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NSW Parliamentary Research Service

Abortion law: a national perspective

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by Tom Gotsis and Laura Ismay

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Abortion law: a national perspective

By

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CONTENTS

Summary	i
1. Introduction	1
1.1 Reasons why women seek to have an abortion	1
1.2 Public opinion towards abortion.....	3
1.3 Abortion statistics.....	9
2. Overview of Australian abortion law	11
2.1 State legislation	11
2.2 Australian abortion law: a patchwork quilt.....	14
2.3 Role of the Commonwealth	16
3. New South Wales abortion law	17
3.1 Overview.....	17
3.2 The abortion provisions: ss 82–84 of the Crimes Act 1900.....	17
3.3 Interpretation of s 83 by the courts	19
3.4 Convictions for unlawful abortions committed after Wald	27
3.5 NSW Health’s Policy Directive on Terminations	29
3.6 Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016	30
3.7 Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017	35
4. ACT abortion law	38
4.1 Overview.....	38
4.2 Abortion decriminalised	38
4.3 Conscientious objection.....	39
4.4 Safe access zones.....	39
5. Northern Territory abortion law	40
5.1 Overview.....	40
5.2 Current law	40

5.3	Law as at 1 July 2017	42
6.	Queensland abortion law.....	45
6.1	Overview.....	45
6.2	Decriminalisation Bill and reference to Law Reform Commission.....	45
6.3	Current offences	46
7.	South Australian abortion law	47
7.1	Overview.....	47
7.2	Abortion offences.....	47
7.3	Lawful abortions.....	48
7.4	Conscientious objection	49
8.	Tasmanian abortion law	49
8.1	Overview.....	49
8.2	Abortion decriminalised	50
8.3	Lawful abortions.....	50
8.4	Conscientious objection.....	50
8.5	Safe access zones.....	51
8.6	Abortion offences.....	52
9.	Victorian abortion law.....	52
9.1	Overview.....	52
9.2	Abortion decriminalised	53
9.3	Lawful abortions.....	53
9.4	Conscientious objection.....	54
9.5	Safe access zones.....	54
9.6	Abortion offences.....	55
9.7	Abolition of any common law offence of abortion	56
10.	Western Australian abortion law	56
10.1	Overview.....	56

...

10.2 Abortion offences..... 57

10.3 Lawful abortion 57

10.4 Conscientious objection..... 58

11. Conclusion..... 58

SUMMARY

There are currently two Private Members Bills before the NSW Parliament relating to abortion: the [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#), which was introduced in the Legislative Council by Dr Mehreen Faruqi MLC; and the [Summary Offences Amendment \(Safe Access to Reproductive Health Clinics\) Bill 2017](#), which was introduced into the Legislative Council by Penny Sharpe MLC: [1].

The [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#) proposes to decriminalise abortion by abolishing ss 82–84 of the *Crimes Act 1900* and to introduce safe access zones around abortion premises. The [Summary Offences Amendment \(Safe Access to Reproductive Health Clinics\) Bill 2017](#) also proposes to establish safe access zones around abortion premises so that abortions can be accessed and provided safely, privately and with dignity: [3.6], [3.7].

Public opinion

The available evidence suggests that public opinion on abortion has shown a liberalising trend since the late 1990s, with a majority of Australians supporting abortion. That support for abortion can be dependent on the circumstances under which the abortion is requested: [1.2].

Abortion statistics

The prevalence of abortion in Australia cannot be determined conclusively, due to the absence of national statistics. South Australia is currently the only jurisdiction in Australia whose laws require it to regularly collect and publish abortion data. In South Australia in 2014 there were 4,650 terminations of pregnancy, which represents 13.8 terminations of pregnancy per 1,000 women aged 15-44 years: [1.3].

Overview of Australian abortion law

As depicted in Figure 5, in the majority of Australian jurisdictions abortion performed by doctors with the informed consent of the woman concerned has been decriminalised. In the Australian Capital Territory, Tasmania, Victoria and Western Australia abortion is available on request but this is subject to time limits in all except for the Australian Capital Territory. Where the time limits are exceeded abortion is available where statutory criteria are met. In the Northern Territory abortion is available up to 23 weeks where statutory criteria are met: [2].

In NSW, Queensland and South Australia, abortion is a criminal offence unless exceptions apply. The exceptions in South Australia are statutory. In NSW and Queensland the exceptions have been developed by the courts in the face of statutory ambiguity; in that those jurisdictions prohibit “unlawfully” procured abortions without defining the word “unlawfully”. While the courts in both jurisdictions have attempted to clarify what “unlawfully” means, considerable uncertainty remains, both for the public and the medical profession: [2.1], [3.3], [6.3].

The Commonwealth government also plays a role, as it funds abortion services through Medicare and regulates the availability of abortion medication: [2.3].

Figure 5: Legal status of abortion across Australia*

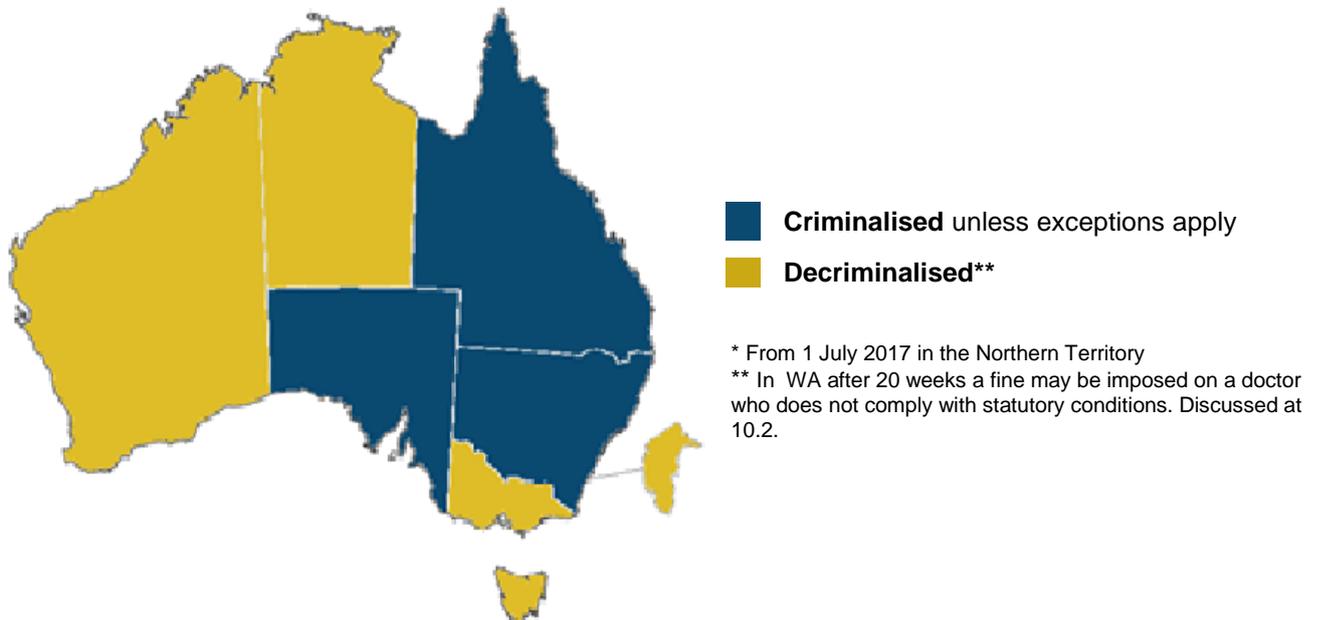


Figure 6 reveals that four jurisdictions have enacted safe access zones around abortion premises. Within those safe access zones behaviour that insults, intimidates, interferes with or invades the privacy of people attempting to access or provide abortion services is prohibited: [4.4], [5.3.4], [8.5], [9.5].

Figure 6: Abortion safe access zones*



A summary of the main features of abortion laws in each jurisdiction is set out in Table 2.

Table 2 Key features of abortion law across Australia

(Abortions performed with consent on a woman by a medical practitioner)

	Criminalised			Decriminalised					
	NSW	QLD	SA	ACT	NT*	TAS	VIC	WA	
Covers both surgical and drug-based abortions	✓	✓	✓	✓	✓	✓	✓	✓	
Every abortion prohibited	✗	✗	✗	✗	✗	✗	✗	✗	
Abortion available on request	✗	✗	✗	✓	✗	✓ (to 16 weeks)	✓ (to 24 weeks)	✓ (to 20 weeks)	
Abortion available if doctor(s) satisfied of certain matters	✓	✓	✓	✗	✓ (to 23 weeks)	✓ (after 16 weeks)	✓ (after 24 weeks)	✓ (after 20 weeks)	
Conscientious objection by doctors recognised	✗	✗	✓	✓	✓	✓	✓	✓	
Doctors who conscientiously object must redirect woman to abortion services	✗	✗	✗	✗	✓	✓	✓	✗	
Counselling mandatory	✗	✗	✗	✗	✗	✗	✗	✓	
Safe access zones	✗	✗	✗	✓	✓	✓	✓	✗	

* As at 1 July 2017 in the Northern Territory, when the [Termination of Pregnancy Law Reform Act 2017 \(NT\)](#) is expected to commence..

1. INTRODUCTION

There are currently two Private Members Bills before the NSW Parliament relating to abortion: the [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#), which was introduced in the Legislative Council by Dr Mehreen Faruqi MLC; and the [Summary Offences Amendment \(Safe Access to Reproductive Health Clinics\) Bill 2017](#), which was introduced into the Legislative Council by Penny Sharpe MLC.

In order to inform parliamentary debate of the two abortion Bills, this paper reviews and compares abortion law across all Australian jurisdictions. As such, the focus of this paper is not on whether abortion is “right” or “wrong”. The consideration of abortion in terms of whether the act itself is “right” or “wrong” is a matter of personal ethics upon which individual minds are free to differ. As the Supreme Court of the United States said in *Roe v Wade*:¹

We acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitude to life and family and their values, and the moral values one establishes and seeks to observe, are likely to influence and colour one’s thinking and conclusion about abortion.

A fuller understanding of the context in which Australia’s abortion laws operate is first provided through a discussion of the reasons why women may seek to have an abortion; public opinion on abortion; and abortion statistics.

1.1 Reasons why women seek to have an abortion

The reasons women seek to have an abortion are diverse. Financial constraints, lack of support, foetal abnormality, domestic violence, not wanting to have children, and being too young or too old are amongst a large list of factors that may lead a woman to seek to terminate a pregnancy.

1.1.1 Pregnancy Advisory Service (PAS): 2009 study

A 2009 study anonymously extracted reasons given for abortion from the hospital records of 3,018 women who had contacted the Pregnancy Advisory Service at the Royal Women’s Hospital in Melbourne between 1 October 2006 and 30 September 2007.² Table 1 details the primary reason for requesting an abortion, as stated by these 3,018 women.

¹ 410 US 113 (1972).

² H Rowe et al “[Considering abortion: a 12-month audit of records of women contacting a Pregnancy Advisory Service](#)” (2009) 190(2) *Medical Journal of Australia* 71.

Table 1: Primary reason for considering an abortion

Reason	Number of women	% of total
Does not want children now	701	23.2%
Already enough children	547	18.1%
Too young	339	11.2%
Not the right time	325	10.8%
Has young baby	263	8.7%
Financial reasons	189	6.3%
New or unstable relationship	103	3.4%
Medical reasons	101	3.3%
Relationship problems	98	3.2%
Violent partner	47	1.6%
Partner not involved	44	1.5%
Too old	31	1.0%
Single parent	31	1.0%
Alone, isolated, unable to cope	23	0.8%
Pregnancy the result of rape	23	0.8%
Mental health	23	0.8%
Never wants children	14	0.5%
Cultural reasons	11	0.4
Current partner not "partner in pregnancy"	9	0.3%
Travelling	1	0.03%
Other	95	3.1%
Total	3018	100%

Source: H Rowe et al. 'Considering abortion: a 12-month audit of records of women contacting a Pregnancy Advisory Service' (2009) 190(2) *Medical Journal of Australia*

The top four reasons given reflect a fundamental desire for women to control when in their lives they have children and how many children they should have.

1.1.2 Contraceptive failure

A study of Australian and New Zealand women suggests that over half (67%) of women seeking an abortion had been using contraception when they became pregnant.³ A 2016 study by members of the School of Public Health &

³ W Abigail, C Power and I Belan "Changing patterns in women seeking terminations of pregnancy: A trend analysis of data from one service provider 1996-2006" (2008) 32(3) *Australia and New Zealand Journal of Public Health* 230-237(8)

Preventive Medicine at Monash University found that 40.8% of women aged 18-32 years experienced an unintended pregnancy.⁴ This is compared with 27.6% of women aged 33-42 years and 22% of women aged 43-51 years.⁵ Another Australian study in the same year found that, of participants who had fallen pregnant, 73.4% were using contraception at the time, with the combined oral contraceptive pill being the most frequently used form (39.1%).⁶

It is apparent that all forms of contraception carry some risk of failure. As set out in a 2011 article, some of the better-known methods of contraception have failure rates of up to 6%, even with perfect use.⁷ This includes male condoms (2% failure rate within the first year of use, with perfect use), diaphragms (6% failure rate within the first year of use, with perfect use) and combined pill and progestin-only pill (0.3% failure rate within the first year of use, with perfect use). These failure rates increase significantly when “typical use” is accounted for, rising to 18% in the case of male condoms.⁸

There is also a significant disparity between rates of use of contraception across Australia. A [2012 study](#) found that female patients who were Indigenous, spoke a language other than English at home or held a Commonwealth Healthcare Card had significantly lower rates of contraceptive usage.⁹

1.2 Public opinion towards abortion

The nature of the abortion debate in Australia often appears polemic. For instance, a recent [anti-abortion rally](#) in Brisbane saw protesters march against Independent Member of Parliament Rob Pyne's attempts to reform abortion laws in Queensland through two Private Members Bills. Two weeks later, [pro-choice protesters](#) gathered outside Cairns Courthouse to express their support for the Bills.

Over the years a number of surveys have been conducted on public opinion towards abortion. In 2008, the Victorian Law Reform Commission

⁴ The term “unintended pregnancy” is used interchangeably with “accidental pregnancy” and refers to mistimed, unexpected and unplanned pregnancies. See H Rowe, S Holton and M Kirkman “[Prevalence and distribution of unintended pregnancy: The Understanding Fertility Management in Australia National Survey](#)” (2016) 40(2) *Australian and New Zealand Journal of Public Health* 104-09.

⁵ H Rowe, S Holton and M Kirkman “[Prevalence and distribution of unintended pregnancy: The Understanding Fertility Management in Australia National Survey](#)” (2016) 40(2) *Australian and New Zealand Journal of Public Health* 104-09.

⁶ J Coombe “[Contraceptive use at the time of unintended pregnancy: Findings from the Contraceptive Use, Pregnancy Intention and Decisions study](#)” (2016) 45(11) *Australian Family Physician* 842.

⁷ J Trussell “[Contraceptive failure in the United States](#)” (2011) 83(5) *Contraception* 397-404.

⁸ J Trussell “[Contraceptive failure in the United States](#)” (2011) 83(5) *Contraception* 397-404.

⁹ D Mazza “[Current contraceptive management in Australian general practice: an analysis of BEACH data](#)” (2011) 197(2) *Medical Journal of Australia* 111.

commissioned Professor David Studdert to examine five key community attitude surveys on abortion.¹⁰ The surveys examined were:¹¹

- Australian Survey of Social Attitudes
- Australian Election Study
- Australian Cross Bioethics Institute Survey
- Australian Federation of Right to Life Associations Survey
- Marie Stopes International Survey

The Commission's report set out the primary strengths and limitations of each survey, as well as its background, content and results. The report stated that Professor Studdert reached the following conclusions:¹²

Available data on the attitudes of Australians to abortion is not particularly strong. In the two strongest surveys from a methodological viewpoint, the information comes from single general questions, which permit a limited view of community sentiment. Two other surveys commissioned by groups with conservative positions about abortion ask more specific questions, but suffer from poor response rates and problems in survey design.

In view of these limitations, the available evidence provides general support for the following conclusions:

- A majority of Australians support a woman's right to choose whether to have an abortion.
- A subset of those supporters regard the right to choose to have an abortion as capable of limitation, with restriction of choice based on factors such as gestational age and women's reasons for seeking the abortion. However, there is insufficient evidence to estimate the size of that subset.¹³

Several socio-demographic characteristics are associated with positive (and negative) views of abortion. For example, there is less support for abortion among persons with religious beliefs. Nonetheless, even among persons with religious beliefs, supporters remain in the majority.

Public opinion towards abortion has shown a liberalising trend since the late 1990s.¹⁴ However, whilst overall public support for abortion has grown¹⁵, as has

¹⁰ [Law of Abortion: Final Report](#) (2008) Victorian Law Reform Commission 57-69

¹¹ The Commission identified the Australian Survey of Social Attitudes (ASSA) and Australian Election Study (AES) as the strongest estimates of what Australians think about abortion. The ASSA only included questions related to abortion in its 2003 and 2050 surveys. For this reason, only the AES has been discussed in greater detail below (see 1.3.1) See [Law of Abortion: Final Report](#) (2008) Victorian Law Reform Commission at 66.

¹² [Law of Abortion: Final Report](#) (2008) Victorian Law Reform Commission at 68.

¹³ The Commission noted that there was insufficient evidence to estimate the size of that subset. See [Law of Abortion: Final Report](#) (2008) Victorian Law Reform Commission at 68.

¹⁴ See further the Australian Election Study, discussed at 1.2.1.

been noted, support for the procedure can be dependent on the circumstances under which the abortion is requested.¹⁶

Outlined below are a time series of results from the Australian Election Study (which was one of the surveys noted in the Victorian Law Reform Commission's report) and the results of two other recent studies.

1.2.1 The Australian Election Study

The [Australian Election Studies](#) (AES) are a series of surveys on political and social issues timed to coincide with Australian federal elections.¹⁷ The AES [website](#) notes that the studies “aim to provide a long-term perspective on stability and change in the political attitudes and behaviour of the Australian electorate”. All of the AES studies are national, post-election, self-completion surveys with the sample drawn randomly from the electoral register. Since 2010 the surveys have also included an online completion option.¹⁸

As Figure 1 shows:

- the proportion of Australians who believe “women should be able to obtain an abortion easily when they want one” has increased from 46.2% in 1979 to 63.0% in 2016;¹⁹
- the percentage of Australians who believe abortion should be allowed in special circumstances has decreased from 48.5% to 27.9% over this same period of time;²⁰ and,
- the proportion of respondents who believe abortion should be banned has remained consistently around 5.0%.

¹⁵ R Visser et al. “[Attitudes towards sex and relationships: the Second Australian Study of Health and Relationships](#)” (2014) 11 *Sexual Health* 11.

¹⁶ See [Law of Abortion: Final Report](#) (2008) Victorian Law Reform Commission at 68; and Queensland Parliamentary Health, Communities, Disability Services and Domestic Family Violence Prevention Committee, [Abortion Law Reform \(Woman's Right to Choose\) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Final Report](#), August 2016 at 51

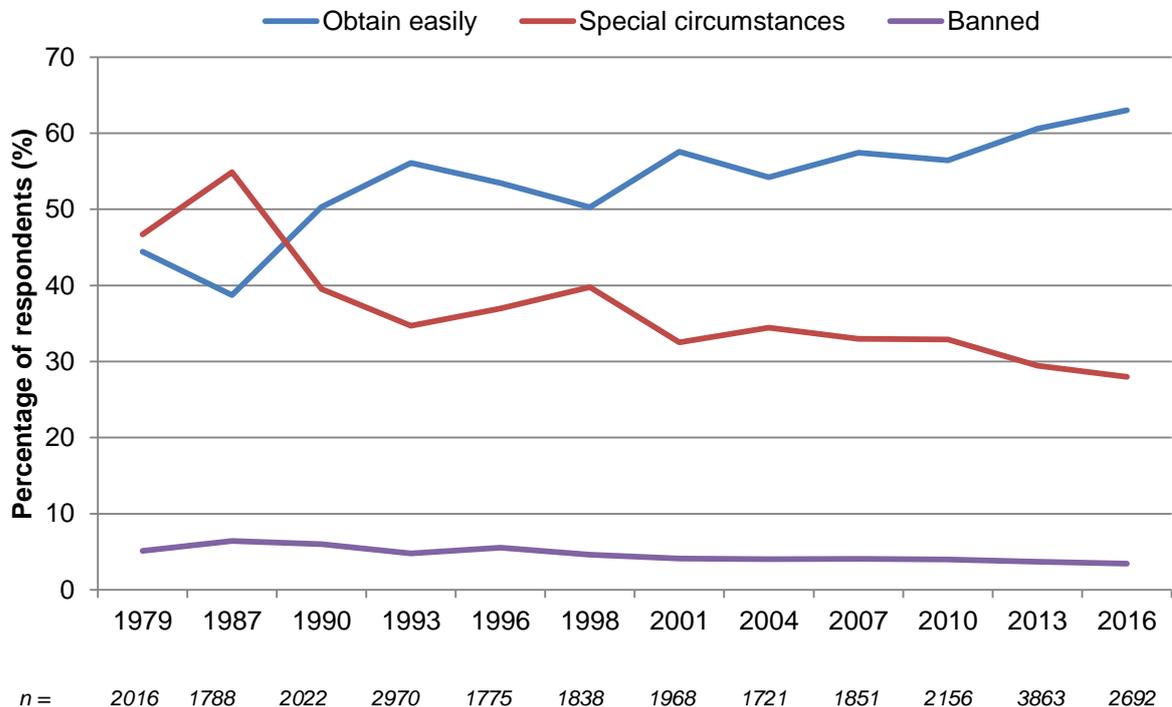
¹⁷ [Voter Studies, Australian Election Studies](#)

¹⁸ The number of valid responses has varied significantly between 1979 and 2016, with a low of 1,769 in 2004 and a high of 3,955 in 2013.

¹⁹ S Cameron and I McAllister, [Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2016: Appendix](#), (2016) Canberra: The Australian National University 37.

²⁰ A definition of “special circumstances” was not offered to respondents.

Figure 1: Percentage of respondents across Australia who believe abortions should be easily obtainable, obtainable under special circumstances or banned.



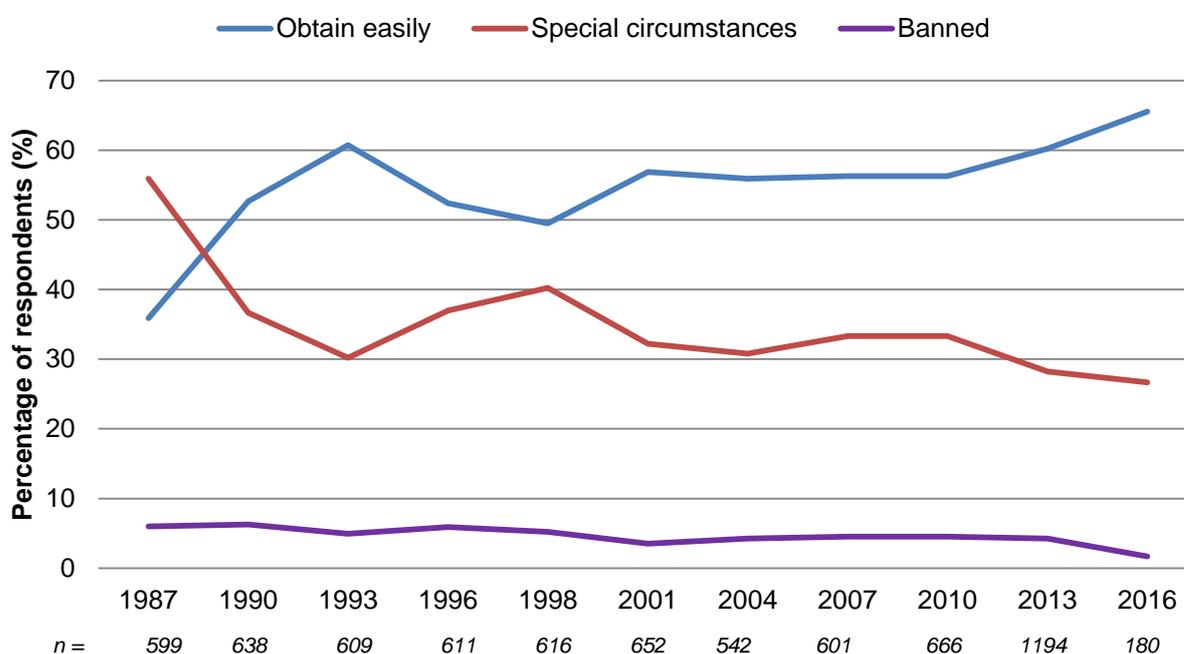
Source: [Voter Studies, Australian Election Studies](#)

As set out in Figure 2, the AES figures for NSW are broadly similar to the national responses:²¹

- 65.6% of NSW respondents in 2016 believe that women should be able to obtain an abortion readily, compared with 35.9% in 1987;
- the number of NSW respondents who believe abortion should only be allowed in special circumstances decreased from 55.9% in 1987 to 26.7% of 2016; and,
- the percentage of persons in 2016 who believe abortion should be banned was 1.7%, compared with 6.0% in 1987.

²¹ [Data](#) for each of the surveys was available in SPSS format, where respondents were categorised according to their state of residence. Data for NSW respondents is not available for 1979.

Figure 2: Percentage of NSW respondents who believe abortion should be easily obtainable, obtainable under special circumstances or banned



Source: [Voter Studies, Australian Election Studies](#)

1.2.2 Lonergan Research Study

In September 2015, the NSW Greens commissioned Lonergan Research to survey NSW residents on their views on abortion.²² This survey represents the latest publicly available survey of the opinions of NSW residents. The survey was conducted online using a permission-based panel, with data weighted to the latest population estimates sourced from the Australian Bureau of Statistics. A total of 1,015 NSW respondents aged 18 years or older were surveyed; 595 respondents were drawn from Sydney, with the remaining 420 drawn from regional NSW.

The key findings were:

- Respondents predominantly (63%) classified abortion as a women's health issue. This classification was more prevalent across regional and rural NSW (68%), compared to Sydney (60%). 46% of respondents from Sydney also saw it as a moral issue, compared with 39% of residents from regional/rural NSW.
- 76% of respondents were not aware that abortion is an offence under the *Crimes Act (1900)*.
- 73% of respondents believe that abortion should be decriminalised and regulated within the health service. Support for decriminalising abortion

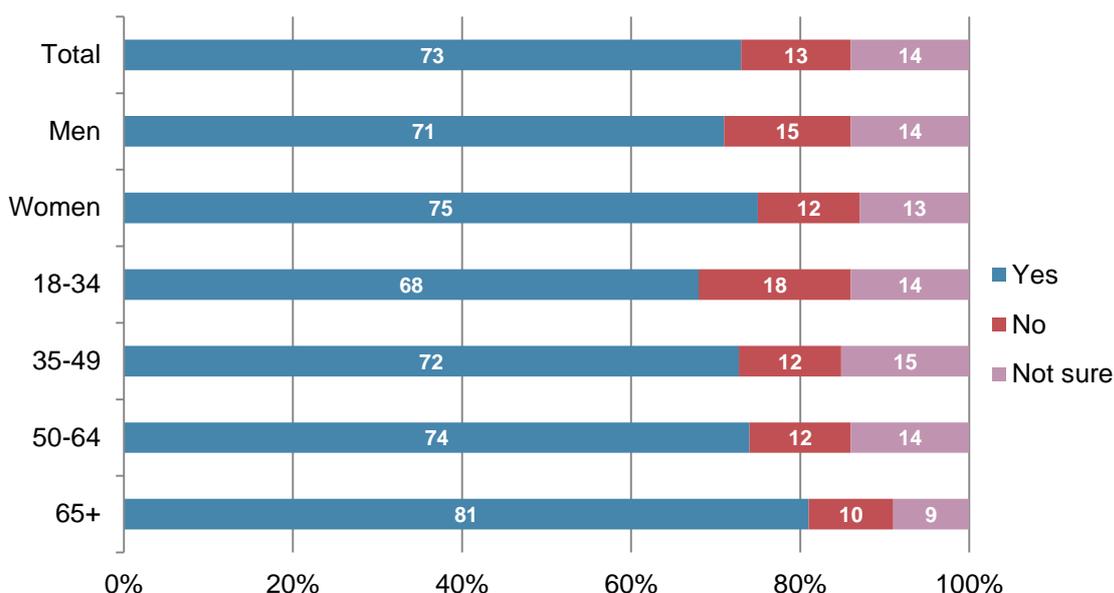
²² Lonergan Research, Public views on Abortion – NSW, September 2015

was marginally higher across regional and rural NSW (77%) compared to Sydney (70%), as well as in older groups of respondents.

- Support for the decriminalisation of abortion was highest (86%) amongst respondents who had voted for The Greens in the 2015 NSW State Election, followed by those who voted for Labor (77%), the LNP (75%) and another party or Independent (69%).

Figure 3 shows the distribution of survey responses on the issue of the decriminalisation of abortion and its regulation within the health care services.

Figure 3: Percentage of NSW respondents (n= 1015) who believe abortion should be decriminalised and regulated within the health care services.



The Lonergan Research survey also asked respondents for their views on the circumstances in which an abortion should be available to women. On this issue, the results were broadly similar to those observed for the AES NSW respondents, with just over half (58%) believing women should be able to obtain an abortion readily when they want one. A further 26% believed abortion should be allowed only in special circumstances,²³ whilst 6% responded that abortion should not be allowed under any circumstances.²⁴

The survey data also indicates that NSW residents are strongly opposed to the harassment of women seeking abortion, with 89% of respondents agreeing that women seeking an abortion should be protected from any form of harassment or threatening behaviour. More specifically, 81% of respondents support the implementation of protester exclusion zones around abortion clinics as a method for protecting women who visit these clinics.

²³ Special circumstances were not defined

²⁴ 7% of all respondents answered "Don't know"

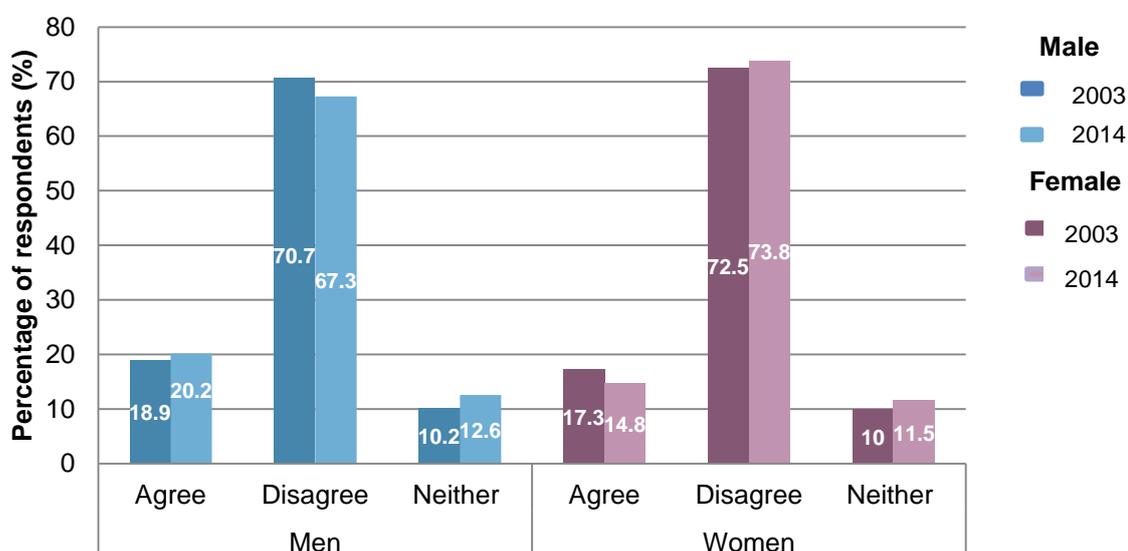
1.2.3 The First and Second Australian Study of Health and Relationships

The [First and Second Australian Studies of Health and Relationships](#), which was conducted by researchers at the University of NSW, “provides a snapshot of the sexual health and well-being of the Australian population” in 2003 and 2014.²⁵ Amongst other questions, the studies asked respondents to assess their level of agreement with the statement that “abortion is always wrong”.

The 2003 study surveyed 10,173 men and 9,134 women aged 16-59 years from all Australian States and Territories.²⁶ The 2014 study asked the same question of 20,094 people aged 16-59 years from all Australian jurisdictions.

Figure 4 shows the percentages of responses in each of the studies, broken down by gender and the year of study.

Figure 4: Percentage of males and females who agreed, disagreed or responded “neither” to the statement that “Abortion is always wrong” (2003, 2014)



Source: [First and Second Australian Studies of Health and Relationships](#)

1.3 Abortion statistics

The prevalence of abortion in Australia cannot be determined conclusively, due to the absence of national statistics. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists has criticised the absence of this data, stating that the collection of abortion statistics is a key way to understand the individual and public health impacts of termination of pregnancy.²⁷ As

²⁵ R d Visser et al. [Australian Study of Health and Relationships](#)

²⁶ Of this figure, data from 9432 men and 9283 women is available.

²⁷ The Royal Australian and New Zealand College of Obstetricians and Gynaecologists,

abortion can be performed both medically (via the administering of abortifacients) and surgically, statistical data would need to record the use of both of these methods.

South Australia is currently the only jurisdiction in Australia required to regularly collect and publish abortion data.²⁸ This information has been released annually since 1970 as part of an annual report on the State's pregnancy outcomes. The most recent report shows that in 2014:²⁹

There were 4,650 terminations of pregnancy notified in South Australia in 2014, 31 fewer than in 2013. There were 13.8 terminations of pregnancy per 1,000 women aged 15-44 years. Following the introduction of specific legislation in 1970, the pregnancy termination rate rose to a peak of 13.9 in 1980, followed by a period of relative stability in the 1980s, with another increase commencing in 1991 which reached a peak of 17.9 in 1999. The rate declined to 15.3 in 2005; remained relatively stable until 2011, and has since continued to decline.

A [2005 study](#) responded to the absence of national data on abortion by attempting to estimate the prevalence of abortion in Australia. In this study, Annabelle Chan and Leonie Sage of the South Australian Pregnancy Outcome Unit combined figures from three different sources to estimate the national abortion rate. These sources were:³⁰

- Medicare claim statistics under Medicare code 35643 for private patients;
- hospital morbidity statistics for medical abortion for public patients; and,
- extrapolated figures from South Australia.

One of the key limitations with this approach is the use of statistics based on Medicare procedure code 35643. The authors noted that, while use of this procedure code was the most appropriate for estimating the number of induced abortions, it did lead to overestimation by about 18.7% of the number of abortions in the private sector in South Australia in the period studied. They attribute this overestimation to the fact that the item description "evacuation of the contents of the gravid uterus..." is not exclusive to the performance of surgical abortions. This code also covers spontaneous miscarriage, death of the foetus in utero and other gynaecological conditions,³¹ making it difficult to isolate a figure for surgical abortions alone. With this limitation in mind, the study estimated that in 2003 the abortion rate in Australia was approximately 19.7 per 1000 women aged 15–44 years.³² This was compared with the abortion rates in

[Termination of Pregnancy](#), July 2016.

²⁸ CI 4, [Criminal Law Consolidation \(Medical Termination of Pregnancy\) Regulations 2011](#) (SA)

²⁹ South Australia Pregnancy Outcome Unit, [Pregnancy Outcome in South Australia 2014](#), 2016

³⁰ A Chan and L Sage, "[Estimating Australia's Abortion Rates: 1985 – 2003](#)" (2005) 182(9) *Medical Journal of Australia* at 447.

³¹ Medicare Benefit Schedule item 35643 refers to "evacuation of the contents of the gravid uterus by curettage or suction curettage, not being a service to which item 35639/35640 applies, including procedures to which item 35626, 35627 and 35630 applies". Note that these methods can generally only be used in the first trimester - up to 13 weeks. This item cannot be used for a curette after an incomplete miscarriage (Medicare Item 35640).

³² A Chan and L Sage, "[Estimating Australia's Abortion Rates: 1985 – 2003](#)" (2005) 182(9) *Medical*

the following countries:³³

- Germany (7.7 per 1000)
- Netherlands (8.7 per 1000)
- England and Wales (16.1 per 1000)
- New Zealand (21.0 per 1000)
- United States (21.3 per 1000)

2. OVERVIEW OF AUSTRALIAN ABORTION LAW

2.1 State legislation

The primary responsibility for the regulation of abortion lies with the States and Territories. The main abortion legislation in each jurisdiction is listed below:

- [*Crimes Act 1900 \(NSW\)*](#), ss 82-84
- [*Health Act 1993 \(ACT\)*](#), ss 80-84
- [*Termination of Pregnancy Law Reform Act 2017 \(NT\)*](#), ss 6-13
- [*Criminal Code 1899 \(Qld\)*](#), ss 224-226
- [*Criminal Law Consolidation Act 1935 \(SA\)*](#), ss 81-82A
- [*Reproductive Health \(Access to Terminations\) Act 2013 \(Tas\)*](#), ss 4-8
- [*Abortion Law Reform Act 2008 \(Vic\)*](#), ss 4-8
- [*Health \(Miscellaneous Provisions\) Act 1911 \(WA\)*](#), ss 334

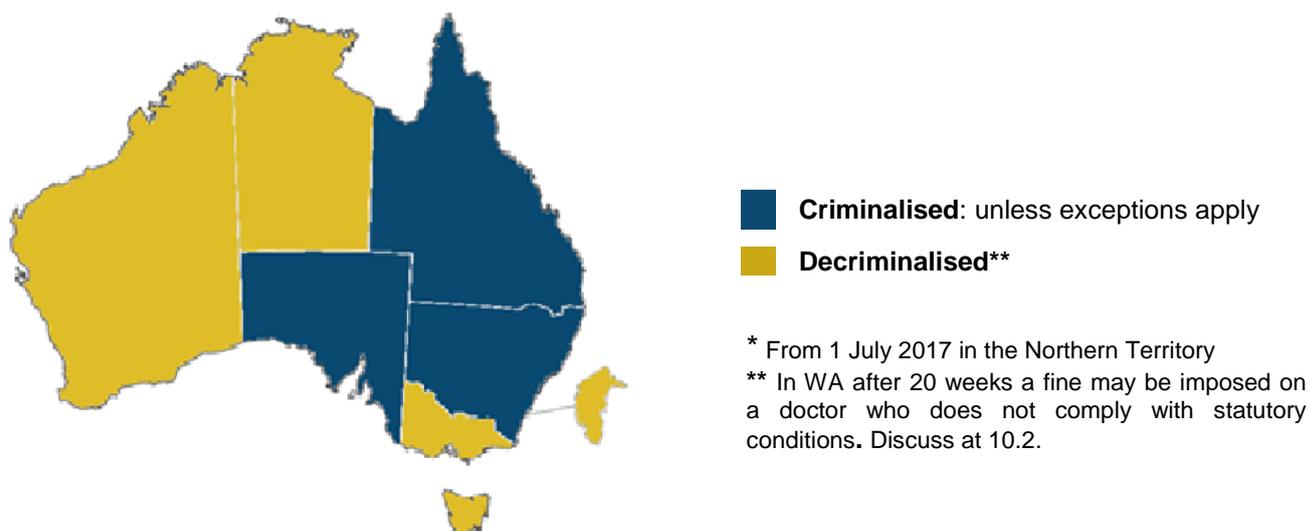
As depicted in Figure 5, in the majority of Australian jurisdictions abortion performed by doctors with the informed consent of the woman concerned has been decriminalised. In the Australian Capital Territory, Tasmania, Victoria and Western Australia abortion is available on request but this is subject to time limits in all except for the Australian Capital Territory. Where the time limits are exceeded abortion is available where statutory criteria are met. In the Northern Territory abortion is available up to 23 weeks where statutory criteria are met.

In NSW, Queensland and South Australia, abortion is a criminal offence unless exceptions apply. The exceptions in South Australia are statutory. In NSW and Queensland the exceptions have been developed by the courts in the face of statutory ambiguity; in that those jurisdictions prohibit “unlawfully” procured abortions without defining the word “unlawfully”. While the courts in both jurisdictions have attempted to clarify what “unlawfully” means, considerable uncertainty remains, both for the public and the medical profession.

Journal of Australia at 449.

³³ All the figures are for women aged 15-44 years. The figures for Germany, Netherlands, England and Wales are for the year 2002. The figures for New Zealand are for the year 2003. The figures for the United States are for the year 2000.

Figure 5: Legal status of abortion across Australia*



As depicted in Figure 6, four jurisdictions also provide for safe access zones around abortion clinics through the following legislation:

- [Health Act 1993 \(ACT\)](#), ss 85-87
- [Termination of Pregnancy Law Reform Act 2017 \(NT\)](#), ss 14-16
- [Reproductive Health \(Access to Terminations\) Act 2013 \(Tas\)](#), s 9
- [Public Health and Wellbeing Act 2008 \(Vic\)](#), ss 185A-185H

Within those safe access zones behaviour that insults, intimidates, interferes with or invades the privacy of people attempting to access or provide abortion services is prohibited. The purpose of safe access zones is to ensure that abortions may be accessed safely, privately and with dignity.

Figure 6: Abortion safe access zones*

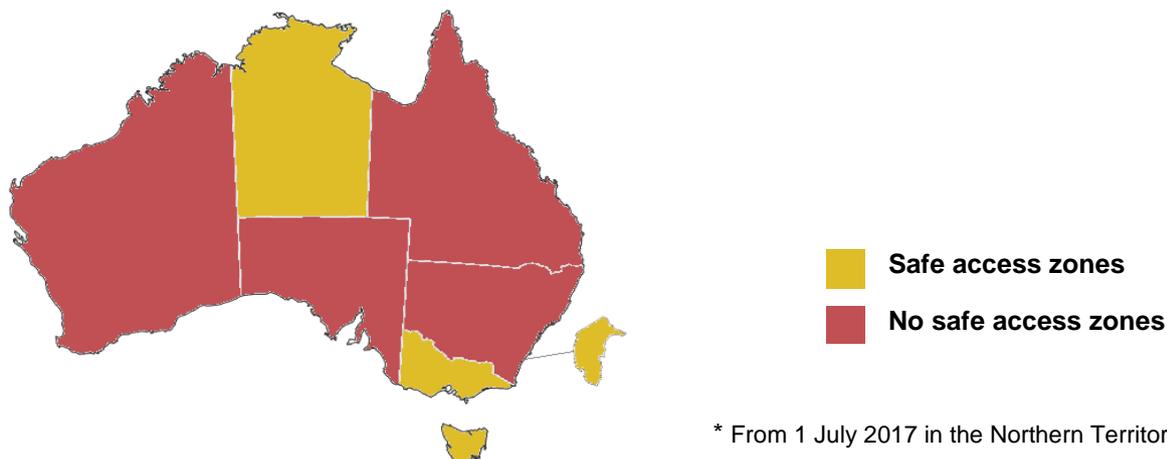


Table 2 provides an overview of the key features of abortion legislation in each jurisdiction:

Table 2 Key features of abortion law across Australia

(Abortions performed with consent on a woman by a medical practitioner)

	Criminalised			Decriminalised					
	NSW	QLD	SA	ACT	NT*	TAS	VIC	WA	
Covers both surgical and drug-based abortions	✓	✓	✓	✓	✓	✓	✓	✓	
Every abortion prohibited	✗	✗	✗	✗	✗	✗	✗	✗	
Abortion available on request	✗	✗	✗	✓	✗	✓ (to 16 weeks)	✓ (to 24 weeks)	✓ (to 20 weeks)	
Abortion available if doctor(s) satisfied of certain matters	✓	✓	✓	✗	✓ (to 23 weeks)	✓ (after 16 weeks)	✓ (after 24 weeks)	✓ (after 20 weeks)	
Conscientious objection by doctors recognised	✗	✗	✓	✓	✓	✓	✓	✓	
Doctors who conscientiously object must redirect woman to abortion services	✗	✗	✗	✗	✓	✓	✓	✗	
Counselling mandatory	✗	✗	✗	✗	✗	✗	✗	✓	
Safe access zones	✗	✗	✗	✓	✓	✓	✓	✗	

* As at 1 July 2017 in the Northern Territory, when the [Termination of Pregnancy Law Reform Act 2017 \(NT\)](#) is expected to commence.

2.2 Australian abortion law: a patchwork quilt

Even though, as set out in Figure 5, abortion has been decriminalised in the majority of Australian jurisdictions, there is no single, uniform way in which abortion is dealt with across Australia. This lack of uniformity gives rise to a number of concerns, including: the effects of abortion tourism and the extent to which abortions are available where foetal abnormality has been detected.

2.2.1 Abortion tourism

A lack of uniformity gives rise to the potential for “abortion tourism”,³⁴ which involves women travelling outside their State or Territory to obtain an abortion in a jurisdiction where the procedure is legal.³⁵ Abortion tourism is not unique to Australia. The World Health Organisation has referred to women in countries with extremely restrictive abortion laws (such as Portugal, Ireland, Poland and Malta) as “having to take the risk of an unsafe abortion or having to travel to another country to have a safe abortion.”³⁶ A recent article by journalist David Aaronovitch published in *The Times* suggests the issues that arise from a lack of legal uniformity across jurisdictions are neither new nor unique to Australian jurisdictions. Referring to this phenomenon as “the old conundrum”, Aaronovitch writes:

...the old conundrum never, ever changes. Women who don't want to give birth will very often find some way of making sure they don't. That's why you have "abortion tourism" between places that try to restrict safe abortion and those that facilitate it: Ireland and Britain, Queensland and Victoria, Utah and Colorado. And if no such option is easily available then many women in desperation make later and riskier choices.³⁷

This lack of uniformity has been said to burden the health services of jurisdictions where abortion is decriminalised, as women travel to these jurisdictions in order to have the procedure performed.³⁸ Victorian lawyer Patrick Ferdinands argues that a lack of uniformity also undermines the abortion laws of jurisdictions such as NSW and Queensland, where the procedure remains criminalised, because it “allow[s] individuals seeking abortions to ‘forum shop’ across jurisdictions to circumvent the practical effect of existing criminal laws proscribing abortion”.³⁹

³⁴ Glenn Cohen, Assistant Professor at Harvard Law School also referred to this phenomenon in 1997 as “circumvention tourism”: C Cohen, [“Circumvention Tourism”](#) (2012) 97(6) *Cornell Law Review* at 1309.

³⁵ C De Costa, [“Abortion law in Australia: it's time for national consistency and decriminalisation”](#) (2015) 203(9) *Medical Journal of Australia* at 349.

³⁶ J Lazarus, “Why Ippf Has Chosen Abortion As One Of The Five “A”S”, *Abortion in Europe* (2005) 59 [The European Magazine For Sexual And Reproductive Health](#) at 11.

³⁷ D Aaronovitch, [“We've got women leaders but no real equality”](#), 23 February 2017, *The Times*.

³⁸ [“Abortion tourism brings scores of women to Victoria for late terminations”](#), 26 October 2015, *The Age*.

³⁹ P Ferdinands, [“How the Criminal Law in Australia Has Failed to Promote the Right to Life for](#)

2.2.2 Foetal abnormality

As the following discussion demonstrates, the termination options available for women faced with foetal abnormality vary considerably across Australia.⁴⁰

2.2.2.1 NSW and Queensland

As detailed in Chapters 3 and 6, abortion is lawful in both NSW and Queensland only if necessary to avoid a serious danger to the life or physical or mental health of the woman. Consequently, for foetal abnormality to be a basis for lawful abortion it has to constitute a serious danger to the life or physical or mental health of the woman. As the Queensland Parliamentary Committee Inquiry into Abortion Law Reform commented:⁴¹

The Clinical Guideline states that an abnormal foetus with high likelihood of disability or death is not in itself a basis for a lawful termination. It recommends that the effect on the woman of the foetal abnormality be explored as to how it affects the woman and that it may be important to have documented advice from a paediatrician regarding the prognosis for the foetus if the pregnancy were to continue. Queensland Health reiterated the advice in the Clinical Guideline that foetal abnormality alone is not sufficient to meet the current legal requirements for lawful termination in Queensland.

2.2.2.2 ACT, Tasmania and Victoria

The abortion laws of the ACT, Tasmania and Victoria do not expressly refer to foetal abnormality. However, in those jurisdictions, abortion is available on demand (subject to statutory time limits in Victoria and Tasmania).

In Tasmania, after the time limit of 16 weeks the risk posed by the continuation of the pregnancy to the physical or mental health of the woman is the determining factor.

The Victorian legislation states that after a woman is 24 weeks pregnant a medical practitioner may perform an abortion having had regard to “all relevant medical circumstances” and having deemed the abortion appropriate. What is meant by “all relevant medical circumstances” is unclear but the phrase can conceivably encompass the issue of foetal abnormality.

[Unborn Children: A Need for Uniform Criminal Laws on Abortion across Australia](#)” (2012) 17(1) *Deakin Law Review* at 77.

⁴⁰ See: L de Crespigny and J Savulescu “[Pregnant Women with Fetal Abnormalities: The Forgotten People in the Abortion Debate](#)” (2008) 188(2) *Medical Journal of Australia* 103.

⁴¹ Parliamentary Health, Communities, Disability Services and Domestic Family Violence Prevention Committee, [Abortion Law Reform \(Woman's Right to Choose\) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland Final Report](#) (2016) at 41.

2.2.2.3 Northern Territory, South Australia and Western Australia

The legislation of the Northern Territory, South Australia and Western Australia expressly provides for terminations in the case of a serious medical condition or disability suffered by the child.⁴²

2.3 Role of the Commonwealth

Whilst primary responsibility for the regulation of abortion resides with the States and Territories, the Commonwealth also plays a role. A number of procedures performed in surgical abortions are currently listed on the Medicare Benefits Schedule (MBS),⁴³ a list of medical services subsidised by the Commonwealth government. The Commonwealth is also involved in the regulation of medicines that may be used in abortions via the [Therapeutic Goods Administration](#) (TGA). Until 2006 responsibility for the importation, trial, registration and listing of one of the key medications used in medical abortions, Mifepristone (also known as RU-486),⁴⁴ lay with the Federal Minister for Health. On 3 March 2006, the [Therapeutic Goods Amendment \(Repeal of Ministerial responsibility for approval of RU486\) Act 2006](#) commenced operation, transferring this approval role to the TGA.

Mifepristone has thus been available in Australia since 2006, under the TGA's [Authorised Prescriber Scheme](#). Since 2012, general practitioners can undergo online training and offer it as an option for women seeking termination, who can then obtain the medication from a pharmacist. From 1 February 2015, a composite pack containing both Mifepristone and Misoprostol (known as MS 2-step) became available in Australia via the [Pharmaceutical Benefits Scheme](#).

⁴² Despite its explicit inclusion in the legislation in the NT, SA and WA, Associate Professor Kirsten Savell and Professor Isabel Karpin note that uncertainty about the limits imposed by the term "serious disability" (or similar variants) remains: K Savell and I Karpin, "[The meaning of "serious disability" in the legal regulation of prenatal and neonatal decision-making](#)" (2008) 16 *Journal of Law and Medicine* at 233.

⁴³ This includes but is not limited to: Item 35643, evacuation of the contents of the gravid uterus by curettage or suction curettage; and Items 35639 and 35640, curettage of uterus, with or without dilatation (including curettage for incomplete miscarriage) under general anaesthesia, or under epidural or spinal (intrathecal) nerve block where undertaken in a hospital: [Medicare Benefits Schedule \(MBS\)](#) (2017)

⁴⁴ [Australian Public Assessment Report for Mifepristone](#), (2012) Therapeutic Goods Administration

3. NEW SOUTH WALES ABORTION LAW

3.1 Overview

The main features of NSW abortion law are set out in Table 3:

Table 3 Main features of NSW abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✗
Abortion available if doctor(s) satisfied of certain matters	✓
Conscientious objection by doctors recognised	✗
Doctors who conscientiously object must redirect woman to abortion services	✗
Counselling mandatory	✗
Safe access zones	✗

3.2 The abortion provisions: ss 82–84 of the Crimes Act 1900

Abortion law is found in ss 82–84 of the *Crimes Act 1900*. Sections 82–84 were part of the *Crimes Act 1900* when it was first enacted. In the intervening 117 years, ss 82–84 have remained unchanged.

Sections 82–84 of the *Crimes Act 1900* prohibit “unlawfully” performed abortions without specifying what the word “unlawfully” means. In the absence of any statutory reform, it has fallen to the courts to interpret NSW’s abortion laws in light of the social and technological changes that have occurred since their enactment and “the reality of the availability of termination procedures in our society today”.⁴⁵

The decisions of the courts, which are discussed in detail at 3.3, establish that, in contrast to the situation in the Australian Capital Territory, Tasmania, Victoria and Western Australia, abortion on request is not available in NSW. Abortion is lawfully available only if a medical practitioner forms an honest belief (a subjective test) based on reasonable grounds (an objective test) that abortion is necessary to preserve the woman from serious danger to her life or physical or mental health. How that complex legal test is to be applied in practice has been left to the courts to determine on a case by case basis.

⁴⁵ *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47 at 70 per Kirby ACJ.

Concerns as to the effect of this legal complexity and uncertainty on the availability of abortion have been raised by the Law Society of NSW:⁴⁶

Case law in NSW has provided some clarity around the definition of “unlawful” ... [but it is] limited and uncertain. Termination clinics operate in NSW in the shadow of the law by relying on the police to apply a generous interpretation of [the law].

While we understand that prosecutions are rare, this remains an insecure and problematic basis on which to operate and in particular, has led to many medical practitioners being reluctant to work in the area.

Academic Mark Rankin has expressed the issue in the following terms:⁴⁷

Of course, in practice such legal complexity is probably lost on a particular medical practitioner, who may simply decide that the abortion is necessary to prevent harm (broadly defined to include physical, mental and socio-economic factors) to the woman concerned.

Unfortunately ... there is no way to predict whether a court would hold a particular medical practitioner’s decision to be ... lawful. This level of legal uncertainty and instability invites prosecution, if a government were so inclined.

3.2.1 Woman unlawfully procuring her own miscarriage: s 82

Section 82 of the *Crimes Act 1900* prohibits a pregnant woman from: unlawfully administering any drug or poison; or unlawfully using any instrument or other means; with the intent of procuring her own miscarriage. An offence against s 82 of the *Crimes Act 1900* carries a maximum penalty of 10 years imprisonment.⁴⁸

3.2.2 Unlawfully procuring a woman’s miscarriage: s 83

Section 83 of the *Crimes Act 1900* prohibits any person from: unlawfully administering to any woman, whether with child or not, any drug or noxious thing; unlawfully causing any woman, whether with child or not, to take any drug or noxious thing; or unlawfully using any instrument or other means; with the intent to procure the woman’s miscarriage. An offence against s 83 of the *Crimes Act 1900* carries a maximum penalty of imprisonment for 10 years.

Section 83 is the central provision in the abortion debate; as it relates to the situation where a woman seeks to obtain an abortion from a medical practitioner.

⁴⁶ [The Law Society of NSW, letter to Dr Mehreen Faruqi MLC, 9 August 2016 p 2.](#)

⁴⁷ M Rankin, “[The Disappearing Crime of Abortion and the Recognition of a Woman’s Right to Abortion: Discerning a Trend in Australian Abortion Law?](#)” (2011) *Flinders Law Journal* 1 at 18. Similar views were expressed by the Dean of UNSW Law School, Professor George Williams, in: “[NSW lags way behind on updating its abortion laws](#)”, 13 June 2016, *The Sydney Morning Herald*.

⁴⁸ Between 1 January 2000 and 30 June 2016 there were three finalised charges under s 82 (one in 2003 and two in 2004). In respect of all three charges, the proceedings did not result in a finding of either guilt or innocence, as the three charges were “dismissed due to mental health/other health issues or withdrawn or otherwise disposed of”: NSW Bureau of Crime Statistics and Research (email to the authors dated 20 December 2016).

3.2.3 Unlawfully supply drug, instrument or thing knowing it is intended to be unlawfully used to procure a woman's miscarriage: s 84

Section 84 of the *Crimes Act 1900* prohibits any person from unlawfully supplying or procuring any drug or noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of any woman, whether with child or not. An offence against s 84 carries a maximum penalty of imprisonment for five years.⁴⁹

3.3 Interpretation of s 83 by the courts

As stated above (at 3.2), there is no statutory guidance as to when a woman can lawfully obtain an abortion from a medical practitioner because the word "unlawfully" is undefined. It is this issue that the courts have grappled with.

3.3.1 The English case of *R v Bourne*

In the absence of Australian authority on the question of what constitutes an unlawful abortion, it was generally assumed that the legal position in Australia reflected the 1930s English case of *R v Bourne*.⁵⁰ That case involved Dr Bourne, a leading gynaecologist and obstetric surgeon, being acquitted by a jury after being charged with performing an unlawful abortion on a 14 year old girl who became pregnant as a result being raped.⁵¹ Justice Macnaghten held that for the abortion to have been unlawful the Crown would have to prove beyond reasonable doubt that Dr Bourne did not act "in good faith for the purpose only of preserving the life of the girl".⁵²

The test of lawfulness proposed by Justice Macnaghten was not restricted to acting in good faith to save the life of a pregnant woman, but extended to the situation where the doctor believed:⁵³

[O]n reasonable grounds and with adequate knowledge, that the probable consequence of the pregnancy would be to make the woman "a *physical or mental wreck*". ...

Wreckage remained undefined, but there was little doubt that Macnaghten J's test demanded a very high level of danger to health before abortion would be justified.

⁴⁹ Between 1 January 2000 and 30 June 2016 there were no finalised charges under s 84 of the *Crimes Act 1900*. Source: NSW Bureau of Crime Statistics and Research (email to the authors dated 20 December 2016).

⁵⁰ N Cica, [Abortion Law in Australia](#), 1998, Commonwealth Parliamentary Library, under the heading "Pre-reform: English Case Law"; [1938] 3 All ER 615; [1939] 1 KB 687. See also: C de Costa, "[The King versus Aleck Bourne: The Case that established the lawfulness if terminating pregnancy to preserve women's health](#)" (2009) 191(4) *Medical Journal of Australia* 230.

⁵¹ [1938] 3 All ER 615; [1939] 1 KB 687. The relevant provision was s 58 of the *Offences Against the Person Act 1861*.

⁵² [1938] 3 All ER 615; [1939] 1 KB 687.

⁵³ N Cica, [Abortion Law in Australia](#), 1998, Commonwealth Parliamentary Library, under the heading "Pre-reform: English Case Law".

3.3.2 The Victorian case of *R v Davidson*

The 1969 case of *R v Davidson*⁵⁴ involved an accused being charged with offences against s 65 of the *Crimes Act 1958 (Vic)*, which at the time stated:⁵⁵

Whosoever...with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of a felony, and shall be liable to imprisonment for a term of not more than fifteen years.

The case was tried in the Supreme Court of Victoria, where Justice Menhennitt confirmed:⁵⁶

The only decision of which I am aware in which the meaning of the word "unlawfully" in s 65 of the *Crimes Act 1958*, or its equivalent elsewhere, has been deliberately construed is *R v Bourne*.

After having particular regard to the "deliberate and repeated use of the word 'unlawfully' in s65",⁵⁷ the nature of the offence, *Bourne* and legal commentary, Justice Menhennitt determined that "necessity is the appropriate principle to apply to determine whether a therapeutic abortion is lawful or unlawful".⁵⁸ Accordingly:⁵⁹

[T]o establish that the use of an instrument with intent to procure a miscarriage was unlawful, the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him 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; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need 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.

3.3.3 *R v Wald*

In 1971, almost three-quarters of a century after the enactment of the abortion offences, the distinction between an unlawful and lawful abortion performed with consent by a medically qualified practitioner was judicially considered in NSW by Judge Levine in the District Court case of *R v Wald*.⁶⁰ The case involved a

⁵⁴ [\[1969\] VR 667](#).

⁵⁵ [\[1969\] VR 667](#) at [2]. Section 65 was subsequently repealed and replaced with a provision relating to abortions performed by unqualified persons.

⁵⁶ [\[1969\] VR 667](#) at [5].

⁵⁷ [\[1969\] VR 667](#) at [16].

⁵⁸ [\[1969\] VR 667](#) at [16].

⁵⁹ [\[1969\] VR 667](#) at [27].

⁶⁰ (1971) 3 DCR (NSW) 25.

surgeon, an anaesthetist and an orderly being charged with unlawfully using an instrument to procure the miscarriage of nine different women, contrary to s 83 of the *Crimes Act 1900*.⁶¹ The matter proceeded to trial, where the accused were acquitted by a jury.⁶²

A preliminary issue in *Wald* was whether there was sufficient evidence for the charges to be left to the jury. It was in that context that Judge Levine considered the scope of s 83 and said:⁶³

Everything turns upon the word “unlawful”. In my view, s 83 envisages that it is not every use of an instrument upon a woman with intent to procure a miscarriage that constitutes an offence, the offence is only committed if it be done unlawfully; and it would seem to me that the legislature had in mind that there were circumstances in which such use of an instrument could be lawful.

Judge Levine determined that the 1969 Victorian abortion case of *R v Davidson*⁶⁴ “provides the answer”⁶⁵ as to how the word “unlawful” in s 83 of the *Crimes Act 1900* should be interpreted when an operation to terminate pregnancy is “skilfully performed, with the woman’s consent, by duly qualified medical practitioners”.⁶⁶

Expressly applying *Davidson*, Judge Levine in *Wald* determined:⁶⁷

[F]or the operation to have been lawful ... the accused must have had an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life, or physical or mental health, which the continuance of the pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted. The Crown of course bears the onus of establishing that the operations were unlawful.

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 as at the very time when 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 the pregnancy, if uninterrupted. In either case such a

⁶¹ A referring doctor and the owner of the premises in which the abortions were performed were also charged with abortion-related offences. All accused were further charged with conspiring to commit an offence against s 83 of the *Crimes Act 1900*.

⁶² (1971) 3 DCR (NSW) 25 at 33.

⁶³ (1971) 3 DCR (NSW) 25 at 28.

⁶⁴ [1969] VR 667.

⁶⁵ (1971) 3 DCR (NSW) 25 at 29.

⁶⁶ (1971) 3 DCR (NSW) 25 at 29.

⁶⁷ (1971) 3 DCR (NSW) 25 at 29.

conscientious belief on reasonable grounds would have to be negated before an offence under s 83 of the Act could be proved.

Wald remains the basis in NSW for determining if an abortion provided by a medical practitioner with consent is lawful or unlawful.

3.3.4 *K v Minister for Youth and Community Services*

Wald was applied in the 1982 case of *K v Minister for Youth and Community Services*.⁶⁸ K was a 15 and a half year old ward of the State who was 12 weeks pregnant when her case was heard in the Supreme Court by Justice Helsham, the then Chief Judge in Equity. K's background was described by Justice Helsham as:⁶⁹

[O]ne of deprivation ... a deprived childhood with no stability of any sort, moral, domestic, school or emotional ...

She realized that if she has the child there is no wa[y] in which she can really cope with its support or its rearing, and given her age and maturity (intelligence testing would tend to indicate she is in the mildly retarded range) this is just plain commonsense. There is just no chance that this baby could have any life with its mother. So it would have to become a State ward and, as she says, she does not want that. Further, she would have to leave the home where she is living; she has been told so.

There was also medical evidence before the court that the continuation of the pregnancy would pose a serious danger to K's mental health, including "very serious psychological and mental stress".⁷⁰

Justice Helsham accepted that *R v Wald* correctly stated the law.⁷¹ Applying *Wald* to the facts of the case before him, Justice Helsham said:⁷²

I have not the slightest doubt that there would be no legal impediment to the carrying out of an abortion on the plaintiff. There is ample material upon which a conclusion could be reached that the social and medical situation of this girl constitutes reasonable grounds upon which an honest belief could be formed that an abortion is necessary to prevent serious danger to her physical or mental health. Indeed, I would go so far as to say that in my view there is virtually no evidence before me to the contrary.

⁶⁸ [1982] 1 NSWLR 311.

⁶⁹ [1982] 1 NSWLR 311 at 314 and 315.

⁷⁰ [1982] 1 NSWLR 311 at 316.

⁷¹ [1982] 1 NSWLR 311 at 318.

⁷² [1982] 1 NSWLR 311 at 318.

3.3.5 CES v Superclinics

The test propounded by Judge Levine in *Wald* had not come before a NSW appellate court for consideration until 1995, in *CES v Superclinics (Australia) Pty Ltd*.⁷³

*CES v Superclinics (Australia) Pty Ltd*⁷⁴ was essentially a “wrongful birth” case,⁷⁵ as it involved a claim for damages brought by parents against a doctor following the birth of a child who would not have been born but for the negligence of doctors.⁷⁶ But in determining whether it was possible for the plaintiff to claim damages, the court first had to consider whether the mother in *CES* could lawfully have obtained an abortion.

Facts: A young woman (the first plaintiff) visited doctors at a clinic operated by Superclinics Australia Pty Ltd (the defendants) to request a pregnancy test after missing her period, stating that if she were pregnant she wished to have the pregnancy terminated.⁷⁷ Her first pregnancy test returned a false negative result; in other words, it indicated she was not pregnant when in fact she was pregnant. Her second test provided an accurate positive result but, when she telephoned the clinic to obtain her results, she was wrongly told that the test was negative. When she next visited a doctor she was exhibiting external signs of pregnancy and an ultrasound was conducted. The ultrasound revealed she was approximately 19 and-a-half weeks pregnant. When she again requested that the pregnancy be terminated, she was told it was too late to perform a termination procedure safely. She subsequently gave birth to a healthy child.

Decision at trial: In the Supreme Court the first plaintiff and the father of the child (the second plaintiff) sought compensation for damages arising from the birth of their child. Justice Newman determined that the plaintiffs could not claim damages because the termination sought by the first plaintiff was unlawful within the terms of either ss 82 or 83 of the *Crimes Act 1900*.⁷⁸

Decision on Appeal: The plaintiffs appealed to the Court of Appeal. By majority (Kirby ACJ and Priestley JA; Meagher JA dissenting) the court upheld the appeal, set aside the judgment below and ordered a new trial to be held.⁷⁹

The manner in which each judge interpreted s 83 of the *Crimes Act* is discussed in detail below in order to demonstrate the complexity besetting this area of the law. As that discussion reveals, Justice Kirby determined that neither the plaintiff nor her doctors would have acted unlawfully if the abortion sought by the plaintiff had been performed. Justice Priestley determined that, in the

⁷³ (1995) 38 NSWLR 47 at 59.

⁷⁴ (1995) 38 NSWLR 47

⁷⁵ For a discussion of wrongful birth cases, see: D Stretton, “[The Birth Torts: Damages for Wrongful Birth and Wrongful Life](#)” (2005) 10(1) *Deakin Law Review* 319; [Harriton v Stephens](#) [2002] NSWSC 461; [Edwards v Blomeley](#) [2002] NSWSC 460 and [Waller v James](#) [2002] NSWSC 462.

⁷⁶ [Waller v James](#) [2002] NSWSC 462 at [60].

⁷⁷ (1995) 38 NSWLR 47 at 50–52.

⁷⁸ (1995) 38 NSWLR 47 at 54.

⁷⁹ (1995) 38 NSWLR 47 at 85 per Priestly JA, Kirby ACJ agreeing at 79.

circumstances of this case, any doctor performing an abortion on the plaintiff would have acted unlawfully but the plaintiff, relying on the erroneous advice of the doctor, would not have acted unlawfully. Justice Meagher determined that both the plaintiff and any doctor performing an abortion on the plaintiff would have acted unlawfully. In short, although each of the judges applied the *Wald* test to the same set of facts, three different answers were obtained to the question of whether or not the abortion sought by the plaintiff was lawful.

Acting Chief Justice Kirby: Held that the trial judge, Justice Newman, erred in concluding that the termination sought would necessarily or probably have been unlawful.⁸⁰

There was evidence before the trial judge that the plaintiff's mental health had been "seriously affected" in a "perfectly predictable way" after the birth of the child.⁸¹ The plaintiff had just turned 21 when she discovered she was pregnant. She had limited financial resources, reduced employment prospects and was unlikely to have the support of a long-term relationship with the father of the child.⁸² These pressures resulted in the plaintiff suffering from anxiety, depression and ambivalent feelings towards her child.⁸³

Moreover, there was no evidence from which it could be found that a medical practitioner, faced with the facts of the first plaintiff's case, could not have formed the honest and reasonable belief that the continuance of the pregnancy would have posed a serious danger to the mental health of the first plaintiff, either during the pregnancy or after the birth of the child.⁸⁴ Nor was any evidence available that a termination would have been disproportionate in the circumstances of this case.⁸⁵

Justice Kirby expanded the ambit of the *Wald* test to include serious danger posed to a pregnant woman's mental health after the birth of a child:⁸⁶

The *Wald* test allows a consideration of the economic demands on the pregnant woman and the social circumstances affecting her health when considering the necessity and proportionality of a termination. ...

However, there is one anomaly in the test to which I must draw attention. The test espoused by Levine DCJ seems to assert that the danger being posed to the woman's mental health may not necessarily arise at the time of consultation with the medical practitioner, but that a practitioner's honest belief may go to a reasonable expectation that that danger may arise "at some time *during the currency of the pregnancy, if uninterrupted*" ... There seems to be no logical basis for limiting the honest and reasonable expectation of such a danger to the mother's psychological health to the period of the currency of the pregnancy

⁸⁰ (1995) 38 NSWLR 47 at 66.

⁸¹ (1995) 38 NSWLR 47 at 65.

⁸² (1995) 38 NSWLR 47 at 64–65.

⁸³ (1995) 38 NSWLR 47 at 65 per Kirby ACJ.

⁸⁴ (1995) 38 NSWLR 47 at 67.

⁸⁵ (1995) 38 NSWLR 47 at 67.

⁸⁶ (1995) 38 NSWLR 47 at 60.

alone. Having acknowledged the relevance of other economic or social grounds which may give rise to such a belief, it is illogical to exclude from consideration, as a relevant factor, the possibility that the patient's psychological state might be threatened *after* the birth of the child, for example, due to the very economic and social circumstances in which she will then probably find herself. Such considerations, when combined with an unexpected and unwanted pregnancy, would, in fact, be most likely to result in a threat to a mother's psychological health *after* the child was born when those circumstances might be expected to take their toll.

In relation to the assessment of a risk to the future mental health of a pregnant woman, Justice Kirby emphasised:⁸⁷

[T]he only relevant question is whether a referring medical practitioner, or a surgeon performing such terminations, could honestly and reasonably have believed that a serious threat to the mother's mental health would have emerged upon the birth of the child if the pregnancy were not terminated, as desired. The inquiry cannot satisfactorily be further limited. Nor should it be, given the wide variety of particularities which will arise for consideration in each case. ...

[In his case] there was, within the very broad language of the *Wald* test, sufficient evidence to suggest that a medical practitioner advising the first appellant could honestly and reasonably have formed the view that she was facing a serious danger to her mental health by being forced to continue with the unwanted pregnancy. It would then have been open to conclude that the termination procedure was proportionate as a solution to that danger in her case. More accurately, a jury in a criminal trial following a termination would have had to question whether there was sufficient evidence to *negate* the surgeon's honest belief that the danger was serious, thus rendering the opinion unreasonable, and the performance of the operation unlawful.

Justice Priestley: Took a highly nuanced view of the issue of whether or not the abortion sought by the plaintiff was lawful; one which illustrates the legal uncertainty that confronts women, couples and doctors when the issue of abortion arises:⁸⁸

So long as the law in this area is accepted as being governed by *Wald*, whether or not any particular miscarriage has been *unlawfully* procured must depend on ascertaining whether or not the person procuring the miscarriage honestly believed on reasonable grounds that the operation was necessary to preserve the woman from serious danger to her life, or physical or mental health. In the absence of an answer to his question in some court proceedings in which it became an issue, how is the question to be answered? I do not think it can be.

...

[A]s the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a common law

⁸⁷ (1995) 38 NSWLR 47 at 66.

⁸⁸ (1995) 38 NSWLR 47 at 83.

criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.

Regarding the position of a medical practitioner who performed the requested termination on the plaintiff, Justice Priestley said he did *not* think the medical practitioner would have been right to tell the plaintiff that the abortion was justified and then perform the abortion:⁸⁹

I do not see how on the facts available a medical practitioner could have honestly believed on reasonable grounds that the abortion would have been necessary to preserve the plaintiff from serious danger to her life or physical or mental health.

This position reflects a cautious interpretation of *Wald*, which Justice Priestley expressed in the following terms:⁹⁰

It is understandable that the plaintiff's unwanted pregnancy caused her concern and worry. It is also, in my opinion quite clear that the *Wald* doctrine does not make such concern and worry by themselves alone reasonable grounds for a medical practitioner to come to an honest and reasonable belief that not to interrupt the pregnancy would result in serious danger to a woman's physical or mental health. Those factors *could* have such a result, but that is not the same as saying they *would* have such a result, and it is belief in the latter situation for which, on this approach, there must be reasonable grounds for an abortion to be lawful. The distinction is an important one because it means the difference in New South Wales between abortion for all practical purposes being available on demand, and its only being lawfully available in the limited circumstances described in *Wald*.

According to Justice Priestley, the position of the plaintiff, however, was different. There was a real possibility that the plaintiff, had she been diagnosed as being pregnant in a timely manner, would have seen a medical practitioner who advised her that the abortion she requested was not unlawful and who subsequently terminated her pregnancy.⁹¹ In those circumstances, had the plaintiff acted on the medical practitioner's advice without questioning the accuracy of it as legal advice, she would not have been guilty of any offence in submitting to the abortion (such as aiding and abetting or conspiring to commit an offence against s 83 of the *Crimes Act 1900*).⁹²

Justice Meagher: Narrowly interpreted *Wald*, determining that its "apparent and unstated exception" to the prohibition on abortion "has no application on the present facts".⁹³

⁸⁹ (1995) 38 NSWLR 47 at 82.

⁹⁰ (1995) 38 NSWLR 47 at 82.

⁹¹ (1995) 38 NSWLR 47 at 83–84.

⁹² (1995) 38 NSWLR 47 at 84.

⁹³ (1995) 38 NSWLR 47 at 85.

Newman J found the plaintiff's health excellent at all times. Nor could a medical practitioner, however progressive, have had honest or reasonable grounds to think otherwise — so much is expressly found by his Honour. Moreover, in these circumstances the plaintiff could hardly have had honest or reasonable grounds for believing an abortion to be legal.

3.4 Convictions for unlawful abortions committed after Wald

In order to ascertain where the boundary between lawful and unlawful abortions currently lies, it is also necessary to examine cases where there has been a conviction of a medical practitioner for an offence against s 83 of the *Crimes Act 1900* committed after *Wald*.⁹⁴

3.4.1 R v Smart⁹⁵

In 1981 Dr Smart was charged with an offence against s 83 of the *Crimes Act 1900* after he performed an abortion on a 17 year old girl without first asking her about the state of her physical or mental health.⁹⁶ Applying *Wald*, the judge directed the jury that the issue in the case was whether or not the doctor had formed the requisite view about the necessity to undertake the abortion; that is, whether the doctor held an honest belief on reasonable grounds that the abortion was necessary to preserve the woman from serious danger to her life, or physical or mental health.⁹⁷ The jury returned a verdict of guilty. Dr Smart was convicted and sentenced by way of a good behaviour bond.⁹⁸

3.4.2 R v Sood

Between 1 January 2000 and 30 June 2016 one person (Ms Sood) was convicted of a principal offence against s 83 of the *Crimes Act 1900*.⁹⁹ Ms Sood performed an abortion on LT, a 20 year old woman who was 22–24 weeks pregnant when the abortion was performed. Ms Sood was a qualified medical practitioner when she performed the abortion on LT. However, she had been formally deregistered by the Medical Tribunal¹⁰⁰ by the time she was sentenced in the Supreme Court to a good behaviour bond for a period of two years.¹⁰¹

⁹⁴ A General Practitioner, Dr Rellee George Skinner, was convicted of conspiring to procure the miscarriage of several women and sentenced to imprisonment for 12 months, to be served by way of periodic detention. However, the offences occurred in 1970, a year before *Wald*, and involved the abortion being conducted by an unqualified person: *Skinner v Beaumont* [1974] 2 NSWLR 160.

⁹⁵ This was an unreported 1981 decision of the NSW District Court. A brief outline of *Smart* was outlined in *R v Sood* [2006] NSWSC 1141 at [65]–[66].

⁹⁶ For a discussion of *Smart*, see: N Cica, [Abortion law in Australia](#), 1998, Commonwealth Parliamentary Library Research Service, text accompanying note 74.

⁹⁷ Discussed in *R v Sood* [2006] NSWSC 1141 at [65]. See also: N Cica, [Abortion law in Australia](#), 1998, Commonwealth Parliamentary Library Research Service, text accompanying note 74.

⁹⁸ Discussed in *R v Sood* [2006] NSWSC 1141 at [66].

⁹⁹ Source: NSW Bureau of Crime Statistics and Research. Email dated 20 December 2016.

¹⁰⁰ *In Re Dr Suman Sood* [2006] NSWMT 1.

¹⁰¹ [2006] NSWSC 1141 at [71].

To prepare LT for a surgical abortion, LT was administered prostaglandin tablets (also known as Cytotec), a medication used to induce labour.¹⁰² LT was told to wait in the surgery for an hour before going home and to return the next morning in order for a surgical procedure to be undertaken. The prostaglandin acted faster than expected. LT went into an advanced stage of labour at home and delivered a child who did not survive.¹⁰³

Ms Sood had not offered LT counselling; although that omission did not by itself render the abortion unlawful because, as Justice Simpson said:¹⁰⁴

The requirement of the law is not that medical practitioners contemplating termination of pregnancy undertake counselling in order to ensure that patients do not take an irrevocable step unwisely and without due consideration; nor is it that they seek to deter patients from doing so. The requirement of the law is that medical practitioners assess and balance the relative dangers of termination against the dangers of non-termination — that is, of obliging an unwilling patient to proceed with an unwanted pregnancy with all that that might, physically or mentally, entail.

More relevantly, Ms Sood had not inquired about LT's reasons for requesting an abortion¹⁰⁵ or "the impact of the pregnancy or the anticipated birth of the child upon her physical or mental health".¹⁰⁶ Unlawfulness was thereby established because, in the absence of those inquiries, Ms Sood could not have formed the requisite belief that the termination of the pregnancy was necessary in order to protect the woman from serious danger to her life or health, whether physical or mental.¹⁰⁷ Further, even if — contrary to the evidence — Ms Sood did hold such a belief, such a belief could not have been based upon reasonable grounds.¹⁰⁸

As to whether or not the abortion would have been unlawful if Ms Sood had made the inquiries required by *Wald*, Justice Simpson said:¹⁰⁹

I am satisfied that Ms Sood did not make the necessary inquiries on that issue, and thus could not have formed the necessary belief.

On the evidence I am, however, also satisfied that, had she turned her mind to those issues, it would have been open to Ms Sood to have formed the necessary belief. LT was a young woman aged 20 who presented, even when giving evidence four and a half years after these events, as somewhat vulnerable. At the time of her encounter with Ms Sood she was in a relationship that was foundering, and that subsequently failed. She was living with her parents, who were, it is true, very supportive, and with the father of the child,

¹⁰² [2006] NSWSC 1141 at [9]. Ms Sood inserted one tablet into LT's vagina (the first offence) and supplied LT with tablets for her take orally (the second offence).

¹⁰³ [2006] NSWSC 1141 at [11].

¹⁰⁴ [2006] NSWSC 1141 at [21].

¹⁰⁵ [2006] NSWSC 1141 at [8] and [19].

¹⁰⁶ [2006] NSWSC 1141 at [18] and [19].

¹⁰⁷ [2006] NSWSC 1141 at [17] and [18].

¹⁰⁸ [2006] NSWSC 1141 at [19].

¹⁰⁹ [2006] NSWSC 1141 at [23]–[26].

but was financially stressed. Her parents were planning to leave Australia and return to live in the Cook Islands from where they had come. LT would then have been left, at a very young age, with a newborn baby, without immediate parental support, with inadequate financial resources, and in a failing (or failed) relationship. It may well have been concluded that LT's physical and/or mental health would have been put at risk by the continuation of the pregnancy.

... I am unable to find that this termination was one which, if the proper inquiries had been made, would not or could not have been lawfully performed. In other words, it was not an unlawful termination because of the circumstances of LT; it was an unlawful termination because Ms Sood failed to make the requisite inquiries in order to satisfy herself of the necessity to terminate the pregnancy. Had she made those inquiries, she may well have, quite properly, formed that belief and proceeded lawfully to terminate the pregnancy.

I repeat, the gist of Ms Sood's offences was to take steps towards the termination of the pregnancy in the absence of a belief that it was necessary to do so.

3.5 NSW Health's Policy Directive on Terminations

The NSW Ministry of Health's Policy Directive *Framework for terminations in NSW Public Health Organisations*¹¹⁰ broadly accords with the legal position in NSW. Clause 2.1 of the policy states that abortions are lawfully available as a health service in NSW public hospitals on the basis of the legal test established in *Wald*. However, it also adopts a policy position on matters that have not been addressed by NSW abortion law, including requiring that:

- all women seeking an abortion be offered counselling (clause 3.1);
- gestation period and foetal abnormality be considered as part of an assessment of need (clause 3.2); and
- doctors who conscientiously object inform the woman that they have a conscientious objection and take every reasonable step to direct the woman to another health practitioner, in the same profession, who does not have a conscientious objection to termination of pregnancy (clause 4.2).

The relevant clauses are set out in Table 4.

¹¹⁰ [Policy Directive Pregnancy—Framework for Terminations in NSW Public Health Organisations](#), 2014, NSW Government, Ministry of Health.

Table 4: Policy Directive: Framework for Terminations in NSW Public Health Organisations

Criminal law (Clause 2.1):

In NSW the law on termination is governed by the NSW Crimes Act 1900 as interpreted by relevant case law. In summary, termination is lawful if: The procedure is performed with the consent of the woman and by a registered medical practitioner. The medical practitioner procuring the termination has an honest belief based on reasonable grounds that the procedure is necessary to preserve the woman from serious danger to her life, or physical or mental health. These grounds may be medical, economic or social. In the circumstances, the operation is not out of proportion to the danger intended to be avoided.

Counselling (Clause 3.1):

All women seeking a termination of pregnancy are to be offered counselling. This counselling does not replace but is additional to any genetic counselling that may be indicated.

Assessment of need (Clause 3.2):

The decision for termination of pregnancy is one between an individual woman and her treating practitioner. For all proposed terminations the following criteria should be considered and documented: 1. The woman's physical and psychological condition. 2. Accurate assessment of gestational age.¹¹¹ 3. In cases of birth defect, the diagnostic probability. 4. In cases of birth defect, the prognosis for the foetus.

Conscientious objection (Clause 4.2):

Any medical practitioner who is asked to advise a woman about termination of pregnancy, or perform, direct, authorise or supervise a termination of pregnancy, and who has a conscientious objection to termination of pregnancy must: 1. Inform the woman that they have a conscientious objection and that other practitioners may be prepared to provide the health service she seeks; and 2. Take every reasonable step to direct the woman to another health practitioner, in the same profession, who the practitioner reasonably believes does not have a conscientious objection to termination of pregnancy. ...The exception to this is termination of pregnancy in emergency situations. Medical practitioners, midwives and nurses must perform a termination of pregnancy in those rare emergency cases where it is necessary to preserve the life of the pregnant woman, regardless of their objection to abortion.

3.6 Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016

In August 2016 Dr Mehreen Faruqi MLC introduced the [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#) into the Legislative Council as a Private Member's Bill. It is anticipated that the Bill will be debated in the first half of 2017.¹¹² In the Bill's Second Reading speech, Dr Faruqi MLC emphasised:¹¹³

This is the first time an abortion decriminalisation bill has been introduced in the New South Wales Parliament. ... The bill ... is not about encouraging or discouraging abortions. It is ... about the right to a choice. It grants the same

¹¹¹ Clause 3.2 further states that the process for assessing need differs depending upon gestational age and provides additional guidance on that issue.

¹¹² M Faruqi, [The time for heel dragging is over: Decriminalise abortion](#), 6 March 2017, The Greens.

¹¹³ [NSWPD 11 August 2017 \(M Faruqi\) pp 10 and 12.](#)

rights that people in Victoria, the Australian Capital Territory and Tasmania already enjoy to people in need of reproductive health in New South Wales. It says to women and all people who choose to have an abortion that they are not criminals and that we are going to remove the stigma and shame they currently face, and that anyone in need of a pregnancy termination service has affordable access to it with dignity and privacy.

The law must be brought into line with reality and with modern medical practice. There must be watertight protections for patients and their doctors so they can be absolutely confident that they are on the right side of the law.

3.6.1 Objects

The objects of the Bill are set out in its [Explanatory Note](#) as being:

- (a) to repeal the offences under the *Crimes Act 1900* relating to abortion,
- (b) to abolish any rule of common law that creates an offence relating to abortion,
- (c) to provide that it constitutes unsatisfactory professional conduct for a medical practitioner who has a conscientious objection to abortion to fail to advise a person requesting an abortion, or advice about abortions, of the objection and to fail to refer the person to another health practitioner who does not have such a conscientious objection or to a local Women's Health NSW (WHNSW) Centre,
- (d) to provide for exclusion zones (also known as safe access zones) around premises at which abortions are provided to ensure the safety, well-being, privacy and dignity of people accessing the services provided at the premises, their partners, health professionals and other staff.

3.6.2 Repeal of abortion offences

The [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#) amends the *Crimes Act 1900* by omitting Part 3 Division 12 of the *Crimes Act 1900*, which contains ss 82–84 (NSW's abortion offences).¹¹⁴ The Bill also expressly abolishes any extant common law offence relating to the procurement of a woman's miscarriage.¹¹⁵

¹¹⁴ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#), Sch 1.1[1]. The following consequential amendments are also made: under Sch 1 1.1[2] of the Bill, ss 82 and 83 of the *Crimes Act 1900* are omitted from the table of offences of specific intent under s 428B of the *Crimes Act 1900*; under Schedule 1 1.2 of the Bill, ss 82–84 of the *Crimes Act 1900* are omitted from Schedule 1 Table 1 of the *Criminal Procedure Act 1986* (indictable offences that are to be dealt with summarily unless the prosecutor or person charged elects otherwise).

¹¹⁵ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#), Sch 1 1.1[3]. As to the possible existence of common law offences against abortion, see: A Grubb, "[Abortion Law in England: The Medicalization of a Crime](#)" (1990) 18(1-2) *Law, Medicine & Health Care* 146 at 147, where the author states: "The history of abortion law in England is somewhat shrouded in mystery. It is unclear whether the common law punished those who performed abortions."

3.6.3 Unsatisfactory professional conduct

The [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#)¹¹⁶ amends Schedule 1[13] of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that (except in an emergency or when a patient's life or health is at serious risk) it constitutes unsatisfactory professional conduct for a medical practitioner to:

- fail to inform a person who is seeking an abortion or advice about abortions of any conscientious objection that the medical practitioner has to abortion, before giving any advice on abortion or other options; or
- fail to refer the person in a timely manner to another health practitioner (in the same profession) whom the health practitioner knows or reasonably believes does not have a conscientious objection to abortion, or to a local Women's Health NSW Centre, so as to enable the person to have full information about all of the person's options in relation to pregnancy.

The Second Reading speech states that this proposed amendment:¹¹⁷

Does not force any health practitioner to perform a pregnancy termination, nor does it vilify them for not performing one. ... This provision is to prevent a situation where a doctor who has an objection to abortion fails to inform a patient about all of their options, including termination. Patients rely on their health practitioners for knowledge and expertise. This ensures that patients get timely advice and access. ... [The proposed amendment] also makes clear that in the case of an emergency a medical practitioner must treat a patient regardless of an objection to abortion. Again, this is no different from what medical professionals already undertake in case of other medical emergencies.

3.6.4 Safe access zones around reproductive health clinics

Schedule 2 of the [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#) amends the *Summary Offences Act 1988* by inserting a new Part 2 Division 1A (ss 11AA–11AG), entitled "Prohibited behaviour around premises at which abortions are provided".

The purpose of Part 2 Division 1A is to:¹¹⁸

prohibit behaviour that is detrimental to the health, safety, well-being, privacy and dignity of people seeking to access reproductive health services, including behaviour that threatens the health and safety of health professionals, staff and other persons who need to access premises so as to provide those health services.

¹¹⁶ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016](#), Sch 1 1.3.

¹¹⁷ [NSWPD 11 August 2017 \(M Faruqi\) p 11.](#)

¹¹⁸ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AA(1).

This purpose is to be achieved by:

- preventing the physical obstruction of the entrance to premises in order to ensure that people seeking or providing health services can access or leave the premises free from intimidation, harassment and abuse; and
- prohibiting conduct that damages a person's rights (particularly rights relating to medical autonomy and confidentiality), by ensuring that health services can be accessed "free from unreasonable intrusions on privacy and dignity and free from other unjustified interference, including the questioning of decisions."¹¹⁹

Offences relate to the concept of an "exclusion zone", which is defined as being an area within a 150 metre radius of premises at which abortions are provided or a pedestrian access point to a building that houses premises at which abortions are provided.¹²⁰

3.6.4.1 Offence of impeding access to premises

An offence of impeding access to premises would be created by proposed s 11AC, which states:

A person who is in an exclusion zone must not bother, beset, harass, intimidate, interfere with, impede, obstruct or threaten, by any means, a person who is accessing, leaving, or attempting to access or leave, premises at which abortions are provided.

An offence against proposed s 11AC carries a maximum penalty of 150 penalty units (\$16,500)¹²¹ or imprisonment for 6 months.

3.6.4.2 Offence of making distressing communications

An offence of making distressing communications would be created by proposed s 11AD. This offence prohibits a person who is in an exclusion zone from communicating disapproval of abortion in a manner that: is able to be seen or heard by a person who is accessing or leaving, or inside, premises at which abortions are provided; and is reasonably likely to cause distress or anxiety to any such person. The disapproval can be communicated by graphic, oral, written or any other means. An offence against proposed s 11AD carries a maximum penalty of 150 penalty units (\$16,500)¹²² or imprisonment for 6 months.

¹¹⁹ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AA(2).

¹²⁰ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AB.

¹²¹ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹²² One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

3.6.4.3 Offence of capturing or distributing visual or audio data

Offences of capturing or distributing visual or audio data would be created by proposed s 11AE. Under s 11AE(1) a person must not intentionally capture visual or audio data of another person without the other person's consent if the other person is: inside an exclusion zone and accessing or leaving premises at which abortions are provided; or inside premises at which abortions are provided. An offence against proposed s 11AE(1) carries a maximum penalty of 150 penalty units (\$16,500)¹²³ or imprisonment for 6 months.

Under proposed s 11AE(2) a person must not distribute visual or audio data of another person that was captured without the other person's consent when the other person was: in an exclusion zone and accessing or leaving premises at which abortions are provided; or inside premises at which abortions are provided. An offence against proposed s 11AE(2) carries a maximum penalty of 150 penalty units (\$16,500)¹²⁴ or imprisonment for 6 months.¹²⁵

The offences created by proposed s 11AE do not apply to the capture or distribution of images by security cameras, where: their use is for security purposes only, images are restricted to entries and exits of the premises being secured, and capture of visual or auditory data of persons accessing or leaving abortion premises is both incidental and unavoidable.¹²⁶

3.6.4.4 Police powers of seizure

A police officer would be able to seize all or part of a thing that the officer suspects on reasonable grounds may provide evidence of prohibited conduct in an exclusion zone around abortion premises.¹²⁷ Any item seized would be forfeited if the person from whom the item was seized was convicted of an exclusion zone offence.¹²⁸

3.6.4.5 The right to protest outside Parliament protected

Safe access zone provisions would not apply to conduct occurring outside Parliament House.¹²⁹

¹²³ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹²⁴ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹²⁵ The offences, generally speaking, do not apply to: persons employed or contracted to provide services at premises at which abortions are provided, other persons with a reasonable excuse and police officers acting in the course of their duties: [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AE(4).

¹²⁶ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AE(3).

¹²⁷ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AF(1).

¹²⁸ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AF(2).

¹²⁹ [Abortion Law Reform \(Miscellaneous Acts Amendment\) Bill 2016, Schedule 2](#), proposed s 11AG.

3.7 Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017

On 30 May 2017 Penny Sharpe MLC introduced the Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 into the Legislative Council as a Private Member's Bill.

In the Bill's [Second Reading speech](#) Penny Sharpe MLC said:¹³⁰

If passed this bill will protect the safety, wellbeing, privacy and dignity of women accessing reproductive health services across New South Wales. It will also protect the employees of reproductive health services. ...

I acknowledge that some members of the community have deeply held views about abortion. The bill does not seek to prevent people from holding or expressing their views, or protesting about their views, on abortion. However, this bill does not allow deeply held views to be an excuse for intimidation and harassment outside clinics.

Penny Sharpe MLC further stated that, although the Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 focuses exclusively on establishing safe access zones around abortion clinics:¹³¹

I believe that the laws governing abortion in New South Wales should be changed. I believe that abortion offences should not be included in the *Crimes Act* and I believe that women should be able to access abortion on demand. I look forward to another bill that will come before this House later this year that will seek progress on these issues. I will continue to work with all the women and men who support abortion law reform in New South Wales.

3.7.1 Object

The Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 inserts Division 2C into Part 2 of the *Summary Offences Act 1998*. The object of the Bill is to create safe access zones around abortion premises and prohibit behaviour within those zones that undermines the safety, well-being, privacy and dignity of persons accessing and providing services at abortion premises.¹³²

¹³⁰ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, [Second Reading speech](#), 30 May 2017.

¹³¹ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, [Second Reading speech](#), 30 May 2017.

¹³² Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11J(2)(a).

3.7.2 Offences

The following offences would be created by the Bill:

3.7.2.1 Interfering with access of persons to abortion premises

It would be an offence for a person in a safe access zone to harass, intimidate, interfere with, threaten, hinder, obstruct or impede any person accessing or leaving abortion premises.¹³³

The maximum penalty for the offence is 150 penalty units (\$16,500)¹³⁴ or 12 months imprisonment.

3.7.2.2 Obstructing, blocking or impeding footpaths or roads

A person in a safe access zone would be prohibited from obstructing or blocking, without reasonable excuse, a footpath or road leading to any abortion premises.¹³⁵

The maximum penalty for the offence is 150 penalty units (\$16,500)¹³⁶ or 12 months imprisonment.

3.7.2.3 Causing actual or potential distress or anxiety

A person in a safe access zone would be prohibited from communicating about abortions in a manner that is able to be seen or heard by a person accessing, leaving or inside abortion premises, and reasonably likely to cause distress or anxiety to such a person.¹³⁷

The maximum penalty for the offence is 150 penalty units (\$16,500)¹³⁸ or 12 months imprisonment. The offence does not apply to an employee or other person who provides services at the abortion premises.¹³⁹

3.7.2.4 Capturing and distributing visual data

It would be an offence to intentionally capture visual data of a person, by any means, without that person's consent, if the person is in a safe zone and is accessing, leaving or inside abortion premises.¹⁴⁰

¹³³ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11K.

¹³⁴ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹³⁵ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11L.

¹³⁶ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹³⁷ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11M(1).

¹³⁸ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹³⁹ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11M(2).

¹⁴⁰ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017,

The maximum penalty for the offence is 150 penalty units (\$16,500)¹⁴¹ or 12 months imprisonment.

It also would be an offence to publish or distribute a recording of a person without that person's consent if: the recording was made while that person was in a safe access zone and was accessing, leaving or inside abortion premises; and the recording would likely lead to the identification of the other person.¹⁴²

The maximum penalty for the offence is 150 penalty units (\$16,500)¹⁴³ or 12 months imprisonment.

3.7.3 Police powers of seizure

Police officers would be able to seize all or part of a thing that may on reasonable grounds be suspected of providing evidence of a safety zone offence.¹⁴⁴ If a person is convicted of a safety zone offence, any seized item is forfeited.¹⁴⁵

3.7.4 Right to protest outside Parliament protected

The safe access zone provisions would not apply to conduct occurring outside Parliament House.¹⁴⁶ Nor would the safe access zone provisions prohibit surveys and opinion polls being conducted, or leaflets distributed, with the authority of a candidate during a Commonwealth, State or local government election, referendum or plebiscite.¹⁴⁷

Schedule 1, proposed s 11N(1).

¹⁴¹ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹⁴² Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11N(2).

¹⁴³ One penalty unit equals \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

¹⁴⁴ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11O(1).

¹⁴⁵ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s 11O(2).

¹⁴⁶ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s11P(1).

¹⁴⁷ Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017, Schedule 1, proposed s11P(2).

4. ACT ABORTION LAW

4.1 Overview

An overview of ACT abortion law is provided in Table 5:

Table 5 Main features of ACT abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✓
Abortion available if doctor(s) satisfied of certain matters	✗
Conscientious objection by doctors recognised	✓
Doctors who conscientiously object must redirect woman to abortion services	✗
Counselling mandatory	✗
Safe access zones	✓

4.2 Abortion decriminalised

Abortion in the ACT was decriminalised when the [Crimes \(Abolition of Offence of Abortion\) Act 2002 \(ACT\)](#) repealed the former abortion offences in the *Crimes Act 1900 (ACT)* and abolished any common law offence of procuring a woman's miscarriage. There is no conflict between the decriminalisation of abortion and the right to life provided by s 9(1) of the *Human Rights Act 2004 (ACT)*, as s 9(2) expressly states that right to life "applies to a person from the time of birth".

Some abortion offences are provided under provisions of the [Health Act 1993 \(ACT\)](#),¹⁴⁸ but they are restricted to prohibiting surgical and drug-based abortions¹⁴⁹ from being carried out by persons who are not doctors¹⁵⁰ or in places that are not approved medical facilities.¹⁵¹

¹⁴⁸ As amended by the *Medical Practitioners (Maternal Health) Amendment Act 2002*.

¹⁴⁹ Section 80 of the *Health Act 1993 (ACT)* defines "abortion" to mean causing a woman's miscarriage by: administering a drug; using an instrument; or any other means.

¹⁵⁰ Section 81 of the *Health Act 1993 (ACT)*, which carries a maximum penalty of 5 years.

¹⁵¹ Section 82 of the *Health Act 1993 (ACT)*, which carries a maximum penalty of 50 penalty units (\$7,500) and/or imprisonment for 6 months. One penalty unit is defined in s 133(2) of the *Legislation Act 2001 (ACT)* to have a value of \$150 for an offence committed by an individual.

4.3 Conscientious objection

Section 84 of the *Health Act 1993 (ACT)* caters for the needs of medical practitioners who are conscientious objectors by providing that no-one is under a duty (whether contractual, statutory or other legal requirement) to carry out or assist in carrying out an abortion; and that a person is entitled to refuse to assist in carrying out an abortion.

4.4 Safe access zones

Persons using and providing abortions in approved medical facilities are protected from interference and harassment. The Minister must declare an area around an approved medical facility to be a “protected area”.¹⁵² In making the declaration, the Minister must be satisfied that the area declared is: (a) not less than 50 meters at any point from the approved medical facility; (b) sufficient to ensure privacy and unimpeded access for anyone entering, trying to enter or leaving an approved medical facility; and (c) no bigger than necessary to ensure that outcome.¹⁵³

It is an offence for a person in a protected area to engage in “prohibited behaviour”.¹⁵⁴ The offence carries a maximum of 25 penalty units (\$3,750).¹⁵⁵ “Prohibited behaviour” is defined to mean:¹⁵⁶

- Harassing, hindering, intimidating, interfering with, threatening or obstructing a person, including by capturing visual data of the person, in the protected period (being the period between 7 am and 6 pm on each day the facility is open or any other period declared by the Minister) that is intended to stop the person from: entering the approved medical facility; or having or providing an abortion in the approved medical facility.
- An act that can be seen or heard by anyone in the protected period and is intended to stop a person from: entering the approved medical facility; or having or providing an abortion in the approved medical facility.
- A protest in the protected area in relation to the provision of abortions in the approved medical facility.

It is also an offence to publish captured visual data of a person entering or leaving (or trying to enter or leave) an approved medical facility; with the intention of stopping a person from having or providing an abortion; and the recorded person did not consent to the publication.¹⁵⁷ That offence carries a maximum penalty of 50 penalty units (\$7,500) and/or imprisonment for 6 months.¹⁵⁸

¹⁵² Section 86(1) of the *Health Act 1993 (ACT)*.

¹⁵³ Section 86(2) of the *Health Act 1993 (ACT)*.

¹⁵⁴ Section 87(1) of the *Health Act 1993 (ACT)*.

¹⁵⁵ Section 87(1) of the *Health Act 1993 (ACT)*. The value of one penalty unit for an offence committed by an individual is \$150: s 133 of the *Legislation Act 2001 (ACT)*.

¹⁵⁶ Section 85 of the *Health Act 1993 (ACT)*.

¹⁵⁷ Section 87(2) of the *Health Act 1993 (ACT)*.

¹⁵⁸ Section 87(2) of the *Health Act 1993 (ACT)*.

5. NORTHERN TERRITORY ABORTION LAW

5.1 Overview

On 21 March 2017 the [Termination of Pregnancy Law Reform Bill 2017 \(NT\)](#) passed the Legislative Assembly of the Northern Territory.¹⁵⁹ The Bill was assented to on 24 April 2017.¹⁶⁰ The [Termination of Pregnancy Law Reform Act 2017 \(NT\)](#) is expected to commence on 1 July 2017.¹⁶¹ An overview of Northern Territory abortion law, reflecting the [Termination of Pregnancy Law Reform Act 2017 \(NT\)](#), is provided in Table 6:

Table 6 Main features of Northern Territory abortion law* (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✗
Abortion available if doctor(s) satisfied of certain matters	✓ (up to 23 weeks)
Conscientious objection by doctors recognised	✓
Doctors who conscientiously object must redirect woman to abortion services	✓
Counselling mandatory	✗
Safe access zones	✓

* As at 1 July 2017 in the Northern Territory, when the [Termination of Pregnancy Law Reform Act 2017 \(NT\)](#) is expected to commence.

5.2 Current law

5.2.1 Law covers surgical abortions but not drug-based abortions

Medical treatment for the termination of a pregnancy “includes surgery”, with no express reference made to drug based abortions.¹⁶²

¹⁵⁹ [Northern Territory Legislation](#) website.

¹⁶⁰ Northern Territory of Australia Government Gazette, No S24, 27 April 2017.

¹⁶¹ Advice from the Office of the Parliamentary Counsel (Northern Territory). See also: J Poulsen, “[New Northern Territory abortion law to come into effect on July 1](#)”, 23 March 2017, *NT News*.

¹⁶² Section 11(8) of the *Medical Services Act (NT)*.

5.2.2 Lawful abortions

Where a woman is not more than 14 weeks pregnant, it is lawful for a medical practitioner to terminate the woman's pregnancy if the medical practitioner and another medical practitioner believe:¹⁶³

- the continuance of the pregnancy would involve greater risk to her life or greater risk of harm to her physical or mental health than if the pregnancy were terminated; or
- there is a substantial risk that, if the pregnancy were not terminated and the child were born, the child would be seriously handicapped because of physical or mental abnormalities.

Moreover, the treatment is required to be given in a hospital and the appropriate person must consent to the giving of the treatment.¹⁶⁴

Where a woman is not more than 23 weeks pregnant, it is lawful for a medical practitioner to give medical treatment with the intention of terminating a woman's pregnancy if the termination is immediately necessary to prevent serious harm to the woman's physical or mental health and the appropriate person consents to the giving of the treatment.¹⁶⁵

It is also lawful for a medical practitioner to terminate a woman's pregnancy if the treatment is given or carried out in good faith for the sole purpose of preserving her life and the appropriate person consents to the giving of the treatment.¹⁶⁶

5.2.3 Conscientious objection

A person who conscientiously objects to abortion is not under any duty to terminate, or assist in terminating, a woman's pregnancy, or to dispose of or assist in disposing of an aborted foetus.¹⁶⁷

5.2.4 Abortion offences

A person is guilty of an offence if the person administers a drug to a woman or causes a drug to be taken by a woman, or uses an instrument or other thing on a woman, in order to procure the woman's miscarriage.¹⁶⁸ The offence carries a maximum penalty of 7 years imprisonment.

¹⁶³ Section 11(1) of the *Medical Services Act (NT)*. Section 11(2) provides that at least one of the medical practitioners must be a gynaecologist or obstetrician unless it is not reasonably practicable in the circumstances.

¹⁶⁴ Section 11(1) of the *Medical Services Act (NT)*. Section 11(5) of the *Medical Services Act (NT)* provides that the appropriate person to provide consent is the woman herself if she is at least 16 years of age and competent or, otherwise, her legal guardians.

¹⁶⁵ Section 11(3) of the *Medical Services Act (NT)*.

¹⁶⁶ Section 11(4) of the *Medical Services Act (NT)*.

¹⁶⁷ Section 11(6) of the *Medical Services Act (NT)*.

¹⁶⁸ Section 208B(1) of the *Criminal Code Act (NT)*. Section 208B(2) of the *Criminal Code Act (NT)* provides that an offence against s 208B(1) can be committed even if the woman is not pregnant.

It is also an offence for a person to supply or obtain a drug, instrument or other thing knowing that it is intended to be used to procure a woman's miscarriage.¹⁶⁹ That offence carries a maximum penalty of 7 years imprisonment.

5.3 Law as at 1 July 2017

As discussed above at 4.1, the *Termination of Pregnancy Law Reform Act 2017 (NT)* is expected to commence on 1 July 2017.¹⁷⁰ As stated in the [Explanatory Statement](#), the object of the new legislation is to:¹⁷¹

decriminalise terminations of pregnancies performed by health practitioners with relevant qualifications. ... [and] increase access by women to safe terminations of pregnancy in either of out-of-hospital or within hospital settings ... Health practitioners will be able to maintain a conscientious objection to providing termination of pregnancy services but will be required to refer a woman to another practitioner to access the services sought. ... [The Act] includes the concept of safe access zones to provide protected access to health facilities where termination of pregnancy services are provided.

5.3.1 Definition of abortion widened

The *Termination of Pregnancy Law Reform Act 2017 (NT)* widens the definition of abortion to include: surgical procedures; prescribing, supplying or administering a termination drug; or "any other action taken with the intention of inducing an abortion".¹⁷² This will allow both surgical and medical abortions to be lawfully performed in the Northern Territory.

5.3.2 Lawful abortions

Where a woman is not more than 14 weeks pregnant, a qualified medical practitioner may perform an abortion, if the medical practitioner considers the abortion is "appropriate in all the circumstances", having taken into account: all relevant medical circumstances; the woman's current and future physical, psychological and social circumstances; and professional standards and guidelines.¹⁷³

Where a woman is more than 14 weeks pregnant but not more than 23 weeks pregnant, a qualified medical practitioner may perform an abortion if the medical practitioner has consulted with at least one other medical practitioner and each

¹⁶⁹ Section 208C(1) of the *Criminal Code Act (NT)*. Section 208C(2) provides that an offence against 208C(1) can be committed even if the woman is not pregnant.

¹⁷⁰ Advice from the Office of the Parliamentary Counsel (Northern Territory). See also: J Poulsen, "[New Northern Territory abortion law to come into effect on July 1](#)", 23 March 2017, *NT News*.

¹⁷¹ *Termination of Pregnancy Law Reform Act 2017 (NT)*, [Explanatory Statement](#), p 1.

¹⁷² Section 6(1) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁷³ Section 7 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*. Other health professionals may assist in the performance of an abortion or supply a termination drug if directed to do so by a qualified medical practitioner: s 8 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

medical practitioner considers the termination is appropriate in all the circumstances, having taken into account: all relevant medical circumstances; the woman's current and future physical, psychological and social circumstances; and professional standards and guidelines.¹⁷⁴

A medical practitioner may also perform a termination on a woman in an emergency if the medical practitioner considers the termination is necessary to preserve the woman's life.¹⁷⁵

5.3.3 Conscientious objection

Where a woman requests a medical practitioner to advise on or perform an abortion, a duty is imposed on medical practitioners who conscientiously object to abortion to inform the woman of their conscientious objection.

The medical practitioner must then refer the woman, within a clinically reasonable time, to another medical practitioner who is known not to conscientiously object to abortion.¹⁷⁶

Despite any conscientious objection to abortions, a medical practitioner is under a duty to perform an abortion in an emergency where an abortion is necessary to preserve the life of a pregnant woman.¹⁷⁷

5.3.4 Safe access zones

5.3.4.1 Offence of engaging in prohibited conduct

It is an offence for a person to intentionally and recklessly engage in prohibited conduct in a safe access zone.¹⁷⁸ The maximum penalty for this offence is 100 penalty units (\$15,400) or 12 months imprisonment.¹⁷⁹ A safe access zone includes the area inside abortion premises and 150 meters outside abortion premises.¹⁸⁰

The defining characteristic of prohibited conduct is that it may deter a person from entering or leaving abortion premises, or from performing or receiving an abortion.¹⁸¹ Prohibited conduct includes:¹⁸²

¹⁷⁴ Section 9 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁷⁵ Section 10 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁷⁶ Section 11 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*. A similar provision applies to other health professionals who are directed by a doctor to assist in the performance of an abortion: s 12 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁷⁷ Section 13(1) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*. The duty extends to other health practitioners, including midwives and nurses, assisting a medical practitioner in an emergency where an abortion is necessary to preserve the life of the pregnant woman: s 13(2) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁷⁸ Section 14(1) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁷⁹ Under cl 2 of the *Penalty Unit Regulations (NT)* the value of one penalty unit is \$154.

¹⁸⁰ Section 4 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁸¹ Section 14(4) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

- harassing, hindering, intimidating, interfering with, threatening or obstructing a person;
- recording a person by any means without the person's consent and without a reasonable excuse; and
- an act that could be seen or heard by a person in the vicinity of abortion premises.

5.3.4.2 Offence of publishing a recording

It is an offence for a person to intentionally and recklessly publish a recording of another person who is in a safe access zone if the recording was made without the other person's consent and shows the other person entering or leaving abortion premises.¹⁸³

The maximum penalty for this offence is 100 penalty units (\$15,400) or 12 months imprisonment.¹⁸⁴ It is a defence to a prosecution for this offence if the defendant had a reasonable excuse.¹⁸⁵

5.3.4.3 Police powers of seizure

If a police officer believes on reasonable grounds that a person is committing or is likely to commit a safe access zone offence, the police officer may seize and remove any object, material, information, document, poster, picture or recording that was used, or about to be used, in relation to the offence.¹⁸⁶

5.3.5 Abortion decriminalised

The *Termination of Pregnancy Law Reform Act 2017 (NT)*¹⁸⁷ abolishes the abortion offences in the *Criminal Code (NT)*. New abortion offences are introduced that apply only to abortions performed on a woman by unqualified persons.¹⁸⁸ These offences carry a maximum penalty of 7 years imprisonment.

¹⁸² Section 14(4) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁸³ Section 15(1) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁸⁴ Under cl 2 of the *Penalty Unit Regulations (NT)* the value of one penalty unit is \$154.

¹⁸⁵ Section 15(3) of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁸⁶ Section 16 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁸⁷ Section 20 of the *Termination of Pregnancy Law Reform Act 2017 (NT)*.

¹⁸⁸ Proposes s 208A of the *Criminal Code (NT)*

6. QUEENSLAND ABORTION LAW

6.1 Overview

An overview of Queensland abortion law is set out in Table 7:

Table 7 Main features of Queensland abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✗
Abortion available if doctor(s) satisfied of certain matters	✓
Conscientious objection by doctors recognised	✗
Doctors who conscientiously object required to direct woman to abortion services	✗
Counselling mandatory	✗
Safe access zones	✗

6.2 Decriminalisation Bill and reference to Law Reform Commission

Last year Independent Queensland MP Robert Pyne introduced two Private Member's Bills into the Queensland Legislative Assembly (the [Abortion Law Reform \(Women's Right to Choose\) Amendment Bill 2016 \(Qld\)](#) and the [Health \(Abortion Law Reform\) Amendment Bill 2016 Qld](#)) in order to decriminalise abortion and regulate the provision of abortion as a health service.¹⁸⁹ On 28 February 2017, the day before being debated, Mr Pyne withdrew the Bills, with media reporting:¹⁹⁰

Instead, the existing laws will be referred to the Queensland Law Reform Commission (QLRC) to provide advice that the Labor Government has pledged to enact if it is re-elected. ... Attorney-General Yvette D'Ath said the QLRC would be asked to look at options to remove the termination of pregnancies by medical practitioners from the Criminal Code and to look at a new framework.

¹⁸⁹ See, [Health \(Abortion Law Reform\) Amendment Bill 2016](#), 2017, Parliamentary Committees, Queensland Parliament.

¹⁹⁰ C O'Brien, "[Abortion decriminalisation bills withdrawn from Queensland Parliament agenda](#)", 28/2/2017, ABC News.

6.3 Current offences

Queensland's abortion law is broadly similar to that of NSW. In particular, ss 224–226 of the *Criminal Code 1899 (Qld)* prohibit “unlawfully” performed abortions without defining the term “unlawfully”.

The key provision is s 224 of the *Criminal Code 1899 (Qld)*, which provides:

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.

That offence carries a maximum penalty of 14 years imprisonment.

Section 224 needs to be read in light of 282(1) of the *Criminal Code 1899 (Qld)*, which states:

(1) A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation on or medical treatment of—

(a) a person or an unborn child for the patient's benefit; or

(b) a person or an unborn child to preserve the mother's life;

if performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

For the purposes of s 282(1)(a), s 282(4) defines “medical treatment” as not including medical treatment intended to adversely affect an unborn child.

Two further offences exist. The first prohibits a woman from attempting to procure her own miscarriage, whether or not she is pregnant, by unlawfully administering to herself any poison or using force or means of any kind, or permitting any such thing or means to be administered to or used upon her.¹⁹¹ This offence carries a maximum penalty of 7 years imprisonment. The second offence prohibits a person from unlawfully supplying “anything whatever” knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.¹⁹² That offence carries a maximum penalty of 3 years imprisonment.

Attempting to discern the scope of Queensland's abortion law, Judge McGuire in *R v Bayliss and Cullen*¹⁹³ expressly applied the Victorian decision of *R v Davidson*¹⁹⁴ as representing the law of Queensland and interpreted ss 224 and 282 accordingly.¹⁹⁵ Judge McGuire emphasised that, while there may be

¹⁹¹ Section 225 of the [Criminal Code 1899 \(Qld\)](#).

¹⁹² Section 226 of the [Criminal Code 1899 \(Qld\)](#).

¹⁹³ (1986) 9 Qld Lawyer Reps 8.

¹⁹⁴ [\[1969\] VR 667](#). Discussed at 3.3.2.

¹⁹⁵ Uncertainty exists as to whether the more liberal interpretation of *Wald* also applies in Queensland, as in *Bayliss and Cullen* Judge McGuire only expressly applied *Davidson*: (1986) 9 Qld Lawyer Reps 8 at 45. See also: N Dixon, [Abortion Law Reform: An Overview of Current Issues](#), 2003, Queensland Parliamentary Library, p 14.

exceptional cases where the prohibition against abortion would not apply, “there is no legal justification for abortion on demand.”¹⁹⁶

Judge McGuire also drew attention to the inherent uncertainty of Queensland’s abortion laws and the need for “more imperative authority” to effect changes in order to clarify the law.¹⁹⁷

7. SOUTH AUSTRALIAN ABORTION LAW

7.1 Overview

An overview of South Australian abortion law is set out in Table 8:

Table 8 Main features of South Australian abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✗
Abortion available if doctor(s) satisfied of certain matters	✓
Conscientious objection by doctors recognised	✓
Doctors who conscientiously object required to direct woman to abortion services	✗
Counselling mandatory	✗
Safe access zones	✗

7.2 Abortion offences

The *Criminal Law Consolidation Act 1935 (SA)* prohibits a pregnant woman or “any person” from unlawfully administering a drug or unlawfully using an instrument upon, respectively, herself or a pregnant woman with intent to procure an abortion.¹⁹⁸ The maximum penalty imposed for this offence is imprisonment for life.¹⁹⁹

It is also an offence for a person to unlawfully supply or procure a drug or instrument knowing that it is intended to be unlawfully used or employed with

¹⁹⁶ (1986) 9 Qld Lawyer Reps 8 at 45.

¹⁹⁷ (1986) 9 Qld Lawyer Reps 8 at 45.

¹⁹⁸ Section 81 of the *Criminal Law Consolidation Act 1935 (SA)*.

¹⁹⁹ Section 81(1) and (2) of the *Criminal Law Consolidation Act 1935 (SA)*.

intent to procure the miscarriage of any woman, whether or not she is pregnant.²⁰⁰ The maximum penalty for this offence is three years imprisonment.²⁰¹

Anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised to be lawful.²⁰²

7.3 Lawful abortions

7.3.1 Risks to woman or risk of child suffering abnormalities

A person is not guilty of performing an unlawful abortion if the pregnancy of a woman is terminated by a legally qualified medical practitioner in a case where he or she and one other legally qualified medical practitioner are of the opinion, formed in good faith after both have personally examined the woman, that:

- the 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
- that there is a 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.²⁰³

In determining whether the continuance of a pregnancy would involve risk of injury to the physical or mental health of a pregnant woman, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.²⁰⁴

The treatment for the termination of the pregnancy is to be carried out in a hospital or a hospital of a class that is declared by regulation to be a prescribed hospital.²⁰⁵

In an effort to prevent abortion tourism, an abortion cannot be provided to a woman lawfully if the woman has not resided in South Australia for a period of at least two months before the termination of her pregnancy.²⁰⁶

7.3.2 Immediately necessary to save life or prevent grave injury

It is also not an offence for a qualified medical practitioner to terminate the pregnancy of a woman where the medical practitioner is of the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman.²⁰⁷

²⁰⁰ Section 82 of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰¹ Section 82 of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰² Section 82A(9) of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰³ Section 82A(1)(a) of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰⁴ Section 82A(3) of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰⁵ Section 82A(1)(a) of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰⁶ Section 82A(2) of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰⁷ Section 82A(1)(b) of the *Criminal Law Consolidation Act 1935 (SA)*.

7.3.3 Limitation on scope of lawful abortions

An abortion cannot be lawfully performed by a person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes such child to die before it has an existence independent of its mother, where it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.²⁰⁸ Evidence that a woman had been pregnant for more than 28 weeks is prima facie proof that she was pregnant with a child capable of being born alive.²⁰⁹

7.4 Conscientious objection

No person is under a contractual, statutory or other legal duty or requirement to participate in performing a termination to which he or she conscientiously objects.²¹⁰ However, the right of conscientious objection does not affect any duty to participate in treatment which is necessary to save the life, or to prevent grave injury to the physical or mental health, of a pregnant woman.²¹¹

8. TASMANIAN ABORTION LAW

8.1 Overview

An overview of Tasmanian abortion law is set out in Table 9:

Table 9 Main features of Tasmanian abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✓ (up to 16 weeks)
Abortion available if doctor(s) satisfied of certain matters	✓ (after 16 weeks)
Conscientious objection by doctors recognised	✓
Doctors who conscientiously object must redirect woman to abortion services	✓
Counselling mandatory	✗
Safe access zones	✓

²⁰⁸ Section 82A(7) of the *Criminal Law Consolidation Act 1935 (SA)*.

²⁰⁹ Section 82A(8) of the *Criminal Law Consolidation Act 1935 (SA)*.

²¹⁰ Section 82A(5) of the *Criminal Law Consolidation Act 1935 (SA)*.

²¹¹ Section 82A(6) of the *Criminal Law Consolidation Act 1935 (SA)*.

8.2 Abortion decriminalised

Abortion law was decriminalised in Tasmania by the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

8.3 Lawful abortions

Tasmanian abortion law covers both medical and surgical abortions.²¹² An abortion can be lawfully performed on a woman²¹³ by a medical practitioner if it is performed in good faith, with reasonable care and skill and with the woman's consent.²¹⁴ Abortion is available on demand up to 16 weeks.²¹⁵ After 16 weeks the pregnancy of a woman may be terminated by a medical practitioner with the woman's consent if the medical practitioner:

- reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and
- has consulted with another medical practitioner who reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated.²¹⁶

At least one of the medical practitioners must be a medical practitioner who specialises in obstetrics or gynaecology.²¹⁷

In assessing the risk of injury to the physical or mental health of the pregnant woman, the medical practitioners must have regard to the woman's physical, psychological, economic and social circumstances.²¹⁸

Tasmanian abortion law expressly provides that a woman who consents to, assists in or performs a termination on herself is not guilty of a crime or any other offence.²¹⁹

8.4 Conscientious objection

No person has a contractual, statutory or other legal duty or requirement to participate in the performance of an abortion if the person has a conscientious objection to terminations.²²⁰ However, a medical practitioner has a duty to perform a termination in an emergency if a termination is necessary to save the

²¹² Section 3(1) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²¹³ Woman is defined to mean a female person of any age: s 3 of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²¹⁴ Section 51(1A) of the *Criminal Code Act 1924 (Tas)*.

²¹⁵ Section 4 of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²¹⁶ Section 5(1) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²¹⁷ Section 5(3) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²¹⁸ Section 5(2) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²¹⁹ Section 8 of the *Reproductive Health (Access to Termination) Act 2013 (Tas)*.

²²⁰ Section 6(1) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

life of a pregnant woman or to prevent her serious physical injury.²²¹ A similar duty is imposed on a nurse or midwife to assist a medical practitioner to perform a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.²²²

Medical practitioners who conscientiously object to terminations must, if a woman seeks a termination or advice regarding available pregnancy options, provide the woman with a list of prescribed health services from which the woman may seek advice, information or counselling on the full range of pregnancy options.²²³ That requirement does not apply to a medical practitioner who has a duty to perform a termination in an emergency in order to save the life of a pregnant woman or to prevent her serious physical injury.²²⁴

8.5 Safe access zones

It is an offence to engage in prohibited behaviour within a safe access zone around premises at which abortions are provided.²²⁵ A safe access zone is defined in s 9(1) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)* to mean an area within a radius of 150 meters from premises at which terminations are provided. Prohibited behaviour is defined in to include:

- besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding a person;
- a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided;
- footpath interference; or
- intentionally recording a person accessing or attempting to access premises at which terminations are provided without that person's consent.²²⁶

It is also an offence for a person to publish or distribute a recording of another person accessing or attempting to access premises at which terminations are provided without that other person's consent.²²⁷

These offences carry a penalty of 75 penalty units (\$11,775) and/or imprisonment not exceeding 12 months.²²⁸

If a police officer reasonably believes a person is committing or has committed

²²¹ Section 6(2) and (3) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²² Sections 6(2) and 6(4) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²³ Section 7(2) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²⁴ Section 7(3) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²⁵ Section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²⁶ Section 9(1) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²⁷ Section 9(4) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²²⁸ Penalty units in Tasmania are indexed annually for inflation, as provided for by the *Penalty Units and Other Penalties Act 1987*, s 4A. The Tasmanian Government's [Department of Justice advises](#) that the value of one penalty unit for the period 1 July 2016–30 June 2017 is \$157.

the prohibited behaviour or publication/distribution offence, the police officer may require that person to state his or her name and the address of his or her residence.²²⁹ It is an offence for a person to fail or refuse to comply with such a requirement, or to provide false information; one which carries a maximum penalty of a fine not exceeding two penalty units (\$314).²³⁰

8.6 Abortion offences

It is an offence for an abortion to be performed on a woman by a person who is not a medical practitioner or the pregnant woman in question.²³¹ It is also an offence for a person to intentionally or recklessly perform an abortion on a woman without the woman's consent, whether or not the woman suffers any other harm.²³²

9. VICTORIAN ABORTION LAW

9.1 Overview

An overview of Victorian abortion law is set out in Table 10:

Table 10 Main features of Victorian abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✓ (to 24 weeks)
Abortion available if doctor(s) satisfied of certain matters	✓ (after 24 weeks)
Conscientious objection by doctors recognised	✓
Doctors who conscientiously object must redirect woman to abortion services	✓
Counselling mandatory	✗
Safe access zones	✓

²²⁹ Section 9(7) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²³⁰ Section 9(8) of the *Reproductive Health (Access to Terminations) Act 2013 (Tas)*.

²³¹ Section 178D of the *Criminal Code Act 1924 (Tas)*. Many of the offences in the *Criminal Code Act 1924*, including ss 178D and 178E, do not specify maximum penalties. Section 389 of the *Criminal Code Act 1924* states that, subject to the provisions of any other statute and except as otherwise provided, the maximum punishment for any crime shall be imprisonment for 21 years and/or a fine.

²³² Section 178E of the *Criminal Code Act 1924 (Tas)*.

9.2 Abortion decriminalised

Abortion was decriminalised in Victoria by the [Abortion Law Reform Act 2008 \(Vic\)](#).

As stated by the Victorian Law Reform Commission, there is no inconsistency between Victoria's decriminalisation of abortion in 2008 and its *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.²³³

[T]he Charter does not affect current and future Victorian law on abortion and child destruction. This encompasses both the express terms of any statute and any judicial interpretation of statute law.

While s 9 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* provides that "[e]very person²³⁴ has the right to life and has the right not to be arbitrarily deprived of life", s 48 states:

Nothing in this [Charter](#) affects any law applicable to abortion or [child](#) destruction, whether before or after the commencement of Part 2.

9.3 Lawful abortions

Abortion is defined to include both surgical and drug-based abortions.²³⁵ A registered medical practitioner may perform an abortion on a woman up until the time she is 24 weeks pregnant.²³⁶

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 also reasonably believes the abortion is appropriate in all the circumstances.²³⁷ In considering whether the abortion is appropriate in all the circumstances, a registered medical practitioner must have regard to: (a) all the relevant medical circumstances; and (b) the woman's current and future physical, psychological and social circumstances.²³⁸

A registered pharmacist or registered nurse who is authorised under the *Drugs, Poisons and Controlled Substances Act 1981* to supply a drug may administer or supply a drug to cause an abortion in a woman who is not more than 24 weeks pregnant.²³⁹

²³³ [Law of Abortion: Final Report](#), 2008, Victorian Law Reform Commission, Melbourne, p 16.

²³⁴ "Person" is defined broadly in s 3 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to mean "a human being".

²³⁵ Section 3 of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²³⁶ Section 4 of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²³⁷ Section 5(1) of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²³⁸ Section 5(2) of the of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²³⁹ Section 6 of the [Abortion Law Reform Act 2008 \(Vic\)](#).

A registered medical practitioner may in writing direct a registered pharmacist or registered nurse, who is employed or engaged by a hospital, to administer or supply a drug to cause an abortion in 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 medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.²⁴⁰ In considering whether the abortion is appropriate in all the circumstances, a registered medical practitioner must have regard to: (a) all relevant medical circumstances; and (b) the woman's current and future physical, psychological and social circumstances.²⁴¹

A registered pharmacist or registered nurse may administer or supply a drug to cause an abortion in a woman who is more than 24 weeks pregnant only if the pharmacist or nurse is employed or engaged by a hospital and only at the written direction of a registered medical practitioner.²⁴²

9.4 Conscientious objection

If a woman requests an abortion or related advice from a registered health practitioner who conscientiously objects to abortions, 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 who is known not to have a conscientious objection to abortion.²⁴³

Despite any conscientious objection to abortion, a registered medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.²⁴⁴

9.5 Safe access zones

9.5.1 Purpose of safe access zones

Part 9A of the *Public Health and Wellbeing Act 2008 (Vic)* provides for safe access zones around premises at which abortions are provided. The purpose of the safe access zones is to:

- protect the safety and wellbeing and respect the privacy and dignity of: people accessing the services provided at those premises, employees and other persons who need to access those premises in the course of their duties and responsibilities; and
- prohibit publication and distribution of certain recordings.²⁴⁵

²⁴⁰ Section 7(1) of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²⁴¹ Section 7(2) of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²⁴² Sections 7(3) and 7(4) of the [Abortion Law Reform Act 2008 \(Vic\)](#). Hospital is defined in s 7(5) to mean a public hospital, private hospital or day procedure centre within the meaning of the *Health Services Act 1988*.

²⁴³ Section 8(1) of the [Abortion Law Reform Act 2008 \(Vic\)](#).

²⁴⁴ Sections 8(2) and (3) of the [Abortion Law Reform Act 2008 \(Vic\)](#). A similar duty is provided by ss 8(2) and 8(4) in respect of registered nurses who conscientiously object to abortions.

²⁴⁵ Section 185A of the *Public Health and Wellbeing Act 2008 (Vic)*.

A key principle underlying the operation of Part 9A is that “the public is entitled to access health services, including abortions”.²⁴⁶

9.5.2 Safe access zone offences

It is an offence for a person to engage in a prohibited behaviour within a safe access zone.²⁴⁷ The offence carries a penalty of 120 penalty units (\$18,655) or imprisonment for a term not exceeding 12 months.²⁴⁸ “Safe access zone” means an area within a radius of 150 metres from premises at which abortions are provided.²⁴⁹ “Prohibited behaviour” includes:²⁵⁰

- besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding a person who is accessing, attempting to access or leaving premises at which abortions are provided; or
- communicating in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access or leaving premises at which abortions are provided and that is reasonably likely to cause distress or anxiety; or
- interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to abortion premises at which are provided; or
- intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person’s consent.

It is an offence to publish or distribute, without consent or reasonable excuse, a recording of a person accessing, attempting to access, or leaving premises at which abortions are provided, if the recording is likely to identify the person and their accessing of premises at which abortions are provided.²⁵¹ That offence carries a penalty of 120 penalty units (\$18,655) or imprisonment for a term not exceeding 12 months.

9.6 Abortion offences

It is an offence for an unqualified person to perform an abortion on another person.²⁵² The offence carries a maximum penalty of 10 years imprisonment. The offence does not apply to a woman who consents to, or assists in, the

²⁴⁶ Section 185C of the *Public Health and Wellbeing Act 2008 (Vic)*.

²⁴⁷ Section 185D of the *Public Health and Wellbeing Act 2008 (Vic)*.

²⁴⁸ The value of a penalty unit is set annually by the Department of Treasury on 1 July each year, and is [currently set at \\$155.46](#).

²⁴⁹ Section 185B(1) of the *Public Health and Wellbeing Act 2008 (Vic)*.

²⁵⁰ Section 185B(1) of the *Public Health and Wellbeing Act 2008 (Vic)*.

²⁵¹ Section 185E of the *Public Health and Wellbeing Act 2008 (Vic)*.

²⁵² Section 65(1) of the [Crimes Act 1958 \(Vic\)](#). Section 65(3) of the [Crimes Act 1958 \(Vic\)](#) defines a qualified person to be a registered medical practitioner. Registered pharmacists and registered nurses are also defined by s 65(3) of the [Crimes Act 1958 \(Vic\)](#) to be qualified persons but only for the purpose of performing an abortion by administering or supplying a drug in accordance with the *Abortion Law Reform Act 2008 (Vic)*.

performance of an abortion on herself.²⁵³

9.7 Abolition of any common law offence of abortion

Section 66 of the *Crimes Act 1958 (Vic)* provides that:

“Any rule of common law that creates an offence in relation to procuring a woman’s miscarriage is abolished”.

The rationale for the s 66 provision was discussed by the Victorian Law Reform Commission, which said:²⁵⁴

It is strongly arguable that any common law offences in Victoria have been swept aside by the enactment of [provisions prohibiting abortion in] the *Crimes Act*; however, it may be open to a judge to find that the common law offence was revived by [any] repeal of the *Crimes Act* provisions unless legislation made it clear that this was not the intention of parliament. As there is so much uncertainty surrounding the scope of the old common law offence of procuring an abortion, it would be prudent to stipulate that it has been abolished and cannot be revived.

10. WESTERN AUSTRALIAN ABORTION LAW

10.1 Overview

An overview of Western Australian abortion law is set out in Table 11:

Table 11 Main features of Western Australian abortion law (abortions performed with consent on a woman by a medical practitioner)	
Covers both surgical and drug-based abortions	✓
Every abortion prohibited	✗
Abortion available on request	✓ (to 20 weeks)
Abortion available if doctor(s) satisfied of certain matters	✓ (after 20 weeks)
Conscientious objection by doctors recognised	✓
Doctors who conscientiously object must redirect woman to abortion services	✗
Counselling mandatory	✓
Safe access zones	✗

²⁵³ Section 65(2) of the *Crimes Act 1958 (Vic)*.

²⁵⁴ *Law of Abortion: Final Report*, 2008, Victorian Law Reform Commission, Melbourne, p 25.

10.2 Abortion offences

It is an offence for a person who is not a medical practitioner to perform an abortion.²⁵⁵ That offence carries a maximum penalty of 5 years imprisonment. It is also an offence to perform an abortion²⁵⁶ unless the abortion is performed by a medical practitioner in good faith and with reasonable care and skill, and the abortion is lawful under s 334 of the *Health (Miscellaneous Provisions) Act 1911 (WA)* (as discussed above at 9.2).²⁵⁷ The penalty for the offence is a \$50,000 fine. In relation to that monetary penalty, academic Mark Rankin notes:²⁵⁸

The removal of imprisonment as a potential penalty for medical practitioners that fail to meet the conditions for a lawful abortion suggests that in Western Australia abortion is now viewed as, *prima facie*, a medical procedure, and therefore lawful, provided it is performed by a member of the medical profession.

10.3 Lawful abortion

An abortion is defined to include “doing any act with intent to procure an abortion”,²⁵⁹ and as such covers both surgical and drug-based abortions.²⁶⁰ An abortion may be lawfully performed on request if a woman is less than 20 weeks pregnant and is able to provide informed consent.²⁶¹ “Informed consent” means consent freely given by a woman following appropriate and adequate counselling.²⁶² Special requirements apply in respect of dependant minors. In particular, s 334(8) of the *Health (Miscellaneous Provisions) Act 1911 (WA)* provides that a “dependent minor” (defined as “a woman ... [who] has not reached the age of 16 years and is being supported by a custodial parent or parents”):

shall not be regarded as having given informed consent unless a custodial

²⁵⁵ Section 199(3) of the *Criminal Code (WA)*.

²⁵⁶ Performing an abortion means doing any act with intent to procure an abortion, whether or not the woman concerned is pregnant: s 199(5) of the *Criminal Code (WA)*.

²⁵⁷ Section 199(1) and (2) of the *Criminal Code (WA)*.

²⁵⁸ M Rankin, “[The Disappearing Crime of Abortion and the Recognition of a Woman’s Right to Abortion: Discerning a Trend in Australian Abortion Law?](#)” (2011) *Flinders Law Journal* 1 at 29.

²⁵⁹ Section 334(1) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*.

²⁶⁰ Western Australian Health Policy discusses methods of abortion as including both surgical and medical (drug-based) abortions: [Termination of pregnancy: Information and legal obligations for medical practitioners](#), 2007, Government of Western Australia, Department of Health, p 14.

²⁶¹ Section 334(3)(a) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*. [Termination of pregnancy: Information and legal obligations for medical practitioners](#), 2007, Government of Western Australia, Department of Health, p 8. Section 334(3)(a) effectively renders superfluous s 334(3)(b) (which states “the woman concerned will suffer serious personal, family or social consequences if the abortion is not performed”) because s 334(3)(b) also does not apply unless the woman has given informed consent: s 334(4) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*.

²⁶² Section 334(5) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*..

parent of the woman has been informed that the performance of an abortion is being considered and has been given the opportunity to participate in a counselling process and in consultations between the woman and her medical practitioner as to whether the abortion is to be performed.

Under ss 334(9) and (11) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*, a dependent minor may apply to the Children's Court for an order effectively overriding s 334(8).

Where informed consent cannot be provided (for instance, due to illness or incapacity), an abortion may lawfully be performed if: serious danger to the physical or mental health of the woman will result; or the pregnancy of the woman is causing serious danger to her physical or mental health.²⁶³

After 20 or more weeks an abortion is not justified unless two medical practitioners who are members of a panel of at least 6 medical practitioners appointed by the Minister have agreed that the woman or unborn child has a severe medical condition that, in their clinical judgment, justifies the procedure.²⁶⁴ A further requirement is that the abortion is performed in a facility approved by the Minister.²⁶⁵

10.4 Conscientious objection

Section 334(2) of the *Health (Miscellaneous Provisions) Act 1911 (WA)* provides that no person, hospital, health institution, other institution or service is under a contractual, statutory or other legal duty or requirement to participate in the performance of any abortion.

11. CONCLUSION

The national perspective adopted by this paper reveals that there is no uniform approach to abortion law across Australia. Five Australian jurisdictions have decriminalised abortion, although the model of decriminalisation adopted varies across those jurisdictions. Safe access zones have also been introduced in four Australian jurisdictions.

The surveys of public opinion discussed in this paper suggest that the majority of Australians support lawful abortion, although support for abortion can be dependent on the circumstances under which abortion is sought.

In NSW abortion remains a criminal offence punishable by a maximum penalty of 10 years imprisonment. NSW courts have established a limited exception to the offence of abortion, under which abortions can be lawfully performed when necessary to preserve a woman from serious danger to her life or physical or mental health. However, NSW abortion law remains inherently ambiguous and of undetermined scope. It is in this context that abortion services are provided to the women of NSW.

²⁶³ Section 334(3)(c) and (d) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*.

²⁶⁴ Section 334(7)(a) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*.

²⁶⁵ Section 334(7)(b) of the *Health (Miscellaneous Provisions) Act 1911 (WA)*.

The Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 would introduce a model of decriminalisation most like that of the Australian Capital Territory. A different model has been adopted in the other decriminalised jurisdictions where various time limits apply. The reforms proposed by the Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 would see NSW provide for safe access zones around abortion premises, similar to those in the Australian Capital Territory, Northern Territory, Tasmania and Victoria.