Submission No. 1220
Received 30 June 2016

Submission to Inquiry on Abortion Law Reform

Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament

Zoe Rathus AM

Senior Lecturer

Griffith University Law School **30 June, 2016.**

Introduction

I wish to record my thanks to the Member for Cairns, Mr Rob Pyne MP, for placing this issue before Parliament. I do not intend to provide a detailed submission because I know that many lawyers, medical practitioners, health service providers, social workers and others much closer to the current system will have covered the relevant laws and situations regarding Queensland women. However, I thought it would be useful for the Committee to have a copy of the relevant chapter of the *Report of the Taskforce on Women and the Criminal Code* from 2000. I was the Deputy Chair of that Taskforce and we consulted widely across Queensland in respect of all of the issues we addressed.

It can be seen that, like the Information Paper provided in this Review, the Taskforce investigated existing laws around Australia and overseas. Further, more submissions were received on the relevant Issues Paper about reproductive issues than any other Issues Paper.[1] Having considered legislation from Australia and overseas, scholarly research, submissions received and discussions among the members of the Taskforce we arrived at the same recommendation as this Bill proposes –simply repeal sections 224, 225 and 226 of the Criminal Code.[2] I support this Bill. It may useful to consider establishing an expert panel or other advisory group to assist with implementation after the law reform has occurred.

[1] Office of Women's Policy and Department of Attorney-General, *Report of the Taskforce on Women and the Criminal Code*, Queensland Government, 2000, p 351.
[2] *Report of the Taskforce on Women and the Criminal Code*, p 366.

Answers to Questions

In terms of the specific questions asked I provide the following brief comments:

1. ***What policy objectives should inform the law governing termination of pregnancy in Queensland?***

   Termination of pregnancy should be considered a health service available to all women in Queensland. It is critical that women can receive prompt medical advice and counselling support (if required) and should have access to a safe and affordable service no matter where they reside.

2. ***What legal principles should inform the law governing termination of pregnancy?***

   Equity of access for all women without judgment.

3. ***What factors should be taken into account in deciding if a termination of pregnancy is lawful? (e.g. consent of the woman, serious danger to the woman's life, the woman's physical and mental health, other factors?)***

   Consent of the woman should be the only mandatory requirement. The other issues listed would no doubt be relevant in many discussions between health service providers and women patients, but they do not require legislative entrenchment.

4. ***Should termination of pregnancy be regulated according to the period of gestation? If so, how should the law apply to particular gestational periods?***

   Personally I think that these are matters between the woman and her doctor, although I understand that this creates discomfort for some members of our community. If it is considered that a time limit should be included, I suggest that terminations after that time limit should only require the consent of the woman and the formal opinion of her doctor that continuing the pregnancy would cause serious danger to the woman's life or physical, mental or emotional health.

5. ***Should the law in Queensland provide for conscientious objection by health providers?***

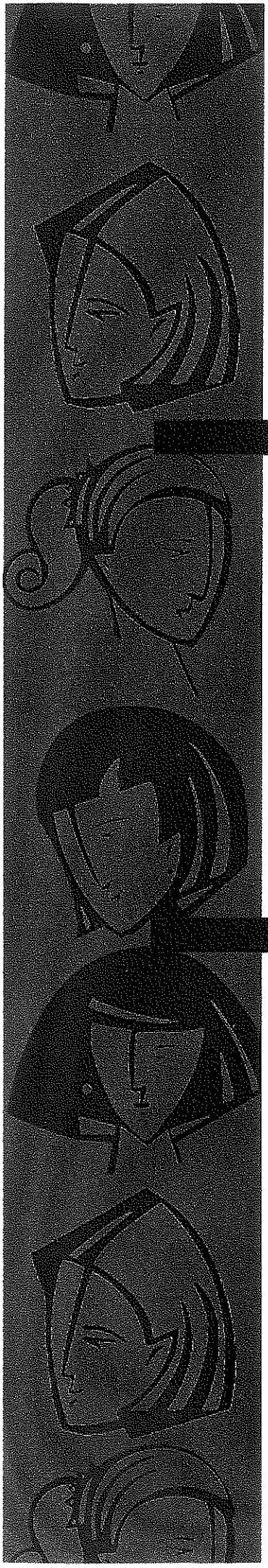
   Yes – there are plenty of examples of this and I think it is a reasonable compromise.

6. ***What counselling and support services should be provided for women before and after a termination of pregnancy?***

Sufficient so that all women who wish to access such services are able to, however, they must not be forced on the women.

7. ***Please inform the committee about your views on any other aspects of the Bill and the terms of reference.***

It is time for Queensland to change these laws and come into line with more progressive guidelines and arrangements that exist in most of the rest of Australia and much of the world.



REPORT OF THE TASKFORCE ON WOMEN AND THE CRIMINAL CODE

FEBRUARY 2000

Office of **Women's Policy**
Department of Equity and Fair Trading

QUEENSLAND GOVERNMENT

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL

The Honourable Matt Foley MLA
Attorney-General and Minister for Justice and Minister for The Arts

The Honourable Judy Spence MLA
Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading

Dear Ministers

The Members of the Taskforce on Women and the Criminal Code are pleased to present to you our Report.

Yours sincerely,

Josephine Akee

Stephanie Belfrage

Lesley Chenoweth

Leanne Clare

Susan Currie

Monique Dawson

Joy Deguara

Catherine Dineen

Kay Halford

Katie Holm

Donna Justo

Isabelle Kearsley

Nitra Kidson

Di Macleod

Catherine McCahon

Heather Nancarrow

Margaret Mobbs

Zoe Rathus

Louise Shephard

Virginia Sturgess

Netta Tyson

CHAPTER 9: REPRODUCTION AND SEXUALITY

PART 1: INTRODUCTION

The issues of abortion, surrogacy and female genital mutilation are issues of great concern to the women of Queensland and are dealt with together on the basis that they each affect a woman's control over her sexuality and reproduction.

The Taskforce chose not to examine the laws of prostitution in Queensland as the Government has recently undertaken a full review and has already announced a new legislative framework for the regulation of the sex industry in Queensland.

PART 2: ABORTION

Inclusion of abortion

Although abortion was not expressly included in our Terms of Reference the Taskforce decided early in our deliberations that it was an issue on which we had to consult and report. It is an offence contained in the *Criminal Code* that touches specifically on women and is of concern to women. We could not honestly report on the impact of the *Criminal Code* on women without reporting on the consequences of abortion being an offence.

Issues Paper 6 on Abortion and Surrogacy, published by the Taskforce in June 1999, attracted the largest number of submissions of any Issues Paper. There were submissions both from groups that have advocated for the decriminalisation of abortion for many years, as well as from groups and individuals opposed to abortion.

The Taskforce received a number of well-researched and knowledgeable submissions about abortion from health service providers, academics and other groups with expertise in abortion. We have used those submissions as the basis of much of the discussion in this Chapter rather than undertaking an extensive literature review.

Polarised community views

Abortion is a subject that attracts strong opinion and emotional debate. One view is that abortion is a woman's health and human rights issue:

> *Women can never have control over their lives and make meaningful decisions about their future if they cannot control when and where they have children. Their potential, education, careers and future happiness is in jeopardy if the decision is taken out of their hands by discriminatory laws. Being forced to carry an unwanted pregnancy to term imposes irreversible circumstances that can alter a women's financial status, physical, mental and sexual health, self-esteem, social relationships and life goals.*[759]

[759]International Women's Day Committee submission

On the other hand, many argue that abortion is taking a life:

> *Our members are ever vigilant of the need to express our firm belief that life is precious, it exists within the womb and that both mother and child need every support society provides to enable birth to eventuate, including supportive counselling which could well make the difference to a woman's attitude to her pregnancy.*[760]

Clearly it is impossible to reconcile these views and we have not attempted to do so. We have endeavoured to take a realistic and pragmatic approach to the presentation of information.

Community attitudes

A number of polls have been conducted over recent years and all tend to indicate strong community support for decriminalisation. In an Anderson McNair poll conducted in 1991, 81% supported a woman's right to have abortion. In 1995 a survey conducted by the *Courier Mail* indicated that two-thirds of Queenslanders want abortion decriminalised[761], while a survey of Western Australian gynaecologists in 1990 showed that 100% support legally available abortion.[762]

Although the Taskforce received many submissions from those opposed to abortion, the submissions in favour of improving the availability of abortions spoke cogently of: women's human right to control their fertility; women's health needs; and the realities of poverty and limited life choices for women who are denied the opportunity to terminate an unwanted pregnancy.

MCCOC did not feel "*able to make a firm and detailed recommendation to Ministers ... [because the] ... process of consultation has produced two irreconcilable positions, at opposite extremes, with no middle ground.*" Further, the "*issues involved in taking a position on the general issue are not those which are within the particular expertise of this Committee.*"[763] However, the Committee makes a strong and unassailable point when it concludes:

> *The Committee would like to emphasise, however, that it is not possible to do nothing.* ***Even doing nothing means taking a position by default*** *[emphasis added].*

Global context

Many countries have moved away from focusing on criminality in relation to abortion, towards a concern for women's health and family well being.[764]

The Beijing Declaration that emanated from the Fourth United Nations Women's Conference in 1995 contains a clause to the effect that:

---

[760]Submission No 21
[761]Children by Choice, Information on Termination of Pregnancy for Queensland Women, May, 1999
[762]Women's Electoral Lobby submission, 4
[763]Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Non Fatal Offences Against the Person: Report* (1998), 165
[764]Public Health Association of Australia Inc, *The Regulation of Abortion in Australia: Public Health Perspectives* (1997), Canberra, Fact Sheet 1

> *A woman's health and the health of her children, is affected by family planning issues. These include the age at which she begins and stops child-bearing, the interval between each birth, the total number of pregnancies and the socio-cultural and economic circumstances in which she lives and raises her children.*[765]

The Declaration calls for countries to review any laws containing punitive measures against women and abortion practices.[766]

The United Nations CEDAW, of which Australia is a signatory, prohibits all forms of discrimination against women in the delivery of health care, and in marriage and family relations respectively. Articles 12.1 and 16.1 (e) of CEDAW provide:

> 12.1. States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning...
>
> 16.1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ...
>
> (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

Although this Convention has led to the enactment of federal and state legislation relating to discrimination against women, governments have avoided restructuring the legal regime regarding termination of pregnancy. Arguably, it is Australia's adherence to the Convention that provides the political and legal imperative for this to occur.

Facts about performance of abortions in Australia

The state of abortion law is of critical importance to women. Approximately 14,000 abortions are performed in Queensland each year.[767] It is the second most common gynaecological procedure performed in Australia and is Medicare funded. There is, in fact, "a gross contradiction between the practice and the law of abortion."[768] Interestingly, the proportion of pregnancies aborted in Australia is estimated to have declined from about one-third in 1937 to about one-quarter in 1990, presumably as a result of improved contraception.[769]

Approximately one in three Australian women will have a termination of pregnancy during her lifetime and one in four pregnancies are terminated in Australia every year.[770] Most

---

[765]*ibid*
[766]*ibid*
[767]Children by Choice, Information on Termination of Pregnancy for Queensland Women, May, 1999
[768]Women's Electoral Lobby submission, p 3
[769]Public Health Association of Australia Inc, *The Regulation of Abortion in Australia: Public Health Perspectives* (1997), Canberra, Fact Sheet 2
[770]Children by Choice, Information on Termination of Pregnancy for Queensland Women, May, 1999

abortions (over 90%) are performed before the 12th week of pregnancy.[771] All women are represented in the statistics - varying education levels, social classes, religious and cultural backgrounds, single and partnered women, with and without children, with and without paid employment.[772] Approximately 29% of the women are under 20 years, 63% are between 20 to 35 years and 8% are over 35 years.[773]

The reasons for abortions include: the desire for more financial security before having a family; problems within the relationship (ranging from insecurity to domestic violence); spacing between children; feeling that they are too young to mother; pregnancy resulting from rape or incest; identified health problems in the foetus; and study and career issues.[774]

No contraception is 100% effective. As well, some women do not fully understand the issues associated with the use of contraceptives (for example, certain antibiotics interfere with the effectiveness of the pill). Children by Choice report over half of their clients use a regular method of contraception and 39% report using contraception when they became pregnant.[775]

Consequences of criminalisation

Cost and access

The fact that the *Criminal Code* provides for the prosecution and imprisonment of medical practitioners who perform abortions shapes the provision of abortion services in Queensland, in terms of availability within the private health sector, and in terms of State health policy.[776] There is a lack of choice for women in selecting a health professional to conduct an abortion.[777] Often rural women travel to neighbouring towns and cities to consult with more sympathetic general practitioners or women specific services.[778]

In Brisbane an abortion performed in the first 12 weeks of pregnancy costs about $170 and rises by $50 per week thereafter. In Rockhampton, Townsville and Cairns it is $350 for up to 12 weeks and $50 per week thereafter. For rural women the costs are significantly higher (for example, a woman from Cape York has additional travel and accommodation costs and is therefore looking at $600 up front - $200 Medicare rebate can be claimed back later). By the time she has saved that money she is likely to be more advanced in the pregnancy which increases her costs and the attendant health risks. The most common reasons for delay are: costs; lack of information on where to access services; inconvenience of travel; and child care arrangements.[779]

> *Those who are most disadvantaged by these circumstances are young women, women living in rural and remote regions of Queensland (where Aboriginal and Torres Strait Islander women are over-represented) and women from lower socio-economic backgrounds. The provision of*

[771]Submission from Women's Electoral Lobby, 3
[772]Children by Choice, Information on Termination of Pregnancy for Queensland Women, May, 1999
[773]Submission from Women's Electoral Lobby, 3
[774]Children by Choice, *op cit*, May, 1999
[775]*ibid*
[776]Children by Choice Submission, 9
[777]*ibid*
[778]Submission No 137
[779]Children by Choice, Information on Termination of Pregnancy for Queensland Women, May, 1999

> *termination of pregnancy services through private health facilities in Queensland do not meet the stated goals for equity of access to health services because women who are already disadvantaged have the least access to these limited services. There is a continuing need for termination of pregnancy services in public hospitals.*[780]

Limits professional quality control

The criminality of abortion means that it is difficult to ensure practitioners are appropriately qualified or experienced.[781] There is an absence of under-graduate and post-graduate training leading to low numbers of qualified professionals to provide services. The criminal aspect creates problems of access to education for doctors, nurses, psychiatrists, psychologists, counsellors and social workers to assist them to understand and integrate the technical, social and emotional aspects of abortion.[782]

As long as doctors are vulnerable to being charged with a criminal offence, many will be reluctant to develop and practice abortion skills.[783] Further, there will be no widespread or systematic establishment of reliable services throughout the community to meet the needs of all women.[784] This also restricts progressive health care concepts such as the implementation of clinical guidelines for free standing day surgery facilities.[785]

Emotional and psychological consequences for the woman

While abortion remains an offence in the *Criminal Code*, there will be enormous pressure on women not to actively seek abortions and to feel criminal or at least guilty when they do.[786] Women in rural areas who have to consult the local doctor often find the experience "humiliating" or "at the very least an anxious experience" because of the "emotive and moral stigma attached to terminations".[787]

> *Single, teenage and older women all have differing needs which go far beyond the medical issue of pregnancy termination. What is common to them all is that legal uncertainty and moralistic bearings on the issue of abortion do nothing to help women's decision-making. Counselling should be directed to facilitation of the woman's own problem solving capacity, with the final decision resting with the woman.*[788]

The emotional and social costs of carrying an unwanted pregnancy to term appear to extend to the offspring who show greater psychiatric morbidity and delinquency and less education than matched controls on 21 year follow up.[789]

---

[780] *ibid*
[781] Children by Choice Submission , 17
[782] *ibid*
[783] *ibid*
[784] *ibid*
[785] Women's Electoral Lobby submission, p 3
[786] Children by Choice Submission, 15
[787] Submission No 137
[788] Public Health Association of Australia Inc, *The Regulation of Abortion in Australia: Public Health Perspectives* (1997), Canberra, Fact Sheet 4
[789] Children by Choice Submission, 23

On the other hand, some submissions suggested long term psychological consequences from having an abortion:

> *We women regret what we have done. ... We don't really know what we are doing when we have an abortion.*[790]

Queensland law

Sections 224, 255 and 226 of the *Criminal Code* govern abortion law in Queensland. These sections are aimed at: any doctor or other health worker who performs an abortion; the woman herself; and any one who supplies drugs or instruments for the purpose of performing abortions. It is the section that targets doctors that has been used for prosecutions:

> **Attempts to procure abortion**
>
> **224.** Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.

Accordingly, abortion is a crime but section 282 is accepted as a defence when the abortion is performed "for the preservation of the mother's life".

> **Surgical operations**
>
> **282.** 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 of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

The Queensland law has been influenced by court decisions in Victoria and New South Wales that have established the legal frameworks for those states. In 1969 Justice Menhennitt laid down the first major contemporary statement relating to the interpretation of the abortion law in Victoria. He said that an abortion could be lawfully performed if it was:

> *"necessary to preserve the woman from a serious danger to her life or physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail".*[791]

Two years later this view was extended by Judge Levine in NSW to include:

> *"any economic, social or medical ground or reason which ...could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health."*[792]

---

[790]Submission No 114
[791]***R v Davidson*** [1969] VR 667
[792]*R v Wald* [1971] 3 NSWDCR 25

After raids on the Greenslopes clinic in Brisbane in 1985 Doctors Bayliss and Cullen were prosecuted for procuring an illegal abortion. In the case that followed[793] Judge Maguire undertook a detailed examination of the law and concluded that section 282 should be read as the defence to the abortion sections, although he believed that it was originally intended for a different purpose.

The question, therefore, which is critical to understanding the legal position in Queensland is how widely the expression "*or upon an unborn child for the preservation of the mother's life*" can be interpreted. If it only relates to life and death situations then lawful abortions would be exceedingly rare, given the developments in medical science. However, if some reference can be made to the quality of life of the mother, the defence has much broader application, although its applicability to any particular abortion will often be difficult to gauge in advance.

Judge Maguire took the view that Justice Menhennitt's ruling applied in Queensland but he was not convinced that the wider interpretation expressed by Judge Levine would be adopted here. He concluded by saying:

> *This ruling serves to illustrate the uncertainty of the present abortion laws of Queensland. It will require more imperative authority (either a Court of Appeal or Parliament) to effect changes if changes are thought to be desirable or necessary with a view to amending and clarifying the law.*[794]

The practical results of the Menhennitt and Levine rulings are that abortions are available in Victoria and New South Wales in free-standing clinics and private and public hospitals.[795] In practice, availability is more restricted in Queensland. This is perhaps the result of the law seeming less clear, the highly politicised action around abortion in Queensland (from all sides of the debate) and the geographic remoteness of some communities.

Law in other Australian jurisdictions

Table 1, at the conclusion of this Part, sets out a summary of the laws and practices relating to abortion in the different Australian states and territories. At about the same time as the Menhennitt and Levine rulings were made, South Australia (1969) and the Northern Territory (1971) legislated to legalise abortion in certain situations. Abortion is still an offence in those places but a regulatory framework provides for lawful abortions.

Since then there had been no significant abortion legislation until 1998 when both Western Australia and the Australian Capital Territory moved on the issue in slightly different ways. The irony appears to be that some attempts to liberalise the laws have created hurdles that in fact impede access to abortions. It is possible that New South Wales and Victoria, with their common law judgments unchallenged for about 30 years, provide women with the most equitable and practical access.

It is useful to examine the major features of the South Australian and Northern Territory models and compare those with the approaches of the late 1990s.

---

[793] *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8

[794] *ibid*

[795] Children by Choice Submission ,28

South Australia - 1969

Circumstances in which an abortion can be performed:

- If the pregnancy is under 28 weeks:
  - the continuation of pregnancy involves greater risk to women's life or there is a risk of injury to physical or mental health, taking into account her actual or reasonably foreseeable environment; or

  - serious physical or mental abnormalities in the foetus
    and in either case:

    - it is necessary in the opinions of two qualified medical practitioners
    - it is carried out in "prescribed" hospital or clinic
    - there is a two months residency requirement in SA

- If the pregnancy is over 28 weeks pregnant:
  - then only to preserve the woman's life.

- "parental" or other consent is not required at any age.

Northern Territory - 1973

Circumstances in which an abortion can be performed:

- if the pregnancy is under 14 weeks:
  - continuation of pregnancy involves greater risk to women's life or risk of injury to physical or mental health than termination (no guidance on what to take into account); or

  - there is serious physical or mental abnormalities in foetus and:

    - it is necessary in the opinions of two qualified medical practitioners
    - it is carried out by a gynaecologist or obstetrician
    - it is performed in a hospital

- if the pregnancy is between 14 and 23 weeks:
  - where necessary to prevent grave injury to physical or mental health of woman

- if the pregnancy is over 23 weeks:
  - only to preserve woman's life

- if the woman is under 16 years - "parental" or other appropriate consent required.

Western Australia - 1998

Recent legislative reform occurred in Western Australia after a decision was made to charge two doctors. Due to the uncertainty that this decision generated about the legal position of other doctors, all doctors who performed abortions in Western Australia refused to continue until the law was reformed. Two women also tried to self-abort.[796] There followed an extraordinary political campaign involving politicians, doctors, service providers, women's groups, anti-abortion groups and others. The campaign is well documented in a number of articles.[797]

The final outcome was that the existing sections of the *Criminal Code* (equivalent to sections 224, 225 and 226) were repealed and replaced with one section. The women themselves can no longer be charged, but a maximum penalty of $50,000 applies to doctors who breach the law.[798]

Circumstances in which an abortion can be performed:

- if the pregnancy is under 20 weeks:
  - it must be performed by a medical practitioner;
  - is "justified under section 334 of the Health Act" and the woman must give "informed consent";
  - a medical practitioner must provide certain detailed information and referrals. It must be a different practitioner from the one who will perform the abortion so there must always be two doctors involved;
  - it must be determined that the woman "will suffer serious personal, family or social consequences" if the abortion is not performed or that there is serious danger to the physical or mental health of the woman.
- if the pregnancy is over 20 weeks:
  - two medical practitioners from a panel of at least six appointed by the Minister must agree that "the mother, or the unborn child, has a severe medical condition that ... justifies the procedure"; and
  - it must be in an approved facility.
- where the woman is under 16 and is a dependent minor the custodial parent must be informed and "given the opportunity to participate in a counselling process" or the woman may apply to the Children's Court for an order.

---

[796]C. Davenport, "Achieving Abortion Law Reform in Western Australia" (1998) 13(28) *Australian Feminist Studies* 299 , 299-300

[797]C. Davenport, "Achieving Abortion Law Reform in Western Australia" (1998) 13(28) *Australian Feminist Studies* 299, L. Teasdale, "Confronting the Fear of Being 'Caught': Discourses on Abortion in Western Australia", (1998) 22(1) UNSW Law Journal 60, C. Calcutt, "Abortion Law Reform in Western Australia" (1998) 55 *Health Issues*, A. Creagh "Abortion in W.A." (1998) New Doctor 16

[798]Section 199, *Criminal Code,* Western Australia

The Act is to be reviewed within three years and a report is to be presented to Parliament within four years.

It is reported that the new laws have restricted access to abortion services for young women.[799] According to USA research parental involvement laws may cause young women to delay seeking medical services, thereby increasing the risk of the procedure. It may also lead to unwanted births, illegal abortion and suicide.[800]

Australian Capital Territory - 1998

In the ACT no changes were made to the *Crimes Act* which contains similar provisions to the Queensland *Criminal Code*. Instead a new Act was introduced which now provides a regulatory framework around the provisions of the *Crimes Act*.

The *Health Regulation (Maternal Health Information) Act 1998* introduced an objects section that sets the tone for the legislation. The objects include:

- ensuring "adequate and balanced medical advice and information" are given to women;
- ensuring abortions are only performed by "appropriately qualified persons in suitable premises";
- providing statistical reports to government;
- providing the right of persons and bodies to refuse to participate in abortions;

The rest of the Act sets out other rules including:

- the practitioner must be a medical practitioner in an "approved facility";
- the practitioner must provide certain information, for example, a detailed list of information and referrals;
- the woman and her doctor must sign a declaration regarding the provision of information;
- the consent of woman in writing must be obtained after a 72 hour "cooling off" period following the declaration about information;
- a seven member Advisory Panel must approve materials for the information; and
- the Minister must receive statistical quarterly reports from approved facilities (non-identifying of patients).

---

[799]Children by Choice Submission, 18
[800]C. Calcutt, *op. cit.*

Abortion laws around the world

Table 2, at the conclusion of this Part, gives an overview of abortion laws around the world. It can be seen that "currently about 61% of the world's population live in countries where induced abortion is permitted for a wide range of reasons or without restriction as to reason (most industrialised nations, not including Australia). In contrast, 25% live in nations where abortion is generally prohibited (mainly South America and Africa except South Africa).

United States of America

The famous American decision of *Roe v Wade*[801] occurred at about the same time as our Menhennitt and Levine rulings, but took a very different approach determined by constitutional rights. The major findings of Justice Blackburn can be summarised as follows:

- government may not interfere with a woman's decision to terminate a pregnancy in any way during the first trimester of pregnancy, except to insist that it be performed by a physician;
- in the second trimester, government has the power to regulate abortion only in ways designed to preserve and protect the woman's health;
- from the third trimester, protection of foetal life becomes a sufficiently compelling reason to justify interference to protect foetal life unless the abortion is necessary to preserve the woman's life.[802]

Issues raised by law reform

Repeal sections 224, 225 and 226 of the *Criminal Code*

Children by Choice advocates repeal of sections 224, 225 and 226 of the *Criminal Code* as "*a necessary precondition for the guarantee of women's reproductive rights.*"[803]

Arguably the amendment of these sections, or the introduction of a regulatory framework, could actually jeopardise access to those who were intended to benefit. As we noted in Western Australia, small details in the regime can create insurmountable hurdles for some women - usually the poorest, least educated and with the fewest resources.

Compromises in regulatory frameworks are generally intended to satisfy or placate some of the concerns raised by those opposed to abortion. Ironically, it is doubtful that they serve any purpose. Those opposed remain horrified by any attempt to improve access to abortions. Those who believe that abortions should be available are often frustrated by the new hurdles and feel dissatisfied. Those who suffer are the women who believe that the new law has improved access to abortion, and then find themselves in a bureaucratic medical maze as they work against time to fulfil the requirements of eligibility.

---

[801] ***Roe v Wade*** US 113 (1972)
[802] L. Tribe, *Abortion: The Clash of Absolutes,* (1990) W W Norton & Co in submission No 229.
[803] Children by Choice Submission, 18

The Public Health Association of Australia recommends that all reference to lawful, medically provided abortion be removed from the criminal laws and codes of the States and Territories of Australia and that abortion be regulated within the Medical Practitioners Acts.[804]

In France the first steps in law reform were taken by the conservative approach of simply legislating that the offence provisions did not apply to abortions performed within the first 10 weeks.[805] This is in line with policy in the USA where first trimester abortions are considered to be entirely private matters between a woman and her doctor.

Who can perform and where

Many of the regulatory schemes contain conditions about who can perform abortions and where they can be conducted. While quality control is vital in health care, most medical procedures do not have specific laws for such matters and general medical practice standards apply. For example, rules requiring abortions be performed by medical practitioners, limits the possibility of specialist nurses and midwives training and qualifying in this area of work. Requiring the facilities in which abortions are performed to be specially approved often limits access in rural and regional areas. If changes are to be made, ensuring access to services of all kinds for women in these isolated areas of Queensland should be considered.

Limitations based on period of gestation

Many groups suggest that there should be no specified limit on the period of gestation. It is argued that women and doctors do not willingly submit themselves to late abortions.

Age of consent

It was submitted to the Taskforce that the Western Australian provisions requiring young women to obtain Court orders have "caused confusion, complaints and concerns"[806]

Potential framework for restriction

A number of the submissions suggested that any regulatory framework would provide a basis on to which restrictions could be grafted. There could be an inherent danger in attempting to develop a set of rules that try to set out in advance the circumstances in which an abortion is legal or illegal.

Ways forward

Consultative panel

---

[804]Public Health Association of Australia Inc, *The Regulation of Abortion in Australia: Public Health Perspectives* (1997), Canberra, Fact Sheet 7

[805]David Applebaum, *Judges' Voices in the French Abortion Debate of the 1970s* (1995) E Law, Murdoch University School of Law, Western Australia

[806]Children by Choice Submission, 19

Children by Choice, in recognising the difficulties of rushing change in the law, have recommended that:

- a Consultative Panel be set up to establish a plan for, and oversee the process of, abortion and related services becoming accessible to all Queensland women as an urgent health and social justice goal;

- the Panel be given a time frame of no more than four years, with the planning process to be complete within one year, and it should report to the Minister for Women's Policy, the Attorney-General, the Minister for Health, and the Premier;

- the members of the Panel should be committed to the overall goal of ensuring that Queensland women have reasonable and equitable access to abortion services, and should be women;

- it include a representative from each of the following:

  - Office of Women's Policy
  - Queensland Health
  - Department of Justice and Attorney-General
  - the medical profession
  - the legal profession
  - Children by Choice
  - Family Planning Queensland
  - Women's Health Queensland Wide (a network of women's health services)
  - women in rural and remote areas
  - Aboriginal women
  - young women
  - women of the Torres Strait Islands
  - women from non-English speaking backgrounds;

- the Panel make and implement plans with respect to the following aspects of abortion services, and other fertility control services (but not necessarily limited to them):

  - Set standards for private health facilities in which abortion services are available, in consultation with the Royal Australian College of Obstetricians and Gynaecologists, the Royal Australian College of General Practitioners and the Abortion Providers Federation of Australia.

  - Make recommendations in relation to abortion services within the Queensland public health system, after appropriate consultation, and oversee implementation with regional hospital boards and any other bodies.

  - Make recommendations and oversee the implementation in relation to the Patient Transit Scheme, after consultation with Queensland Health, to ensure that it becomes appropriately accessible to women.

- Make recommendations about the education of health professionals and the training of health professionals about this issue, after consultation with appropriate medical and educational bodies.

- Make recommendations, and consult about their implementation, to ensure wider knowledge and availability of emergency contraception.

- Make recommendations for, and consult about their implementation, contraceptive and safe sex education in primary and secondary schools.

- Make recommendations about the provision of information, counselling, and post-abortion counselling for Queensland women.

Appropriate facilities

Another submission suggests publicly funded and free-standing clinics should be provided in regional centres, and that these should have overnight facilities and be linked to the public hospital system. These should adopt the Abortion Providers Federation of Australia Standards of Practice and Guidelines for Member Facilities. [807]

Training and education for providers

In South Africa the *Choice on Termination of Pregnancy Act 1996* became operative on 1 February 1997. It permits abortions to be performed upon the woman's request through the first trimester of pregnancy - a dramatic change from the previous law. This has required the urgent training and education of service providers about the technical procedures and also the issues relevant to working with women who have chosen to terminate a pregnancy.

The Planned Parenthood Association of South Africa has been conducting workshops with service providers. The goals of the workshops are to:

- facilitate the implementation and management of abortions in an efficacious manner;
- gain an understanding of providers' concerns regarding abortion;
- assist providers in relating their values to their clients' needs; and
- develop recommendations for incorporating such training sessions into regular programs for providers.[808]

Prevention

A number of submissions suggested that Australia should change its attitude towards RU486 (widely touted as the "morning after" pill). One argued that it should be part of total heath

[807]International Women's Day Committee submission

[808]S. Gittmacher, F. Kapadia, J. Te Water Naude and H. de Pinho, "Abortion Reform in South Africa: A Case Study of the 1996 Choice of Termination of Pregnancy Act" (1998) 24(4) *International Family Planning Perspectives* 191, 193

care for Queensland women.[809] The Taskforce does not have enough information about this pharmaceutical product to comment.

Education on sexuality and reproduction

Submissions generally indicated strong support for sex education in schools, although anti-abortion submissions tended to suggest that such education could be negative and dangerous.

> *The risks associated with indiscriminate sexual behaviour (eg sexually transmitted diseases) should be clearly communicated, along with the fact that the only 100% safe means of avoiding STDs is to have a monogamous long term heterosexual relationship with uninfected partners. The only 100% safe way to avoid pregnancy is to avoid heterosexual relations.*[810]

Submissions in favour proposed there be broad education about contraception, sexually transmitted diseases, hygiene[811] and sexual preference[812]. It was also suggested that basic education should begin at preschool.[813]

Counselling

Post abortion counselling, education and family planning services should be offered by qualified health practitioners to help avoid further unwanted pregnancies.[814]

Deliberations

Options

The Taskforce considered the following options:

1. Leave the law as it stands.

2. Make no legislative change but establish a panel to review abortion laws, practices and procedures with a view to possible change in the future.

3. Repeal the relevant sections of the *Criminal Code.*

4. Repeal the relevant sections and then establish a panel to investigate issues such as access in public hospitals, training and education for service providers and community education on wider related issues.

5. Amend the relevant sections so that they only apply to abortions performed after a specific number of weeks of gestation.

---

[809] Women's Electoral Lobby submission, 3
[810] Submission No 143
[811] Submission No 177
[812] Submission No 110
[813] Submission No 221
[814] Public Health Association of Australia Inc, *The Regulation of Abortion in Australia: Public Health Perspectives* (1997), Canberra, Fact Sheet 4

Discussion

A small minority of the Taskforce prefer there be no change to the existing law. These views are based either on the belief that the termination of a pregnancy is inconsistent with the sanctity of life, or because they believe the current law already allows access to terminations and no legislative change is necessary.

For many Taskforce members, the issue of equity of access rather than personal or moral views is the most important factor. The Taskforce endeavoured to take a pragmatic and realistic approach and not be drawn into the emotional arguments that attend this issue.

A significant majority is of the view that the sections of the *Criminal Code* that criminalise abortion should be repealed. Some believe that this should occur in conjunction with the establishment of a panel as set out in option 4. Others do not support any further action because they do not want to encourage abortions, but believe that the current uncertain status, and criminal taint, creates an adverse environment for many women - including women who are poor, socially disadvantaged or geographically isolated.

One member does not support repeal of the current laws but supports the establishment of a panel that could examine repeal of the laws as an option.

Early in discussions we considered recommending a regulatory framework which would lead to laws similar to South Australia, the Northern Territory, Western Australia or the ACT. We also considered the option of retaining the current law but clarifying the existing defence. However, ultimately, these ideas were unanimously rejected. The Taskforce is mindful that regulatory frameworks can operate against those women most in need of assistance. The more we considered the rules which would apply, the less we were inclined to enter that arena to make judgments in advance of circumstances.

Recommendation 81

Repeal sections 224, 225, and 226 of the Criminal Code.

Table 1:

Summary of Law and Practice of Abortion in Australia[815]

State	Legislation	Common Law Decisions	Legal Interpretation	Availability of Legal Abortion
Queensland	Criminal Code 1899 ss 224, 225 and 226	R v Bayliss and Cullen (1986), Maguire J, District Court	serious danger to woman's life or physical or mental health	free-standing clinics
Victoria	Crimes Act 1958 ss 65 and 66	R v Davidson (1969) Menhennitt J, Supreme Court	serious danger to woman's life or physical or mental health	free-standing clinics, private and public hospitals
New South Wales	Crimes Act 1900 ss 82, 83 and 84	R v Wald (1971) Levine J, District Court	economic, social or medical grounds causing serious danger to woman's physical or mental health	free-standing clinics, private and public hospitals
Tasmania	Criminal Code ss 134 and 135	untested	nil	free-standing clinic
Northern Territory	Criminal Code ss 172, 173 and 174	untested	pregnant under 14 weeks * risk to women's life or risk of injury to physical or mental health * serious physical or mental abnormalities in foetus * opinions of 2 medical practitioners * carried out by gynaecologist or obstetrician * in a hospital	Darwin and Alice Springs hospitals by specialist gynaecologist and obstetrician
Australian Capital Territory	Crimes Act 1900 ss 42, 43, 44 Health Regulation (Maternal Health Information) Act 1998	untested	*must be performed by a medical practitioner *in an approved facility *woman must be provided with specified advice, information and referral *woman and doctor must sign declaration about information etc	free-standing clinic

[815]Based on Table provided in Children by Choice submission

State	Legislation	Common Law Decisions	Legal Interpretation	Availability of Legal Abortion
			*72 hour "cooling off" period	
South Australia	Criminal Law Consolidation Act 1935 (as amended) ss 81, 82 and 82A	untested	pregnant under 28 weeks * risk to women's life or risk of injury to physical or mental health – taking into account her actual or reasonably foreseeable environment; or *serious physical or mental abnormalities in foetus *opinions of 2 medical practitioners *carried out in prescribed hospital or clinic *2 months residency in SA	free-standing clinic and prescribed hospitals
Western Australia	Criminal Code 1913 s 199 and 259 Health Act 1911 s334	untested	pregnant under 20 weeks *must be performed by medical practitioner *woman will suffer serious personal, family or social consequences; or *serious danger to physical or mental health of woman *woman must give "informed consent" *woman must be provided with specified advice, information and referral	free-standing clinics

Table 2:

INTERNATIONAL FAMILY PLANNING PERSPECTIVES 24(2): 56-64 Page 59						
Table 1. Countries, by restrictiveness of abortion law, according to region, 1997						
Abortion Restrictiveness	The Americas and the Caribbean	Central Asia, the Middle East and North Africa	East and South Asia and the Pacific	Europe	Sub-Saharan Africa	
To save the woman's life No. of countries = **54** Percentage of world's people = **25%**	Brazil -R Chile -ND Colombia Dominican Republic El Salvador -ND Guatemala Haiti Honduras Mexico -R Nicaragua - SA/PA Panama - PA/R/F Paraguay Venezuela	Afghanistan Egypt –SA Iran Lebanon Libya –PA Oman Syria -SA/PA United Arab Emirates -SA/PA Yemen	Bangladesh Indonesia Laos Myanmar Nepal Papua New Guinea Philippines Sri Lanka	Ireland	Angola Benin Central African Rep Chad Congo (Brazzaville) Cote d'Ivoire Dem. Rep. of Congo -F Gabon Guinea-Bissau-SA/PA Kenya Lesotho	Madagascar Mali Mauritania Mauritius Niger Nigeria Senegal Somalia Sudan -R Tanzania Togo Uganda
Physical Health **23** countries **10%** of people	Argentina -R (limited) Bolivia -R/I Costa Rica Ecuador -R/I (limited) Peru Uruguay -R	Kuwait -SA/PA/F Morocco –SA Saudi Arabia -SA/PA	Pakistan Rep. of Korea -SA/R.I/F Thailand - R	Poland -R/I/F	Burkina Faso -R Burundi Cameroon -R Eritrea Ethiopia Guinea	Malawi -SA Mozambique Rwanda Zimbabwe -F/R/I

INTERNATIONAL FAMILY PLANNING PERSPECTIVES 24(2): 56-64 Page 59

Table 1. Countries, by restrictiveness of abortion law, according to region, 1997

Abortion Restrictiveness	The Americas and the Caribbean	Central Asia, the Middle East and North Africa	East and South Asia and the Pacific	Europe	Sub-Saharan Africa	
Mental Health **20** countries **4%** of people	Jamaica -PA Trinidad & Tobago	Algeria Iraq -SA/F/R/I Israel -F/R/I Jordan	**Australia** Hong Kong -F/R/I Malaysia New Zealand -F/I	Northern Ireland Portugal -PA/F/R Spain -F/R Switzerland	Botswana -F/R/I Gambia Ghana -F/R/I	Liberia -F/R/I Namibia –F/R/I Sierra Leone
Socio-economic Grounds **6** countries **20%** of people			India –PA/R/F Japan -SA Taiwan -SA/PA/I/F	Finland -R/F Great Britain -F	Zambia	
Without restriction As to reason **49** countries **41%** of people	Canada - L Cuba*-PA United States -PV Puerto Rico -PV	Armenia* Azerbaijan* Georgia* Kazakstan* Kyrgyz Rep* Tajikistan* Tunisia* Turkey* -SA/PA Turkmenistan* Uzbekistan*	Cambodia† -PA China -PA/L Mongolia* N. Korea -L Singapore‡ Vietnam -L	Albania* Austria† Belarus* Belgium† Bosnia-Herzegovina* -PA Bulgaria* Croatia* -PA Czech Rep.* -PA Denmark* -PA Estonia* France* -PA Germany† Greece* -PA Hungary† Italy§ -PA	South Africa*	

INTERNATIONAL FAMILY PLANNING PERSPECTIVES 24(2): 56-64 Page 59

Table 1. Countries, by restrictiveness of abortion law, according to region, 1997

Abortion Restrictiveness	The Americas and the Caribbean	Central Asia, the Middle East and North Africa	East and South Asia and the Pacific	Europe	Sub-Saharan Africa	
				Latvia* Lithuania* Macedonia* -PA Moldova* Netherlands -PV Norway* -PA Romania† Russian Red.* Slovak Rep.* -PA Slovenia* -PA Sweden** Ukraine* Yugoslavia* -PA		

* Gestational limit of 12 weeks. †Gestational limit of 14 weeks. ‡Gestational limit of 24 weeks. § Gestational limit of 90 days. ** Gestational limit of 18 weeks. *Notes:* For gestational limits, duration of pregnancy is calculated from the last menstrual period, which is generally considered to occur two weeks prior to conception. Thus, statutory gestational limits calculated from the date of conception have been extended by two weeks. ND - Existence of defence of necessity is highly doubtful. SA = Spousal authorisation required. PA = Parental authorisation required. R – Abortion allowed in cases of rape. I = Abortion allowed in cases of incest. F = Abortion allowed in case of foetal impairment. L = Law does not indicate gestational limit. PV = Law does not limit previability abortions.

The information in this Table was provided in the submission from the Women's Electoral Lobby