Developments in abortion law

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The trend towards the right of a competent adult woman to, at least in early pregnancy, terminate her pregnancy if she chooses to do so, requires the law to be clear in its permitting of this. The ACT and Tasmania have recently instigated changes to their abortion laws to make them more liberal than previously.

Two recent news items show the tensions in the law concerning abortion in Australia and indicate that the law is becoming more permissive in two more jurisdictions, following the trend in Western Australia two years ago. The first item relates to changes to legal regulations in the ACT, the second relates to a change in the Tasmanian legislation on abortion.

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No more viewing photos of fetuses before abortion

The Chief Minister of the ACT, Jon Stanhope, was reported in late November 2001 to have said that regulations made in 1999 under the Health Regulations (Maternal Health Information) Act 1998 (ACT) will be changed so that it is no longer mandatory for women to view pictures of dead fetuses before undergoing an abortion.[1-4] According to the online news service Australian Current Law News, he said that 'Making women look at the pictures was unnecessary, insensitive and patronising … Women in these situations may already be under enormous emotional stress and they do not deserve to be subjected to further pressure'. Women will also no longer be required to listen to descriptions of abortions that would impose further stress on them.

Changes to Tasmanian abortion law

News reports in early December 2001 stated that a police investigation into abortions in Tasmania had thrown a 77-year-old law into doubt (forcing the State Government to pay for women to go to Melbourne to have their pregnancies terminated) and that virtually all Tasmanian doctors had stopped performing the procedure amid warnings that backyard abortion clinics could spring up and signs that the issue was splitting the community.[5,6] Apparently the issue had come to a head after a medical student complained to police that abortions were being performed at the Royal Hobart Hospital contrary to the Criminal Code Act 1924 (Tas) that permits the procedure only if the mother's health is at risk.[7]

Soon after this report, the police commenced an investigation and there was an immediate review of the law. On 21 December 2001, it was reported that legislation had been passed to amend the Tasmanian law and that abortion services would be resumed after a short suspension.[8,9] The text of the legislation states that an abortion will be lawful if two doctors (one of whom must be a gynaecologist or obstetrician) approve it.[10]

Significance of these news items

These reports indicate that there is a continuing relaxation of the law on abortion throughout Australia and the way that the law is applied. Although there are some 100,000 abortions undertaken in Australia each year, the criminal codes in each jurisdiction continue to recognise the concept of unlawful abortion. This means that women are not entitled to 'abortion on demand'. They can have only abortions that are 'lawful'. Doctors who perform abortions in circumstances that fall outside what is 'lawful' may be prosecuted.

Lawful abortions

The 'lawfulness' of an abortion is determined in different ways.

In Victoria, NSW and the ACT, judges have interpreted the word 'unlawfully' so that abortions are lawful if the doctor honestly believes on reasonable grounds that the act is necessary to preserve the woman from a serious danger to her life or her physical or mental health. This principle (which is part of the 'Menhennitt rules' first stated by the Victorian Supreme Court judge Justice Menhennitt in *R. v. Davidson* [1969]) has been extended in later cases so that risks to the mother's health have been interpreted to include risks on economic and social grounds, as well as medical ones.[11,12] This means that, in practice, most women who seek an abortion can get one.

In Queensland (and also, until now, in Tasmania), abortion is permitted only 'for the preservation of the mother's life', but this has been broadly interpreted. In Queensland, the Menhennitt rules seem to have been applied so that a threat to the mother's health, rather than life, is in practice sufficient to make an abortion lawful.[13] However, it is not clear to what extent the later extensions of the test,

especially in cases in NSW, to include economic and social factors, will be applied; that issue has not yet come before the courts. In Tasmania, it was assumed, until the recent challenge to the law, that a threat to the mother's health, rather than life, would also justify an abortion.

South Australia and the Northern Territory enacted legislation specifically on abortion some years ago (1969 and 1974, respectively).[14,15] These statutes provide that abortions are lawful in early pregnancy if performed in a hospital after two doctors have examined the woman and certified the risk to the mother's life, or to her physical or mental health. In the South Australia provisions, over 28 weeks' gestation the child is presumed capable of being born alive and it is an offence to abort except to save the mother's life; depending on the circumstances, a child might be considered capable of being born alive from 22 or 23 weeks' gestation so cannot be aborted after this time except to save the mother's life. In the Northern Territory, abortions are lawful up to 14 weeks' gestation if there is a risk to the mother's physical or mental health, up to 23 weeks if there is a risk of grave injury to the mother, and at any stage of gestation if the mother's life is at risk. The risk includes the mother's 'actual or reasonably foreseeable environment'. Fetal disability (that is, a substantial risk that the child will be born seriously physically or mentally handicapped) is also a ground for abortion. (This is not the case in Victoria or NSW where fetal disability is not a ground in itself but must be construed as presenting a risk to the mother's life or health for the abortion to be lawful.)

Western Australia has the most permissive legislation in Australia as the law was changed quite recently after two doctors were prosecuted for abortion (the proceedings were discontinued before the case came to hearing). Now, under the Health Act 1911 (WA) section 334, a woman can obtain an abortion virtually on request up to 20 weeks' gestation, although counselling must be provided.[16] After 20 weeks' gestation, abortion is not lawful unless two doctors (who are members of a specially appointed panel) certify that the mother or the unborn child has a 'severe medical condition'.[17] The abortion must also then be performed in a special facility.

Court action

It is apparent that the factor that has been most significant in producing more permissive abortion laws is a court action. In Victoria, this started with *R. v. Davidson,* and later cases in NSW led to even more liberal interpretations.[11,12] The much later prosecution of two doctors in Western Australia led to the most permissive laws of all. In the jurisdictions in which there have been no cases interpreting the legislation, like Tasmania, or few cases, like Queensland, the legal position is less clear and probably less liberal. In these circumstances, it is not surprising that the Tasmanian government moved quickly to introduce legislation to clarify the law and to make it more liberal.

The proposed changes in the Regulations in the ACT are part of a similar trend – an acknowledgement that, at least in early pregnancy, a competent adult woman should be entitled to terminate her pregnancy if she chooses to do so, whether for medical, social or economic grounds or because of fetal disability. The high number of pregnancies that are being terminated each year in Australia indicates that many women are making this choice and it is undesirable that the law should be unclear.

Series Editor's comment

When I first went into general practice in suburban Melbourne in 1971, the Menhennitt ruling was only two years old. It was then considered 'prudent' that when a woman attended a GP to request an abortion, the GP would confirm the pregnancy and then refer the patient to a psychiatrist for confirmation or otherwise of the GP's opinion that the woman's mental health would be damaged if the pregnancy was continued. The woman would then attend a gynaecologist, with a referring letter from the GP recommending termination and a letter from the psychiatrist supporting that recommendation. It was accepted practice that the gynaecologist would be proceeding lawfully if two independent medical opinions other than that of the performing gynaecologist supported a medical need for the abortion.

That cumbersome approach was soon abandoned, mainly for the practical reasons that it was difficult to find psychiatrists willing to be used as (effectively) rubber stamps and able to give prompt appointments. It then became accepted practice that the two opinions regarding the medical need could be those of the referring doctor and the gynaecologist who went on to perform the abortion.

Ultimately, the whole sham was abandoned (at least in Victoria), and all the GP needed to do was give the patient a note saying that pregnancy had been diagnosed, and its approximate duration (or, when the HCG blood pregnancy test became available, a copy of the pathology report). The GP could refer the patient privately to a gynaecologist for consideration of termination or suggest she took the note to one of the newly established, openly publicised, abortion clinics. The essence was that it was considered up to the doctor who ultimately performed the termination to form his or her own view of the necessity for its performance, and that no recommending or second opinion was required.

This was not 'abortion on demand', or even 'abortion on request'. The doctor still faced the potential burden of having to demonstrate the medical grounds on which the decision to terminate was made – that is, that not having the termination would cause harm. In reality, the test applied was the other way around. The

various well-run and medically safe clinics established over that period worked on the premise that a woman walking in wanting an abortion would get one unless the doctor or screening counsellor believed that having the abortion would expose her to greater risk of medical or psychiatric harm than not having one.

The tension in the community between the 'Right To Life' and 'Pro Choice' lobbies meant that no politician would voluntarily go near the abortion issue unless he or she was a committed pro-life or pro-choice zealot prepared to become a martyr over the issue. The police turned a blind eye and undertook no investigational activity unless stimulated to do so by a formal complaint. That has happened in two States, Western Australia and Tasmania, and led to the introduction in those States of new abortion laws.

Very few GPs perform abortions, and hence do not face the possible legal burden to prove their lawfulness. However, most GPs diagnose pregnancies that turn out to be unwanted, and hence the GP becomes involved in providing advice and counselling. These are thankfully medical, not legal, issues – but I would like to add one caveat.

All of us are human beings as well as doctors. That means we hold personal religious and philosophical beliefs. It is, however, improper for us to attempt to influence a patient's behaviour to accord with our personal beliefs. You have every right to be morally opposed to having any involvement with abortion – but if that is the case you must be honest and say that your opposition is morally and not medically based, and suggest the patient see another doctor for counselling.

There have been pamphlets sent to doctors by people associated with some 'pro-life' organisations making dogmatic statements that doctors who do not mention the (alleged) higher risk of breast cancer in women who have had abortions, and the risk of psychiatric complications following abortion, will be found guilty of negligence. The assertion of a link between breast cancer and abortions has been said by the Anti-Cancer Council to be unsupported by any good evidence. As to the risk of psychiatric complications, they need to be balanced against the risks to which the patient would be exposed if she does not have an abortion.

In my view, the doctor is exposed to far greater legal risk by giving advice that masquerades as medical advice but is tainted by personal moral views. MT

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14. Criminal Law Consolidation Act 1935 (SA) s 82A.
15. Criminal Code of the Northern Territory of Australia s 174.
16. Health Act 1911 (WA) s 334 (3a), (5).
17. Health Act 1911 (WA) s 334 (7).