



A suitable legislative framework for termination of pregnancy in South Australia

Fact Sheet 5 – Termination and the criminal justice system

The present specific offences dealing with termination of pregnancy in the *Criminal Law Consolidation Act 1935* (SA) (the 'CLCA') date from 1969. The present law 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.

The maximum penalty imposed for this offence is imprisonment for life.

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 intent to procure the miscarriage of any woman, whether or not she is pregnant.

The maximum penalty for this offence is three years imprisonment.

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

It should also be noted that for the purpose of the present criminal law, it is assumed that a foetus of 28 weeks gestation is capable of being born alive. This reflected the state of medical science when the present law was introduced in 1969.

Lawful abortions

The present South Australian law contained in Division 17 of the CLCA can be accessed online at http://classic.austlii.edu.au/au/legis/sa/consol_act/clca1935262/s82a.html.

The present law provides that 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 they 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.¹

¹ CLCA s 82A. SALRI notes that this ground of lawful abortion under the present law raises concerns. See further H Pringle, 'Abortion and Disability: Reforming the Law in South Australia' (2006) 29(2) *University of New South Wales Law Journal* 207; Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 44-46 [3.86]-[3.95]; Carole Petersen, 'Reproductive Justice, Public Policy, and Abortion on the Basis of Foetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities' (2015) 28(1) *Journal of Law and Health* 121. SALRI, drawing on the VLRC, uses the term 'foetal abnormality' because it is used by medical practitioners to

In determining whether the continuance of a pregnancy would involve the 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.

This provision draws on the common law in this area which recognises broadly similar defences.²

The CLCA provides that a termination of a pregnancy is to be carried out in a prescribed hospital as set out in the regulations. This may lead to issues of access to these medical services in rural or regional areas as there are limited prescribed hospitals in rural or regional locations, some of which may be unable, due to staffing, to perform termination procedures.

In an effort to prevent what was described at the time as 'abortion tourism',³ the 1969 changes provide that 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. This residency requirement can create difficulties for new arrivals or international students.

It is also not an offence under the CLCA 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.

Other jurisdictions have considered the situation where a woman terminates her own pregnancy. For instance, the relevant laws in the Northern Territory, Tasmania and Victoria expressly remove criminal responsibility from a woman who consents to or assists in the termination of her own pregnancy.⁴

There are different views on whether a woman should be criminally responsible for the termination of her own pregnancy.⁵ One view is suggested that there should be an express provision in the law that the woman is not criminally responsible for the termination of her own pregnancy, to clarify the law and provide certainty, particularly in relation to an early medical termination.⁶ Another view is that the offence should remain as a deterrent to 'backyard' terminations, or to women 'self-administering' terminations without medical supervision.⁷ The Queensland Law Reform Commission concluded that the law should clearly provide that a woman who consents to, assists in or performs a termination on herself does not commit an offence.⁸

describe a positive test or indication for certain genetic or other conditions. SALRI does not wish to imply that a foetus which is diagnosed with such conditions is in any way 'abnormal'. See also Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 5. This is a sensitive and complex area: at 44-46 [3.86]-[3.95].

² See *R v Bourne* [1939] 1 KB 687. See also *R v Davidson* [1969] VR 667; *R v Wald* (1971) 3 DCR 25; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

³ Mary Heath and Mulligan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41, 52.

⁴ *Criminal Code* (NT) s 208A(4); *Criminal Code* (Tas) s 178D(1)(b) and Reproductive Health (Access to Terminations) Act 2013 (Tas) s 8; *Crimes Act 1958* (Vic) s 65(2). The provision in Tasmania extends to the woman performing her own termination.

⁵ See, for example, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Health (Abortion Law Reform) Amendment Bill 2016*, Report No 33a (2017) [4.4.2]; Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 106-109[3.242]-[3.261].

⁶ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws: Consultation Paper* (WP 76) (December 2017) [118]. See also Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Health (Abortion Law Reform) Amendment Bill 2016*, Report No 33a (2017) [4.4.2].

⁷ Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Health (Abortion Law Reform) Amendment Bill 2016*, Report No 33a (2017) [4.4.2].

⁸ Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 109-110 [3.262]-[3.266].

Further restrictions

Under the current South Australian law, 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 woman. (See Fact Sheet 9 – Late Term Terminations.)

QUESTIONS TO CONSIDER

SALRI is interested in your views on the role and scope of the relevant criminal law in South Australia. Some matters you might consider are:

- Should there be offences relating to qualified health practitioners performing abortions in the *Criminal Law Consolidation Act 1935 (SA)*?
- Should there be offences relating to the woman procuring an abortion in the *Criminal Law Consolidation Act 1935 (SA)*?
- Should a woman ever be criminally responsible for the termination of her own pregnancy?
- Should South Australia have criminal offences for abortions not performed by an appropriate health practitioner?
- Should South Australia provide for safe access zones in the area around premises where termination of pregnancy services are provided?
- If a safe access zone was established should it:
 - (a) automatically establish an area around the premises as a safe access zone?; or
 - (b) empower the responsible Minister to make a declaration establishing the area of each safe access zone?
- What types of behaviour or conduct should be prohibited in a safe access zone?
- Should the prohibition on behaviours in a safe access zone apply only during periods of operation?
- Should it be an offence in South Australia to make or publish a recording of another person entering or leaving, or trying to enter or leave, premises where termination of pregnancy services are performed, unless the recorded person has given their consent?
- Should it be unlawful to harass, intimidate or obstruct:
 - (a) a woman who is considering, or who has undergone, a termination of pregnancy;
 - (b) a person who performs or assists, or who has performed or assisted in performing, a lawful termination of pregnancy?

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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