

# ABORTION LAWS

## TIME TO REFORM?

By George Williams and Ngaire Watson

Queensland's first abortion case in 24 years took place between 12 October and 14 October 2010. The case renewed debate about the anomaly of the law surrounding abortion, as it currently exists in both Queensland and NSW, and the way in which both jurisdictions have for decades now been effectively sidestepping this admittedly emotionally charged and controversial legal topic. While George Williams addresses the legal context of the case, Ngaire Watson examines the key medico-legal issue that proved a turning point in arriving at the legal outcome. While welcoming the outcome of this particular case (the couple was acquitted), both authors agree that it is time for policy makers in both Queensland and NSW to grasp the nettle and change the law both to bring it into line with that of the rest of Australia, and to more accurately reflect current social attitudes.



**LEGAL CONTEXT**

Queensland's first abortion trial in decades was possible because Queensland law, like that in NSW, still treats the termination of a pregnancy as a criminal offence. Parliaments in both jurisdictions have failed in not reforming the law.

It was alleged that Tegan Leach, 20, and her partner, Sergie Brennan, 22, imported the abortion drug, misoprostol, from the Ukraine and used it to terminate Leach's eight-week pregnancy. They faced jail terms of seven and three years respectively.

The law governing their case is set down in the 1899 Queensland Criminal Code in a chapter entitled 'Offences against morality'. The chapter covers a range of repugnant acts, including the indecent treatment of children and bestiality, and also the crime of abortion.

Leach was charged under s225 with procuring her own abortion. In language from more than a century ago, the section states: 'Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime.'

Brennan was charged under s226. It mandates imprisonment for supplying drugs or instruments to procure an abortion.

Similar sections can be found in the NSW *Crimes Act* 1900. Both the NSW and Queensland laws are relics of an earlier age in being based on superseded Acts of the British Parliament. These go back as far as an 1803 English statute that imposed the death penalty for undertaking the procedure. British law has since been transformed and, since 1967, has permitted a woman to have an abortion under medical supervision.

Most Australian states and territories have followed suit: South Australia in 1969, the Northern Territory in 1974, Western Australia in 1998, Tasmania in 2001 and Victoria in 2008 have all legislated to make it clear that a woman can lawfully choose to terminate her pregnancy. The ACT has gone even further. It fully decriminalised the practice in 2002, and now treats abortion in the same way as any other medical procedure.

Queensland and NSW have failed to take any such step. In these states, women are able to seek an abortion only because, when prosecutions have been brought, courts have given the law a liberal interpretation.

In NSW, Judge Levine held in 1971 that an abortion is not unlawful if the doctor 'had an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life, or physical or mental health'. Queensland's Judge McGuire reached a similar conclusion in 1986.

These judge-made rulings have since been adhered to, but remain subject to the possibility of judicial revision or review by the High Court. They also come with significant limits. According to Judge McGuire, it is only in 'exceptional cases' that a woman having an abortion in Queensland can escape the criminal law. He also said that Parliament 'should

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rightly use its authority to see that abortion on whim or caprice does not insidiously filter into our society. There is no legal justification for abortion on demand.'

These interpretations of the Queensland and NSW laws apply to medically supervised abortions. They could not assist a couple in the position of Leach and Brennan. In their case, importing medication from overseas without authorisation raises legal issues and could be worthy of sanction. However, this is a different matter entirely to their being charged and perhaps jailed for several years for procuring an abortion.

Leach and Brennan's case demonstrates the need for reform. Unfortunately, rather than causing the Queensland government to act, the case has left it paralysed. The state's pro-choice premier, Anna Bligh, has said that the matter must be dealt with by way of a private member's bill and conscience vote. However, neither she nor any other member of the Queensland Parliament has yet introduced such a bill. NSW has also failed to see any strong push for change.

Views about abortion have changed over the past century, and the statute book should alter to reflect this. The law must provide for circumstances in which a woman can terminate an unwanted pregnancy.

In this, Queensland and NSW should catch up with legal change elsewhere in Australia. They should legislate so that pregnancies may be terminated under medical supervision in a way that protects women's interests and respects their reproductive decisions.

**MEDICAL BACKGROUND**

A 40-week pregnancy is calculated from the date of the first day of the last menstrual period. This means the first two weeks of the pregnancy are counted, even though the pregnancy does not actually exist. Fertilisation occurs in the third week. Hormonal changes are occurring in the woman to thicken the uterus and prevent its contractility and to close the cervix. The first trimester is officially considered to end at 14 weeks.<sup>1</sup> For women who are considering a termination of pregnancy, the very early weeks of pregnancy are particularly important because this is the safest time.

**Misoprostol and mifepristone**

Misoprostol is a drug that causes uterine contraction. It can be used alone to terminate a pregnancy, but is often used >>

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in conjunction with mifepristone. Mifepristone blocks the action of progesterone, a hormone necessary to maintain pregnancy. It also causes the cervix to soften, and starts uterine contractions.

The Royal Australian and New Zealand College of Obstetricians and Gynaecologists states:

'The safety and efficacy of mifepristone used in conjunction with a prostaglandin analogue usually misoprostol, is well established, as the best available regimen for medical termination of pregnancy.'<sup>2</sup>

Among the plethora of information available about abortion on the web, there are two good-quality websites that offer detailed information about medical abortions.<sup>3</sup> These sites are important resources for women wanting sound medical information about abortion.

### A LARGE PROBLEM

According to the World Health Organisation, there are 23 million pregnancies annually in developed countries. More than 40 per cent of these pregnancies are unintended and 28 per cent end in induced abortion.<sup>4</sup> The scope of the issues surrounding abortion and its legality is vast and yet is avoided by legislators, who lack the courage to tackle it.

### THE CASE OF R V SERGIE BRENNAN AND TEGAN SIMONE LEACH

On 1 February 2009, during part of a large criminal investigation search, the police searched the premises of Sergie Brennan and Tegan Leach. The couple was not implicated in the reason for the search. In the course of the search, the police found some empty blister packs and small bags with a white powdery substance in them. There was a script in the name of Sergie Brennan and a handwritten document written in another language.

The items were seized and the blister packs and other substance sent to a laboratory for examination. Misoprostol and mifepristone were both found in detectable quantities.

Sergie Brennan and Tegan Leach were taken to a police station and a formal interview was conducted and recorded. The couple freely admitted that Tegan was pregnant but they were not in a position to give their best to raising a child yet. Sergie Brennan had organised to have the drugs sent

to Australia from his sister in Russia. No charges were laid with respect to the importation of the drugs.

The charges were:

- Count one: Sergie Brennan unlawfully supplied to Tegan Simone Leach a substance knowing that it was intended to be unlawfully used to procure the miscarriage of Tegan Simon Leach.
- Count two: Tegan Leach unlawfully administered to herself a noxious thing with intent to procure her own miscarriage.

A third element to the charge required proof that Sergie Brennan supplied the drugs knowing that they were to be used *unlawfully* to procure the miscarriage of Tegan. It did not matter if Sergie was ignorant of the law or whether Tegan was actually pregnant or not. As the unlawful act did not depend on a pregnancy, the prosecution had to prove the 'noxious thing' was noxious to Tegan rather than noxious to a foetus.

Both pleaded 'not guilty'.

The Crown brought Professor Nicholas Fisk, an obstetrician specialising in foetal medicine from the University of Queensland, as an expert witness. Professor Fisk described the differences in surgical and medical abortions. A surgical abortion involves the evacuation of the uterus using instruments inserted via the cervix under anaesthesia. A medical abortion involves the administration of drugs over 36 to 48 hours, such as misoprostol and mifepristone, which induce uterine contractions. Evidence was led under cross-examination that both these drugs are listed as essential medicines by the World Health Organisation, and that the drugs are commonly used in countries such as the United States, Sweden and the United Kingdom.

The definition of a 'noxious thing' became a critical point. The Crown argued that an otherwise harmless thing can become noxious if taken in sufficient quantities. Counsel for the defence held that the particular substances in question were not noxious. The Crown conceded:

'It would be, in my respectful submission, open to your Honour to say that although the wording of the charge does not include the word "noxious" the Crown has conducted its case on the basis that the substance in count 1 is in fact a noxious substance, and unless you are satisfied that it is a noxious substance the Crown case has not been proven as it has been conducted in this trial.'<sup>5</sup> In his summing up, His Honour, Everson J, gave the jury the following directions:<sup>6</sup>

'It is submitted [by the prosecution] that you can be satisfied beyond reasonable doubt that the drugs were noxious because they were used in a way intended to achieve the expulsion of a foetus from the woman's body and thereby change the state of her body. The defence submits that you simply cannot be satisfied beyond reasonable doubt that the combination of drugs supplied to and taken by the defendant Leach was noxious.

In considering whether the prosecution has discharged the onus of proving beyond reasonable doubt that the combination of drugs was noxious, you need to carefully



consider the evidence of Professor Fisk. He gave evidence that there are virtually no complications with using mifepristone, and that the side-effects of using misoprostol included relatively minor symptoms such as nausea in 50 per cent of cases, and minor instances of diarrhoea and vomiting. Under cross-examination he confirmed that mifepristone was not harmful to the person taking it. He also conceded that the combination of the drugs did not appear to have caused the defendant Leach to suffer any ill effects.'

After the jury retired, it sent a note asking:

'Can it please be clarified that the term "a noxious thing" "will or" - "will or will not" alter the verdict of count 1, given that the term itself is not included in count 1?'

When the jury returned, His Honour gave them following answer:<sup>7</sup>

'...Whilst it is true that the term "noxious" or "a noxious thing" is not included in count 1, I can inform you, as I did in the course of my summing-up, that the Crown has conducted its case on the basis that the substance supplied to Ms Leach by Mr Brennan was noxious and therefore, if you are not satisfied beyond reasonable doubt that it was, you must acquit Mr Brennan of count 1...'

When the jury returned, it found both Sergie Brennan and Tegan Leach 'not guilty'.

## FLAWED LAW

Abortion law is 'the elephant in the room' in Australia. Everyone knows it is happening; doctors around Australia perform abortions every day, but it is surrounded by stigma and secrecy. Prior to the trial, it was reported that Tegan Leach had lost her job and was staying in a secret location after her home was fire-bombed and her car vandalised.<sup>8</sup> Abortion is a dangerous and divisive topic.

Sergie Brennan and Tegan Leach were acquitted. His Honour, Everson J, directed the jury to consider the testimony of Professor Fisk, who said the drugs taken by Tegan Leach were not noxious. Given that the prosecution failed to prove an essential component of the charge – that the drugs were noxious – there is little chance of a successful future prosecution in Queensland where these drugs are used. Of course, this excludes any other abortifacient (abortion-inducing) agents. However, the fact remains that in Queensland the laws that were used to bring the couple to trial still exist.

In 1995, in his judgment in *CES and Anor v Superclinics (Australia) Pty Ltd and Others*,<sup>9</sup> Kirby A-JC acknowledged '... the reality of the availability of termination procedures in our society today'. Women and their doctors have long managed the legal problems surrounding abortion by saying the mental or physical health of the woman was endangered.

The current president of the Australian Medical Association, Dr Andrew Pesce,<sup>10</sup> pointed out that in Australia most women assume they can obtain an abortion if they wish, yet abortion is officially legal only under certain circumstances. Dr Pesce says doctors regard the doctor-patient relationship as primary, rather than strict

legal interpretations of abortion law. This is a problem for doctors.

## CONCLUSION

We do not know why Sergie Brennan and Tegan Leach did not approach a doctor to perform an abortion. However, it is evident that abortion is stigmatised. For example, people protest daily outside the Melbourne Fertility Control Clinic by approaching women wanting to enter the clinic and urging them not to 'murder' their unborn babies.<sup>11</sup>

No one should be put through the legal and media ordeal that this couple endured. Doctors should not need to turn a blind eye to the law when performing an abortion for a woman.

Politicians advocate community debate about topics that affect its members. This is good, but needs to be followed up with a preparedness to change legislation when community views indicate that it is warranted. There is evidence that community views on abortion have changed. In 2009, an Auspoll study found that 79 per cent of Queenslanders supported the decriminalisation of abortion.<sup>12</sup> The evidence needs to be matched with the political will of our leaders, who can and should demonstrate courage to face their detractors. ■

**Notes:** **1** Medical Methods For Termination Of Pregnancy, *WHO Technical Report Series*, 1977, [http://whqlibdoc.who.int/trs/WHO\\_TRS\\_871.pdf](http://whqlibdoc.who.int/trs/WHO_TRS_871.pdf). **2** College Statement, Mifepristone (RU486), The Royal Australian and New Zealand College of Obstetricians and Gynaecologists, November 2007. <http://ranzcog.edu.au/publications/statements/C-gyn14.pdf> (accessed 13 November 2010). **3** <http://www.misoprostol.org/> provides guidelines about how to use misoprostol to terminate pregnancy. <http://www.medicationabortion.com/index.html> provides information about the legal status of abortion worldwide, references and educational material for health professionals. The site says that 27.7 per cent of pregnancies in Australia are unintended. **4** Facts on Induced Abortion Worldwide, World Health Organisation, October 2007, [http://www.who.int/reproductivehealth/publications/unsafe\\_abortion/abortion\\_facts.pdf](http://www.who.int/reproductivehealth/publications/unsafe_abortion/abortion_facts.pdf) (accessed 13 November 2010). **5** *R v Sergie Brennan and Tegan Simone Leach*, Everson J, Cairns District Court, 13/10/2010, day 2, pp45-6. **6** *Ibid*, 14/10/2010, day 3, pp3-4. **7** *Ibid*, 14/10/2010, p15. **8** Anna Bligh stays out of 'tragic' abortion case, *The Australian*, September 14, 2009. **9** *CES and Anor v Superclinics (Australia) Pty Ltd and Others*, (1995) 38 NSWLR 47. **10** A Pesce, 'Abortion laws in Australia: Time for consistency?' [2006] *UNSWLawJl* 26. **11** Commissioner backs abortion clinic exclusion zone, reported 18 October 2010, ABC News, *The World Today*, <http://www.abc.net.au/worldtoday/content/2010/s3041093.htm> (accessed 28 November 2010). **12** K Betts, 'Attitudes to abortion: Australia and Queensland in the twenty-first century', *People and Place*, vol. 17, No. 3, 2009.

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