

# Abortion in Australia: a legal misconception

Kerry Petersen

Abortion is a procedure and practice which has been universally practised in some form since the beginning of recorded history. While deliberate terminations of pregnancy are reported throughout history, all races, cultures and religious groups have sharply divergent and frequently irreconcilable opinions on this highly controversial subject.<sup>1</sup>

**ABORTION IS A CONTROVERSIAL** and complex issue for which there is no black and white legal solution. Attitudes towards abortion span a broad spectrum, but opinion polls show that most Australians approve of women having the right to make decisions about abortion and there is little support for introducing restrictive laws.<sup>2,3,4</sup> The attitudes of parliamentarians mirror those of the general public and cut across party lines. Many politicians are reluctant to become involved in the public debate and hide behind the so-called conscience vote in parliaments, although it is not entirely clear why this subterfuge is regarded as acceptable. Nevertheless, periodically some politicians raise the issue for ideological or other reasons.<sup>5</sup>

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**Kerry Petersen, LL.M, PhD, Associate Professor; and barrister and solicitor of the Supreme Court of Victoria School of Law, La Trobe University, Melbourne, VIC.**

Correspondence: Dr Kerry Petersen, School of Law, La Trobe University, Melbourne, VIC 3086.  
**k.petersen@latrobe.edu.au**

The power to regulate abortion comes under the jurisdiction of the states and territories and contemporary laws vary from state to state even though their common provenance is the UK statute, the Offences Against the Person Act 1867 (amended by Abortion Act 1967 and the Human Fertilisation and Embryology Act 1990, s.37). This statute was passed in an era when abortion was a taboo subject, and the procedure was unsafe and accompanied by high mortality and morbidity rates. This law framed the offence as an “attempt” to make it easier to prove beyond reasonable doubt, and it was transported to Australian states around the turn of the twentieth century with other criminal laws. The following three offences, which are derived from that 1867 Act, continue to underpin contemporary abortion laws in most Australian jurisdictions:

- The attempt to procure an *unlawful* miscarriage by the pregnant woman
- The attempt to procure an *unlawful* miscarriage (by another person, whether or not the woman is pregnant)
- Supplying the means to procure an *unlawful* abortion knowing there is an intention to procure a miscarriage unlawfully (whether she is pregnant or not).

In practice, medical termination of pregnancy is widely available because of amending state

legislation or “liberal” judicial decisions.<sup>6</sup> Interestingly, a recent study has found that although the majority of Australian general practitioners believe all women should have access to services for termination of pregnancy (TOP), more than a third admitted they did not fully understand the laws in their state or territory.<sup>7</sup> Prosecutions against medical practitioners have always been rare because *inter alia* it is difficult to prove that an unlawful abortion had been performed, and medical practitioners are reluctant to testify against each other.<sup>8</sup> Nevertheless, Western Australia and the Australian Capital Territory are the only states where it is not a criminal offence for a woman to have an abortion.

In Australia, the incidence of abortion is difficult to estimate accurately, and South Australia is the only jurisdiction which collects and publishes reliable data on termination of pregnancy.<sup>9</sup> It has been estimated that in 2002 about 73 300 TOPs took place in Australia, however this estimate is likely to be on the low side.<sup>9</sup>

## Current law

Some Australian states have modified their laws but *unlawful* abortion remains a criminal offence in every jurisdiction apart from the ACT. In the “judicial jurisdictions” — Queensland, New South Wales and Victoria — the courts rather than parliaments have changed the law (see the Criminal Code Act 1899 [QLD]; Crimes Act 1900 [NSW]; Crimes Act 1958 [Vic]). The Victorian case *R v Davidson*<sup>10</sup> has become the benchmark for lawful abortion in these states. According to Menhennitt J’s ruling in the case, an abortion is lawful if the accused held an honest belief on reasonable grounds that the abortion was:

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

The defence of necessity requires the Crown to prove *beyond reasonable doubt*:

- that the accused performed an unlawful abortion;
- that the accused did *not* honestly believe on reasonable grounds that the abortion was necessary; and
- that the abortion was not proportionate to the danger presented by the pregnancy.

The Menhennitt ruling continues to represent the law in Victoria, however, it only covers serious danger to the woman’s physical and mental health, and it is not clear if a prenatal diagnosis of fetal disability would come within the ruling without additional evidence of the likely effect on the pregnant woman’s health.<sup>11</sup>

In the NSW case *R v Wald*, Levine J extended the Menhennitt ruling to include economic social or medical reasons.<sup>12</sup> Subsequently, in *CES v Superclinics (CA)*,<sup>13</sup> Kirby A C-J broadened the Levine ruling to include socio/economic reasons during pregnancy *and* after the birth of a child. Kirby A C-J emphasised that the onus of proof is on the prosecution to negate an honest and reasonable belief. This criminal onus makes it very difficult for the Crown to prove that the person did not act in good faith — the essential element of the offence. In Queensland, McGuire J’s ruling in the District Court case *R v Bayliss and Cullen*<sup>14</sup> approved the Menhennitt ruling and applied the defence of necessity to the Queensland Criminal Code. This interpretation was followed more recently by a Queensland court in *Veivers v Connolly*.<sup>15</sup>

In the “statutory jurisdictions” — the Australian Capital Territory, the Northern Territory, South Australia, Tasmania and Western Australia — parliaments rather than courts have implemented change to abortion laws (see the Medical Practitioners [Maternal Health] Amendment Act 2002 [ACT]; Criminal Law – Consolidation Act 1935 [SA]; Criminal Code Act 1983 [NT]; Criminal Code Act 1924 [Tas]; Criminal Code Act 1913 [WA], Health Act 1911 [WA]). In the ACT, there are no criminal abortion provisions, but abortions must be carried out by medical practitioners in approved clinics.

In 1969, the South Australian Parliament liberalised abortion law along the same lines as the UK. The criminal statute remains law, but pro-

vides for lawful abortion when two medical practitioners form the bona fide belief after a personal examination of the woman that the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk to the physical or mental health of the pregnant woman than if the pregnancy were terminated; or there is a risk that the child, if born, would be seriously handicapped.

The medical practitioner may take social factors into account in determining the risk to the woman and abortions must take place in approved abortion facilities. The first ground (lesser risk than continuation of the pregnancy) can be interpreted broadly because an abortion before 16 weeks is statistically safer than carrying a pregnancy to term. The Act also provides that an abortion can take place at any time without these conditions if immediately necessary to save a woman's life or prevent grave injury to her physical or mental health. The grounds for abortion in the Northern Territory are comparable but the gestation limits are far more restrictive.

Tasmania has adopted a similar approach to South Australia by amending the criminal statute to provide for lawful abortion. The "maternal ground" is the same as South Australia and although there is not a specific fetal ground, doctors have a broad discretion in deciding what constitutes a risk to the pregnant woman. The woman must give an informed consent to the procedure. This statutory consent condition requires the doctor to counsel the woman on the medical risks of abortion and of carrying the fetus to term, and refer her to counselling for other matters.

Western Australia introduced the most radical change to abortion law in Australia in 1998. This legislation provides that a woman's informed consent is a ground for a lawful abortion. The informed consent condition is satisfied if the doctor counsels her about the medical risks of both an abortion and continuing with the pregnancy and offers her a referral to counselling. Provisions specifying the circumstances in which an abortion can be provided and limitations have been moved from the Criminal Code to the Health Act 1911, but medical practitioners can

still be prosecuted under the Criminal Code if the conditions in the Health Act are not met. A review of the abortion legislation in 2002 concluded that the law was "working in the manner which in which Parliament intended".<sup>16</sup>

### **Late term abortions**

The Menhennitt ruling does not impose any time limit on abortions, but Victorian "child destruction" laws make it an offence to unlawfully destroy the life of a child capable of being born alive before it has an existence independent of its mother.<sup>17</sup> Evidence that the woman was 28 weeks pregnant or more at the time of the abortion is prima facie proof that the fetus was capable of being born alive. However, advances in technology have lowered "threshold viability" to infants born between 22–26 weeks' gestation. These abortions may be lawful under the first part of the Menhennitt ruling, but as Skene points out, the second part, proportionality, is more difficult to establish particularly for abortions performed on fetal grounds.<sup>18</sup> To date, this matter has not come before the courts although an abortion performed at 31 weeks' gestation in a Melbourne teaching hospital in 2000 has been the subject of various official inquiries.<sup>19</sup> There are similar child destruction provisions in South Australia. Criminal laws in the ACT, NSW, NT, Qld and Tasmania penalise an intentional act which causes injury or prevents the live birth of a child who is about to be delivered (see the Crimes Act 1900 [ACT]; Crimes Act 1900 [NSW]; Criminal Code Act 1983 [NT]; Criminal Code Act 1899 [QLD]; Criminal Code Act 1924 [Tas]). In WA, abortions can be obtained legally after 20 weeks' gestation in limited circumstances subject to approval from two medical practitioners sitting on an abortion panel as required by the Health Act 1911.

### **Comments**

To establish a legal framework for termination of pregnancy based on either total prohibition or total repeal of abortion laws would be politically problematic. The weight of public opinion seems gener-

ally to support legal cut-off points based on the reason for the abortion and the period of gestation, with women having broad access to safe and affordable abortions earlier in pregnancy. Where to draw the line and how to agree upon appropriate grounds are highly contentious questions probably not resolvable through legal provisions.

The controversial and complex nature of abortion is reflected in disparate legal regimes throughout Australia, a situation which seems confusing, irrational and inequitable and which ignores women's rights to self determination and autonomy.<sup>19,20</sup> On the other hand, this disparity may enhance reproductive choice for women who do not satisfy the grounds for a termination in their home state. (SA is the only state with a residential requirement. It was introduced to prevent Adelaide becoming the "abortion capital" of Australia.) In spite of the problems raised by the lack of uniformity, there is no evidence of "backyard" abortion being practised in Australia today, and subsidised abortions are widely available, particularly in states which permit private clinics to offer services. These achievements are not inconsiderable but there is a need to shift the paradigm beyond manufactured legal solutions. There is also a need to address the issue of abortion more creatively with women's rights and interests at the forefront. I would argue that this is the most compelling task ahead.

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