

Overview of abortion law in NSW- 2009

Prior to 1971 abortion was the single largest identifiable cause of maternal mortality in NSW. This was due to the illegality of this procedure. Hospital gynaecological wards were full of women with complications of backyard abortions often due to infection and/or heavy bleeding due to retained tissue. In that year justice Levine was the trial judge in a prosecution of a doctor (Louis Wald) charged under section 83 of the NSW Crimes Act with performing an abortion. In this trial Justice Levine defined the circumstances where an abortion would be lawful. Dr Wald was acquitted. The Levine ruling was a landmark judgement which, in effect, considerably reduced the chance of a successful prosecution of a doctor for procuring an abortion in NSW.

Section 83 of the NSW Crimes Act states "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 the intent in any such case to procure her miscarriage, shall be liable to imprisonment for 10 years."

Section 82 of the NSW Crimes Act under the heading "Administering drugs to herself by woman with child" states "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."

Women as well as doctors are also at risk of criminal charges for procuring an abortion in NSW.

Justice Levine used the logic that if there was such a thing as an unlawful abortion then there must also be such a thing as a lawful abortion which, until then, had been undefined in law. The Levine ruling stated that a doctor must have an honest belief on reasonable grounds that the termination of pregnancy was necessary to avoid serious danger to the woman's life, or physical, or mental health, not merely the usual risks of pregnancy and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted. Furthermore, the Levine ruling also stated that the grounds for a lawful abortion could include physical, mental and socio-economic reasons. In addition the onus of proof was on the crown, the procedure did not have to be performed in a hospital and only one doctor's opinion was necessary.

Free standing clinics then began to establish making abortion available and affordable to most women. In NSW about 80% of abortions are performed in clinics and the remaining 20% are performed in private or public hospitals.

Currently in NSW each abortion performed could be either, at a later date, deemed to be lawful or unlawful, depending on the circumstances. For example, the concept of "serious danger" is open to a range of interpretations. This means that those providing or seek abortion services face enormous legal uncertainty and remain potentially at risk of criminal prosecution. The legal risks have been clearly demonstrated by the criminal charges recently brought in Queensland against a young woman for undergoing an abortion using RU486.

In 2006, in NSW, Dr Suman Sood was successfully prosecuted for performing an 'unlawful' abortion. In a civil case in NSW (CES vs Superclinics) a bible quoting judge, justice Newman, found that if the woman involved had proceeded to have her pregnancy terminated the abortion would have been illegal. This case went on to appeal where 2 of the 3 appeal judges (Kirby & Priestly) viewed that the abortion would have been lawful and one (Meagher) to be unlawful. Combining the above two cases 3 out of 5 judges viewed that, in 2 particular instances, an abortion would have been unlawful. A narrow or broad approach to interpreting abortion law in NSW could depend, each time, on a judge's personal inclinations.

Doctor's medical insurance companies have at their discretion whether or not they would cover criminal acts. Therefore a doctor may have to fund their own defence if they were charged under the NSW Crimes Act. This is a disincentive for doctors to work in this area.

Abortion is one of the commonest surgical procedures performed in Australia. The objective of ProChoice NSW is to remove abortion from the NSW crimes act and treat abortion like other surgical procedures. This removes the opportunity for elements hostile to abortion within a government or the judiciary from using the potential ambiguity of the lawfulness of each procedure to attack or dismantle abortion services within NSW.

If abortion is removed from the NSW crimes act this will protect both the women seeking and the doctors providing such services. The current ambiguity is unreasonable and acts against the public interest and undermines one of the foundations of public health.

For a comprehensive analysis of the legal position of abortion in NSW go to <http://www.aph.gov.au/library/Pubs/rp/1998-99/99rp01.htm>

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