

E – BRIEF



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Recent Developments in Abortion Law

by Kathryn Simon

1 Introduction

There have been a number of developments since the publication of [Abortion and the law in New South Wales](#) in August 2005.¹ The most notable development is the introduction of the Victorian [Abortion Law Reform Act 2008](#) in October 2008.² This publication provides a brief overview of the Victorian Law Reform Commission Report, which contributed to the reforms, the new legislation and the key issues in the debate about abortion.

2 Overview of Abortion Law

Prior to the reforms, section 65 of the [Crimes Act 1958](#) provided that unlawful termination of pregnancy at any stage during pregnancy was prohibited in Victoria. Section 66 of the *Crimes Act 1958* prohibited the supply of an instrument or substance knowing it will be used to unlawfully terminate a pregnancy.

In *R v Davidson* [1969] VR 667 (‘the Menhennitt ruling’), the Court considered what constitutes a lawful abortion. In this case, the Court held that women in Victoria could lawfully seek a termination of their pregnancy if performed by a qualified medical practitioner who had an honest and reasonable belief that the abortion was necessary to preserve a woman’s life or health from serious danger.

Accordingly, Justice Menhennitt held that an abortion was lawful in the following circumstances:

For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) 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 continuation of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.

In NSW, the Courts have considered and expanded upon the Menhennitt ruling. Sections 82 and 83 of the [Crimes Act 1900](#) deal with abortion in NSW and are essentially the same as the equivalent Victorian legislation prior to the *Abortion Law Reform Act 2008*.

In the case of *R v Wald* (1971) 3 DCR (NSW) 25, District Court Justice Levine made the following comments:

In my view 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 an accused could honestly and reasonably believe there would

result a serious danger to her physical or mental health. It may be that an honest belief be held that the woman's mental health was in serious danger at the very time she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of pregnancy, if uninterrupted.

The effect of this ruling was that, economic and social factors could be considered when determining whether to lawfully terminate a pregnancy. This decision was affirmed in *CES v SuperClinics* (1995) 38 NSWLR 47 and more recently in *R v Sood (Ruling No 3) [2006] NSWSC 762*. In *CES v SuperClinics*, Justice Kirby held that a medical practitioner may take into account danger to the woman's health both during and after pregnancy.³

3 The Victorian Law Reform Commission Report

In September 2007, the Victorian Attorney General asked the Victorian Law Reform Commission to provide advice about options to clarify the operation of the law regarding abortion and the removal from the *Crimes Act 1958* of offences relating to termination of pregnancy where performed by a qualified medical practitioner.

Accordingly, the Victorian Law Reform Commission conducted broad consultation for the review, met with 36 groups and individuals and received 519 submissions. It found that 94.6% of abortions occurred before 13 weeks, and 4.7% occurred after 13 weeks but before 20 weeks. Less than 1% of abortions were performed after 20 weeks gestation.⁴

In March 2008, the Victorian Law Reform Commission published its report titled [Law of Abortion: Final Report](#). The report outlined a number of key recommendations and three models for reform.⁵ These three models are as follows:

- **Model A:** codifies the 'Menhennitt rules' regarding abortion, namely that abortion is lawful with a woman's consent, and when a doctor determines that the abortion is necessary because of the risk of harm to the woman if the pregnancy is not terminated. According to this model, the final decision making responsibility rests with the medical practitioner who performs or supervises the abortion.

Three options are provided within this model for determining risk of harm.

- (a) The first restates the Menhennitt rules that an abortion must be a necessary and proportionate response to the risk of harm faced by a pregnant woman.
 - (b) The second reflects NSW case law, which adds a description of the range of matters impacting on a woman's physical or mental health that may be taken into account when determining risk of harm. These matters are economic, social, or medical matters that may arise during or after pregnancy.
 - (c) The third option simplifies the determination of risk of harm.
- **Model B:** provides for a two-staged approach to regulation. Abortions before the gestation period of 24 weeks are regulated in the same

way as any other medical procedure, with the woman's consent and the procedure must be performed, or supervised, by a medical practitioner. After 24 weeks gestation, abortion would be lawful if a doctor (or two doctors) determined that it was necessary to prevent risk of harm to the woman if the pregnancy continued.

- **Model C:** regulates abortion in the same way as all other medical procedures. In this model abortion is lawful with the woman's consent, and if performed by a medical practitioner. This model places decision-making responsibility with the woman, and service availability with the medical profession.⁶

4 The Abortion Law Reform Bill

The [Abortion Law Reform Bill](#) (now the Abortion Law Reform Act) passed through both houses of the Victorian Parliament without any amendments. It reflects 'Model B' of the three models, with a two-tier approach to the regulation of abortion. As stated in the [Explanatory Memorandum](#), the Bill reforms the law with respect to abortion; regulates health practitioners performing abortions; amends the *Crimes Act 1958* to repeal the provisions relating to abortion; abolishes the common law offence of abortion and creates new offences relating to abortion.

Section 4 allows a registered medical practitioner to perform an abortion on a woman who is not more than 24 weeks pregnant. This means that prior to 24 weeks, an abortion is treated as any other medical procedure. The legislation defines a woman as a female of any age.

Section 5 of the Bill provides that a registered medical practitioner may perform an abortion on a woman who is more than 24 weeks pregnant only if the medical practitioner:

- (a) reasonably believes that the abortion is appropriate in all the circumstances; and
- (b) has consulted at least one other registered medical practitioner who has also reasonably believes that the abortion is appropriate in all the circumstances.

Section 5(2) states that a registered medical practitioner must have regard to all relevant medical circumstances and the woman's current and future physical, psychological and social circumstances when deciding whether an abortion is appropriate.

Section 6 confirms that a registered pharmacist or nurse may supply drugs to cause an abortion in a woman who is not more than 24 weeks pregnant. Pursuant to section 7 of the Act, after 24 weeks, the registered medical practitioner must reasonably believe that abortion is appropriate in all the circumstances, and that opinion must be shared by at least one other registered medical practitioner in order to administer or supply drugs to cause an abortion.

Section 8 deals with the obligations of registered health practitioners who have a conscientious objection to abortion. Registered health practitioner is defined to mean all regulated health professions, including medical practitioners, nurses, pharmacists and psychologists. The section provides that if a woman requests a health practitioner to advise a woman on a proposed abortion, or to perform, direct, authorise or supervise

an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must:

- (a) inform the woman that the practitioner has a conscientious objection to abortion; and
- (b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.

Section 8(3) states that despite any conscientious objection, a medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of a pregnant woman.

As recommended by the Victorian Law Reform Commission, the legislation also repeals section 10 of the *Crimes Act 1958*, which previously created an offence of child destruction. Further, the definition of 'serious injury' in section 15 of the *Crimes Act 1958* is amended by the legislation so that the definition of 'serious injury' includes destruction, other than in the course of a medical procedure, of a pregnant woman's foetus (whether or not the woman suffers harm).

Finally, the legislation substitutes new provisions for sections 65 and 66 of the *Crimes Act 1958*. Accordingly, the amended section 65 makes it an offence for an unqualified person to perform an abortion on another person and provides a penalty of up to 10 years for the offence. The amended section 66 clarifies that any rule of common law that creates an offence in relation to procuring a woman's miscarriage is abolished.

5 Comment

The Bill passed through Parliament unamended. The conscience vote in the Legislative Council resulted in 23 votes in favour of the Bill and 17 against the Bill. The conscience vote in the Legislative Assembly resulted in 48 in favour and 28 against the Bill.⁷

The debate regarding the Bill was extensive and covered a range of issues. These included whether the legislation should include a provision regarding counselling services for women seeking an abortion, whether the 24 weeks gestation period is too late and a number of concerns were raised regarding the conscientious objection provision in section 8.⁸

In the [Second Reading Speech](#) in the Legislative Council on 12 September 2008, the Hon Gavin Jennings, MLC stated the following:

Modern legislation that reflects current clinical practice and community standards is long overdue. By introducing this bill, we are acknowledging that women should be supported in their reproductive health choices, and deserve legal certainty when making these difficult choices. Medical and health practitioners have strongly advocated on the need for legal certainty on the circumstances in which an abortion is legal. Indeed a wide range of individuals and groups have long campaigned for abortion law reform.

Members of Parliament, like the community more broadly, have a diverse range of views on these matters, which are shaped by deeply personal, ethical, moral and religious values. I hope that the debate on this bill will at all times respect the diversity of views held in the community and the Parliament.⁹

A range of views for and against the Bill, were expressed during the debate in Parliament.¹⁰ For example, The Hon Theo Theophanous, MLC argued that the Bill should allow an abortion up to 20 weeks rather than 24 weeks gestation and made the following comments:

I'm not opposed to abortion full stop, but I do think this legislation goes too far for me to be able to vote for it in its current state...I think the 24 weeks is a bridge too far to go...I've said publicly that I thought 20 weeks was a much more realistic and community supported type of number. That's five months – six months for me was too difficult to support.¹¹

In contrast, in support of the Bill, the Hon Maxine Morand MP, stated:

It would be hard to find a bill that has been debated as long as this in the Victorian parliament...For 40 years women have had to face uncertainty around abortion services, they now have clarity and certainty, for women and their practitioners in Victoria. And that is undeniably incredibly important...I believe we have the most modern legislation, we will have a stand alone act that regulates abortion, and that will be unique in Australia.¹²

Others, for example the Peter Kavanagh MLC commented that the vote was a 'profound mistake'.¹³ He stated in Parliament that:

There are several major reasons to oppose the legalisation of abortion. First, of course, abortion kills unborn human beings. Abortion also inevitably means the killing of those who are born following so-called failed abortions. Abortion is often painful to the foetus. Abortion severely harms many women physically and psychologically.

Abortion is often used to cover up the sexual abuse of minors. Abortion is frequently performed without the genuine consent of women in Victoria. Legalising abortion would also damage our society and degrade the way we treat each other.¹⁴

Catholic interest groups also expressed concern regarding the conscientious objection provision, which requires medical practitioners with a conscientious objection to abortion to refer a woman to another practitioner.¹⁵ The Archbishop Denis Hart reportedly stated that:

We can't in our Catholic hospitals perform abortions, and we can't and won't refer people for abortions.¹⁶

The group Doctors in Conscience against Abortion even called on the Prime Minister to intervene to stop the proposed reforms, claiming that it had legal advice that the Bill was contrary to the [Victorian Charter of Human Rights and Responsibilities](#).¹⁷ The group's spokesperson stated that:

The bill is unprecedented in the Western world, in imposing laws that would force doctors to act in violation of their conscientious beliefs by actively assisting patients to obtain an abortion.¹⁸

In contrast, pro choice activist Dr Jo Wainer stated in an article published by [New Matilda](#) that:

The Act is a profound shift in the relationship between the state and its female citizens. It changes both nothing and everything. Nothing, because the number, rate and incidence of abortion will not change. And everything, because for the first time women will be recognised as the authors of our

own lives. With that comes our full citizenship.¹⁹

6 Conclusion

The Abortion Law Reform Bill is a significant development in Victorian law that has implications for NSW. The legislation in NSW is similar to the provisions in the Victorian *Crimes Act 1958* prior the amendments in October 2008. Accordingly, the debate regarding the decriminalisation of abortion in Victoria is relevant if NSW considers whether it will pursue similar reforms to the *Crimes Act 1900*.

- ¹ [Abortion and the Law in NSW, Talina Drabsch, NSW Parliamentary Library, Briefing Paper No 9/2005](#); See also [Abortion Law in Australia, Natasha Cica, Australian Parliamentary Library, 31 August 1998](#).
- ² [Abortion Decriminalised in Victoria, The Sydney Morning Herald, 10 October 2008](#); [Victorian abortion controversy not over, The Age, 11 October 2008](#).
- ³ [Victorian Law Reform Commission Report at pp 6 & 20-21; NSW, Vic rule out abortion law changes, The Age, 24 August 2006](#).
- ⁴ [Victorian Law Reform Commission Report at p 36](#).
- ⁵ [Three Abortion Law Reform Options On Offer, Law Institute Journal, July 2008 at p 87](#).
- ⁶ [Victorian Law Reform Commission Report at p 6 and Chapter 6: Options for Reform](#).
- ⁷ [Abortion Decriminalised in Victoria, The Sydney Morning Herald, 10 October 2008](#); [Mariza O'Keefe, Victorian Abortion Bill passes lower house, Australian Associated Press, 12 September 2008](#).
- ⁸ [Katie Bradford, Victorian abortion controversy not over, Australian Associated Press, 11 October 2008](#); [Theo Theophanous fights abortion bill, Herald Sun, 15 September 2008](#); [Jamie Duncan, Contentious Abortion Bill passes state's lower house, Daily Telegraph, 12 September 2008](#).
- ⁹ [VPD, 12 September at p 3793](#).
- ¹⁰ [Two steps forward, one back, on abortion and IVF, The Age, 13 October 2008](#).
- ¹¹ [Geraldine Mitchell and Nick Higginbottom, Final Hurdle for Abortion Bill, Herald Sun, 7 October 2008](#); [Geraldine Mitchell, Theo](#)

- [Theophanous fights abortion bill, Herald Sun, 15 September 2008](#); [VPD, 9 October 2008 at p 4091](#).
- ¹² [Abortion Decriminalised in Victoria, The Sydney Morning Herald, 10 October 2008](#).
- ¹³ [Paul Austin and David Rood, Abortion reform clears last hurdle, The Age, 11 October 2008](#).
- ¹⁴ [VPD, 9 October 2008 at p 4094](#).
- ¹⁵ [Martin Laverty, Conscience is law, Herald Sun, 24 September 2008](#).
- ¹⁶ [Geraldine Mitchell and Nick Higginbottom, Final hurdle for abortion Bill, Herald Sun, 7 October 2008](#); [Law reform must not trample on rights of conscience, The Age, 24 September 2008](#).
- ¹⁷ The Victorian Parliament's Scrutiny of Acts and Regulations Committee considered this provision in [Alert Digest No 11 of 2008, Tuesday 9 September 2008](#).
- ¹⁸ [Julia-Anne Davies, Doctors ask PM to act on abortion, The Australian, 8 October 2008](#); [Martin Laverty, Conscience is Law, Herald Sun, 24 September 2008](#); [Law reform must not trample on rights of conscience, The Age, 24 September 2008](#).
- ¹⁹ [Jo Wainer, Celebrate Sisters, The Battle is Won, New Matilda, 25 November 2008](#).

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