

Abortion law in Australia: it's time for national consistency and decriminalisation

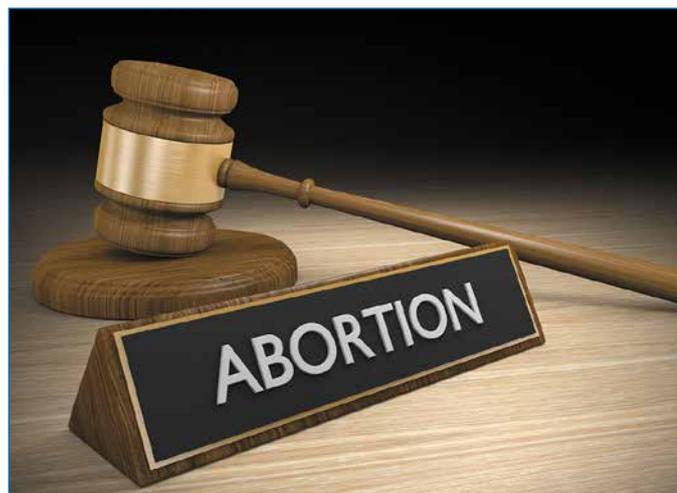
Current Australian abortion laws continue to disadvantage many women

“increasing information about the health of the fetus [is] becoming available ... very early in pregnancy”

It is almost 7 years since abortion was decriminalised in Victoria, where a doctor can now terminate a pregnancy at up to 24 weeks with the woman's consent, and after 24 weeks with the agreement of a second doctor. This change has not resulted in increased numbers of abortions, which have remained stable over many years.¹ Earlier, in 2002, the Australian Capital Territory had removed all criminal sanctions for abortion. Abortion was decriminalised in Tasmania in 2013; here a doctor may perform an abortion at up to 16 weeks with the woman's consent, and after 16 weeks with the additional agreement of a second doctor. In all remaining Australian jurisdictions, a patchwork of differing abortion laws operate. Only in the ACT has regulation of abortion been removed completely from criminal law.² These legal inconsistencies have significant ramifications for the access of Australian women to abortion.

Meanwhile, developments move apace in our understanding of fetal health, and in the diagnosis of fetal abnormality. Medicare-funded diagnosis of fetal abnormality is now routinely offered to all pregnant Australian women — with the implication that a woman may choose to terminate the pregnancy if a serious abnormality is detected. The rapid development of non-invasive prenatal testing (NIPT) — a high-level screening approach that analyses cell-free fetal DNA in the maternal bloodstream — will lead to increasing information about the health of the fetus becoming available to women and their partners very early in pregnancy, allowing earlier and safer termination of the pregnancy, should this be their choice.³ Greater awareness of the risks and social costs associated with multiple pregnancies has led to the selective reduction in the number of fetuses carried to term in such pregnancies, in order to maximise the prospects for a healthy birth.⁴

Abortion laws, however, have not kept pace with these developments.² Fetal abnormality is specifically discussed in the legislation in Western Australia, South Australia, Tasmania and the Northern Territory, and covered by the decriminalisation of abortion in Victoria and the ACT; in practice, however, late abortion is restricted by health regulations in WA, SA and the NT. In Queensland and New South Wales, the law does not refer to fetal abnormality at all. The result of these differences is continuing and extensive abortion “tourism” from all Australian states to Victoria, and overseas, in the face of barriers to access to abortion.²



Barriers to access

Although mifepristone is being used in accredited hospitals throughout Australia for second trimester abortions on the grounds of fetal abnormality (and many private practitioners and clinics also use it for early medical abortion), access to the drug is very difficult for rural women, especially in SA and the NT, where, by law, abortion can only be performed in designated hospitals.²

Where services are provided, the access of women to these services is often hindered by verbal and sometimes physical harassment outside clinics. Attempts to curtail protesters' activities have, to date, been unsuccessful, generally because of the protesters' implied rights to freedom of political communication. To address this problem, Tasmania introduced mandated exclusion zones around clinics in 2013, prohibiting a range of behaviours “in relation to terminations” within 150 metres of an abortion clinic.

The High Court of Australia has provided a two-step test to determine whether the implied right to freedom of political communication has been invalidly curtailed by a particular law. Step one assesses whether the law effectively burdens communication about the federal government or political matters. In those cases where it does, step two requires a determination on whether the law remains valid because it is reasonably appropriate and adapted to serve a legitimate end. Constitutional law scholars generally agree that the Tasmanian provision can withstand any High Court challenge.⁵

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While doctors have the right to conscientious objection to performing an abortion, this objection should not restrict the access of women who consult them to procedures they need. Victorian abortion law reflects this balance, requiring the objecting doctor to refer the woman to a health practitioner who is known to have no conscientious objections to abortion.

Another challenge is the lack of a national data collection of abortion statistics that would assist in ensuring the delivery of appropriate abortion and family planning services, and enable policy makers and law reform agencies to track the effects of changes in law and policy on abortion practice. While statistics are collected in SA, WA and the NT, only the figures for SA are publicly available. This lack of statistics also means that figures for interstate abortion “tourism” are imprecise.

The Victorian review of abortion regulation

The most comprehensive review of abortion regulation was undertaken by the Victorian Law Reform

Commission (VLRC) in 2007–2008. The Victorian parliament responded to the VLRC report by not only decriminalising abortion but also by introducing reforms that place the responsibility for decision making with the woman, or the woman and her doctor, and that for service availability with the medical profession; that is, by regulating abortion in the same way as other medical procedures. Together with the inclusion of the Tasmanian anti-harassment provision, the Victorian legislation might be seen as providing a viable model for the rest of Australia.

In 2015, there is an urgent need for legislative uniformity across Australia so that the law is in step with modern medical practice, and so that women, regardless of where they live, have equal access to abortion services.

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References are available online at www.mja.com.au.

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