

SECTION 259

Present Form -

This provision relieves of criminal responsibility, any person who performs in good faith and with reasonable care and skill a surgical operation upon another for his benefit, or upon an unborn child for the preservation of the mother's life, provided, having regard to all the circumstances, it was reasonable to perform the operation.

The provision is limited in that it applies only to surgical operations, and does not apply to other forms of medical treatment. Also, it is limited, and rightly in my view limited, to relieving the individual concerned from criminal

responsibility. The provision as currently framed, does not affect the position in relation to any civil liability which might arise for damages. It applies to persons other than legally qualified medical practitioners, and consistently with its general format contains a very limited protection in relation to operations performed to secure an abortion for the preservation of the mother's life.

This aspect of the Section is one upon which I have commented in my recommendations concerning Section 199, wherein I suggested the deletion of provisions relating to criminal responsibility for what are commonly called therapeutic abortions from Section 259 and their insertion in Section 199 so that that provision would function as a Code in itself in relation to such matters.

Other difficulties which the Section has caused lie in relation to the limited nature of the protection it offers to surgical operations only and not to other forms of medical treatment. I can see no good policy reason why the protection afforded by the Section should be so limited, and the exact meaning of the phrase "surgical operation" is perhaps in any event open to dispute.

If one considers its operation in relation to the vexed question of blood transfusions for members of religious sects who object to such conduct, then the question would be whether the insertion of the needle, through which the transfusion was to be made into the vein of the patient was of itself a surgical operation. For myself, I would not have thought so. Of course that question is one which is dealt with in a limited way in the Health Act, 1911 - 78 Section 338A. That provision gives a power for a medical practitioner to perform a blood transfusion upon a child without the authority of the child's parent or guardian in cases of medical necessity. It should be noted that while the provision applies only to children, who are persons under the age of 21 years for the purposes of this section, it does as I construe it relieve from civil as well as criminal liability.

Recommendation -

1. As mentioned above, I take the view that this Section should be left with a general operation and make no specific reference to the circumstances in which abortions may be performed without attracting criminal responsibility. That format is in fact the one adopted in the equivalent provision of the Tasmanian Criminal Code, Section 51. (See Appendix A).
2. The Section should continue to apply to individuals other than legally qualified medical practitioners where it will be of use in cases of necessity and it should apply, as now, with or without consent of the patient, not only where treatment has been refused, but where it has proved impossible to obtain consent from an unconscious patient, or from some adult person with a legal responsibility in relation to a child.

3. The provision should continue to be confined in its operation to criminal responsibility and that is of particular relevance, for example in circumstances where the law is framed in such a way that consent cannot be given to particular types of invasion of one's body. I have in mind particularly the administration of treatment, or the performance of a surgical operation which would, although for the benefit of the patient, be productive of changes which would be capable of being categorised as constituting grievous bodily harm. That is an offence with respect to which the consent of the victim is irrelevant, and the problem arises potentially in relation to such operations as amputations and other serious procedures of a non-surgical nature, such as radiological treatment which may have deleterious effects of themselves while being for the overall purpose of preserving the life of the patient. It would be monstrous, in my view, that the medical profession and others associated with such procedures should be potentially liable to criminal prosecution, whatever may be the situation in relation to their civil liability.
4. It is therefore recommended that the Section should be given an operation which would relieve only from criminal liability, bona fide operations or treatment administered for the benefit of an individual provided the procedure is carried out only when reasonably necessary and then with reasonable care and skill.