Abortion and the law in Australia

The legal test for when an abortion is not 'unlawful' – and therefore permitted – is different in each state and territory. This article describes the current legal position in Australia with respect to abortion, but does not attempt to discuss the complex ethical issues surrounding abortion.

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Case history

On 23 August 2006, a medical practitioner in Sydney was found guilty of performing an illegal abortion, but found not guilty of the manslaughter of a premature baby in May 2002. It was reported that the jury found the medical practitioner guilty in relation to two charges of giving a 20 year old patient a drug to procure an abortion. The following day, the patient gave birth at home. The baby, born at 23 weeks gestation, was pronounced dead in hospital about 4 hours later. The abortion was found to have been unlawful because the medical practitioner had failed to adequately counsel the patient.

This case has prompted discussion about the vexed question of abortion law reform. When reviewing the current legal position in relation to abortion, three broad categories of criminal law need to be considered: the laws that create the crime of 'unlawful abortion', the laws that create 'child destruction' and the law of 'homicide'. Homicide may be applicable in the context of abortion where a child is born alive but dies as a consequence of injuries inflicted in utero during an abortion.[1]

The case that articulates the test to be applied in Australian jurisdictions to determine whether an abortion has been performed legally is the 1969 decision in *R v Davidson*.[2] In this Victorian case, Menhennitt found that for an abortion to be lawful, a medical practitioner must have honestly believed on reasonable grounds that the abortion was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and that, in the circumstances, the danger of the abortion was not out of proportion to the danger to be averted. The test was approved and further refined in 1971 in a New South Wales case, *R v Wald*, in which Levine felt it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which a medical practitioner could honestly and reasonably believe there would result a serious danger to the woman's physical or mental health which the continuance of the pregnancy would entail.[3]

Risk management strategies

It has been estimated that about 100 000 abortions are performed each year in Australia.[4] From time-to-time, general practitioners will be consulted by a patient who requests an abortion or wishes to discuss their options when faced with an unplanned pregnancy. There are significant differences in the legislative provisions in each state and territory with respect to abortion. Some of the specific provisions are summarised below:

Australian Capital Territory (*Crimes Act 1900, Health Act 1993*)

- Abortions must be performed in approved facilities
- Specific recording requirements and regulations about counselling, including the provision of specific medical information (a regulation under the Act sets out the material that the information must include)
- 'Cooling off' period of 72 hours after counselling

- No one is under a duty to assist or carry out an abortion
- A person is entitled to refuse to assist in carrying out an abortion.

New South Wales (*Crimes Act 1900*)

- Abortion is lawful if there is 'any economic, social or medical ground or reason' upon which a doctor could base an honest and reasonable belief that an abortion is required to avoid a 'serious danger to the pregnant woman's life or to her physical or mental health'.

Northern Territory (*Criminal Code Act 1983*)

- Abortion up to 14 weeks gestation is permitted where either the 'maternal health ground' or the 'fetal disability ground' is satisfied by a gynaecologist or obstetrician
- If the woman is less than 23 weeks gestation and it is necessary to terminate the pregnancy immediately to avert grave injury to her physical or mental health then an abortion may be carried out legally
- If the girl is less than 16 years of age, the consent of the person having authority in law is required.

Queensland (*Criminal Code Act 1899*)

- An abortion will be lawful unless it can be proved that the procedure was not performed 'for the preservation of the mother's life' and was not 'reasonable having regard to the patient's state at the time and to all the circumstances of the case'.

South Australia (*Criminal Law Consolidation Act 1935*)

- An abortion will not be lawful unless the pregnant woman has been resident in SA for at least 2 months before the abortion and a second medical practitioner has confirmed the abortion is legally justified, unless the termination of pregnancy is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman
- A person is not guilty of an offence if the pregnancy is terminated by a medical practitioner in a case where he/she and one other medical practitioner are of the opinion, formed in good faith after both have personally examined the woman:
  (i) that continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated, or
  (ii) that there is substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped.

Tasmania (*Criminal Code Act 1924*)

- The termination of a pregnancy is legally justified if two medical practitioners (one of whom is an obstetrician or gynaecologist) have certified that continuation of the pregnancy would involve a greater risk to a woman's physical or mental health than if the pregnancy were terminated
- The woman must give informed consent unless it is impractical for her to do so.

Victoria (*Crimes Act 1958*)

- Abortion will be lawful if the medical practitioner held an honest belief on reasonable grounds that the abortion was both 'necessary' and 'proportionate'.

Western Australia (*Criminal Code Act 1913, Health Act 1911, Acts Amendment (Abortion) Act 1998*)

- A medical practitioner may be guilty of an offence unless the abortion is performed in good faith and with reasonable care and skill and its performance is justified under section 334 of the *Health Act 1911*
- An abortion must be 'justified' – a pregnant woman must have freely given informed consent or have other social, personal, medical or mental health reasons for wanting an abortion
- A medical practitioner, other than the one performing the abortion, must provide the woman with medical information about abortion and pregnancy and offer her pre- and post-abortion counselling
- If the pregnant woman is at least 20 weeks pregnant, she can only have a legal abortion if two medical practitioners, who are members of a government appointed committee, agree that the pregnant woman or fetus has a severe medical condition which justifies the procedure
- A 'dependant minor' (<16 years of age who is financially supported by her custodial parent(s)) cannot give consent unless one of the following conditions are met: one of her custodial parents is informed that an abortion is being considered and given the opportunity to participate in the counselling and other medical consultations; or a court order is obtained from the Children's Court dispensing with this requirement.

Conflict of interest: none.

References

1. Cica, N. Abortion Law in Australia. Parliament of Australia. Research paper 1 1998–99. Available at www.aph.gov.au.
2. *R v Davidson* (1969) VR 667.
3. *R v Wald* (1971) DCR 25.
4. de Crespigny LJ, Savulescu J. Abortion: time to clarify Australia's confusing laws. Med J Aust 2004;181:201–3.

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