THE UNIVERSITY of ADELAIDE

South Australian Law Reform Institute

A suitable legislative framework for termination

Fact Sheet 2 - History

The present criminal law in South Australia relating to abortion dates to 1969.[1]

Abortion has been regulated by statute in England since 1803 and especially with the *Offences against the Person Act 1861* (UK). In Australia, the original law relating to abortion was contained in each colony's criminal laws. Such legislation was (and is still) based (to varying degrees) on the UK *Offences against the Person Act 1861* which set out that 'every Woman, being with Child, or other person who, with Intent to procure a Miscarriage, shall unlawfully administer any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever, with Intent to procure the Miscarriage of any Woman, shall be guilty of Felony'.

The leading English case which significantly informed the 1969 South Australian law was *R v Bourne,*[2] where a medical practitioner was charged with carrying out an unlawful abortion on a teenage girl who had been raped. In this case, the trial judge held that an abortion was 'lawful' if it was carried out to preserve a woman's life, which include a serious threat to the woman's physical or mental health. The judge elaborated that if a medical practitioner honestly believed 'on reasonable grounds and with adequate knowledge, that the probable consequence of the continuation of the pregnancy will make the woman a physical or mental wreck', the medical practitioner could be seen as having acted lawfully to preserve the woman's life.[3]

The background to the 1969 South Australian changes was that, even in the 1960s, sex education was rare and contraception was unreliable and difficult to obtain. High demand for abortion and the legal uncertainty (and medical risks) surrounding the status of abortion services created an environment in which corruption and selective prosecution were real problems interstate.[4]

South Australian MP's were allowed a conscience vote on the 1969 South Australian Bill which was thoroughly debated and ultimately led to an intermediate position as set out in the present law between those MPs in 1969 supporting abortion on demand and those MPs in 1969 supporting the total prohibition of abortion or at least confining it to a physical risk of life to the woman.[5]

The 1969 South Australian model firmly placed the decision about termination not with the woman but with the medical practitioner.[6]

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[1] *Criminal Law Consolidation Amendment Act 1969* (No 109 of 1969).

[2] [1939] 1 KB 687.

[3] This decision was extended in subsequent Australian cases after the 1969 South Australian changes. See *R v Davidson* [1969] VR 667; *R v Wald* (1971) 3 DCR (NSW) 25; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

[4] See further Mary Heath and Mulliagan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41; Clare Parker, 'A Parliament's Right to Choose: Abortion Law Reform in South Australia' (2014) 11 *History Australia* 60.

[5] See further Mary Heath and Mulliagan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41. It has been suggested that the present law in South Australia is now actually stricter than the common law position which was relaxed by the cases decided after the 1969 South Australian changes.

[6] Mary Heath and Ea Mulliagan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41, 54.

There have been very few modern prosecutions in Australia for abortion offences.[7] There has only ever been one apparent prosecution of a medical practitioner in South Australia for abortion offences since the 1969 changes came into effect[8] (though SALRI is aware of other cases where abortion has been charged against other individuals, usually in the context of other offences involving domestic violence and/or sexual abuse).[9]

The criminal law focus of the present law gives rise to differing views about its role and effect.[10]

Though prosecutions were, and remain, rare, there are still concerns for medical practitioners that they may be at risk of prosecution given the fundamental criminal status of abortion.[11]

Child Destruction

The offence of child destruction was originally created in England to deal with lethal acts intentionally performed during childbirth where there was doubt about whether the child was born alive. Rather than having to establish live birth in order to convict a person of murder, manslaughter or infanticide, the offence of child destruction could be alternatively charged in cases of doubt. While it does not appear to have been the intention of the initial English legislation, unlawfully terminating a pregnancy when a woman is carrying a child capable of being born alive falls within the ambit of both the English and South Australian Acts.[12]

It does not appear that this charge has ever been utilised in South Australia to deal with acts during child birth or later term abortion procedures.

[7] See, for example, *R v Sood* [2006] NSWSC 1141 (31 October 2006).

[8] *R v Anderson* (1973) 5 SASR 256. The medical practitioner was ultimately acquitted on appeal. See Mary Heath and Mulliagan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41, 43, 64-65. Another civil case unsuccessfully) asserted the illegality of medical practitioner-provided abortion in South Australia. See *City of Woodville v SA Health Commission* [1991] SASC 2761 (8 March 1991) (Matheson J).

[9] See, for example, *R v C* [2004] SADC 26 (27 February 2004) (and on appeal *R v C* [2005] SASC 60 (23 February 2005). The attempted abortion charge was one of 11 charges and was part of a course of sustained sexual abuse. The victim was his daughter.

[10] See, for example, Kirsten Black, Heather Douglas and Caroline de Costa, 'Women's Access to Abortion After 20 Weeks' Gestation for Fetal Chromosomal Abnormalities: Views and Experiences of Doctors in New South Wales and Queensland' (2015) 55 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 144; Caroline de Costa et al, 'Abortion Law Across Australia — A Review of Nine Jurisdictions' (2015) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 105; Caroline de Costa, Heather Douglas and Kirsten Black, 'Making it Legal: Abortion Providers' Knowledge and Use of Abortion Law in New South Wales and Queensland' (2013) 53 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 184; Heather Douglas, Kirsten Black and Caroline de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560; Patrick Ferdinands, 'How the Criminal Law in Australia Had Failed to Promote the Right to Life for Unborn Children: A Need for Uniform Criminal Laws on Abortion Across Australia'" (2012) 17(1) *Deakin Law Review* 43; Kate Gleeson, 'The Other Abortion Myth — The Failure of the Common Law' (2009) 6 *Bioethical Inquiry* 69; Mary Heath and Ea Mulliagan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41.

[11] A criminal conviction also 'is not the only form of harm a medical practitioner can suffer for providing abortion services': Mary Heath and Ea Mulliagan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41, 66. This is said to especially arise if the law is unclear and uncertain. See Lachlan J de Crespigny and Julian Savulescu, 'Abortion: Time to Clarify Australia's Confusing Laws' (2004) 181 *Medical Journal of Australia* 201.

[12] See generally Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 95-109.

Reporting

Since shortly after the inception of the legislation in 1969 South Australia has recorded information on every procedure performed in the State. This information source is unique in Australia in that it has been continuous for nearly 50 years and provides valuable information on trends in abortion over time. Under the current legislation, the records are restricted preventing general access and can only be used for limited reporting purposes. The current restrictions limit SA Health or any other government body from using the statistics obtained for general medical and policy purposes.

The information currently retained is set out in the *Criminal Consolidation (Medical Termination of Pregnancy) Regulations 2011*. This information does include the name of the woman however this is not used in any reports.

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***Please note*: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.**

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