

ABORTION LAWS IN AUSTRALIA: TIME FOR CONSISTENCY?

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The political controversy surrounding the recent moves in Federal Parliament to return responsibility for approval of the use of mifepristone (RU 486) to the Therapeutic Goods Administration has demonstrated a number of telling points.

Firstly, it does seem there is a general political acceptance of a woman's right to obtain an abortion *in certain circumstances*. Despite the surfacing of some strongly held views from the 'pro-life' lobby, at no time was there any suggestion that current access to abortion be restricted, either by a change in laws determining lawful abortion, or by restriction in Medicare funding for abortion.

Secondly, notwithstanding this general consensus, there remains a very strongly held view of a vocal minority who, whilst accepting abortion being lawful in certain circumstances, will continue to oppose a legal recognition of abortion on demand, and will go to some lengths to derail any political moves to further liberalise access to abortion.

A permissive judicial interpretation of abortion laws to date means that the writer is unaware of any woman who has requested an abortion and been denied it. Justice Kirby noted in a judgment of a medical negligence claim that it was common knowledge that in NSW abortion was available on demand.¹ There is an assumption amongst women requesting an abortion that they will obtain one. Although it is unclear exactly how many abortions are performed in Australia each year, it is found that only 2 per cent are performed for foetal abnormality, and even fewer would be performed for life threatening maternal disease. The remainder are performed for social or economic reasons.² Put simply, there is a strong expectation from most women that they should have access to abortion on demand.

Where does this leave the reasonable doctor? The issue was reviewed recently in the Medical Journal of Australia.³ On the one hand, laws in most states and the territories make it quite clear that abortion is only lawful under certain circumstances. In effect, politicians have sidestepped the politically difficult issue of legislating either for or against abortion. The law places a legal barrier to access to abortion, and presumes that doctors are the gatekeepers. If the medical

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1 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

2 Farhat Yusuf and Stefania Siedlecky, 'Legal abortion in South Australia: a review of the first 30 years' (2002) 42(1) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 15.

3 Lachlan De Crespigny and Julian Savulescu, 'Abortion: time to clarify Australia's existing laws' (2004) 16 *Medical Journal of Australia* 201.

profession were to act in this capacity, doctors would from time to time (presumably more often than currently occurs) determine that, in a particular instance, abortion would be unlawful and deny the woman's request. The fact that, in practice, any woman seeking an abortion will obtain one means that the medical profession, on balance, is focusing on the obligations of the doctor-patient relationship, rather than a strict interpretation of abortion laws.

Recent events have led to increasing unease amongst the medical profession with their simultaneous gatekeeper/caregiver role. In 2000, in Victoria, the circumstances surrounding the abortion of a pregnancy at 32 weeks led to a highly publicised referral to the state Coroner and possible sanction from the state Medical Board. Currently, a NSW doctor is before the NSW Supreme Court charged with manslaughter, and performing an illegal abortion arising out of her treatment of a patient who had attended specifically requesting abortion at 23 weeks gestation. The baby was subsequently born alive at home but died soon after birth. Notwithstanding the eventual outcome, this case demonstrates the extent to which the application existing laws to a request for abortion may be determined by chance, rather than legal clarity or rigour.

Further unease follows when improvements in survival rates of premature babies are considered. Whilst 40 years ago it would be highly unlikely that a baby born before 28 weeks gestation would survive the complications of prematurity, there is now a reasonable chance of survival of a normally formed and grown baby at 23 to 24 weeks. This change inevitably impacts on attitudes regarding what should be the upper limit for abortions performed for reasons other than major foetal abnormality or threat to the life of the mother.

If scepticism from the medical profession needed any further stimulus, the lack of uniformity in abortion laws in Australia is of major significance. Why should the geographical location of a woman determine whether or not she has access to lawful abortion? A woman with a foetus affected by a major abnormality at 20 weeks may obtain a legal abortion in the ACT, but require approval from a government committee in Western Australia; and, in NSW, Victoria and Queensland, lawful access would be uncertain and available on maternal health grounds only. Is it any wonder that the Australian Medical Association has called for provision of unambiguous abortion laws that clarify when abortion is sanctioned by the law, and when it is not?

Good laws provide legal certainty for medical practitioners acting in good faith when approached by women seeking abortions. Legal clarity should underpin the availability of abortion for women to the extent that the public consensus allows. The current variations in Australian abortion laws certainly are not consistent with these aims.

The medical profession is willing to assist in resolving this situation. Whereas, in the past, decisions regarding the clinical approach to requests for abortions which raised difficult ethical issues were left to the discretion of individual doctors, most hospitals now have guidelines to assist patients and clinicians making these decisions. A meeting of clinicians working in hospitals performing late term abortions has produced a consensus document intended for publication

and community review.⁴ Perhaps this process may be the catalyst for consistent abortion laws in Australia.

4 Leslie Reti, Letter to the Editor (2005) 182(2) *Medical Journal of Australia* 94–95.