

AUSTRALIAN ABORTION LAWS:

Do they pose a 'health hazard'?

Medical practitioners' decisions on who can and cannot have an abortion should be based on abortion law. Many Australian laws could be interpreted as suggesting that the role of law is to place obstacles in the way of a woman seeking an abortion, making doctors the gatekeepers. Laws are often uncertain, conflicting and inconsistent between States and Territories.

More than a third of general practitioners say that they do not fully understand abortion laws in their State.¹ Around two-thirds believe that an abortion is legally justified if there is a risk that the child will be seriously handicapped, even though this law only applies to 18 per cent of general practitioners. There is little reason to think that gynaecologists understand the laws any better. How can anyone understand and accurately interpret unclear laws?

Abortion law in Australian States and Territories²

New South Wales, Queensland and Victoria—Judicial interpretations of what is 'unlawful' under the *Crimes Act* permit abortion on maternal health grounds only.

Tasmania—Legislation is along the lines of Victoria's judicial interpretation of 'unlawful'.

Western Australia—Legislative changes have made abortion legal until 20 weeks gestation.

South Australia—Grounds for lawful abortion include a maternal health ground and a fetal disability ground.

Northern Territory—Has similar provisions to those of South Australia up to 14 weeks gestation.

Australian Capital Territory—Abortion has been removed from criminal statutes.

a complaint by a third party initiated investigation and intense media exposure. The Western Australian and Tasmanian controversies resulted in law change; after five years the Victorian case is still going through the courts and the Medical Practitioners Board.

The Laws

In some States, such as Victoria and New South Wales, even a 'lethal' abnormality is not of itself grounds for abortion; to be lawful it must be necessary to preserve the woman from serious danger to her life or physical or mental health. Obstetricians are at high risk because they manage most abortions following the diagnosis of fetal abnormality. I suspect that few doctors in the eastern States document that these abortions are because of 'danger to mental health'.

Only in ACT have politicians been courageous enough to initiate abortion law reform to produce clear and just laws; abortion has been removed from the criminal statutes. There is hope that politicians elsewhere can follow suit and introduce abortion laws that show similar compassion to Australian women.

Legal Uncertainty

Legal uncertainty is increased by the crime of child destruction. Victoria, Queensland, South Australia and the Northern Territory have child destruction laws. The situations in which the law applies are variable and uncertain since there is no case law, but in some States gynaecologists may be charged under this law as early as 23 weeks.

Uncertain abortion laws leave the doctor exposed if there is a poor outcome, a procedure-related complication, or the patient subsequently changes her mind. In a recent court case a woman unsuccessfully claimed to have withdrawn consent for an abortion prior to the procedure.³ It is terrifying to consider the possible outcome if this claim followed a procedure such as feticide where the legality of the procedure is often unclear.⁴ When laws are unclear, statutory authorities cannot easily dismiss a complaint without a full (and often prolonged) investigation.

Medical practitioners are at risk. It is shocking that Australian women and doctors can face charges

But these misunderstandings result in women missing out on what most would consider lawful abortions.

If an obstetrician offers a woman an abortion, cases in Western Australia, Tasmania and Victoria show that both she and the doctor can be at risk. In each State,

if an abortion is performed, but doctors can face charges of manslaughter by negligence if they refuse abortion and the woman later suicides. Resulting jail sentences can be up to 20 years.

There is another risk. A GP in England offered to refer a 'patient's daughter' to Spain for a late abortion, not realising that she was speaking to a Daily Telegraph reporter with a hidden recorder and camera. The GP became headline national news.⁵ Our uncertain laws make 'exposure' by anti-abortionists an even greater risk.

Access to Abortion

It is unreasonable that unless they have the resources to travel, Australian women's access to abortion depends on where they live. Why should an ACT woman carrying a fetus with a major abnormality at 20 weeks be entitled to a legal abortion, yet if she lived in Western Australia she would need to win approval from a Government committee, while in NSW her access to abortion would be uncertain? Just as a doctor with a moral objection to offering a woman abortion should offer a referral to another doctor, women should be told if legal abortion is available interstate.

Because of legal uncertainty, access to abortion often depends on what doctors in different regions are prepared to offer women, rather than the law. Who is offered abortion also varies from hospital to hospital. This is unjust since few women are informed of the differing rules. Many public hospitals place arbitrary limits on the gestation at which they will offer abortion in differing situations. In states where there is no legal gestational limit, this is an unacceptable practice that denies a legal abortion to many women.

'Reproductive tourism' allows a woman with the resources to travel elsewhere to access abortion.⁶ An average of at least 2684 Australian women have used interstate services per year since 1984-1985.⁷ One of the reasons is that abortion access is more restricted in Queensland than Victoria and New South Wales. In addition about half of the women having 'late-terminations' in Victoria in 2004 lived in other States.⁸ Women's stories that lead them to request abortion are heart-rending; that our laws then force many to travel interstate, away from loved ones, is cruel.

It is little wonder that many women think that their abortion is illegal.

The unfortunate proliferation of abortion committees in hospitals and elsewhere adds to the variable access for women. These have become yet another external group intruding into the doctor-patient relationship. Often their members are anonymous, the basis of their judgements secret. Abortion is one of the few medical interventions in which the doctor-patient relationship is regularly overridden by uninvolved third parties.

The Recent Abortion Debate

The major disappointment of the recent abortion debate was the number of pro-choice Federal and State politicians who felt that Australia's mish-mash of often uninterpretable and antiquated laws was satisfactory. The status quo is not only unsatisfactory; it is risky for both Australian women and their doctors.

When should terminations be offered to women?

As a 17-year-old Shay was told that she could not have an abortion because she was 13 weeks pregnant. She is now an unmarried mother.

A woman with monochorionic twins had a thickened nuchal translucency of 6.3mm at 11 weeks. Abortion was recommended but she was unable to reach a decision until 18 weeks; because of the current political situation the hospital clinic was then not prepared to offer an abortion.

Right-wing religious politicians led the debate. There were fears that laws would be tightened. Recent abortion law reform in Western Australia, Tasmania and ACT caused intense debate but each resulted in the liberalisation of laws. This is no surprise since over 80 per cent of Australians agree with a woman's right to choose an abortion⁹, as do 84 per cent of GPs¹ and the majority in all major religious groups.¹⁰

Some politicians redefine late abortion to apply from 20 weeks instead of the usual 23 or 24 weeks, the gestation of potential viability. There is little to recommend 20 weeks as an important milestone, and it compromises obstetric management. Ultrasound scans for many women, including those who are overweight or where there is uncertainty about an abnormality, are often best delayed until 20 to 22 weeks.

The RCOG Ethics Committee stated in 1998 that late termination has become 'a standard management option in tertiary referral centres for serious abnormalities diagnosed after 24 weeks'. Nevertheless, some Australian politicians are attempting to ban abortion from as early as 12 weeks.

Towards a Just Abortion Law

We need uniform laws. Achieving this would require States and Territories to work together, presumably with Federal Government input. This is difficult, but it can be achieved as shown by co-operation with gun law legislation; more recently embryo



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experimentation laws (2002-2003) were developed for a relative handful of frozen embryos. It is now time to address the issue of vastly more abortions performed annually.

Justice demands that across Australia, abortion is removed from the criminal code.

The ACT has set the standard. Abortion by a medical practitioner was removed from the criminal code. Access to abortion should not rely on a doctor-gatekeeper subjectively judging a woman's reason for abortion (clearer laws are needed) and access should not depend on an abnormality being present – such laws discriminate against fetuses with disabilities.

Early abortion has long been available to most Australian women – the law should clearly allow it. It is ridiculous to suggest that politicians need to save women from having an abortion late in pregnancy, as it wrongly implies that women would otherwise irresponsibly rush to late abortion.

Our abortion rate is cause for concern, but the way to reduce the abortion rate is by reducing unwanted pregnancies, not by potentially criminalising Australian women.

Modernising The Law

So what are the desirable outcomes we as a country should be aiming for? Perhaps the following should be considered:

- All jurisdictions should follow the ACT's lead in allowing women to access abortion without fear of criminal prosecution.
- Governments should introduce a single clear national law on abortion, both in early and late pregnancy.
- Obstetricians and gynaecologists should participate actively in the abortion debate to protect the interests of both their patients and themselves.

Our patients are often denied access to abortion because of legal uncertainty, or simply because they live in the wrong place. They and we (as obstetricians) are at risk of legal action. Australia's mish-mash of contradictory and often-antiquated abortion laws needs modernising. Otherwise we are destined to continue to be plagued with cases being reported to statutory authorities leading to damage to the lives and careers of women and their doctors.

Obstetricians have an important role as advocates for patients. Abortion should not be in the criminal code.

It is unacceptable that the abortion debate has been dictated without fair and consistent laws being introduced. Current laws are a 'health hazard' both to Australian women and their doctors.

Recommended further reading

Protect and Defend, a work of fiction by Richard North Patterson. Ballantine Books, NY, 2005 ISBN: 0345404793

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