

ABORTION AND THE LAW IN NEW SOUTH WALES

Abortion remains in the *Crimes Act 1900* (NSW): With penalties of up to 10 years imprisonment for women, doctors and anyone who assists - abortion is the only health procedure in the *Crimes Act*. New South Wales is the only state or territory in Australia that is yet to reform its laws relating to abortion. Our state is one of three Australian jurisdictions (along with South Australia and Western Australia) that still criminalises women for accessing abortions.

Sections 82-84 of the *Crimes Act 1900* (NSW) deal with abortion and have never been amended or reformed:

Section 82. Whosoever, being a woman with child, unlawfully administers to herself any drug or noxious thing; or unlawfully uses any instrument to procure her miscarriage, shall be liable to penal servitude for ten years.

Section 83. 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 such cases to procure her miscarriage, shall be liable to penal servitude for ten years.

Section 84. Whosoever unlawfully supplies or procures any drug or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman whether with child or not, shall be liable to penal servitude for life.¹

The Act specifies that abortion is a crime only if it is performed unlawfully. However, it does not define when an abortion would be considered lawful or unlawful.

Women and health practitioners can only rely on case law to protect them from prosecution: As the *Crimes Act* does not stipulate what it is considered a lawful abortion procedure, women, health practitioners and health facilities must rely on the common law precedent, namely the Levine ruling of 1971, to avoid criminal prosecution.

Judge Levine established a legal precedent on the definition of 'lawful' in his ruling on the case of *R v Wald* in 1971.² He ruled that an abortion should be considered to be lawful if the doctor honestly believed on reasonable grounds that "the operation was necessary to preserve the woman involved from serious danger to her life or physical or mental health which the continuance of the pregnancy would entail". Levine also specified that two doctors' opinions were not necessary and that an abortion does not have to take place in a public hospital.

The Levine judgement has been affirmed in other NSW court cases, and in 1995, the decision in *CES v Superclinics* expanded the definition of 'threat to mental health' to include "if the pregnancy continues the effects of economic or social stress that may be pertaining to the time".³

¹ *Crimes Act 1900* (NSW). NSW Parliament. Available at: http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/ca190082/

² *R v Wald* (1971) 3 DCR (NSW) 25.

³ *CES and Another v Superclinics (Australia) Pty Limited and Others* (1995) (NSWSC) 103.

Women charged under s82 of the Crimes Act: There have been few instances of women being charged and prosecuted for obtaining an unlawful abortion in NSW, however, a very real risk remains - the most recent prosecution was only two years ago. In August 2017, a Blacktown mother of five was prosecuted for self-administering a drug to cause a miscarriage.⁴

As a result of the existing NSW law on abortion, women and health practitioners remain liable to criminal prosecution for unlawful abortion, with the lawfulness of the procedure depending on the facts and circumstances of each case.

The legal community supports decriminalisation

The NSW Bar Association called for the decriminalisation of abortion, arguing that “abortion should generally be treated as a health matter and a woman’s autonomy and health should be promoted.”⁵

The Law Society of NSW says that the current law “remains an insecure and problematic basis on which to operate and, in particular, has led to many medical practitioners being reluctant to work in the area”.⁶

Community Legal Centres NSW says, “criminalisation of abortion does not reflect modern medical practice or social expectations regarding reproductive health and autonomy. All patients should be able to access abortions... safe from the threat of criminal prosecution and harassment.”⁷

⁴ Whitbourn, M. 2017. “Sydney woman prosecuted for taking abortion drug”, *Sydney Morning Herald*. Available at: <https://www.smh.com.au/national/nsw/sydney-woman-prosecuted-for-taking-abortion-drug-20170814-gxvoqd.html>

⁵ NSW Bar Association. 2019. “NSW Election 2019 Policy Statement”. Available at: https://www.nswbar.asn.au/docs/webdocs/Election_2019_22.2.19.pdf

⁶ NSW Parliamentary Research Service. 2017. “Abortion law: a national perspective”. Available at: <https://www.parliament.nsw.gov.au/researchpapers/Documents/Abortion%20Law.pdf>

⁷ Community Legal Centres NSW. 2019. “Abortion law reform”. Available at: <https://www.clcnsw.org.au/policy/abortion-law-reform>