

Criminal Code (Medical Treatment) Amendment Bill 2009

Explanatory Notes

Objectives of the Bill

The objective of the Bill is to ensure the Criminal Code provides an excuse from criminal responsibility, in appropriate circumstances, to a person who provides medical or surgical treatment for a patient's benefit or who provides surgical or medical treatment affecting an unborn child for the preservation of the mother's life or for the benefit of the unborn child.

Reasons for the Bill

Section 282 of the Criminal Code relieves a person from criminal responsibility for the performance of a surgical operation upon any person for the patient's benefit (limb 1) or upon an unborn child for the preservation of the mother's life (limb 2). To obtain protection under section 282, the surgical operation must be—

- performed in good faith;
- performed with reasonable care and skill; and
- reasonable having regard to the patients state at the time and all the circumstances of the case.

Whilst the potential scope of the existing section 282 is wide, it may not cover all types of medical treatment provided to a patient in need, for example the administration of a drug orally or even intravenously.

Where a medical practitioner is presented with a patient whose condition requires treatment, either because it will be beneficial or it threatens their life it is an anomaly for a treating medical practitioner to be criminally liable for performing a medical procedure but be protected from criminal liability for performing a surgical operation which may carry a greater risk for the patient.

Section 282 requires amendment to extend the excuse to encompass the provision of medical treatment. This will ensure that health practitioners

treating their patients are provided with appropriate legal protection for the appropriate use of medical and surgical procedures alike.

Concerns have also been raised by medical practitioners in Queensland's public hospitals and the Australian Medical Association (Qld Branch) about the potential liability for criminal prosecution in providing medical terminations.

The proposed amendment to section 282 will not extend the set of circumstances in which a treatment, including a termination, may be lawfully administered. The section will still require that the treatment be administered in good faith, with reasonable care and skill, and for the benefit of the patient or (in relation to procedures that are intended to adversely affect an unborn child) the preservation of the mother's life. It will merely allow the treatment to be administered medically (for example, through the prescription of drugs) as an alternative to surgical treatment.

The amendment will also ensure that a person acting under the lawful direction or advice of a health professional in administering, supplying or procuring substances is also protected from criminal liability.

Achievement of the Objectives

The objective is achieved by amending section 282 of the Criminal Code to encompass the provision of medical treatment.

Estimated Cost for Government Implementation

Nil.

Consistency with Fundamental Legislative Principles

The amendment to section 282 of the Criminal Code will apply retrospectively to 19 August 2009. Amended section 282 provides an excuse to persons who provide surgical or medical treatment in good faith, with reasonable care and skill, where such treatment is reasonable having regard to the patient's state at the time and to all the circumstances of the case. Within this context, surgical or medical treatment provided with the intention of affecting an unborn child for the preservation of the mother's life or for the benefit of the unborn child also falls within the protection of the section. In order to provide certainty for medical and other health practitioners, it is appropriate that the extended excuse apply retrospectively to 19 August when public hospitals in Queensland informed

the government they would be ceasing to provide medical termination services.

Consultation

Consultation has occurred with a range of community groups including Children by Choice, Family Planning Queensland, the Queensland Council for Civil Liberties, the Catholic Archdiocese, Cherish Life Queensland and The Australian Christian Lobby.

Notes on Provisions

Clause 1 establishes the short title of the Act as the *Criminal Code (Medical Treatment) Amendment Act 2009*.

Clause 2 omits section 282 and inserts a new section 282 which applies to the provision of surgical or medical treatment.

The effect of new section 282 subsections (1) and (4) is to excuse from criminal responsibility, a person who performs or provides, in good faith and with reasonable care and skill—

- a surgical operation on or medical treatment of, a person for the patient's benefit and where the medical treatment is not intended to adversely affect an unborn child;
- a surgical operation on or medical treatment of, an unborn child for the unborn child's benefit; or
- a surgical operation on or medical treatment of a person or an unborn child to preserve the mother's life.

The performance of the operation or the provision of the medical treatment must be reasonable, having regard to the patient's state at the time and all the circumstances of the case.

Subsection 282(4) defines 'patient' to mean the person or unborn child on whom the surgical operation is conducted or the medical treatment provided.

The amendment modernises the excuse to recognise modern treatments and procedures and retains the existing requirement that any procedures

undertaken with the intent of adversely affecting an unborn child may only be performed where it is necessary for the preservation of the mother's life. Given this phrase has been the subject of judicial interpretation previously (see *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8), it proposed that it retained in its current form.

The effect of subsections (2) and (3) is to provide that it is lawful for a person to administer a substance or supply or procure a substance in accordance with the lawful direction or advice of a health professional. This may be relevant to some medical treatments that may involve a health practitioner prescribing medication that in whole or in part is self-administered pursuant to such prescriptions. The subsection also applies where the person acts in the reasonable belief that the advice or direction of the health professional was lawful.

Subsection (4) defines the terms 'health professional' and 'patient'. Further, the subsection provides that for subsection (1)(a), 'medical treatment' does not include medical treatment intended to adversely affect an unborn child.

Clause 3 inserts a new part 9, chapter 85 to provide a transitional provision. New section 722 provides for the retrospective application of the amendment. The amendment will apply to proceedings for an offence started but not finished before 19 August 2009 or started after 19 August 2009, whether the act or omission constituting the offence happened before or after the 19 August 2009. The amendment will not apply to proceedings for an appeal against a conviction or sentence that happened before the 19 August 2009.