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I deliberately asked that my being a member of Pro Choice NSW be mentioned in my introduction to this presentation, because the issue of abortion is one that generates many strong opinions. I respect that many people hold different views on abortion to my own. However, regardless of one's moral position on abortion, there are fundamental problems with the existing NSW law on abortion. While people may disagree as to what the solution to those problems should be, it must be recognised that the current law is inadequate in this area.

I was asked to speak about the law on late term abortion, a difficult task because there is no law in New South Wales specific to late term abortion. There is no distinction, in the test of lawfulness of an abortion, by reference to the stage at which the abortion is requested.

Instead, I will focus on the law on abortion generally and the legal test of when abortion is and is not legal. I will then explore where that leads in the context of late term abortion.

Current Law on Abortion in New South Wales

When one starts to examine the current abortion law in New South Wales, the most striking fact is how little of it there is.

There have been very, very few cases that have gone to court in New South Wales, which may well be a good thing, but it means that when one tries to find a definitive statement of what abortion law is in New South Wales, it is quite hard to find.

Crimes Act

The starting point in considering the law on abortion is that abortion is a criminal offence. It is in the NSW Crimes Act, sections 82 and 83. It is a criminal offence both for the doctor performing the abortion and for the woman undergoing the abortion.

Section 82 of the NSW Crimes Act provides *"Whosoever, being a woman with child, unlawfully administers to herself any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years."*

Section 83 of the NSW Crimes Act provides *"Whosoever: unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious*

thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years."

Interestingly, the actual wording of the two relevant sections in the Crimes Act is particularly unhelpful. It contains this troublesome word "unlawfully": *"Whosoever being a woman with child unlawfully administers to herself any drug or unlawfully uses any instrument"* and the same form of words is used for the offence for the doctor.

In other words, the Crimes Act says if one does something unlawful, one is breaking the law, but it does not actually say what makes it unlawful or lawful in any particular case. It is a curious and unhelpful provision to start with.

As a result, the meaning of that one word, "unlawfully", upon which the legality of abortion depends under the Crimes Act, falls to be determined by the judges in individual cases.

Case Law

The key decisions in Australia, originally in Victoria but then in New South Wales, are all extremely old and have been very little considered in recent decades.

Davidson Case

The first case that looked at the meaning of the word "unlawfully" was the case of *Davidson* in Victoria in 1969. That was a decision of Menhennitt J and the principles set out in that case are therefore often called "the Menhennitt Rules".

Menhennitt J stated that for abortion to be lawful under the Victorian Crimes Act (which was, at that time, very similar to the current law in New South Wales) the accused must have honestly believed on reasonable grounds that the act done by him was two things – first, it was necessary to preserve the woman from a serious danger to her life or her physical or mental health, and second, in the circumstances, it was not out of proportion to the danger to be averted.

Wald Case

The *Davidson* decision was in 1969 in Victoria. Two years later was the case in New South Wales which is really still the current law in New South Wales and that is the case of *R v Wald* in 1971.

That case arose when a police raid was conducted on an abortion clinic that Dr Wald was conducting out of a house in the eastern suburbs of Sydney. Dr Wald and two or three other doctors who were working in the clinic on that day were charged under the Crimes Act with the criminal offence of unlawfully performing an abortion.

The decision is actually a decision of a single judge, Levine J, of what was then the Court of Quarter Sessions. It cannot even be found on most online services because it is so old and it was a decision of a single judge.

It was a jury trial because it was a criminal matter. At the conclusion of the evidence there was an application by Dr Wald's counsel for an acquittal by direction (that is, for the judge to direct the jury that they must acquit). Therefore the judgment is Levine J's ruling on that application.

His Honour, in effect, took the Menhennitt Rules that had been laid down in Victoria two years earlier and applied them in New South Wales, but with a slight expansion. He said, in the context of his decision on what directions should be given to the jury, that *"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 the accused could honestly and reasonably believe there would result serious danger to her physical or mental health."*

So the test of "serious danger to the physical or mental health of the woman" is retained, but it is expanded to include not only medical issues, but also economic and social issues. That has been a very significant expansion and is one that is picked up in some of the subsequent cases.

R v Bayliss & Cullen[1]

Interestingly, a similar test was adopted in a case in Queensland a number of years later. However in Queensland the notion of including social and economic grounds when considering risk to the life or health of the woman was specifically excluded.

Superclinics

Nothing of note happened in New South Wales for some decades, until the 1990s, when, with the advent of the "wrongful birth" and "wrongful life" cases, the issue of abortion started to come to the fore.

From 1971 there were no developments until 1995 when the *Superclinics* decision was decided by the NSW Court of Appeal.

The *Superclinics* case was one of the very early "wrongful birth" cases where a woman sued her doctors alleging negligence for their failure to diagnose her pregnancy until it was very far advanced and too late for her to be able to obtain a termination. She subsequently gave birth to a healthy child but then sued for damages for the cost of raising the child.

It was a significant test case at the time on whether one can obtain damages for wrongful birth in those circumstances.

At first instance, Newman J in the Supreme Court of NSW went off on a tangent of his own and decided that the case should fail because it would not have been possible for this woman to obtain a lawful termination in any event. That, in itself, was quite controversial because it was a point that had not been pleaded or argued in the case.

The case went to the Court of Appeal where the leading judgment was written by Kirby J (who was then in the Court of Appeal) and he essentially went back to *Wald* and said that it was still good law in New South Wales. Kirby J held that it was still appropriate to look at economic and social grounds. He also found that one can look not only at a risk to the physical and mental health of the woman during the pregnancy but also a risk after the birth of the child.

Incrementally the test for "lawfulness" of abortion was being expanded.

However, *Superclinics* was in a very different context. It was not in the context of a

[1] (1986) 9 QLD Lawyer Reps 8. No hyperlink available.

specific interpretation of the sections of the Crimes Act, although it does provide some better explanation of exactly what this word "unlawfully" means in New South Wales.

Harriton v Stephens

There was then some comment in the High Court in the matter of *Harriton v Stephens*, which was a "wrongful life" case. Although the case itself was unsuccessful, Crennan J made some comments in her judgment that seemed to suggest that she supported the interpretation that Kirby J had given to the meaning of the word "unlawfully" in his judgment in *Superclinics*.

Dr Sood's Case

At that point there was a reasonable degree of comfort that the *Wald* ruling was still good law in New South Wales. Then, in the same year as *Harriton v Stephens* was decided, there was the decision in relation to the charges that were brought against Dr Sood, a doctor in Sydney who was charged criminally for unlawfully performing an abortion.

The facts of the case were quite unusual. The evidence in that case was that the woman had requested an abortion and that there had been very little discussion with her at all about her reasons for requesting an abortion. It was quite a late abortion, she was already 20 or 22 weeks at the time the abortion was performed and because there was no evidence of any real discussion that Dr Sood had had with the woman to try and ascertain her reasons, the allegation was made that the doctor could not reasonably have formed a belief one way or the other as to whether the abortion was necessary to avert a risk to the woman's life or health.

It was a jury case. It went to the jury and the jury convicted the doctor. The judgment available is the sentencing judgment of Simpson J in the Supreme Court of New South Wales. In her judgment, Simpson J makes some comments about what the legal test is for the lawfulness of an abortion in New South Wales and the basis upon which Dr Sood failed to comply with that test. By this point the doctor had already been convicted. Simpson J noted that while the conviction was appropriate in the circumstances since there was no evidence as to what belief could have been formed one way or the other, on the evidence that had been presented in the Court, it was entirely possible that the abortion might have been lawful if Dr Sood had explored those issues with the patient.

Simpson J was clearly concerned that the case should not be seen as a precedent for narrowing the circumstances in which abortions can lawfully be performed. Nonetheless it is a case in which a doctor was convicted. Dr Sood was given a non-custodial sentence.

The Leach Case[2]

The Sood case was in 2006. Next there was a case in Cairns in 2010 where a young woman, about 19 at the time, was charged with unlawfully taking RU486 to procure her own abortion.

For those who were following abortion law in Australia, that was quite a shocking

[2] R v Leach and Brennan (2010). This was a jury decision with no sentencing judgement.

development because it was the first time in all the cases thus far that a woman had been criminally charged. Based on media reports of the case, it seemed that this was a young woman who had thought about and made a carefully considered decision that now was not the right time to have a child. She discussed it with her boyfriend and with their parents, and had made a considered decision that that was what she wanted to do.

It was very concerning in the lead up to the trial because the Queensland provision in the Crimes Act was considered very similar to the provision in New South Wales, and it was difficult to see what evidence there was that a continuation of the pregnancy would have resulted in a serious risk to the young woman's physical or mental health. It really did seem that there was a risk that this could actually result in a conviction in this particular case.

What ultimately happened was an interpretation of the provision that hinged upon the particular use of words in the section. There is one significant difference in the New South Wales sections which is relevant in light of what happened in the *Leach* case in Cairns.

If one considers section 82 of the NSW Crimes Act, it talks about a woman unlawfully administering to herself any *drug* or noxious thing. The Queensland section actually talks about any *poison* or noxious thing. This is quite a significant difference in light of what happened. In the Queensland case a Crown expert witness gave evidence that RU486, although it would lead to the woman having an abortion, was not in fact noxious to the woman herself.

It appears that the judge then directed the jury that in order to convict they had to be satisfied the drug that she had taken was noxious to herself and not just noxious to the foetus, and there was no evidence to that effect. So the jury acquitted her.

It is interesting to look at it from a New South Wales perspective and note that the New South Wales section does not say poison or noxious thing, it says drug or noxious thing and one can well imagine that "drug" might be given a wider interpretation, such that any medication that causes an abortion might be sufficient to come within section 82; one does not actually have to show that the drug is noxious to the woman. That is still to be tested in New South Wales.

Amendment to Queensland Crime Act

There was an enormous public and political uproar in Queensland over the prosecution in Cairns and it led to amendment of the Crimes Act in Queensland. The Queensland Act has a section that does not exist in the New South Wales Crimes Act, that makes it a defence for someone to perform a surgical procedure in good faith for the benefit of the patient.

That section was amended so that it would apply not only to surgical procedures but also to medical treatment, with the intention being that it would then cover both surgical abortion and medical abortion.

One of the sad ironies of that was that the protection as a result of that amendment goes to the doctor; whereas the case had actually involved the prosecution of the pregnant woman. No amendment was made to the legislation to offer any protection to women undergoing abortions in Queensland.

Nonetheless that change was made in Queensland which means that the position of doctors in Queensland to perform abortions is now significantly safer than the position of doctors in New South Wales.

Law Unsatisfactory in New South Wales

Why is the existing NSW law on abortion unsatisfactory? Abortion remains a criminal offence. Its lawfulness depends on how the circumstances of each case are going to be interpreted by a Court. One only has to look at what happened in the *Superclinics* case with the judgment in the first instance of Newman J to see that that is not a secure basis for knowing exactly when an abortion is going to be lawful and when it is not.

While prosecutions are obviously extremely rare, the *Leach* case demonstrated that both doctors and women are vulnerable to prosecution and it can happen unexpectedly.

Since the amendments to the law in Queensland, New South Wales now has the most restrictive law in Australia, leaving abortion in a grey zone. It is not fully mainstream like other medical procedures. It has a Medicare rebate, so it is mainstream in that sense, but it is not performed in a number of public hospitals.

It is certainly arguable that many abortions currently undertaken would not withstand close legal scrutiny. That point must not be overplayed because it is irresponsible to be alarmist about it when there have been so few prosecutions, but the fact is one must ask the question, would every abortion that is currently performed in New South Wales truly be able to be justified on the basis of a serious danger to the physical or mental health of the mother?

Foetal Abnormality

We then have the issue, relevant to late term abortion, of foetal abnormality. Foetal abnormality in itself is not a ground for termination of pregnancy in New South Wales. The only way a termination of a pregnancy can be performed in New South Wales for foetal abnormality is on the basis that if the child with a disability were born, it would result in a serious risk to the life or the physical or mental health of the mother.

Now that may or may not be the case in individual circumstances, but in reality the practice is that abortions are performed on the basis of foetal abnormality, not on the basis of what the consequences of that are going to be for the mother, and yet the law is not reflecting that.

What we have is a disconnect between what is happening in practice, what is generally considered to be publicly acceptable in terms of a certain category of abortions that are performed, and what the law actually says is permissible.

Other Australian States

It is interesting to examine what has happened in the other States because six other States and Territories in the last few decades, and some quite recently, have legislated to regulate quite specifically when abortions can be performed lawfully. While a number have retained the criminal offences, they have put into the relevant Crimes

Act a specific description of what conditions need to be satisfied in order for abortion to be lawful.

Four States (Western Australia, South Australia, Tasmania and the Northern Territory) have retained the criminal offences while two States (Victoria and the Australian Capital Territory) have decriminalised abortions performed by a registered medical practitioner.

The test of lawfulness varies now between States. Three States (South Australia, Tasmania and the Northern Territory) permit abortion where continuing with the pregnancy poses a greater risk to the health of the mother than would an abortion.

In South Australia and the Northern Territory, an abortion is lawful if the child is likely to be seriously handicapped.

In Western Australia, abortion is permitted up to 20 weeks gestation if the mother consents, and after 20 weeks if the mother or the foetus has a "serious medical condition".

Victoria

Most recently, in Victoria, the Abortion Law Reform Act was passed in 2008 following a long consultation process and a very detailed report prepared by the Victorian Law Reform Commission, which provides a very good summary of the law across Australia.

The abortion law in Victoria was changed, such that it is no longer a crime if the abortion is performed by a registered medical practitioner. Medical and surgical abortions can be performed by a doctor up to 24 weeks. After 24 weeks, two doctors must reasonably believe that the abortion is appropriate in all the circumstances, including all relevant medical factors and the woman's current and future physical, psychological and social circumstances.

Doctors have a right of conscientious objection if they do not want to perform an abortion but they have an obligation to refer the woman to a doctor who they know does not share that personal opposition to performing abortions.

That is an interesting model and is a demonstration of the most recent abortion law reform that has happened in Australia as a result of a detailed process of consultation.

Late Term Abortions – New South Wales

Where does this leave us with late term abortions?

As previously noted, New South Wales law makes no distinction between early and late term abortions. In New South Wales the Births, Deaths and Marriages Registration Act requires the "stillbirth" of a foetus after 20 weeks to be registered. It is unclear the extent to which that happens in practice with terminations of pregnancy, but it is the law.

The fact that there is a lack of clarity around abortion law makes many clinics reluctant to perform higher risk abortions, such as late term. As a consequence, the practical reality is that it is extremely difficult to get a late term abortion in New South Wales. A number of private clinics will do abortions up to 16 weeks. Very few do it

between 16 and 20 weeks, and after 20 weeks it is almost exclusively the public hospital system that will perform abortions, and usually only in cases of foetal abnormality.

There certainly are cases where New South Wales women are travelling to other States in order to get terminations of pregnancy just because of simple reasons of access. Once one gets out of Sydney to the country, things become even worse.

In the context of late term abortions there is an enormous variety of different types of processes and procedures that different institutions have. In a number of public hospitals there are internal processes, such as Ethics Committee approval, that can be quite time consuming and increase the delay, the stress and also the medical risk without any certainty, until that process has run its course, as to whether an abortion is going to be permitted or not.

There was a case earlier this year of a woman whose foetus was diagnosed as having a very serious abnormality late in the pregnancy, beyond 24 weeks gestation. Her treating medical practitioners agreed that an abortion was appropriate and started to put the steps in train for termination at a large Sydney hospital. It was clear that it was going to take at least two weeks and possibly three weeks for the process to play out with no certainty that it would ultimately be approved. Coincidentally, this woman's father is a doctor. He phoned his contacts around the world and the outcome was that she and her husband flew to South Africa the following day and had the termination of pregnancy there. They had the contacts and the resources to be able to do that, but that is not available to the majority of women.

As already mentioned, the law in New South Wales does not recognise foetal abnormality as a proper ground for terminating a pregnancy. This is a real issue when it comes to late term abortions. Further there is a complete lack of transparency in the sort of criteria that are used to make the decisions. Very often the decisions are made within hospital committees. Usually no reasons are provided, which means there is no real guidance given to the staff of the hospital as to how similar cases should be treated in the future and there is no discussion of what ought to be the criteria upon which it is decided to perform late term abortions.

Gestational Age Relevance

Should there be a different test based on gestational age? What age should it be? What should be the determining criteria? A whole series of very important ethical issues need to be canvassed and this is currently not happening because the legal framework that is going to facilitate that sort of discussion does not exist.

Conclusion

New South Wales law on abortion presently is unsatisfactory. It is piecemeal. It depends on a few isolated judicial interpretations of the word "unlawfully" in the Crimes Act. It is uncertain and it could change any moment if a new case is brought to Court. That is not a solid basis upon which to make good policy in this area.

New South Wales lags behind all the other States and Territories, all of which have reformed their law, to some extent or another, in recent times. In relation to late term abortions, the lack of clarity is particularly troubling, because this is an area which is both difficult and distressing, and sometimes very controversial. The existing law

prevents the sort of ethical discussion that is necessary to determine what criteria should be used in deciding when and how late term abortions are performed.