

Reproductive rights and women's health in Australia

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“Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.

“It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. ... the promotion of the responsible exercise of these rights for all people should be the fundamental basis for government and community supported policies and programmes in the area of reproductive health, including family planning.” — from the Programme of Action adopted by the International Conference on Population and Development, Cairo, 1994.

The 1994 ICPD Programme of Action recognises reproductive health as a human right for all people throughout their life cycle. Reproductive health and rights are important ends in themselves, and women's reproductive health is inextricably linked to their reproductive rights.

For these important rights to be realised, women must have access to information and services, choice in exercising their rights and support in whatever choices they make. Women's reproductive health and rights should not be adversely affected by their income level or geographical location, social policies or laws.

The law in Australia

Criminal law in Australia is a state responsibility and, although the law varies from jurisdiction to jurisdiction, the derivation of all the laws is the 1861 English Offences Against the Person Act. The current situation in Australia is:

- Australian Capital Territory: The ACT decriminalised abortion in 2002. The ACT Medical Practitioners Act requires that only a registered medical practitioner can perform abortions. A termination of pregnancy committee considers some late terminations but (to my knowledge) none over 24 weeks has been considered.
- Victoria: Following a court ruling in 1969, abortion is lawful if it is necessary to protect the woman from serious danger to her life or her physical or mental health and the danger of the termination

must not be out of proportion to the danger to be averted (the proportionality test). The additional grounds added in later NSW cases (see below) would now almost certainly be accepted by Victorian courts. Unlawful abortion remains a criminal offence.

- NSW: Following a court ruling in 1972, abortion is lawful on the same grounds as set out above for Victoria. In addition, the test for assessing serious danger to the woman's life or health includes economic, social and medical grounds. Unlawful abortion remains a criminal offence.

- Queensland: The criminal code provides a defence if the abortion was performed "for the preservation of the mother's life". This has been reasonably broadly interpreted by the courts, but there have been very few cases and the grounds may not include the wider grounds in NSW and Victoria.

- South Australia: SA has specific legislation permitting abortions in certain circumstances: the abortion must be performed in a hospital, two doctors must agree that continuation of the pregnancy represents greater danger to woman's life or physical or mental health than if the pregnancy were terminated "taking into account the mother's actual or reasonably foreseeable environment". A further ground is a risk that the child (if born) would be seriously physically or mentally handicapped. A health professionals committee considers terminations after 24 weeks and terminations after 28 weeks are not permitted. There is a two-month residency requirement.

- Northern Territory: In October 2006, the parliament passed legislation to effectively decriminalise abortion by removing the abortion provisions from the criminal code. Abortion provisions are to be placed in the more appropriate Medical Services Act, where terminations will be lawful when performed by qualified medical practitioners in a hospital. In pregnancies up to 14 weeks, two doctors must agree about danger to the woman's physical and mental health or the risk of the child (if born) being seriously physically or mentally handicapped. In pregnancies up to 23 weeks, terminations are permitted in special circumstances including being immediately necessary to protect the woman's life or prevent serious harm to her physical or mental health.

- Western Australia: Although unlawful abortion remains a criminal offence, WA effectively decriminalised abortion in 1998. Abortion up to 20 weeks is permitted on request (subject to counselling by another doctor); abortion after 20 weeks is permitted if two doctors agree that the woman or the child has "a severe medical condition".

- Tasmania: The Criminal Code was amended in 2001 to extend the circumstances in which abortion is lawful. The grounds now are that two doctors must certify that continuation of the pregnancy involves greater risk to the woman's physical or mental health than if it were terminated.

The recent trend in Australia is clear; in some jurisdictions decriminalisation has been effected with abortion provisions being transferred to the more appropriate context of health legislation.

The reality

Looking at some figures over time and in different legal frameworks it is possible to make some assessment of women's actions in different circumstances. The incidence of abortion in the past is difficult to estimate because comprehensive statistics were not maintained and the then illegality meant that those involved had a vested interest in concealment. However, we can make some assessments.

The 1904 NSW royal commission on the declining birth rate estimated that abortion was the main

cause of the declining birth rate. A 1944 National Health and Medical Research Council commission believed the incidence of abortion was widespread and various later studies estimated figures of around 75,000 to 100,000 by the late 1960s, when abortion was still illegal throughout Australia. The Royal Commission on Human Relationships estimated 60,000 in 1975. This is a ratio of abortion to live births of 1:3.9, which was similar to other industrialised countries, and a rate of abortions per 1000 women of 21.7, which was the same as in the US.

The 1970 Kaye Inquiry in Victoria, only a year after the Menhennit ruling set the parameters of lawful abortion in Victoria, showed that abortions were occurring in substantial numbers. The inquiry revealed that some doctors performing abortions were bribing police to avoid prosecution. Non-medically qualified backyarders also flourished in the climate of illegality.

A study conducted at the Royal Women's Hospital in 1956 showed that, in March-May 1956, 404 patients were admitted for abortions or threatened abortions (that is, where there had been some interference with the pregnancy). Some patients admitted to having terminated earlier pregnancies — some by doctors, some by nurses and some by non-medically qualified people. Less well-informed women (particularly migrants) were more likely to have been exposed to dangerous procedures.

The study showed that self-induced abortions were common, that abortionists were known to be practising and, if women could afford them, were readily used, and that substantial numbers of abortions were occurring long before the law was changed. These findings emphasise that restrictive laws do not stop abortions but they do make them more dangerous.

After Menhennit, the 1975 National Population Inquiry concluded that the change in the law did not appear to have brought about a change in fertility rates, other than the century-old trend downwards. Other researchers concluded that legal terminations simply replaced illegal ones. Overseas findings are much the same.

Consequences of restrictions

Globally, about 19 million of the estimated 45 million induced abortions annually are unsafe. Nearly 70,000 women die as a result, representing 13% of pregnancy-related deaths (UNFPA State of World Population Report 2004). Reproductive health problems are the leading cause of women's ill-health worldwide. (SWOPR 2005).

It is quite clear that over time and in all places women confronted with a pregnancy they do not wish to continue will seek abortion regardless of legal restrictions and even at the risk of harm to their health or life.

Restrictive laws also have other consequences. These include corruption of law enforcement agencies revealed by the Kaye inquiry; encouraging backyard operators; unfairly placing doctors in a situation of uncertainty about the law (which in turn affects women's capacity to access services); and discriminatory outcomes — the well-informed and well-off have always been able to more readily access safer abortions in private maternity hospitals.

Those opposed to choice believe restrictions will reduce or stop abortions. In reality, restrictive laws just add to women's trauma by making access to the procedure more dangerous, more stressful and more expensive.

A decriminalised framework transforms a distressing, costly, undignified and potentially dangerous experience into a less traumatic, less expensive and safer one. If the law has a useful role to play in

the area of fertility control, particularly in relation to abortion, it is not achieved by imposing criminal sanctions on a choice that is supported by an overwhelming majority of the community and exercised by substantial numbers of women. Nor is it achieved by encouraging the systematic contravention of statutory and judicial rulings.

If the law is to be useful and respected it must be supported by existing social norms. It has no value if its sole predictable effect is to add trauma to the lives of the many members of the society to which it applies or if it is regarded with contempt because of knowing and repeated contravention.

The criminal provisions on abortion should be repealed and women should be free to make whatever decision is right for them in consultation with health professionals.

P.S.

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