



**Australian Government**  
**Department of Health and Ageing**

**SECRETARY**

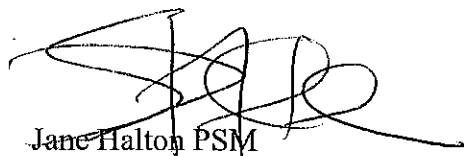
Ms Christine McDonald  
The Secretary  
Senate Finance and Public Administration Standing Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms McDonald

I refer to your email of 19 September 2008 inviting a written submission to the Senate Finance and Public Administration Standing Committee for the inquiry into Medicare item 16525 in Part 3 of Schedule 1 to the *Health Insurance (General Medical Services Table) Regulations 2007*.

The attached submission, addressing the terms of reference of the inquiry, is provided to assist the Senate Committee in its deliberations.

Yours sincerely



Jane Halton PSM  
Secretary

5 October 2008

**Submission to the Senate Finance and Public Administration Standing  
Committee from the Department of Health and Ageing**

Inquiry into item 16525 in Part 3 of Schedule 1 to the *Health Insurance (General Medical Services Table) Regulations 2007*

***Terms of Reference***

On 16 September 2008 the Senate referred the following matter to the Finance and Public Administration Committee for inquiry and report on and not before 13 November 2008:

***(a) the terms of item 16525 of Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007;***

Item 16525 - Management of second trimester labour, with or without induction, for intrauterine fetal death, gross fetal abnormality or life threatening maternal disease, not being a service to which item 35643 applies (Anaes.)

***(b) the number of services receiving payments under this item and the cost of these payments;***

Medicare statistics for 2<sup>nd</sup> trimester management of labour MBS item 16525 - January 1994 to 31 August 2008 (calendar years)

Item/Year		Total	Total
		Benefit (\$)	Services
16525	1994	145,786	936
	1995	168,248	1,019
	1996	113,768	697
	1997	105,366	647
	1998	100,349	605
	1999	102,443	609
	2000	111,719	655
	2001	122,986	714
	2002	109,435	624
	2003	117,942	656
	2004	126,418	683
	2005	148,291	770
	2006	150,583	777
	2007	157,250	790
	2008	113,132	540
<b>Total</b>		<b>1,893,716</b>	<b>10,722</b>

Please note that the services to which item 16525 relates includes both spontaneous abortions (miscarriages) and medical or induced abortions (terminations). It is thus not possible to determine how many services receiving payment under this item were the result of either a spontaneous or induced procedure.

***(c) the basis upon which payments of benefits are made under this item;***

Subsection 10(1) of the *Health Insurance Act 1973* (the HI Act) sets out the circumstances in which Medicare Benefit is payable, and relevantly provides as follows:

*Where, on or after 1 February 1984, medical expenses are incurred in respect of a professional service rendered in Australia to an eligible person, medicare benefit calculated in accordance with subsection (2) is payable, subject to and in accordance with this Act, in respect of that professional service.*

The term 'professional service' is relevantly defined in subsection 3(1) of the HI Act as meaning, "a service (other than a diagnostic imaging service) to which an item relates, being a clinically relevant service that is rendered by or on behalf of a medical practitioner".

A 'clinically relevant service' is relevantly defined in subsection 3(1) of the HI Act as a service rendered by a medical practitioner that is generally accepted in the medical profession as being necessary for the appropriate treatment of the patient to whom it is rendered.

The HI Act confers on the Governor-General the power to make regulations prescribing matters necessary or convenient to be prescribed for the carrying out or giving effect to that Act. The Regulations, made under section 4(1) of the HI Act, give effect to the HI Act. The Regulations are a legislative instrument (see section 6(a) of the *Legislative Instruments Act 2003*). As no contrary intention is indicated in the HI Act, the *Acts Interpretation Act 1901* applies to the Regulations as if they were an Act.

Medicare benefits are payable under item 16525 (management of second trimester labour) when performed in accordance with the item descriptor under the *Health Insurance (General Medical Services Table) Regulations* (GMST) (set out in Part 3 of Schedule 1 as per (a) above).

The second trimester is generally considered to range between 13 and 26 weeks gestation. A Medicare rebate is not available for second trimester labour outside the restrictions of this item. The item restrictions include intrauterine fetal death, gross fetal abnormality or life threatening maternal disease. It is a matter for the doctor's clinical judgment as to whether a patient's condition meets these second trimester requirements. There is no Medicare item for terminations in the third trimester.

Lawful termination of a pregnancy is regulated by the States and Territories. Legislative provisions and judicial considerations on the lawfulness of abortion in the States and Territories is provided in Attachment A.

For a termination to be funded through Medicare it needs to be provided in accordance with State and Territory law. Section 2 of the GMST states that an item in Part 3 does not apply to a service provided in contravention of a law of the Commonwealth or of a State or Territory.

***(d) the effects of disallowing this item.***

If item 16525 were disallowed, Medicare benefits for the management of second trimester labour, regardless of circumstance, would cease to be payable. There would be occasions where such a service would be both legal, according to the relevant state and territory law, and considered medically necessary by the woman and her doctor. If, in those circumstances, the woman sought the service, and the doctor imposed a charge, then the woman would be very likely to face higher costs than would otherwise have been the case if a Medicare benefit were payable.

If item 16525 were disallowed private health insurers would not be obligated to pay benefits to their members for this service. Health insurers can pay benefits for a wide range of health care services that are not covered under Medicare but this would be a decision for the individual fund.

If a woman was faced with higher charges, it would have some disincentive effect on the woman's decision as to whether or not to proceed with the service. To the extent it might thus cause women to defer or avoid a service considered medically necessary, it would be likely to result in negative health consequences for those women.

Examples of some life threatening maternal conditions that may occur include premature rupture of the membranes with infection, severe antepartum haemorrhage, severe pre-eclampsia, pulmonary hypertension and cyanotic heart disease.

**LEGISLATIVE PROVISIONS (STATE LAWS) & JUDICIAL CONSIDERATION  
(CASE LAW) OF THE LAWFULNESS OF ABORTION IN THE DIFFERENT STAGES  
OF PREGNANCY**

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**LEGISLATIVE PROVISIONS (STATE LAWS) & JUDICIAL CONSIDERATION (CASE LAW) OF THE LAWFULNESS OF ABORTION IN THE DIFFERENT STAGES OF PREGNANCY**

<b>State/territory</b>	
<b>ACT</b>	<p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation: <i>Health Act 1993</i></b></p> <p>The <i>Health Act 1993</i> defines abortion as ‘causing a woman’s miscarriage by: administering a drug; or using an instrument; or any other means’ (s80).</p> <p>Only a doctor may carry out an abortion (s81). A person must not carry out an abortion except in a medical facility, or part of a medical facility (s82). No person is under a duty to perform an abortion. People are also entitled to refuse to assist in carrying out the procedure (s84). A woman seeking or receiving an abortion faces no legal sanction.</p> <p><b>The relevant provisions of the <i>Health Act 1993</i> do not differentiate between different stages of pregnancy.</b></p> <p><b>Judicial consideration (case law)</b></p> <p>No relevant case law identified.</p>
<b>NSW</b>	<p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation: <i>Crimes Act 1900</i></b></p> <p>Under s82 and 83 of the <i>Crimes Act 1900</i> it is a crime to unlawfully administer drugs or noxious thing or unlawfully use any instrument or other means with intent to procure a miscarriage.</p> <p><b>The relevant provisions of the <i>Crimes Act 1900</i> do not differentiate between different stages of pregnancy.</b></p>

The *Crimes Act 1900* does not define when an abortion will be 'unlawful'. This means that the scope of lawful abortion is to be found in case law.

**Judicial consideration (case law)**

**R v Wald (1971) 3 NSWDCR 25**

**The lawfulness of termination at a particular stage of pregnancy was not at issue in this case.**

This case established the basic test for when an abortion would be considered unlawful:

- "... for the operation to have been lawful in this case the accused must have 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, which the continuance of pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted." (at 29)
- 'in my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health.' (at 29)

**Ces and Anor v Superclinics (Australia) Pty Limited and Others Nos. Ca 40266/94 [1995] NSWSC 103 – 3 judges Kirby P, Priestly J and Meagher J.**

**The lawfulness of termination at a particular stage of pregnancy was not an issue in this case.**

This case was a civil claim for 'wrongful birth'. The plaintiff had repeatedly visited the defendant but had failed to have her pregnancy diagnosed until she was 19.5 weeks pregnant, when she was informed that it was too late to have the pregnancy terminated safely. The plaintiff claimed injury consisting of the loss of opportunity to terminate the pregnancy.



<p>It had been alleged that there was no loss of opportunity as the plaintiff could not have lawfully obtained an abortion at an earlier stage. However, it was held by all 3 judges that there was no evidence that a termination would in all circumstances have been unlawful and the test in <i>R v Wald</i> was approved.</p> <p><b>R v Sood [2006] NSWSC 1141 (31 October 2006) - single judge Simpson J</b>  <b>The lawfulness of termination at a particular stage of pregnancy was not at issue in this case.</b></p> <p>This case involved the administration of an abortifacient to a woman who was 23-24 weeks pregnant.</p> <p>It was stated that the requirement of the law is that medical practitioners assess and balance the relative dangers of termination against the dangers of non-termination... the focal point of the inquiry is the prediction of harm to the health (physical or mental) of the woman if termination is not performed. This is broad enough to include economic, social or medical factors, including matters that can arise after the birth of the child (at 22).</p> <p>In obiter it was found that it would have been open to the accused (had she turned her mind to it) to hold the necessary belief that the abortion was necessary. The judge stated that '[the mother] would then have been left, at a very young age, with a newborn baby, without immediate parental support, with inadequate financial resources, and in a failing (or failed) relationship. It may well have been concluded that [the mother's] physical and/or mental health would have been put at risk by the continuation of the pregnancy.' (at 24).</p>	<p><b>VIC</b></p> <p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation: <i>Crimes Act 1958</i></b></p> <p>Under s65 of the <i>Crimes Act 1958</i> it is a crime to administer poisons or other noxious thing or unlawfully use any instrument or other means with intent to procure an abortion.</p> <p>Section 10 contains a separate offence of 'child destruction' which relates to the destroying the life of a child capable of being born alive. There is a rebuttable presumption that a woman pregnant for a period of at least 28 weeks is pregnant with a child capable of being born alive.</p>
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	<p><b>The relevant provisions of the <i>Crimes Act 1958</i> do not differentiate between different stages of pregnancy.</b></p> <p>The <i>Crimes Act 1958</i> does not define when an abortion will be 'unlawful'. This means that the scope of lawful abortion is to be found in case law.</p> <p><b>Judicial consideration (case law)</b></p> <p><b>R v Davidson [1969] VR 667 – single judge Menhennitt J</b>  <b>The lawfulness of termination at a particular stage of pregnancy was not at issue in this case.</b></p> <p>This case sets out one of the earliest statements of the judicial law on the lawfulness of abortion. It was held that:</p> <ul style="list-style-type: none"> <li>• ‘The principle of necessity imported by the use of the word “unlawful” in s65 of the <i>Crimes Act 1958</i>, in my view imports, the two elements of necessity and proportion.’ (at 671). Both limbs were held to involve <b>subjective</b> tests, subject to the beliefs being held on reasonable grounds (at 672).</li> <li>• ‘For [abortion] to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.’ (at 672).</li> </ul>
<p><b>WA</b></p>	<p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation: <i>Criminal Code Act, Compilation Act 1913 &amp; Health Act 1911</i></b></p> <p>Abortion is a criminal offence in WA unless:</p> <ul style="list-style-type: none"> <li>• the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and</li> <li>• the performance of the abortion is justified under section 334 of the <i>Health Act 1911</i> (see s199 <i>Criminal Code Act</i>)</li> </ul>

*Compilation Act 1913 (the Criminal Code Act)).*

Section 334 of the *Health Act 1911* sets out the circumstances in which the performance of an abortion is justified for the purposes of section 199 of the Criminal Code Act. **Different rules apply to different gestation periods:**

- It is lawful for a medical practitioner to perform an abortion up to 20 weeks gestation in the following circumstances:
  - the woman has given informed consent; or
  - the woman will suffer serious personal, family or social consequences if the abortion is not performed; or
  - serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed; or
  - the pregnancy is causing serious danger to the woman's physical or mental health (see s334(3)).
  
- Terminations after 20 weeks are only justifiable if:
  - the termination is performed in an approved facility; and
  - two medical practitioners have agreed that the mother, or the unborn child, has a severe medical condition that, in the clinical judgment of those two medical practitioners, justifies the procedure. The two medical practitioners must be members of a Ministerially appointed panel (s334(7)(a) *Health Act 1911*). Once a decision has been reached by the Ministerially appointed practitioners, then that decision is final. The *Health Act 1911* does not allow for appeal rights in relation to post 20-week terminations.

The '*Report to the Minister for Health on the Review of the provisions of the Health Act 1911 and the Criminal Code relating to abortion as introduced by the Acts Amendment (Abortion) Act 1998*' (Report dated 17 June 2002) contains additional information on 'the law in relation to post 20-week abortions' and 'applications for terminating a post 20-week pregnancy'.

The NSW Parliamentary Library Research Services paper '*Abortion and the law in NSW*' (Talina Drabsch, Briefing Paper No 9/05, August 2005) provides (at p33) background information concerning the insertion of section 334 into the *Health Act 1911*.

	<p><b>Judicial consideration (case law)</b></p> <p>No relevant case law identified.</p>
<p>TAS</p>	<p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation: <i>Criminal Code Act 1924</i></b></p> <p>Under the <i>Criminal Code Act 1924</i> it is an offence to unlawfully terminate a pregnancy or for a woman to terminate her own pregnancy (s134, s135). The <i>Criminal Code Act 1924</i> also contains an offence of causing the death of a child before birth (s165). The offence occurs when a person 'causes the death of a child which has not become a human being in such a manner that he would have been guilty of murder if such a child had been born alive'. There is a statutory exception that applies when the death is caused by actions taken in good faith to preserve the mother's life before or during childbirth.</p> <p>Section 164 of the <i>Criminal Code Act 1924</i> outlines the circumstances in which a medical termination would be lawful. The termination of a pregnancy is legally justified if two medical practitioners certify that continuation of the pregnancy would involve greater risk of injury to the woman's physical or mental health than if the pregnancy were terminated, and if the woman gives informed consent (unless it is impracticable for her to do so).</p> <p><b>Section 164 of the <i>Criminal Code Act 1924</i> does not differentiate between different stages of pregnancy.</b></p> <p>The NSW Parliamentary Library Research Services paper '<i>Abortion and the law in NSW</i>' (Talina Drabsch, Briefing Paper No 9/05, August 2005) provides (at pp 30) background information to the insertion of section 164 into the <i>Criminal Code Act 1924</i>.</p> <p><b>Judicial consideration (case law)</b></p> <p>No relevant case law identified.</p>

QLD	<p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation:</b> <i>Criminal Code 1899</i></p> <p>Under the <i>Criminal Code 1899</i> it is a crime to unlawfully administer or cause to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever with intent to procure an abortion.</p> <p>Under s313 of the <i>Criminal Code 1899</i> it is a crime to prevent a child being born alive to a woman ‘about to be delivered of a child’, but no specific meaning is given to this phrase.</p> <p><b>The relevant provisions of the <i>Criminal Code 1899</i> do not differentiate between different stages of pregnancy.</b></p> <p>The <i>Criminal Code 1899</i> does not define when an abortion will be ‘unlawful’. This means that the scope of lawful abortion is to be found in case law.</p> <p><b>Judicial consideration (case law)</b></p> <p><b>Veivers v Connolly [1995] 2 Qd R 326 – single judge de Jersey J.</b></p> <p><b>The lawfulness of termination at a particular stage of pregnancy was not at issue.</b></p> <p>It was held that the phrase ‘for the preservation of the mother’s life’ in s282 of the <i>Criminal Code 1899</i> allows abortions to be performed in situations where there is serious danger to the woman’s mental health and that this danger could arise after the birth (at 329).</p>
NT	<p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation:</b> <i>Criminal Code Act &amp; Medical Services Act</i></p> <p>The circumstances in which an abortion is lawful are set out in the <i>Medical Services Act</i>. Abortions performed outside the</p>

<p>provisions of the <i>Medical Services Act</i> are a criminal offence (the offences of abortion and of supplying things for the purpose of procuring an abortion are set out in the <i>Criminal Code Act</i> (see ss208A, 208B and 208C)).</p> <p>The <i>Medical Services Act</i> provides that therapeutic abortion is lawful in some circumstances. <b>Different rules apply to different gestation periods:</b></p> <ul style="list-style-type: none"> <li>• Abortion is permissible up to 14 weeks gestation if two medical practitioners believe that continuing with the pregnancy would cause greater harm to a woman's mental or physical health than abortion, or if the child would be 'seriously handicapped because of physical or mental abnormalities' (see s11(1)). These terms are not defined.</li> <li>• If the pregnancy is between 14-23 weeks, the abortion may be performed if a qualified medical practitioner is of the opinion that the procedure is necessary to prevent grave injury to the woman's physical or mental health</li> <li>• Abortion is lawful up to 23 weeks gestation if a medical practitioner believes that it is immediately necessary to prevent serious harm to a woman's physical or mental health (see s11(3)).</li> </ul> <p><b>Abortion is also lawful at any time</b> if a medical practitioner believes that it should be performed for the sole purpose of preserving a woman's life (see s11(4)).</p> <p><b>Judicial consideration (case law)</b></p> <p>No relevant case law identified.</p>	<p><b>SA</b></p> <p><b>Legislative provisions relating to abortion in different stages of pregnancy</b></p> <p><b>Relevant legislation: <i>Criminal Law Consolidation Act 1935</i></b></p> <p>Under s81 of the <i>Criminal Law Consolidation Act 1935</i> it is an offence to unlawfully administer a poison or other noxious thing or unlawfully use any instrument or other means with the intent to procure a miscarriage.</p> <p><b>The relevant provision of <i>Criminal Law Consolidation Act 1935</i> do differentiate between different stages of pregnancy:</b></p>
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	<p>A statutory defence to the crime of abortion is found at s82A which sets out the requirements for a legal 'medical termination of pregnancy'. Section 82A(1) of the <i>Criminal Law Consolidation Act 1935</i>, which makes abortion lawful in certain situations where two medical practitioners have formed the opinion that</p> <ul style="list-style-type: none"> <li>• Continuing the pregnancy would involve greater risk to the physical or mental health of the woman, or involve greater risk to the life of the woman than termination; or</li> <li>• There is a substantial risk that the child, if born, would suffer from such a physical or mental abnormality as to be seriously handicapped.</li> </ul> <p>Under s82(7), the statutory defence is not available in cases where the child is capable of being born alive unless the act which caused the death of the child is done in good faith for the sole purpose of preserving the life of the mother. There is a rebuttable presumption that a pregnancy of 28 or more weeks results in a child capable of being born alive.</p> <p>The <i>Criminal Law Consolidation Act 1935</i> does not define when an abortion will be 'unlawful'</p>
	<p><b>Judicial consideration (case law)</b></p> <p>No relevant case law identified.</p>