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Abortion 2017 and Beyond:

The patchwork quilt of Australian abortion law

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Overview

- How far have we got with abortion law reform in Australia?
- What problems still remain?
- Why does it matter?

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A bit of history …

- At the time of Federation, the States modelled their criminal law on 19th century English criminal law.
- It was a crime for a person to perform an abortion and for a woman to have one.
- In 1969, South Australia legislated to make certain abortions lawful, followed by the Northern Territory in 1974.
- In the last 20 years, five Australian jurisdictions have passed new abortion laws:
  - Western Australia (1998), ACT (2002), Northern Territory (2006 and 2017), Victoria (2008) and Tasmania (2013).
- Only NSW and Queensland still retain pre-Federation abortion laws.

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The current abortion law patchwork

- Only four jurisdictions permit a woman to make her own decision about whether to have an abortion and gestational limits may apply (e.g. up to 24 weeks in Victoria, 20 weeks in WA, 16 weeks in Tasmania)
- WA has mandatory counselling for all women undergoing abortion.
- In SA and NT, abortion is lawful only if a doctor certifies that various statutory criteria are satisfied:
  - South Australia - up to 28 weeks in the case of risk to the physical or mental health of the woman or risk the child will be seriously handicapped
  - Northern Territory – up to 14 weeks if a doctor considers the abortion is appropriate, and up to 23 weeks if two doctors certify it is appropriate.
- Late term abortions permitted in Victoria, Tasmania and WA subject to medical certification as to risk to woman etc.
- Other restrictions apply, e.g. abortion must be performed in a medical facility (SA), all abortions must be reported to the Chief Health Officer (NT).

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The position in NSW and Queensland

- Abortion remains a crime for both a woman and her doctor.
- The courts have held that abortion is lawful where a doctor reasonably believes it is necessary to avert a serious risk to the life or health of the woman.
- Two recent prosecutions: *R. v. Leach,* 2010 (Qld) and *DPP v. Lasuladu,* 2017 (NSW)
- Recent abortion law reform Bills in both States have been voted down in Parliament on a conscience vote.
- Neither of the major political parties is currently willing to support abortion decriminalisation.

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Issues around conscientious objection

- All recent abortion law reform has included statutory recognition of a right of conscientious objection.
- Problems remain in relation to the detail and scope of the right:
  - What is a legitimate conscientious objection? e.g. religious belief only?
  - Is there an obligation to refer the patient to another health practitioner? If so, whom?
  - Does it apply to all health practitioners or only doctors?

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Why is the current law unsatisfactory?

- We have eight different regulatory regimes, each with its own test for establishing whether abortion is lawful.
- The taint of unlawfulness still hangs over abortion pushing it to the margins of mainstream medical practice.
- Abortion continues to be treated differently from any other medical procedure – most Australian women do not have the legal right to make their own decision about abortion.
- Resulting disconnect between what the law says, what most people think it says, and what most people think it ought to say.
- In NSW and Queensland, women undergoing abortions and their doctors remain vulnerable to criminal prosecution.

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Why is the current law unsatisfactory? (cont'd)

- Even where the law has been reformed, problems remain including:
  - Burdensome requirements for late term abortions
  - Unintended restrictions on medical abortion preventing provision by GPs
  - Ill-defined rights of conscientious objection which impede access to abortion.
- Anomalies exist in Commonwealth laws, e.g. prohibition on advertising abortion
- The critical issues around improving abortion access cannot be addressed without coherent and consistent law reform.