



ENGENDER

## ACCESS TO ABORTION: SITUATING SCOTLAND IN THE WESTERN WORLD



A woman's fundamental rights to privacy, to security of her person, to be free from cruel or unusual treatment or punishment, and the right to reproductive choice are protected by international covenants. Although these rights are guaranteed under international conventions, domestic laws vary surrounding a woman's right to reproductive choice and, more specifically, her right to make independent decisions about her reproductive health.

Though laws on access to abortion were liberalized in most western democratic countries in the 1970's, a number of countries still criminalize the practice of abortion unless specific legislated or regulatory criteria are met. Provided herein is a snapshot of western laws and practices surrounding abortion, including best practices. Countries where abortion remains illegal or where practices run counter to international human rights norms have not been included, as it remains the position of Engender that Scotland pursue a progressive approach to abortion, consistent with international conventions as well as Scotland's vision for a fairer, more gender-equal society.

To better understand existing approaches to abortion, two categories were developed. The first highlights the jurisdictions where no limitations are placed on a woman's bodily autonomy and, ultimately, a woman's right to decide her future is her own. The second category examines countries where legislation precludes a woman from making an independent decision about her reproductive health and future. Scotland currently finds itself in the latter category.

As outlined in 'Our Bodies, Our Choice: The Case for a Scottish Approach to Abortion', Engender's position remains that a women-centric approach to reproductive health should be undertaken by the Scottish government. It is our firm belief that the development and implementation of a progressive approach to abortion is within Scotland's reach; an approach which would be underpinned by the recognition that reproductive health is a woman's personal choice. Only when women in Scotland have the freedom to make independent reproductive choices will they have true control over their bodies and their futures.

# A WOMAN HAS THE RIGHT TO CHOOSE



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States which have decriminalised abortion treat the practice like any other medical procedure. By removing abortion from criminal law, there is no established set of conditions or grounds women must meet to exercise their reproductive right. Instead, abortion is viewed as a health and women's rights issue, and the practice is grounded in the belief that a woman alone has the right to choose. Countries which have adopted a progressive approach to abortion have found that respecting a woman's choice to make autonomous decisions over her reproductive health leads to positive outcomes for women and their rights, their futures, and the societies in which they live.

## AUSTRALIAN CAPITAL TERRITORY, AUSTRALIA

Abortion law varies by jurisdiction in Australia, as each state and territory is responsible for its own criminal law.

In 2002, the Australian Capital Territory (ACT) became the first Australian jurisdiction to remove abortion from criminal statute. The success of the decriminalisation of abortion was due to a member of the ACT Legislative Assembly, Mr. Wayne Berry, campaigning for a decade for a woman's right to choose. At the time the Bill was introduced, Mr. Berry stood in the Legislative Assembly and stated:

*It is a woman's right to choose whether she has an abortion and most in the community accept this position. Ineffective and outdated law is bad law and should be ditched. Society has moved a long way...and it is time that we brought our laws into line with community attitudes on this issue.*

*Many would wish that the issue were not debated, that it would simply go away. For too long many have said that it should not be debated. Unfortunately, the large majority of those have been men. It is no good wishing that the issue will go away because it will not. We as legislators have to accept that it is our responsibility to make good law and not to sit idly by and ignore bad law because it is controversial...It is time to send the message that we have a responsibility to move in line with community attitudes.<sup>1</sup>*

Shortly after the Bill was passed, the Australian Survey of Social Attitudes found that 81 per cent of those surveyed believed that abortion was a woman's choice.<sup>2</sup>

Since 2002, abortion is a regulated health service in the Australian Capital Territory, meaning the procedure must be performed by a registered medical practitioner. No

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<sup>1</sup> Australian Capital Territory. Legislative Assembly. *Debates*. December 12, 2002. Available from: <http://www.hansard.act.gov.au/hansard/2002/week01/114.htm>

<sup>2</sup> Children by Choice. 2016. *Attitudes to Abortion*. Available from: <https://www.childrenbychoice.org.au/factsandfigures/attitudestoabortion>

other restrictions exist regarding when and in what circumstances an abortion may be carried out.

Data on abortion is not provided herein, as there is no standardised national data collection on abortion in Australia.

## CANADA

Since 1988, there has been no criminal law in Canada regarding abortion. Abortion is treated like any other medical procedure.

Criminal law on abortion was found by Canada's highest court to violate a woman's right to security of the person, her right to liberty as well as her right to freedom of conscience. Specifically, the Supreme Court of Canada ruled:

*The right to 'liberty' [...] guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them. A woman's decision to terminate her pregnancy falls within this class of protected decisions [...]*<sup>3</sup>

*Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person.*

The decriminalisation of abortion in Canada has resulted in the following:

- Abortion is funded and better integrated into the health care system;
- Complications related the procedure are very low and, when they do occur, minor;
- Abortion rates have steadily declined and remain low compared to the rest of the world. Further, 90 per cent of abortions are carried out in the first 12 weeks;<sup>4</sup>
- Further legal precedents have advanced women's equality and reproductive rights; and<sup>5</sup>
- Public support for abortion has increased. In 2014, an independent poll found that 59 per cent of respondents supported Canada's decriminalisation of abortion.<sup>6</sup> This is an increase from 49 per cent in 2012 and 36 per cent in the mid-1990's.<sup>7</sup>

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<sup>3</sup> R v. Morgentaler [1988] S.C.R. 30

<sup>4</sup> Abortion Rights Coalition of Canada. 2016. 'Statistics – Abortion in Canada'. Available from: <http://www.arcc-cdac.ca/backgrounders/statistics-abortion-in-canada.pdf>

<sup>5</sup> Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753

<sup>6</sup> Angus Reid Global. 2014. 'Canadians express little desire to re-introduce abortion laws in their country'. Available from: <http://angusreidglobal.com/wp-content/uploads/2014/07/ARG-Abortion-2014.pdf>

<sup>7</sup> Kennedy, M. 2012. 'New poll shows most Canadians support abortion – with some restrictions'. Available from: <http://news.nationalpost.com/news/canada/new-poll-shows-most-canadians-support-abortion-with-some-restrictions>

Canada remains committed to women's rights surrounding reproductive choice. During the federal election campaign in 2015, the future Prime Minister of Canada, Justin Trudeau, stated 'The days when old men get to decide what a woman does with her body are long gone. Times have changed for the better'.<sup>8</sup>

## VICTORIA, AUSTRALIA

In Victoria, the Abortion Law Reform Act of 2008 provided authority for medical practitioners to perform an abortion up to 24 weeks. The law also abolished common-law offences related to abortion.

The Bill was hotly debated within Victoria's Parliament. Nearly 80 per cent of women parliamentarians voted in favour of the reforms, compared to 53 per cent of male parliamentarians.<sup>9</sup> One parliamentarian, Mr. Martin Pakula, who voted to pass the progressive reforms, explained his support as follows:

*I consider abortion to be a topic which morally is very problematic. It is something that I find entirely unappealing on a personal level [...] I have never been in a position where abortion has been an option, a reality or a consideration in my life. If I were to be honest, I would say that if I had been in that position, I suspect I would have opposed my wife having an abortion. Having said that, I also recognise that it would not have been up to me. It would have been a matter on which my wife would have made a decision.*

*Even though [...] I am exercising my conscience [...] [d]o I as a legislator, as a member of Parliament, believe I have the right to tell every woman in Victoria whether she has the right to make this decision for herself. I do not believe I do, and I do not believe we as a Parliament do.<sup>10</sup>*

Following 24 weeks, an abortion in Victoria, Australia may be performed if two medical practitioners believe the abortion is appropriate in the circumstances, meaning the two medical practitioners must consider all relevant medical information as well as the woman's current and future physical, psychological and social circumstances.

It is a criminal offence in Victoria, Australia for an unlicensed medical practitioner to perform an abortion.

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<sup>8</sup> Cullen, C. 2015. 'Justin Trudeau hits back at 'old men' over abortion stance criticism'. Available from: <http://www.cbc.ca/news/politics/justin-trudeau-hits-back-at-old-men-over-abortion-stance-criticism-1.2770351>

<sup>9</sup> Morgan, J. 2012. 'Abortion Law Reform: The Importance of Democratic Change'. The University of New South Wales Journal, 35:1, 142-174.

<sup>10</sup> Victoria. Parliament. *Debates*. October 7, 2008.

# A WOMAN'S CHOICE IS CONTROLLED BY THE STATE



# A WOMAN'S CHOICE IS CONTROLLED BY THE STATE

Some countries have taken a different approach, strictly regulating access to abortion. In these countries, a woman's right to reproductive choice is subject to a list of grounds and/or conditions that must be met before an abortion may be performed, including that her decision must first be authorized by medical practitioners.

The common theme within the countries listed below is that a woman's choice surrounding her reproductive health, and ultimately her future, is not her own.

## DENMARK

Abortion in Denmark has been legal since 1973 and is regulated under Denmark's Health Act. A woman is able to request an abortion up to 12 weeks. Women under the age of 18 require parental or guardian consent, though the Danish Council for Abortion and Sterilization may rule that legal guardian approval is not required.

A woman requesting an abortion must be provided with medical information as well as counselling before and after the procedure.

An abortion must be performed by a physician in a state or community hospital or in a clinic attached to a hospital.

After 12 weeks, an abortion may be carried out in certain circumstances, including:

1. The woman was sexually assaulted;
2. There is a great risk that the foetus, if born, will suffer from a serious disease;
3. The pregnancy, delivery, or post-delivery care would cause risk to the woman's health as a result of a physical or psychological illness;
4. As a result of physical or psychological illness, the woman would be unable to provide the required care;
5. Generally, the woman would be unable to provide adequate care; or
6. The pregnancy, delivery, or post-delivery care would cause a serious burden to the woman and it is her interests that the abortion be performed. Consideration for this ground includes the woman's age, employment, and personal and financial circumstances.

An abortion after 12 weeks may only be carried out if approved by a committee, including at least two doctors and one individual from the local municipality.

An abortion may be performed at any time if there is a threat to the life or health of the woman.

The Danish government subsidizes the cost of an abortion. Since the 1980's, Denmark has provided non-residents with access to abortion if the woman is over the age of 18.

## FINLAND

Abortion in Finland is regulated by the Act on Termination of Pregnancy.

As per the law, an abortion may be carried out in the following circumstances:

1. The pregnancy or delivery would threaten the woman's life or health;
2. The delivery or post-delivery care would cause the woman considerable burden;
3. The pregnancy is the result of criminal acts (e.g., sexual assault or incest);
4. The woman is younger than 17, or is older than 40 and has already given birth to four children;
5. There are foetal abnormalities; or
6. Either the woman or the man has an illness that seriously limits his or her capacity to provide post-delivery care.

An abortion may be carried out in the first 12 weeks. The procedure requires the consent of two medical practitioners.

An abortion may be obtained after 12 weeks if approved by Finland's National Supervisory Authority for Welfare and Health. In these cases, a special permit is required.

An abortion may also be carried out up to 24 weeks if a major foetal abnormality is detected.

A person in violation of the legislation may be fined.

## FRANCE

French law provides that an abortion is legal up to 12 weeks. A woman is required to meet twice with a doctor or a midwife before the procedure takes place. During the second consultation, a woman is required to make her request for the procedure in writing.

Abortions in France must be performed by a medical practitioner. At the time of



meeting a medical practitioner, a woman must be informed of risks and potential side-effects. French law further provides that a woman be offered consultation with a marriage counsellor, family planning counsellor or social services both before and after the abortion. An adult woman may decline these services. A minor is obligated to accept counselling.

After 12 weeks, French law only permits an abortion if two medical practitioners confirm one of the following:

1. Continuing with the pregnancy would seriously endanger the woman's health; or
2. There are foetal abnormalities.

Women are required to pay the up-front cost of the medical procedure, but the fee is reimbursed by the national health insurance.

## GERMANY

The German Penal Code provides that abortion is unlawful, but permitted on demand under certain conditions and grounds.

An abortion may be performed by a medical practitioner at the request of a woman if the following conditions are met:

1. No more than 12 weeks have elapsed since conception; and
2. The woman presents a certificate indicating that she obtained counselling at least three days before the procedure.

An abortion may also be performed in the following circumstances:

1. Up to 22 weeks if the woman has had counselling and a court order discharges the medical practitioner who terminates the pregnancy on the grounds that the woman was in exceptional distress at the time of the procedure; or
2. There is a risk to the life or physical or mental health of the woman.

In addition to these conditions, an abortion may be carried out on criminal grounds, meaning the pregnancy was caused by a criminal act (e.g., sexual assault). Again, the abortion must be performed before 12 weeks.

In all cases, save for emergencies, a medical practitioner must verify that the grounds exist to perform the abortion. He/she must then provide a medical certificate stating as much. The certifying medical practitioner is not permitted to perform the procedure.

The cost of an abortion is only covered by national health insurance for women with lower incomes.

## GREAT BRITAIN

The Abortion Act 1967 sets out the legislative framework for abortion. As per the Act, an abortion may be carried out up to 24 weeks, except in circumstances where continuing the pregnancy would endanger the life or health of the woman or where there is a serious foetal abnormality.

As per law, a woman may only proceed with an abortion subject to the authorization of the procedure by two doctors. Without the permission of two doctors, abortion is illegal and both women and medical practitioners are subject to prosecution under the Abortion Act 1967.

An abortion must be carried out in a hospital or approved health facility.

In practice, women in Scotland regularly travel outside of Scotland for later-term abortions, as abortion for non-medical reasons is not normally provided after 18-20 weeks. Further information on the reproductive health and rights of women in Scotland can be found in 'Our Bodies, Our Choice: The Case for a Scottish Approach to Abortion'.

## NEW ZEALAND

Abortion is regulated by two pieces of legislation:

1. The Contraception, Sterilisation, and Abortion Act 1977; and
2. The Crimes Act 1961.

The former sets out the procedures a woman must follow to seek an abortion, whereas the Crimes Act 1961 lists the grounds on which an abortion may be sought. Grounds include:

1. Continuing with the pregnancy would result in serious danger to the life, physical or mental health of the woman;
2. There are foetal abnormalities; or
3. The pregnancy is the result of incest or sexual assault.

To seek an abortion, a woman must first meet with her doctor, who provides the woman with a referral to a licensed clinic (if under 12 weeks) or to a licensed hospital (if over 12 weeks). A woman must then obtain the approval of two medical practitioners. A certificate must be issued to perform an abortion.

After 20 weeks, an abortion may only be performed if there is a threat to the woman's life.

In New Zealand, there is no legal age for seeking an abortion.

## NETHERLANDS

In the Netherlands, abortion is regulated by the Termination of Pregnancy Act. The law does not provide any gestational limit, but is 22 weeks in practice. There are limits, however, on the period of time that must elapse between a woman making a request to a medical practitioner for an abortion and the medical procedure itself: 'not earlier than the sixth day after the woman has consulted the physician and on that occasion discussed her intention with him'<sup>11</sup>.

In addition to consulting a medical practitioner and waiting an allotted period of time, a woman must also be advised by the medical practitioner performing the procedure of the different options available to her. The medical practitioner must also inform the woman of the medical risks associated with the procedure.

Since November 1984, women in the Netherlands have been able to obtain abortions under the government sponsored national health insurance system. Non-residents are not prohibited from having an abortion in the Netherlands, but are required to pay for the procedure.

Most recently, the Dutch government announced its intention to develop an international abortion fund to support and promote women's reproductive rights.<sup>12</sup> This announcement was made following the United States' decision to withdraw international funding for reproductive health care.

## NORWAY

Norway's abortion law, enacted in 1978, provides that an abortion is available to a woman, on request, during the first 12 weeks. The procedure must be performed by a physician, and is fully funded.

An abortion after 12 weeks requires the approval of two physicians. In these circumstances, abortions may be approved after consideration of the following:

1. Consideration of the woman's health and/or social situation;
2. Risk to the foetus of severe medical complications; or
3. The woman has become pregnant while under age or after sexual assault.

After 18 weeks, an abortion is carried out in exceptional circumstances only and must be performed in a hospital. However, if there is a threat to the life and health of the woman, an abortion can be performed at any time.

A woman seeking an abortion must be informed of the medical risks and social supports available to her.

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<sup>11</sup> Netherlands. 2016. Termination of Pregnancy Act. Available from: <https://www.hsph.harvard.edu/population/abortion/NETHERLANDS.abo.htm>

<sup>12</sup> BBC News. 2017. 'Netherlands government to counter Trump abortion funding ban'. Available from: <http://www.bbc.co.uk/news/uk-38747646>

Abortions in Norway are available to non-residents.

Any person performing or aiding the performance of an abortion in contravention of Norway's abortion law may be penalized with a fine or three months imprisonment.

## SWEDEN

Abortion is regulated by the Abortion Act. The procedure is provided, on request, up to 18 weeks, subject to the procedure not endangering the life or health of the woman.

After 18 weeks, women seeking an abortion must first gain permission from the National Board of Health and Welfare (the Board). Special reasons must be justified to the Board, whose decision may not be appealed. Special reasons may include that continuing with the pregnancy would have an adverse impact on the woman's physical and psychological health.

In cases where there is a serious threat to the life or health of the woman, an abortion may be authorized at any time during pregnancy. If, however, the threat is so grave that the Board's authorization cannot be obtained in time, an abortion may be carried out without the Board's approval.

All abortions must be performed by a licensed medical practitioner. The cost of the procedure is covered by the government.

The Abortion Act was amended in 2008 to provide that non-residents may seek abortions in Sweden.

The performance of abortions by non-licensed medical practitioners is a criminal offence. Punishments range from a fine to imprisonment. A licensed medical practitioner who violates any provisions in the Abortion Act may face a fine or up to six months of imprisonment.

## SWITZERLAND

Switzerland's abortion law dates to 1937. Abortion is available, on request, during the first 12 weeks of gestation.

To seek an abortion, a woman is required to file a written request. A medical practitioner must then discuss the decision with the woman and provide her with information on counselling services.

The law provides an exemption whereby an abortion may be carried out at any time to prevent serious physical injury or serious psychological distress to the woman.

Abortion is covered under health insurance.

# A WAY FORWARD

Access to safe, legal abortion is a fundamental element of a woman's right to bodily autonomy and reproductive choice and health. Autonomous decision-making on reproductive health provides women with control over their own bodies and their futures. The devolution of abortion law to the Scottish Parliament represents an opportunity to develop a progressive framework which puts women, their rights, and their wellbeing first.

## **We are calling on the Scottish Government to:**

### **Women's rights**

1. Enshrine women's reproductive rights to safe abortion, access to appropriate services and bodily autonomy in a Scottish approach to abortion care
2. Explore the decriminalisation of abortion and removal of the requirement for the 'two doctors rule' in Scotland to ensure women's legal right to choose
3. Protect women's right to service provision against the 'conscientious objection' of auxiliary staff to supporting abortion care
4. Support women's rights to reproductive healthcare by waiving fees for women from Northern Ireland accessing abortion in Scotland

### **Services**

5. Establish a national framework to standardise access to abortion in Scotland, including the regional variations in gestational time limits
6. Develop capacity to perform non-medical abortions up to the legal 24 week gestational threshold in Scotland
7. Strengthen sexual health service standards to ensure that women presenting for abortion receive accurate advice and adequate support from all healthcare workers

### **Medical advances**

8. Regulate over the provision of medical abortion drugs to allow home terminations
9. Work towards removing restrictions that block use of advances in contraception as a component of women's right to reproductive healthcare
10. Develop nurse and midwife-led services that are able to provide manual vacuum aspiration and medical abortions

### **Equality of access**

11. Mandate intersectional data collection on women presenting for and proceeding to abortion, whilst protecting anonymity with regards to public release
12. Ensure that abortion care meets the needs of disabled women, ME women, refugee women and LGBTI people, and explore the introduction of specialist services
13. Ensure that no woman is unable to access abortion due to lack of financial support
14. Encourage schools to strengthen education on reproductive rights and healthy relationships within SRE as part of a wider commitment to tackling abortion stigma in Scotland



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