

# **Sex Selection and Abortion: Australia, Canada, India, and New Zealand**

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### **SEX SELECTION & ABORTION**

#### **COMPARATIVE SUMMARY**

Sex determination, and the selective abortion of fetuses is widespread in some countries. In the past, this may have been due to permissive abortion laws, which in some circumstances led to abortion being used for sex selection. After abortion laws were tightened, technological innovation revolutionized medicine, with prenatal diagnosis being one such area. This new technology has immense potential to allow parents to avoid genetically oriented problems, but its use has had the effect of making it relatively easy for parents to opt for abortion as a means of sex selection when the parents did not wish to have a child of a particular sex. This comparative summary provides an analysis of laws on the subject of sex selection and abortion in Australia, Canada, India, and New Zealand.

While Australia has banned sex selection throughout the country, the States of Victoria, Western Australia, and South Australia have specifically legislated on it. The Australian Government National Health and Medical Research Council has published guidelines that prohibit sex selection unless it is undertaken to prevent an inheritable genetic disease.

Canada has not prohibited any types of abortion, by law, since 1988. While abortion for the specific purpose of sex selection is likewise not prohibited, Canadian physicians typically will not perform an abortion after the twenty-fourth week of pregnancy unless the woman's health is in serious jeopardy. Canada does not, however, allow reproductive technology to be used for sex selection of the fetus.

The laws of India and New Zealand on abortion are closely similar, in that they both provide that causing an abortion is an offense unless it is done to save the life of the woman. Abortion is allowed when, subject to the prescribed length of the pregnancy, the continuance of the pregnancy may cause grave injury to the woman's physical or mental health, or there is substantial risk that the child-to-be would be seriously handicapped if the pregnancy were to continue.

Indian laws do not, under any circumstance, allow sex determination tests to be undertaken with the intent to terminate the life of a fetus developing in the mother's womb, unless there are other absolute indications for termination of the pregnancy as specified by law. Any act causing the termination of the pregnancy of a normal fetus would amount to feticide, and in addition to rendering the physician criminally liable, is considered professional misconduct on his part, leading to his penal censure.

The use of reproductive technology in New Zealand is banned when it is used for sex selection with a view to causing an abortion.

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June 2009

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## AUSTRALIA

### SEX SELECTION & ABORTION

#### *Executive Summary*

*Sex selection is generally prohibited across Australia, with three states specifically legislating on this issue. Abortion is permitted in Australia, originally based upon the development of case law, and more recently through primary legislation.*

#### **I. Sex Selection**

Australia is a federation with a written constitution. The Commonwealth of Australia consists of six states and two territories. Laws may be passed by either the federal Parliament or the Parliament or Legislative Assembly of the various states or territories.

There is a ban on sex selection throughout Australia. This ban came into force in 2004, when the National Health and Medical Research Council essentially outlawed it on moral and ethical grounds. The National Health and Medical Research Council (NHMRC) was established under the National Health and Medical Research Council Act 1992.<sup>1</sup>

The Guidelines, as established by the Council, prohibiting sex selection in Australia state:

Sex selection is an ethically controversial issue. The Australian Health Ethics Committee believes that admission to life should not be conditional upon a child being a particular sex. Therefore, pending further community discussion, sex selection (by whatever means) must not be undertaken except to reduce the risk of transmission of a serious genetic condition.<sup>2</sup>

These guidelines are not in themselves legally binding, however, as this particular section involves the formation and use of human embryo's through the use of artificial reproductive technology. Bodies offering these services must be accredited by an accreditation body, such as

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<sup>1</sup> National Health and Medical Research Council Act 1992, No. 225/1990.

<sup>2</sup> Australian Government, National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology [ART] in clinical practice and research*, 2007, ¶ 11.1, <http://www.nhmrc.gov.au/publications/synopses/files/e78.pdf>.

the Fertility Society of Australia, which requires compliance with the NHMRC ART guidelines as part of its accreditation process.<sup>3</sup>

The States of Victoria, Western Australia and South Australia have specifically legislated on the issue of sex selection.

Victoria prohibits sex selection during assisted reproduction, unless it is necessary to prevent a genetic abnormality or disease, or a Patient Review Panel has otherwise approved the use of sex selection.<sup>4</sup>

In Western Australia, the Reproductive Technology Council approved the use of pre-implantation genetic diagnosis in 2004 but prohibits the use of technology to select the sex of embryo's unless it is to prevent a gender based disorder.<sup>5</sup>

South Australia bans the use of sex selection using reproductive technology unless it is to prevent the transmission of a genetic defect.<sup>6</sup>

### **Abortion**

Abortion law in Australia has been left to the jurisdiction of the individual states, and in many states has evolved through the common law to allow abortions based upon the medical need of the patient.<sup>7</sup> Recent Federal law has reformed the handling of the miscarriage inducing drugs RU 486. The Federal Health Minister no longer has the power to veto any application to allow RU486 to be used in Australia. Approval for the use of the drug has been given to the Therapeutic Goods Administration, a pharmaceutical body.

### **Australian Capital Territory**

The Australian Capital Area became the first jurisdiction in Australia to legalize abortion through the Crimes (Abolition of Offence of Abortion) Act 2002. This law provides that any rule of common law that creates an offence in relation to procuring a woman's miscarriage is abrogated.<sup>8</sup> The passage of this law removed abortion from the criminal statute books altogether.

### **Victoria**

The law on abortion in Victoria has been reformed by the Abortion Law Reform Act 2008. This Act allows a registered medical practitioner to perform an abortion on a woman who

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<sup>3</sup> Australian Government, National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, 2007, <http://www.nhmrc.gov.au/publications/synopses/files/e78.pdf>.

<sup>4</sup> Assisted Reproductive Treatment Act 2008, No. 76 of 2008, § 28 (Victoria).

<sup>5</sup> Reproductive Technology Council, *Approval for Diagnostic Testing of Embryos* (2004) (WA).

<sup>6</sup> Reproductive Technology (Clinical Practices) Act 1988, § 13, (SA).

<sup>7</sup> E.g. *R v Wald* (1971) 3 DCR (NSW) 25; and *R v Davidson* [1969] VR 66 (Vict).

<sup>8</sup> Crimes (Abolition of Offence of Abortion) Act 2002 s. 44(1)

is not more than 24 weeks pregnant.<sup>9</sup> Termination of a pregnancy after 24 weeks can only take place if the medical practitioner;

- (a) reasonably believes that the abortion is appropriate in all the circumstances; and,
- (b) has consulted at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.

(2) In considering whether the abortion is appropriate in all the circumstances, a registered medical practitioner must have regard to;

- (a) all relevant medical circumstances; and,
- (b) the woman's current and future physical, psychological and social circumstances.<sup>10</sup>

### **Western Australia**

A Private Members' bill passed in 1998 known as the Davenport legislation, repealed many of the original Australian criminal code provisions regarding abortion (Sections 199-201.) The legislation of the State of Western Australia now permits abortions up to 20 weeks of pregnancy if one of four grounds are satisfied:

- The first ground essentially allows abortion "on request," provided a second, independent medical practitioner has counseled the pregnant woman about any medical risks associated with abortion, and has offered to refer her for counseling about other matters associated with the abortion. Some additional restrictions are imposed where the pregnant patient is aged under 16.
- The other three grounds permit abortion where;
  - the pregnant woman will suffer serious personal, family or social consequences if the abortion is not performed;
  - serious danger to the pregnant woman's physical or mental health will result if the abortion is not performed; or,
  - the pregnant woman's pregnancy is causing serious danger to her mental health.

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<sup>9</sup> Abortion Law Reform Act 2008 (Vict.), part 2. § 4.

<sup>10</sup> *Id.* § 5, (1) - (2)

After a period of 20 weeks, in order for an abortion to be obtained legally, two objective medical practitioners must agree that the pregnant woman or the fetus has a severe medical condition which would justify an abortion.

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## CANADA

### SEX SELECTION & ABORTION

#### *Executive Summary*

*Federal legislation that made the obtaining of an unapproved abortion a crime was held to be unconstitutional in 1988 and has not been replaced. Canada has no legal restrictions on the obtaining of abortions. Abortion for sex selection is legal and there are reports that it has been practiced. Sex selection in reproductive technology is prohibited, subject to an exception that allows sex selection to prevent disorders or disease.*

#### **I. Abortion**

Until 1988, Canada's Criminal Code required women who wished to have an abortion to satisfy a therapeutic abortion committee, established by a hospital, that the continuation of her pregnancy would be likely to endanger her life or health.<sup>1</sup> However, in the case of *R. v. Morgentaler, Smoling and Scott*, the Supreme Court held that this provision violated section 7 of the Canadian Charter of Rights and Freedoms.<sup>2</sup> Section 7 of the Charter provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>3</sup>

Since 1988, Canada has not had a law prohibiting any type of abortions, including abortions for the purpose of sex selection, although there have been several attempts at legislative reform that have failed. It has been reported that there is evidence indicating that abortions have been procured for the purpose of sex selection in certain immigrant communities in Canada and that a physician in the United States has placed advertisements in British Columbia offering sex determination tests to members of the Indian community.<sup>4</sup>

The absence of an abortion law in Canada does not mean that a woman can easily obtain an abortion at any time during her pregnancy. Physicians in Canada normally do not perform abortions after the twenty-fourth week of a pregnancy, unless the health of the woman is in serious jeopardy even though they cannot be prosecuted for doing so. Although information on

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<sup>1</sup> Criminal Code, R.S.C. c. C-46, s. 287, as amended.

<sup>2</sup> [1988] 1 S.C.R. 30.

<sup>3</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Act, 1982, ch. 11 (U.K.), available at [http://laws.justice.gc.ca/en/charter/Charter\\_index.html](http://laws.justice.gc.ca/en/charter/Charter_index.html).

<sup>4</sup> Sam Soloman, *Sex-Selective Abortion Comes to Canada*, NATIONAL REVIEW OF MEDICINE, Sept. 2007, available at [http://www.nationalreviewofmedicine.com/issue/2007/09\\_15/4\\_policy\\_politics02\\_15.html](http://www.nationalreviewofmedicine.com/issue/2007/09_15/4_policy_politics02_15.html).

the subject is not readily available, it may also be the case that many physicians refuse to perform abortions for the purpose of sex selection.

## **II. Reproductive Technology**

Canada's Assisted Human Reproduction Act states that no person shall:

[f]or the purpose of creating a human being, perform any procedure or provide, prescribe or administer any thing that would ensure or increase the probability that an embryo will be of a particular sex, or that would identify the sex of an *in vitro* embryo, except to prevent, diagnose or treat a sex-linked disorder or disease.<sup>5</sup>

Thus, Canada does generally prohibit sex selection in embryonic procedures, except to prevent, diagnose, or treat a sex-related disorder or disease.

## **III. Concluding Remarks**

Canada does not have a law prohibiting the obtaining or procuring of an abortion for the purpose of sex selection. Canada does prohibit sex selection in reproductive technology, subject to an exception relating to disorders and disease.

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<sup>5</sup> Assisted Human Reproduction Act, 2004 S.C. ch. 2, s. 5(e), *available at* [http://laws.justice.gc.ca/en/showdoc/cs/A-13.4/bo-ga:s\\_5/20090616/en#anchorbo-ga:s\\_5](http://laws.justice.gc.ca/en/showdoc/cs/A-13.4/bo-ga:s_5/20090616/en#anchorbo-ga:s_5).

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## INDIA

### SEX SELECTION & ABORTION

#### *Executive Summary*

*Two laws that prohibit the sex selection of a fetus in India are the Medical Termination of Pregnancy Act, 1971 (MTP), as amended in 2002, and the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT), as amended in 2002. The former Act prohibits abortion except only in certain qualified situations, while the latter prohibits the sex selection of a fetus with a view towards aborting it.*

#### **Background**

The laws of India do not permit abortion. The Medical Termination of Pregnancy Act, 1971 (MTP)<sup>1</sup> Act, which prohibits abortion, was enacted with a view towards containing the size of the family. However, in some cases the desire for a small family may have outweighed the desire for a child of a specific gender, leading to abortions where the sex of the fetus was different from that desired by the family. The MTP Act stipulated that an abortion may lawfully be done in qualified circumstances. But the unscrupulous connived to misuse the law to have abortions conducted for the purpose of sex selection.

Later, innovative technologies made sex selection easier, and without the regulations to control the use of such technologies, these technologies began to be misused for sex-selective abortions. These actions necessitated enactment of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT)<sup>2</sup> in 1994. This act was amended in 2002 in an effort to close loopholes contained in the original act.

#### **MTP Act**

Under the Indian Penal Code, causing an abortion, even if caused by the pregnant woman herself, is a criminal offense, unless it is done to save the life of the woman. The offense is punishable by imprisonment for a period of three years, by fine, or by both.<sup>3</sup>

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<sup>1</sup> The Medical Termination of Pregnancy Act, No. 34 of 1971, as amended by the Medical Termination of Pregnancy Act, No. 64 of 2002.

<sup>2</sup> The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, and the Pre-natal Diagnostic Technologies (Regulation and Prevention of Misuse) Amendment Act, No. 2002, No. 14 of 2003.

<sup>3</sup> The Indian Penal Code, Act No. 45 of 1860, § 312.

The MTP Act provides for an abortion to be performed by a registered medical practitioner in a government hospital provided, in his opinion;

- continuance of the pregnancy, (which at the time must not exceed twelve weeks and);
- involves a risk to the life of the woman or a grave injury to her physical or mental health; or,
- there is a substantial risk that the child, when born, would suffer such physical or mental abnormalities as to be seriously handicapped.<sup>4</sup>

A pregnancy caused by rape is presumed to constitute a grave injury to the mental health of the pregnant woman.<sup>5</sup> The Act also allows an abortion to be performed when the pregnancy occurs due to the failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children. Where the pregnancy is more than twelve weeks but less than twenty weeks, the opinion regarding the medical necessity for an abortion in the above circumstances must be formed in good faith by two medical practitioners. When the pregnancy is less than 12 weeks, the opinion of one medical practitioner is necessary for the approval of an abortion. All abortions must be performed in a government hospital, regardless of the length of the pregnancy.

### **PNDT Act**

The PNDT Act of 1994, later amended in 2002, was enacted with the objective as stated in the preamble ;

...to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female feticide and for matters connected therewith or incidental thereto.

Thus, the PNDT Act prohibits the use of all technologies for the purpose of sex selection, which would also include the new chromosome separation techniques.

With the blanket prohibition contained in sections 3, 4 and 5 of the PNDT Act, there is effectively a ban on sex selection in India. It is not possible to use pre-natal diagnostic techniques to abort fetuses whose sex and family history indicate a high risk for certain sex-linked diseases, or to choose a fetus whose sex is less susceptible to certain sex-linked diseases. This blanket prohibition may appear to be a contradiction to the provisions of the MTP Act, which permits the abortion of a fetus that is at a risk of being born with serious physical or mental disabilities. While it is legally permissible to abort a fetus at risk of serious physical or

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<sup>4</sup> *Supra*, note 1, § 3(2)(ii).

<sup>5</sup> *Id.* § 3(2)(ii) Explanation I.

mental disabilities, it is not permissible to select a fetus of a sex which is less likely to suffer from a sex-linked disease.

The PNDT Act primarily provides for the following:

- Prohibition of sex selection, before and after conception.
- Regulation of prenatal diagnostic techniques (e.g., amniocentesis and ultrasonography) for the detection of genetic abnormalities, by restricting their use to registered institutions. The Act allows the use of these techniques only at a registered place, for a specified purpose, and by a qualified person who is registered for the purpose.
- Prevention of the misuse of such techniques for sex selection, before or after conception.
- Prohibition of the advertisement of any techniques used for sex selection as well as those used for sex determination.
- Prohibition on the sale of ultrasound machines to persons not registered under this Act.
- Punishment for violations of the Act. Violations carry a five-year jail term and a fine of approximately US \$200-\$1,000. All offenses are cognizable when police may arrest without a warrant. They are also non-bailable and non-compoundable.<sup>6</sup>

## **Conclusion**

Indian laws do not, under any circumstance, allow sex determination tests to be undertaken with the intent to terminate the life of a fetus developing in the mother's womb, unless there are other absolute indications for termination of the pregnancy as specified in the MTP Act of 1971. Any act causing the termination of the pregnancy of a normal fetus would amount to feticide, and in addition to rendering the physician criminal liable, is considered professional misconduct on his part, leading to his penal erasure.

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<sup>6</sup> *Supra*, note 3, § 27.

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### NEW ZEALAND

## SEX SELECTION & ABORTION

### *Executive Summary*

*New Zealand allows abortions only in specified circumstances, which do not expressly include sex selection. Sex selection in reproductive technology is generally prohibited, subject to an exception relating to genetic disorders and disease.*

#### **I. Abortion**

New Zealand does not allow abortion on demand. Instead, the Crimes Act prohibits abortions except in limited circumstances. These circumstances, in the case of a pregnancy of not more than twenty weeks gestation, are:

- that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl;
- that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped;
- that the pregnancy is the result of sexual intercourse between:
  - (i) a parent and child;
  - (ii) a brother and sister, whether of the whole blood or of the half blood; or,
  - (iii) a grandparent and grandchild;
- that the pregnancy is the result of sexual intercourse that constitutes an offence against [the] Act; or,
- that the woman or girl is severely subnormal.<sup>1</sup>

In order for a woman to obtain an abortion, she must obtain the approval of two physicians acting as certifying consultants, who agree that the procedure would not violate the provisions of the Crimes Act, 1961. The Crimes Act, 1961 does not provide that an abortion can be approved for the purpose of sex selection. It is possible that two certifying consultants could

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<sup>1</sup> Crimes Act, 1961, No. 43, s. 187A, as amended, available at [http://www.legislation.co.nz/act/public/1961/0043/latest/DLM329364.html?search=ts\\_act\\_abortion\\_noresel](http://www.legislation.co.nz/act/public/1961/0043/latest/DLM329364.html?search=ts_act_abortion_noresel).

approve an abortion on the grounds that forcing a woman to bear a child of an unwanted sex would pose a serious danger to her mental health, but there are no reported cases in which such a decision has been made.

Despite New Zealand's apparent prohibition on abortions for the purpose of sex selection, the impending sale of test kits in the country that reveal the gender of a fetus has raised concern in the Royal Australian and New Zealand College of Obstetricians and Gynecologists that they will lead to an increase in women seeking abortions for impermissible reasons.<sup>2</sup>

## II. Reproductive Technology

New Zealand has a separate statute dealing with reproductive technology. The Human Assisted Reproductive Technology Act provides as follows:

No person may, for reproductive purposes:

- (a) select an in vitro human embryo for implantation into a human being on the basis of the sex of the embryo; or
- (b) perform any procedure, or provide, prescribe, or administer any thing in order to ensure, or in order to increase the probability, that a human embryo will be of a particular sex.

Every person commits an offence who contravenes this section and is liable on summary conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding \$100,000, or both.

It is a defence to a charge of an offence against this section if the defendant proves that the act to which the charge relates was performed to prevent or treat a genetic disorder or disease.<sup>3</sup>

Thus, the selection of in vitro human embryos for implantation on the basis of sex, and the use of procedures to increase the probability that an embryo is of a certain sex are generally prohibited, but the law does contain an exception that allows these steps to be taken to prevent genetic disorders or disease.<sup>4</sup> Persons who violate this prohibition are liable to a fine of up to NZ\$100,000.<sup>5</sup>

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<sup>2</sup> *New Foetal Gender Test Kit Sparks Row*, FINANCIAL TIMES LTD. & NEW ZEALAND PRESS ASS'N, June 8, 2009, available at Lexis-Nexis, Newsfile.

<sup>3</sup> New Zealand, Human Assisted Reproductive Technology Act, 2004, 2004 N.Z. Stat. No. 92, § 11, available at [http://www.legislation.co.nz/act/public/2004/0092/latest/DLM319314.html?search=ts\\_act\\_reproductive+technology\\_noresel](http://www.legislation.co.nz/act/public/2004/0092/latest/DLM319314.html?search=ts_act_reproductive+technology_noresel).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* At current exchange rates, NZ\$100,000 is equivalent to about US\$64,071.

### **III. Conclusion**

New Zealand does not appear to permit abortions to be approved for the purpose of sex selection or allow sex selection reproductive technologies, except in limited circumstances designed to avoid genetic disorders and disease.

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