

Law of Abortion Consultation meeting:

**Interview:**

Dr Leslie Cannold, President Reproductive Choice Australia, *Reproductive Choice Australia is a National Coalition of over 20 organisations including Children by Choice, the Public Health Association of Australia, the Australian Women's Health Network, the Women's Electoral Lobby, and all state-based pro-choice groups*

**Time:** 4pm

**Date:** Wed 10 October 2007

**Venue:** Victorian Law Reform Commission  
Level 10, 10–16 Queen Street, Melbourne

**Discussion questions:**

**What ethical and legal principles should inform the law of abortion in Victoria?**

- The moral right of women, as rational, competent adult, to choose if and when they have a child.
- Reproductive autonomy is a critical aspect of the autonomy liberal democratic societies grant to their citizens to control and direct their lives so as to lead what they define as a good life. If one has children, when and how many is widely understood by Australians as critical to the capacity of a citizen to lead what they define as a good life.
- A woman's right to choose the spacing and timing of her family has been internationally recognised as a human right since the 1960s.
- That legally compelling women to complete a pregnancy and give birth against their will constitutes physical coercion and leads to physical burdens that can only be justified if the fetus's rights are seen as more worthy of protection than those of the woman.
- This view presumes what is currently expressed by Australian law:
  - that two sets of rights can not co-exist within one set of skin and therefore that;
  - birth is the moment when the fetus obtains the full moral rights of a person, and the legal rights of a citizen
- That granting women the right to decide in law does not deny that abortion is one of a number of medical procedures that also have moral implications. Instead it simply rejects the claim that anyone other than the woman – the state, right to life pressure groups – are better placed than the woman herself to negotiate the moral aspects of the decision well.

- The law must refuse to criminalise women for involvement in inducing their own abortion
- Research suggests that medical abortion could become a first line technology in the first and third world for providing safe termination. It is imperative the law does not impede the adoption of medical abortion and other as yet unknown medical technologies that will improve women's access and health by specifying: 1: the means by which a legal abortion is induced 2: the qualifications of the person inducing a legal abortion 3: the place where any part of a legal abortion is induced and completed

**What should be the policy objectives of any law of abortion? Are these currently met in Victoria?**

- The policy objectives of abortion law should be the same as other law and regulations governing medical treatment. Namely, to ensure the procedure is performed by properly trained staff in appropriate settings and that all patients in need have access to a timely service without regard to capacity to pay, or where they live in Australia.

**What factors should be taken into account in deciding if a termination is lawful?**

- Termination is a medical procedure with moral implications. The medical aspects of the procedure should be regulated in the same way as all other medical procedures, with the same considerations in mind: access, privacy, informed consent, etc. The moral issues are best left to the woman or couple, who are the only ones with knowledge of the particulars of their situation to make an appropriate moral judgement.
- The codification or reasons or justifications in law presumes that lawmakers don't need to have any knowledge of a particular woman or couples circumstance to be best placed to make a judgement about the fate of her pregnancy: a judgement with ramifications not for the lives of the lawmakers, but of the woman/couple. It evidences a moral arrogance that is insulting and repugnant.
- If justifications must be codified in law:
  - the limits after which justifications are necessary must be set no earlier than 26 weeks, to ensure women undertaking screening for fetal issues have adequate time to receive their results, seek information and advice and make an informed decision about the future of the pregnancy.
  - Justifications must be framed in women-centred, not fetal centred terms, and must never rely on viability, which is a moveable feast from place to place, and through time.
  - They must be construed as broadly as possible to ensure women have the capacity to make informed choices and exercise control over their lives in the wake of fetal diagnostic tests, failure to diagnose pregnancy, serious illness impacting the mother or a close family member, violence or serious changes to life circumstances

**South Australian legislation includes specific grounds for termination if the foetus is at risk of 'serious handicap'. How should this issue be considered in Victoria?**

- Justifications must never include fetal disability as a justifying reason for termination as to do is both discriminatory and offensive to people with a disability. Instead, women centred reasons – such as a woman's view that termination after a negative fetal diagnosis is required in her situation because of her concerns about fetal pain or suffering, or her inability to care for the disabled child, must justify the choice.
- This position is consistent with that of the Victorian Women with Disabilities Network, which recognises the right of all women to choose whether or not to have an abortion, yet opposes automatic abortion or pressure to have an abortion where the foetus is identified as having a disability, or where a woman has a disability.

**In some jurisdictions, legislation contains different conditions for lawful termination, depending on the stage of the pregnancy. What are the advantages and disadvantages of this approach? Should Victoria take this approach?**

- The vast, vast majority of terminations are sought and take place in the first trimester of pregnancy. Late presentation for termination occurs very often for reasons outside of a woman's control - undiagnosed pregnancy, changed circumstances, foetal abnormality. The later in pregnancy that a termination is performed the more complex and risky the procedure. Post 20-week terminations are uncommon, and rare beyond 24 weeks. Given these figures, the truly heart-rending circumstances that confront women considering termination at this stage and the, expensive, time-consuming and arduous experience of doing so, it is imperative that the law should impose no greater difficulty or distress for these women.
- Arguably, the trauma related to terminations at this stage demand even more respect from the law for the woman's autonomy, privacy and dignity, while the codification of justifications after particular gestations undermines these values, compelling women and couples to explain themselves and seek to measure up to standards of behaviour set by those who have no knowledge of their particular circumstance, and in most instances, the traumatic experience of considering termination at this stage of pregnancy.
- Drawing a line with regard to termination, and requiring justifications after it, presumes the failure of some women to pass muster. These will be compelled by the state to continue a pregnancy they – after consideration – had decided to terminate. Data from West Australia reveals significant problems for such women with regard to guilt, and in forming relationships with the child they sought to abort.
- These empirical facts underline a theoretical point that all line-drawers overlook: compelling women to continue a pregnancy they don't want doesn't make for happy families. Rather it makes for coerced mothers raising unwanted children who, studies show, measure up poorly on a wide range of social, psychological factors compared to children born wanted.

**If a staged approach is taken, on what basis do you determine a point in time in the pregnancy?**

- Women-centred reasons must dictate the setting of any cut-off point, not fetal-centred ones like viability.

- Using viability as a cut-off makes for an inherently unstable law. As technology changes, and doctors with different skills in neonatology move from state to state, pressure will come from abortion opponents to change the law again to take account of each new medical claims with regard to viability.
- A limit set at viability also provides a litigation feast for anti-choice advocates who can take knowledge they have gained licitly or illicitly about particular cases to charge medical practitioners with having procured an unlawful abortion because the aborted fetus was viable. Not only will such cases cause trauma to the women and couples involved, but will they will have a chilling effect on the willingness of medical practitioners to do terminations near viability in the event that dating is mistaken and they underestimate fetal age. Thus a viability limit set at 24 weeks will in practice set a cut-off date for terminations at 22 weeks, or even earlier. And so it will go, as viability moves lower, so will the cut-off point at which medical practitioners feels safe to perform terminations.
- If a limit must be set, it must be no lower than 26 weeks, which allows many fetal diagnostic tests to be conducted and for women and couples to have time for private, non-intrusive, autonomous decision-making. If justifying conditions must be set, then they should be set after 26 weeks. This is consistent with an autonomy-based approach that prioritizes women-centred rather than fetal-centred reasons.
- If a limit must be set, it must not be set in the Crimes Act but in the Health Act. Contravention of the limit must not carry jail time or any other criminal penalties.

#### **What should be the role of the medical practitioner in deciding whether a termination is lawful and can proceed?**

- The gate-keeping role the medical profession plays in current law undermines women's autonomy and codifies negative assessments of their capacity to make their own informed medical choices in law. This problem is why informed consent should be the only condition for lawful termination.
- If justifications are to be codified in law, the medical profession will, by necessity, have a gatekeeping role.
- The suggestion that women's decisions must be overseen, and can appropriately be judged by others, is at its least patronising and insulting when the woman's own doctor – who does have some knowledge of her circumstances – is the only one assigned to the gatekeeper role.
- However, if the law assigns gatekeeping powers to the woman's doctor – or less advisedly to a range of doctors – these doctors must also accept a legal responsibility to disclose to a woman when she enters into his/her care or seeks their view on the unplanned pregnancy any conscientious, philosophical and/or religious concerns they have about abortion. If the woman requests, they must be obliged to refer her to a doctor without such concerns.
- The medical practitioner, nor the institution where s/he works, should be lawfully prohibited from denying a woman lawful medical care on the grounds of their conscientious, religious, philosophical position on abortion.

- Insofar as state governments accept the right to set restrictions on women's access to terminations, they must also accept responsibility to ensure all women have access to safe, legal and timely abortion services.

### Should these decisions be made by one or more practitioners?

- No. The suggestion that women's decisions must be overseen, and can appropriately be judged by others, is at its least patronising and insulting when the woman's own doctor – who does have some knowledge of her circumstances – is the only one assigned to the gatekeeper role.
- Gatekeeping by a woman's own doctor also reduces the bureaucracy and invasion of privacy involved in the woman's circumstances and decision being judged by others

### What sort of practitioners? GPs? Obstetricians and gynaecologists?

- A woman's doctor, regardless of his/her qualifications.
- Speciality requirements have the impact of reducing women's access to termination outside urban centres where such specialists may not always exist, or be available. Alternately, if he or she is the only specialist and becomes overburdened with such decisions, or is anti-choice, access to termination is effectively denied.

### Should the practitioner be required to notify the health department or similar body that the procedure has taken place?

- Deidentified data for terminations performed for congenital abnormalities provides an important contribution for monitoring prevalence and impacts of interventions
- No. For privacy reasons.
- No, because there is no guarantee that these will be used to ensure women are getting access to necessary services and high-quality care, but could be used by an anti-choice minister to flagellate women about abortion in the news media, and build up momentum to reduce access on the grounds of too many
- No matter what the statistics are, they are discussed as a national shame (by which they mean women's shame) evidence too many women having too many abortions for all the wrong reasons. They tend to be used to argue that there are too many abortions and access should be restricted, not to help women.

### Who should have the final say in deciding if a termination will take place?

- The woman. It's her body and her life.

### Should access to lawful termination be conditional upon attendance at counselling and information sessions? If so, what sort of counselling and information?

- Absolutely not, though unbiased, professional counselling by agencies willing and able to refer for all three options with an unplanned pregnancy should be made available to women at no charge at hospitals, community medical centres for women who wish to access it.
- Compelling women to undertake counselling they do not want is nearly as insulting to their autonomy as compelling them to carry a pregnancy to term they choose to terminate. It again suggests that women don't know their own minds and/or must prove they have considered what others believe they ought to have considered before being "allowed" to have an abortion. Because anti-choice counselling agencies deliberately fail to disclose to women their anti-choice philosophies, and the fact that it is the fetus – not the woman – who is the real client, the negative impact of such counselling on women (due to loss of trust) may last just as long.
- Offering quality counselling to women that is accessible, affordable, unbiased, professional and - most importantly – able and willing to refer for all three options, protects women autonomy by ensuring women who wish to have counselling can access it, and that women who do not wish to do so are not coerced into doing so.
- Compelling all counselling agencies to comply with state provisions prohibiting deceptive and misleading advertising would protect women's autonomy by ensuring that women who wish to avail themselves of counselling are able to identify and access the type of service they wish to consult.

**Should the law state that a medical practitioner has no duty to perform or assist a termination unless a woman's life is at risk?**

- It is unnecessary to explicitly state this, as the right to conscientious objection is available to medical professionals with regard to all their work as a medical practitioner. Its explicit inclusion serves anti-choice propaganda purposes only as it underscores the view of a minority in the community that abortion is a morally objectionable practice.

**Does the offence of child destruction need to be changed in any way? If so, how?**

- Yes, like other abortion-related offences, it needs to be removed from the Crimes Act. Indeed, it is particularly the case for this section, as it more than any other causes confusion amongst legal and medical practitioners with regard to its intent and meaning. Retaining it will only perpetuate ongoing uncertainty as to what it prohibits, when and for what reason.
- If, as I have argued is unnecessary, the new law draws a line between abortions at one stage of pregnancy and another, this should be done in a clear unambiguous fashion using modern language.

**Having considered the questions above, what are the key elements you would like to see in any new law of abortion in Victoria?**

- The law must affirm the full humanity and citizenship of women by affirming their autonomous right, and their capacity as rational and competent adults, to make their own decisions about their own bodies, and their own lives.

- The law must affirm the principle that two sets of rights cannot exist within one set of skin, and that birth marks the entrance of the fetus into personhood and the rights of citizenship.
- The law must acknowledge the medical and moral dimensions of the abortion choice but affirm women –NOT politicians, doctors or anti-choice activists – as the ones best suited to make this choice.
- The law must acknowledge that while very rare, circumstances necessitating terminations beyond 20 weeks do occur, and that the need for such terminations could increase with changes in pre-natal testing technology. Any limits on women's access must not be placed before 24 weeks, and must make allowances for the range of difficult circumstances that confront women and for which they seek abortions at this time.
- The law must reject medical gatekeeping or, if it does not, must keep it to a minimum to reduce the harm it does to women as moral citizens and in practical terms. This means that gatekeeping must be restricted to decisions made after 26 weeks, and that the sign-off of the woman's doctor only –regardless of his/her speciality – is all that is required to "approve" her abortion request.
- If doctors are to be granted gatekeeping rights, they should be matched with the responsibility of medicos to disclose to women any objections they have to abortion and referring the woman to a doctor who supports a woman's autonomy to decide.
- If the state asserts the right of the state to set justifying conditions for abortion, they must also accept the responsibility to ensure that women who "qualify" for abortion have access in their communities to a professional and timely abortion service, regardless of their geographical location.
- The law must reject magical thinking in regard to abortion at later gestations. Compelling women to carry a pregnancy to term that she wished to abort does not make for happy families.
- The law must be modern, clear, concise, unambiguous. All the old abortion-related sections must be removed from the Crimes Act.
- Neither doctors nor women must be treated as criminals. Any regulation must appear in the Health Act and no criminal sanctions for breeches must apply.