion; see Queensland Interview No 10, p 6. In this study 11 doctors stated that there were regulations in place in the institutions in which they practised that required them to obtain the opinion of a second doctor, a psychiatric opinion, or the approval of a hospital committee.

<sup>96</sup> Queensland Interview No 7, pp 6-7; similarly see also Queensland Interview No 2, p 4.

<sup>97</sup> Queensland Interview No 11, p 4.

<sup>98</sup> Queensland Interview No 14, p 7.

<sup>99</sup> Queensland Interview No 5, p 16 (general comments made in interview).

<sup>100</sup> Queensland Interview No 2, p 5.

it. It might never happen. I think you have to recognise that if the anti-abortion lobby suddenly decide that they want to find a case ... and see if the police will prosecute you, then you'll end up in court. The bottom line is if we're doing terminations of pregnancy for fetal abnormality under maternal grounds, at some point that may well happen.<sup>101</sup>

A Queensland doctor, who saw the choice about abortion as lying firmly with the woman who requested it, was similarly aware of the possibility of criminal prosecution but continued the practice:

[I]t's a woman's choice whether to continue with a pregnancy or not, and therefore being the skilled surgeon that I am in this particular area, I should be the person to be able to give that service ... So, am I taking a legal risk? Maybe. Some of my legal friends say I'm taking a risk. But the risks are minimal compared to what the risks my colleagues in America are taking.<sup>102</sup>

Several Queensland doctors commented that the prosecution of Tegan Leach<sup>103</sup> in 2009 had not clarified the situation with respect to lawful abortion; rather they suggested that doctors had become increasingly concerned about the risk of prosecution. For example:

Then when the Cairns woman was charged in 2009 obviously that shook us all and made us realise that that case may not protect us at all. Because if the DPP were preparing to take a case like that against a young woman ... then how easy would it be to take one of us to court as well? So I think that really shook us all that maybe the protection that the Premier and the Government had verbally always given doctors – don't worry nobody will ever be prosecuted – really couldn't be relied on anymore so really quite concerning for us all.<sup>104</sup>

One doctor's response to what he perceived as a progressively more uncertain situation was to act defensively. He had become increasingly careful in setting out the reasons why abortion was justified in the particular circumstances:

Once upon a time we'd sign off with three lines. Now ... a page and a half ... because of the events of the last few years have identified to us that we really need to prove section 282. ... we have to be more specific and pedantic about our assessment to prove section 282 ... you're extremely unlikely to be criminally charged ... but [the Attorney General] is not going to be arrested and we are ... the defence is vague you will never know if your defence is good enough until you get to court .... we just rely on hope in the meantime ... the truth is that 98 per cent of what we do is not that simple.<sup>105</sup>

Some doctors were wary of the limitations of District Court judgments of single judges that had not been tested by the appeal process. For example, one doctor observed:

[T]he precedent was established in the 1970s ... However in Queensland, that law was not appealed to the level of the Supreme Court, which has left some ambiguity about the validity of that precedent.<sup>106</sup>

Related to this concern, another commented on the fragility of the protection of current case law:

People can take that case law and say that defends them, but they can also have interpretations of the law by another judge at a different time that can potentially make that invalid. So [case law] helps in a sense and its part of a defence against prosecution, but it still remains termination of pregnancy is illegal in Queensland.<sup>107</sup>

For various reasons many doctors viewed the legal position as, at best, a secondary consideration. For example, a doctor who thought the legal situation in Queensland was unclear explained that he carried out terminations if they were requested and they were medically safe. He explained: "[I]t's not a legal discussion. It's a medical discussion."<sup>108</sup> Another doctor believed the law failed to reflect what was "right" in this area: "I am and I always have been less concerned with what the law might think

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<sup>101</sup> New South Wales Interview No 1, p 5.

<sup>102</sup> Queensland Interview No 1, p 7.

<sup>103</sup> *R v Brennan and Leach* (unrep, Dist Ct, Qld, 12-14 October 2010, Everson J).

<sup>104</sup> Queensland Interview No 6, p 2 (talking generally about law); similarly see Queensland Interview No 13, p 5.

<sup>105</sup> Queensland Interview No 12, p 21.

<sup>106</sup> Queensland Interview No 13, p 1 (general response to law question).

<sup>107</sup> Queensland Interview No 15, p 3; referring to *R v Bayliss*; *R v Cullen* (1986) 9 Qld Lawyer Repts 8.

<sup>108</sup> Queensland Interview No 1, p 15.

as what I think is the right thing to do, which has gotten me into trouble a couple of times.”<sup>109</sup> Doctors in this study identified other issues that have arisen out of the perceived risk of prosecution. For example, many doctors, especially Queensland doctors, had, on occasion, advised women in the later stages of their pregnancies to travel interstate for a termination, usually to Melbourne.<sup>110</sup> Travel in this context has some clear disadvantages for pregnant women, including increased financial costs and lack of support; indeed, doctors generally accepted that having an abortion far from home and without the usual supports could make the termination a particularly traumatic experience.<sup>111</sup>

Some doctors in this study were also concerned that the legal situation had contributed to a loss of relevant skills. One Queensland doctor explained: “[N]o effective training of health practitioners is going to occur when it’s such an unsavoury part of women’s health. Because it’s illegal basically.”<sup>112</sup> Another claimed that doctors studying Obstetrics and Gynaecology (O and G) in Queensland

don’t bother studying termination because it’s too controversial and they’ll never put it in the exam because there’s not enough agreement amongst O and G people about whether it should be examined. It means that because you study selectively for your membership exams ... It means you never are forced to explore your local termination law. It means that, certainly in Queensland, you’ve got a cohort of trainees who came through that time where basically they’ve been able to wash their hands of termination for some time.<sup>113</sup>

Finally, a doctor explained the problem of training gaps as a reflection of the fact that abortion, at least in Queensland, is perceived by many as a radical act rather than a normal part of practice:

[I]n Queensland where we’ve radicalised termination because we don’t make it a normal part of practice. If we trained in - if everyone here trained in Britain then obviously it’s a normal part of your day to day practice. You would accept making a choice to do O&G that you would look after bad outcomes or unwanted pregnancy as well as good outcomes and wanted pregnancy. Or anything in the middle. We’ve allowed abortion to be radicalised in Queensland. It is radicalised. I don’t think most people training in O&G or working in O&G realise they themselves have allowed a perception of it being a radical act to creep in.<sup>114</sup>

## **CONCLUSIONS: RECONCILING THE LAW AND PRACTICE OF ABORTION IN NEW SOUTH WALES AND QUEENSLAND**

According to the present research, doctors providing abortions in New South Wales and Queensland routinely feel compelled to behave, at best, misleadingly but often dishonestly and unethically in order to behave “legally”. In the context of this study, doctors necessarily focused on the woman’s mental health concerns, rather than physical health, to justify the abortion. Commonly doctors expressed frustration at having to invent diagnoses of mental health issues for women requesting a termination in order to bring the abortion within the law. Often this required doctors to ignore or reframe the woman’s view of her circumstances. Leslie has examined the similar legal situation in New Zealand and links the developing feminist movement and the increasing demand for abortion in the 20th century to the development of the mental health defence to abortion.<sup>115</sup> She observed:

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<sup>109</sup> Queensland Interview No 5, p 4.

<sup>110</sup> Queensland Interview No 11, p 4; similarly see also Queensland Interview No 8, p 4; Queensland Interview No 4, pp 7-8; Queensland Interview No 5, p 5; Queensland Interview No 7, pp 5-6; Queensland Interview No 9, p 12; New South Wales Interview No 7, p 6.

<sup>111</sup> Queensland Interview No 2, p 7.

<sup>112</sup> Queensland Interview No 9, p 14.

<sup>113</sup> Queensland Interview No 2, p 13.

<sup>114</sup> Queensland Interview No 19, p 21.

<sup>115</sup> Leslie C, “The ‘Psychiatric Masquerade’: The Mental Health Exception in New Zealand Abortion Law” (2010) 18 *Feminist Legal Studies* 1.

[T]he mental health exception enabled more women to access abortion and therefore usefully responded to increasing demands for more available abortion without confronting the terms on which abortion was generally restricted: specifically, that motherhood was natural and desirable and that women seeking to avoid it were irrational.<sup>116</sup>

Certainly the current legal situation in New South Wales and Queensland encourages doctors to refer patients to psychiatric assessments and for second opinions that, even referring doctors believe, are generally unnecessary. In circumstances where doctors do not see the need for a second opinion or psychiatric opinion, many doctors feel compelled to coach women into making statements about mental health risks and concerns that do not necessarily reflect the woman's views about her situation. In essence, the current legal situation in New South Wales and Queensland perpetuates a long history of the law's tendency to discount women's views and experience.<sup>117</sup> However, this situation also raises ethical concerns, including the possible compromise of the candidness of the doctor-patient relationship.<sup>118</sup> On one level, coaching and unnecessary referrals are unethical as they suggest a failure on the part of the doctor to listen and to respect the views of the "patient".<sup>119</sup> However, at the same time these practices are ethical as they are aimed at supporting the woman's decision about her health care: to have an abortion.<sup>120</sup> As a result of the current legal situation many doctors who perform abortions feel compromised; they are, in effect, obliged to make choices between competing ethical obligations and to essentially challenge the law. These concerns are captured to some degree by the doctor in this study who understood the question of abortion access as a medical question rather than a legal question;<sup>121</sup> and by another doctor who distinguished between access to abortion in the particular case as "right" and the law as something else.<sup>122</sup>

This study suggests that abortion laws in New South Wales and Queensland have an adverse impact on the way practice occurs around even very common abortion scenarios. Doctors interviewed had a very good understanding of the current law about abortion in their State. They generally agreed that, in order to perform an abortion lawfully, they were required to find that there would be serious danger to the woman's life or to her physical or mental health should the pregnancy continue. However, the concept of "serious danger" was generally thought to be unclear and the perception that doctors had of having to ascribe a mental health problem to women seeking abortion was at times challenging.

In part as a result of the legal situation, practitioners in public hospitals have limited women's access to abortion services. Doctors working in the public hospital system feel compelled to make a judgment about what is a "legal" reason to have a termination, knowing that "non-legal" abortions will be carried out privately or interstate. As a result, while "tertiary" abortions on account of fetal abnormality may be carried out in public hospitals, "social" abortions requested on the basis of social and economic hardship must be carried out in the private sector. Some abortions must be carried out in another State – with all the stresses that that entails.<sup>123</sup>

<sup>116</sup> Leslie, n 115 at 3.

<sup>117</sup> Fegan E, "'Subjects' of Regulation/Resistance? Postmodern Feminism and Agency in Abortion-Decision-making" (1999) 7 *Feminist Legal Studies* 241.

<sup>118</sup> In a different context Oyer suggests some abortion laws are an intrusion on the doctor-patient relationship, referring to a Bill in Arizona which will protect doctors from withholding information from their patients about fetal health: Oyer D, "Playing Politics with the Doctor-Patient Relationship" (2012) 366(24) *NEJM* 2326.

<sup>119</sup> Australian Medical Council, *Good Medical Practice: A Code of Conduct for Doctors in Australia* at [3.3], "Effective communication", <http://www.health.nt.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/39/02.pdf> viewed 6 July 2012..

<sup>120</sup> Australian Medical Council, n 119 at [2.1.5], "Recognising and respecting patients' rights to make their own decisions".

<sup>121</sup> Queensland Interview No 1, p 15.

<sup>122</sup> Queensland Interview No 5, p 4.

<sup>123</sup> In the United States many abortions are performed outside of women's State of residence in order to avoid adverse law: Kreimer S, "The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism" (1992) 67 *NYUL Rev* 451. Abortion travel has been considered by law reformers in some Australian jurisdictions. For example, to obtain an abortion in South Australia, the woman must have been resident in South Australia for two months previously: *Criminal Law Consolidation Act 1935* (SA), s 82A(2).

According to interviewees in the present study, the legal situation has also contributed to a perception that abortion is not only illegal but also radical. Interviewees suggested that such views have contributed to a lack of training being provided to doctors about abortion and to the unwillingness of many doctors to provide abortions.<sup>124</sup> However, deficiencies in training and the availability of doctors to perform abortions have not necessarily led to fewer abortions being carried out. Rather, such gaps may result in “abortion tourism”; that is, in women travelling to obtain abortions in other States such as Victoria<sup>125</sup> or to large urban centres hundreds of kilometres from home.

The issue of abortion brings into sharp focus the complex relationship between medicine and law.<sup>126</sup> This study points to two matters of serious concern that result from the current legal framework around abortion in New South Wales and Queensland: a pregnant woman who requests an abortion loses her identity as an autonomous individual; and many doctors feel compelled to manufacture mental illness.<sup>127</sup>

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<sup>124</sup> The relationship between criminalisation and access has also been observed in some States in the United States where, overall, there has been steady decrease in the number of abortion providers. Steinauer et al found that medical trainees who were provided with abortion training were more likely to carry out abortions: Steinauer J, Landy U, Filippone H, Laube D, Darney P and Jackson R, “Predictors of Abortion Provision Among Practicing Obstetrician-Gynecologists: A National Survey” (2008) 198(1) *American Journal of Obstetrics and Gynaecology* 1.

<sup>125</sup> For an examination of the history of abortion law and the relationship between law and practice, see de Costa, n 23 at 22.

<sup>126</sup> El-murr A, “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 at 124, 129. The struggle is similarly reflected in claims of insanity and diminished responsibility in criminal culpability questions.

<sup>127</sup> Lavi tracks a similar relationship between euthanasia and law: Lavi S, *The Modern Art of Dying: A History of Euthanasia in the United States* (Princeton University Press, Princeton, 2005) pp 167-168.