Abortion laws in Australia

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The current law in Australia on abortion is not uniform. Each state and territory has a different approach.

There are criminal law statutes in some states, which make unlawful abortion a crime, and in those places, reliance is placed on the position at common law to clarify when an abortion is not unlawful. Other states and territories have introduced legislation designed to 'de-criminalise' abortion and clarify in statute when an abortion is lawful.

Common law approach to abortion: Victoria, New South Wales, Queensland

Victoria

In Victoria, section 65 of the Crimes Act 1958 provides that:

> Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and 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 an indictable offence, and shall be liable to level 5 imprisonment (10 years maximum) (emphasis added).

In Victoria, abortions are carried out in reliance on the ruling in 1969, in R v Davidson by Mr Justice Menhennitt, who ruled:

> 'For a termination of pregnancy to be lawful the doctor must believe on reasonable grounds that the operation must be necessary to preserve the life of the woman from a serious danger to her life or health which the continuance of the pregnancy would entail. These dangers need not be the normal dangers of pregnancy and childbirth but include other physical and mental factors which could jeopardise the woman's health.'

In July 2007, a private member's Bill was introduced into Victorian Parliament by Candy Broad MLC, which sought to remove the crime of unlawful abortion from the Crimes Act and permit a doctor to carry out an abortion, provided that the procedure was carried out in an approved medical facility. The proposed legislation was similar to the amendments made to the Health Act in the ACT. On 20 August 2007, Premier Brumby announced that the Victorian Government would ask the Victorian Law Reform Commission to advise on options to reform the law relating to abortion in Victoria, including removing abortion offences from the Crimes Act and clarifying under what circumstances an abortion was legal. The report is due by March 2008. The private member's Bill was subsequently withdrawn.

New South Wales

The position in New South Wales has been, until the case of Sood last year, similar to Victoria, and it has long been accepted that 'the concept of unlawfulness for the purposes of section 83 of the Crimes Act (NSW) was correctly articulated by Levine Ch. Q. S. in R v Wald '. That case involved five medical practitioners on charges under section 83. At the close of the Crown case, (the Crown bearing the onus of establishing that the abortions were unlawful), application was made for verdicts of not guilty by direction. It was in that context that Levine Ch. Q.S. said:

> 'For the operation to be lawful in this case, the accused must have had an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life or physical or mental health which the continuance of pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted.'

The Chief Judge was prepared to acknowledge that economic, social or medical grounds could form a basis for an honest belief on reasonable grounds that an abortion was necessary.

In July 2006, Dr Suman Sood pleaded not guilty to two charges: one relating to providing an 'abortion drug' and one of manslaughter of a premature baby. Dr Sood was the first New South Wales doctor since Wald in 1971 to be tried over an abortion.

In her judgment, Justice Carolyn Simpson of the New South Wales Supreme Court, gave consideration to what is meant by the word 'unlawfully' as it appears in section 83 of the Crimes Act (NSW), which she noted was also applicable to the offence of manslaughter by an unlawful and dangerous act.

Her Honour referred to the cases of Wald and Davidson and stated that the question of lawfulness or unlawfulness of an act depends on the law of necessity.

Queensland

Section 224 of the Criminal Code 1899 makes attempts to unlawfully procure an abortion a criminal offence. The use of the word 'unlawfully' connotes the common law, which acknowledges that an abortion is lawful, if performed after the doctor forms an honest belief on reasonable grounds that the abortion is necessary for the life and health of the woman.

Note too the provisions of section 282 of the Queensland Criminal Code:

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

In K v T, Williams J suggested that the Menhennitt ruling in Davidson represented the law in Queensland, but made no definitive ruling on this point. Subsequently, in the District Court case of R v Bayliss and Cullen, McGuire J examined the relevant cases and concluded that, although the common law defence of necessity is not generally applicable to the Queensland Criminal Code, abortion is an exception to the rule.

It is fair to say that the law in Queensland, at least to this Victorian lawyer, appears unclear, without any binding superior court authority on the issue, unlike the position in Victoria and New South Wales.

Health Law approach

Western Australia

Note the provisions of section 334 (7) (8) and (9) of the Western Australian Health Act viz:

> (7) If at least 20 weeks of the woman's pregnancy have been completed when the abortion is performed, the performance of the abortion is not justified unless -
> a) two medical practitioners who are members of a panel of at least six medical practitioners appointed by the Minister for the purposes of this section have agreed that the mother, or the unborn child, has a severe medical condition that, in the clinical judgment of those two medical practitioners, justifies the procedure; and
> b) the abortion is performed in a facility approved by the Minister for the purposes of this section.
>
> (8) For the purposes of this section -
> a) subject to subsection (11), a woman who is a dependant minor shall not be regarded as having given informed consent unless a custodial parent of the woman has been informed that the performance of an abortion is being considered and has been given the opportunity to participate in a counselling process and in consultations between the woman and her medical practitioner as to whether the abortion is to be performed;
> b) a woman is a dependant minor if she has not reached the age of 16 years and is being supported by a custodial parent or parents; and
> c) a reference to a parent includes a reference to a legal guardian.
>
> (9) A woman who is a dependant minor may apply to the Children's Court for an order that a person specified in the application, being a custodial parent of the woman, should not be given the information and opportunity referred to in subsection (8) (a) and the court may, on being satisfied that the application should be granted, make an order in those terms.

In Western Australia, a woman cannot obtain an abortion after 20 weeks gestation without the imprimatur of a government panel and then only for a serious medical condition in herself and or her unborn child.

It is worth pointing out that Western Australia, despite its Health Act amendments, retains in its Criminal Code the offence of unlawful abortion and that this is expressly stated in the amendments to the Act.

Australian Capital Territory (ACT)

The Australian Capital Territory was the first jurisdiction in Australia to remove abortion from its criminal statutes. The Health Act 1993 (ACT) was amended to provide for an abortion to be performed by a registered medical practitioner in a 'medical facility'. The offences of child destruction (unlawfully and either intentionally or recklessly by act or omission preventing the child from being born alive) and childbirth-grievous bodily harm (unlawfully and either intentionally or recklessly by act or omission inflicting grievous bodily harm on the child before the child is born alive) are retained in the criminal law of the ACT.

Northern Territory

In 2006, termination of pregnancy was the subject of new health legislation in the Northern Territory in the form of the Medical Services Amendment Act 2006. Prior to this legislative amendment, which is comparable with the South Australian legislation, abortion was regulated under the Criminal Code.

Tasmania

In late 2001, Tasmania enacted section 164 (1) of the Criminal Code which provides that for abortion to be lawful, two registered medical practitioners must certify in writing that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the woman than if the pregnancy was terminated, and that the woman must give informed consent.

South Australia

The Criminal Law Consolidated Act 1935 (SA) provides that any doctor who has a conscientious objection to performing an abortion is excused, except in circumstances where there is immediate danger to the life or health of the woman. This exemption for conscientious objectors is also to be found in the Western Australian statute.

The South Australian Act provides that an abortion can be legally performed by a qualified medical practitioner, in a prescribed hospital. Again, as in Western Australia and the Northern Territory, the Act provides that two medical practitioners must examine the woman and concur that the risk to the woman's life is greater if the pregnancy continues.

Note that a woman must have resided in South Australia for two months before an abortion may be performed.

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Law reform

It is submitted that laws on abortion should be uniform, that is, the same all around the country, and should explicitly deal with abortion for fetal abnormality.

Whilst it could be said that the current law works adequately, it is not optimal, and reform or clarification of the law is desirable. There is anecdotal evidence that women seeking a lawful termination of their pregnancy 'forum shop' for a State with laws (and doctors) to suit their particular circumstances.

Recently, the Federal Attorney General noted that surrogacy laws were not uniform and noted the desirability of there being a consistent approach. Will abortion law reform be as high on the political agenda? Will the Federal Attorney General urge the States to introduce uniform abortion laws?

Victoria has the chance to introduce legislation that will be a model for similar legislation in New South Wales and Queensland, and hopefully for uniform federal legislation in the future.