

Abortion Law in Australia

[Research Paper 1 1998-99](#)

Natasha Cica

Law and Bills Digest Group

31 August 1998

Contents

[Major Issues Summary](#)

[Introduction](#)

[Unlawful Abortion](#)

[The Crime of Unlawful Abortion](#)

[The \(changing\) Meaning of Unlawful Abortion in Australia](#)

[Child Destruction](#)

[The English Model - Victoria and South Australia](#)

[The Code Jurisdictions - Western Australia, Queensland, the Northern Territory and Tasmania](#)

[The ACT and NSW](#)

[Homicide](#)

[Endnotes](#)

Major Issues Summary

The vexed question of abortion law reform was unexpectedly back in the news in Australia earlier this year. In February 1998 it was announced that two Perth doctors were to be prosecuted under the Western Australian laws that make abortion a crime. These were the first charges laid against medical practitioners under those Western Australian laws in over 30 years.

The political events that followed this decision ultimately culminated in the passage by the Western Australian parliament of legislation introducing what is in many respects the most liberal abortion law in Australia. The legislation originated as a Private Member's Bill introduced into the upper house of the Western Australian parliament by Cheryl Davenport MLC (ALP). The legislation passed with some amendments on 20 May 1998.

The question of when, if ever, performing an abortion will be morally justified is one that endlessly consumes many philosophers, theologians, feminists, social scientists and legal commentators. It is also a question that a large number of Australian women address every day in a more applied sense: when they are making an actual decision about whether to continue an unplanned pregnancy. Like many other medical and moral decisions that people make, each woman's abortion decision is made in the context of complex-and sometimes conflicting-personal and societal values. These values influence and inform the decisions that individual women make about abortion, and these values are in turn influenced and informed by those decisions.

Because different people have different views about which values are offended or affirmed when a woman chooses abortion, and because these views are sometimes irreconcilable and often very strongly held, the debate about the morality of abortion continues. As a consequence, so does the debate about the role that the law should play in this area.

This paper enters neither of those debates.(1) Nor does it attempt to describe the current practice of abortion in Australia,(2) nor how the Australian law and practice compares with the situation in other countries.(3) These are all important questions but they are beyond the scope of this work.

This paper instead describes the laws in each State and Territory of Australia that make it a crime to seek, perform or otherwise be involved in an abortion. Three broad categories of criminal laws are explained. First, the laws that create the crime of 'unlawful abortion'. Secondly, the laws that create the crime of 'child destruction.' Thirdly, the law of homicide.

(1) Laws that create the crime of 'unlawful abortion'

Statutory provisions in every State and Territory-except now Western Australia-make it a crime 'unlawfully' to administer any poison or noxious thing, or use any instrument or other means, with intent to procure miscarriage. The wording of these statutory provisions is based directly on legislation enacted in England in the nineteenth century. The crime of 'unlawful abortion' may be committed by the pregnant woman herself (except in the Northern Territory), by the person performing the abortion, or by anyone else who assists.

In Western Australia, the recent changes to the law repealed the old statutory provisions establishing the crime of 'unlawful abortion' and replaced them with a differently worded provision. This new provision makes it unlawful to perform an abortion unless it is justified under Western Australia's health legislation. This new offence of 'unlawful abortion' may only be committed by the person(s) involved in performing the abortion.

In any State and Territory, the statutory provisions that prohibit 'unlawful abortion' can apply to an abortion performed at any stage of pregnancy. The legal test for when an abortion is not unlawful-and therefore permitted-is different in each State and Territory of Australia.

In summary:

-
- **In Victoria**, a landmark Supreme Court ruling in 1969 ('the Menhennitt ruling') established that an abortion will be lawful if the accused held an honest belief on reasonable grounds that the abortion was both 'necessary' and 'proportionate.' 'Necessity' in this context means that the abortion was necessary to preserve the pregnant woman from a serious danger to her life or to her physical or mental health, beyond the normal dangers of pregnancy and childbirth, that would result if the pregnancy continued. 'Proportionate' means the abortion was in the circumstances not out of proportion to the danger to be averted. The Menhennitt ruling apparently permits an abortion at any stage of pregnancy. Further, it does not appear to impose a requirement that the abortion be performed by a medical practitioner in order to be lawful.

Although there have been a number of occasions in the last thirty years on which re-examination of the Menhennitt ruling by Victorian courts was likely or possible-the *Heath* case (1972), the *McGoldrick* case (1986), the *Backwell* case (1994) and the *Right to Life* case (1995)-on none of those occasions has that re-examination occurred. The Menhennitt ruling therefore continues to represent the legal position in Victoria.

-

- **In New South Wales**, an important District Court ruling in 1971 ('the Levine ruling') established that an abortion would be lawful in that State if there was 'any economic, social or medical ground or reason' upon which a doctor could base an honest and reasonable belief that an abortion was required to avoid a 'serious danger to the pregnant woman's life or to her physical or mental health.' That danger might arise at any time during the pregnancy. The Levine ruling was based on the statement of the law in Victoria in the Menhennitt ruling, but was in the result somewhat more liberal. Like the Menhennitt ruling, the Levine ruling apparently permit an abortion at any stage of pregnancy. Unlike the Menhennitt ruling, however, the Levine ruling seems to impose a requirement that an abortion be performed by a medical practitioner in order to be lawful.

In the decade following the Levine ruling, there were a number of occasions on which courts in New South Wales had (or almost had) the opportunity to re-examine or apply that ruling: the *Skinner* case (1974), the *Liverpool Women's Health Centre* case (1975), and the *Smart* case (1981). None of those cases, however, produced any judicial disagreement with the Levine ruling.

In the 1982 case *K v. Minister for Youth and Community Services*, the Levine ruling was applied without criticism or challenge by a judge in the Equity Division of the New South Wales Supreme Court.

In 1994 the Levine ruling was re-interpreted and applied in a restrictive way by a Supreme Court judge in the *Superclinics* case. That case involved a legal action brought by a woman against a medical clinic in respect of the negligent failure to diagnose her pregnancy at a time when she could have had an abortion. The judge in this case refused to award her damages, on the basis that it would have been a crime for her to obtain an abortion had she known she was pregnant at the relevant time. This result-and the restrictive re-interpretation of the Levine ruling that the judge applied-was overturned on appeal by the majority of the New South Wales Court of Appeal. The interpretation of the law given in that appeal by Kirby P now represents the legal position in New South Wales. The Kirby ruling is somewhat more liberal than the original Levine ruling. The Kirby ruling does not confine permissible abortion to cases where a serious danger to the woman's health would arise during the pregnancy, but additionally allows consideration of threats to her health that might arise after the child's birth. The Kirby ruling also indicates that it would be very difficult to establish in court that a medical practitioner lacked the requisite honest and reasonable belief that an abortion was justified to avert a serious danger to a woman's health.

-
- **In the Australian Capital Territory** the law is unclear. There has been no judicial ruling along the lines of those given by courts in Victoria and New South Wales. It is generally assumed, however, that the legal position in the Australian Capital Territory is the same as the legal position established at any given time by case law in New South Wales.
-
- **In Queensland**, an important District Court ruling in 1986 ('the McGuire ruling') confirmed that the interpretation of the law offered in Victoria in the Menhennitt ruling also applies in Queensland. This result was affirmed in the 1994 case *Veivers v. Connolly*, by a single judge of the Supreme Court of Queensland.

A number of cases originating in Queensland (the legal proceedings surrounding the 1983 case *K v. T*, and the 1989 case *F v. F*) have also made it clear that Australian courts will not grant an injunction to restrain a pregnant woman from terminating her pregnancy. This is the case even where the applicant is the putative father of the foetus.

There have been no prosecutions since 1986 under the Queensland abortion laws in respect of terminations of pregnancy performed in a medical context. The only case in which those laws have been applied was the *Lippiatt* case in 1996, which involved a prosecution of a man who had attacked a pregnant woman, injuring the woman and resulting in a stillbirth.

-
- **In Tasmania**, the law is very unclear. There has been no judicial ruling clarifying the meaning of the statutory provisions that criminalise abortion in that State.
-
- **In South Australia**, legislation was enacted in 1969 that clarified and generally liberalised the abortion law in that State. Under that legislation an abortion cannot be performed late in pregnancy-possibly from around 22-23 weeks of pregnancy, and certainly from 28 weeks of pregnancy-unless the abortion is performed in good faith solely to preserve the life of the pregnant woman. Earlier in pregnancy, however, an abortion can be performed whenever either the 'maternal health ground' or the 'foetal disability' ground is satisfied. The 'maternal health ground' permits abortion if more risk to the pregnant woman's life, or to her physical or mental health (taking into account her actual or reasonably foreseeable environment) would be posed by continuing rather than terminating the pregnancy. The 'foetal disability ground' will be

satisfied if there is a substantial risk that the child would be seriously physically or mentally handicapped if the child were born.

There has been no judicial interpretation of the South Australian legislation. The wording of the grounds on which an abortion will be justified under that legislation, however, suggests that in respect of early abortions the South Australian law is at least as liberal as the legal test in New South Wales under the Kirby ruling.

Procedural requirements are imposed by the South Australian legislation, however, which do not exist in New South Wales (nor in any other Australian jurisdiction except the Northern Territory, and Western Australia in respect of abortions after 20 weeks of pregnancy). The South Australian legislation provides that an abortion will not be lawful unless the pregnant woman has been resident in the State for at least two months before the abortion, and the abortion is performed in a prescribed hospital by a qualified medical practitioner, and a second medical practitioner confirms that the abortion is legally justified. The procedural requirements are waived in emergency situations, where the abortion is immediately necessary to save the pregnant woman's life, or to prevent grave injury to her physical or mental health. Regulations made under the South Australian legislation impose a reporting requirement in respect of every abortion performed in that State.

-
- **In the Northern Territory**, legislation was enacted in 1974 along the lines of the South Australian legislation. The Northern Territory legislation permits abortion up to 14 weeks of pregnancy where either the 'maternal health ground' or the 'foetal disability ground' is satisfied. These grounds are defined in the same way as in South Australia. There has been no case law in the Northern Territory interpreting these grounds. The Northern Territory legislation additionally requires an abortion at this stage of pregnancy to be carried out in a hospital, by a gynaecologist or obstetrician, and with the support of a second medical opinion.

Any medical practitioner may terminate a pregnancy of up to 23 weeks, however, where the abortion is immediately necessary to prevent grave injury to the physical or mental health of the pregnant woman. Any medical practitioner may perform an abortion at any stage of pregnancy if this is necessary to preserve the pregnant woman's life.

-
- **In Western Australia**, until recently the legal position was apparently the same as in Queensland. The law was untested, however, as there had been no judicial ruling on the matter in Western Australia.

Legislation enacted in Western Australia in 1998 effected substantial changes to the abortion laws in that State. Abortion remains unlawful unless it is justified under the (amended) health legislation in that State, which now permits abortion up to 20 weeks of pregnancy if one of four grounds is satisfied. The first ground essentially allows abortion 'on request,' provided a second, independent medical practitioner has counselled the pregnant woman about any medical risks associated with abortion and has offered to refer her for counselling 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.

After 20 weeks of pregnancy an abortion will only be lawful if two doctors agree that the pregnant woman or the foetus has a severe medical condition justifying the abortion. The two doctors must be members of a panel appointed for this purpose by the Minister. The abortion must be performed in a facility approved for this purpose.

Where an abortion is unlawfully performed, the woman herself is no longer subject to any legal sanction in Western Australia. Where an abortion is unlawfully performed by a medical practitioner, he or she is now liable to a fine of \$50 000 rather than imprisonment. Where an abortion is unlawfully performed by someone other than a medical practitioner, the penalty is a maximum of five years imprisonment.

(2) Laws that create the crime of 'child destruction'

The separate crime of 'child destruction' only applies to abortions performed late in pregnancy. Again, the relevant laws are different in each State and Territory of Australia.

In summary:

-
- **In South Australia and Victoria**, it is unlawful to act with intent to destroy 'a child capable of being born alive' before it has an existence independent of its mother, unless the act is done in good faith solely to preserve the mother's life. Evidence that the woman had been pregnant for 28 weeks or more at the time of the abortion is prima facie proof that she was carrying 'a child capable of being born alive.' Although there is no case law on the matter in either State,

relevant cases from England suggest that these child destruction provisions might protect fetuses as early as 22-23 weeks of pregnancy.

-
- **In Queensland**, the child destruction offence makes it a crime to prevent a child from being born alive 'when a woman is about to be delivered of a child.' It is not clear whether this provision only applies to abortions performed very late in pregnancy, when a woman is about to go into labour, or whether it may protect any 'viable' foetus. The legal situation in Queensland is further complicated by a new 'foeticide' offence that was enacted in 1996, and the application of which in a medical context is unclear.
-
- **In Western Australia and the Northern Territory**, the child destruction offences are equivalent to the relevant offence in Queensland. Again, it is not clear whether this crime only applies to abortions performed very late in pregnancy, when a woman is about to go into labour, or whether it may protect any 'viable' foetus.
-
- **In Tasmania**, there is no crime that clearly applies only to the termination of late term pregnancies. The legal situation in that State is therefore very unclear.
-
- **In the Australian Capital Territory**, the child destruction offence prohibits behaviour 'occurring in relation to a childbirth and before the child is born alive' that prevents the child from being born alive or contributes to its death. There is no case law interpreting the meaning of these words. It is likely, however, that this provision only applies to abortions performed at the very end of pregnancy, when delivery has already commenced or is imminent.
-
- **In New South Wales**, there is no child destruction offence.

(3) The law of homicide

The law of homicide can only apply in situations where a child is born alive. Homicide may be applicable in the abortion context where a child is born alive but dies as a consequence of injuries inflicted in utero during an abortion.

Introduction

The provision of abortion services in Australia is subject to the general body of laws that regulate the practice of medicine.(4)

The lawfulness of abortion in Australia is additionally and specifically affected by three categories of criminal laws. The first category comprises laws that create the crime of 'unlawful abortion'. The second category comprises laws that create the crime of 'child destruction'. The third category comprises the law of homicide. Each of these three categories of laws is examined in this paper.

Before discussing these laws, it is important to note the division in Australia between jurisdictions where the criminal law is contained in a Criminal Code (Queensland, Western Australia, Tasmania and the Northern Territory), and those where it is not (Victoria, New South Wales, South Australia and the Australian Capital Territory). In the non-Code jurisdictions, the criminal law is determined by common law rules and also by statutes which restate or modify those rules.

The division is important because it exacerbates the considerable differences between the criminal laws affecting abortion in different parts of Australia, and the uncertainties relating to the meaning of those laws. Each of the Criminal Codes has displaced the interpretive principles and criminal offences contained in the common law, and replaced them with what purports to be a comprehensive statement of the criminal law in that jurisdiction. Decisions by courts on criminal matters in the non-Code jurisdictions therefore are not necessarily of persuasive authority in the jurisdictions with a Criminal Code. This does not mean that common law doctrine and decisions are always irrelevant when interpreting the Criminal Codes. Rather it means that it cannot be assumed that the interpretations of the criminal law in the non-Code jurisdictions necessarily will be viewed as persuasive or determinative when the meaning of a provision of a Criminal Code is being determined.⁽⁵⁾ In general, the courts in Western Australia and Tasmania have been more willing than the courts in Queensland and the Northern Territory to import common law interpretations and principles into the Criminal Code in their jurisdiction.⁽⁶⁾

Nor can it be assumed that the meaning of a provision in the Criminal Code of one jurisdiction will be the same as that of a similar provision in another Criminal Code. Of course, the more similar the wording of the relevant provisions, the more likely it is that they will be given similar interpretations by the courts. As the Criminal Codes in Queensland and Western Australia are almost identical, it would therefore be expected that the courts in these States would most readily follow each other's interpretation of the criminal law. The Criminal Codes in Tasmania and the Northern Territory, however, bear less resemblance to the other Australian Criminal Codes and indeed to each other.⁽⁷⁾

Finally, it is important to state that Australian courts no longer automatically follow the interpretations of the criminal law (or any other kind of law) given by courts in England.

This is the case even in the non-Code jurisdictions, whose criminal laws are more directly derived from-and more closely resemble-English statutory and common law offences. Relevant English decisions certainly will be persuasive. Significant differences exist, however, between the approaches of the Australian and English courts to key aspects of the criminal law.(8)

Unlawful Abortion

[The Crime of Unlawful Abortion](#)

Statutory provisions in every State and Territory of Australia(9)-except now Western Australia(10)-make it a crime to 'unlawfully' administer any poison or noxious thing, or use any instrument or other means, with intent to procure miscarriage. This crime may be committed by the pregnant woman herself(11) or by the person performing the abortion. It is also a crime for anyone to supply or procure anything which that person knows is intended to be used unlawfully to procure a miscarriage. In Western Australia, recent changes to the law repealed the old statutory provisions to this effect and replaced them with a differently worded provision. This new provision makes it unlawful to perform an abortion unless it is justified under Western Australia's amended health legislation. This new offence of 'unlawful abortion' may only be committed by the person performing the abortion.

For convenience only, all the relevant Australian statutory provisions, including the new Western Australian provision, will be referred to here as establishing the crime of unlawful abortion.

In each State and Territory, the law provides that the crime of unlawful abortion is punishable by lengthy periods of imprisonment. In Victoria the penalty is five years' imprisonment for both the woman and the abortionist and one year's imprisonment for supplying or procuring anything to assist. In New South Wales and the Australian Capital Territory the penalty is ten years' imprisonment for the woman and the abortionist, and five years for supplying or procuring. In South Australia the penalty is life imprisonment for the woman and the abortionist, and three years for supplying or procuring. In the Northern Territory the penalty is seven years' imprisonment for all parties. In Tasmania the penalty for all involved is 21 years' imprisonment and/or a fine as determined by the court. In Queensland (and until recently in Western Australia) the penalty is seven years' imprisonment for the woman, 14 years for the abortionist, and three years for supplying or procuring. Changes to the law in Western Australia have replaced these penalties with a fine of \$50 000 where the abortionist is a qualified medical practitioner, and a penalty of five

years' imprisonment where the abortionist is not. A woman on whom an unlawful abortion is performed is no longer subject to any legal punishment in Western Australia.

An abortion performed at any stage of pregnancy may involve commission of the crime of unlawful abortion.(12) This crime therefore potentially can apply to any abortion performed in Australia.

The wording of all these Australian statutory provisions (except now those in Western Australia) is directly based on statutory provisions enacted last century in England: sections 58 and 59 of the Offences Against the Person Act 1861.(13) These 1861 provisions replaced somewhat similar abortion provisions in the earlier Offences Against the Person Act 1837.(14) These had in turn replaced provisions prohibiting abortion contained in Lord Landsdowne's Act 1828,(15) which had in their turn superseded those in Lord Ellenborough's Act 1803.(16) Before the introduction of Lord Ellenborough's Act, it was not a crime under English common law to carry out an abortion before 'quickening', which was described by Blackstone as the time when 'the infant is able to stir in the mother's womb,' and which was generally around the fourteenth week of pregnancy.(17)

The wording of the Australian provisions establishing the crime of unlawful abortion indicates that there will be circumstances in which involvement in an abortion is not unlawful, and therefore not a crime.(18) The legal test for when an abortion is not unlawful, however, is different in each State and Territory of Australia.

The different Australian legal tests may be divided into three broad groups:(19)

- 1.
2. The legal tests in 'common law' jurisdictions.
In Victoria and New South Wales, and (by implication only) in the Australian Capital Territory, the meaning of unlawful abortion is entirely derived from case law.
3. The legal tests in 'code' jurisdictions.
In Queensland and Tasmania,(20) the Criminal Codes that establish the crime of unlawful abortion also separately provide for a statutory defence to that crime. In Queensland only there is also case law interpreting the meaning of the statutory defence and thus indicating when an abortion is not unlawful.
4. The legal tests in 'statutory reform' jurisdictions.

In South Australia and the Northern Territory, legislation has been enacted that provides a statutory explanation of when an abortion is not unlawful. There is no case law in either South Australia or the Northern Territory that further clarifies the meaning of unlawful in this context.

The new Western Australian legislation also provides a statutory explanation of when an abortion is not unlawful, for the purposes of the new offence of unlawful abortion in that State. The Western Australian legislation is therefore included in this third category of tests, even though it is quite dissimilar in content and structure from the legislation in South Australia and the Northern Territory.

The meaning of these legal tests in each State and Territory of Australia is explained in more detail below.

[The \(changing\) Meaning of Unlawful Abortion in Australia](#)

Pre-reform: English Case Law

Until the late 1960s and early 1970s there were no Australian judicial or statutory explanations of when involvement in an abortion would constitute the crime of unlawful abortion. The meaning of unlawful in this context therefore was highly uncertain. Some guidance, however, was provided by an important case that came before the English courts in the 1930s.

The case was *R v. Bourne*.⁽²¹⁾ It was a test case involving the criminal prosecution of an eminent London gynaecologist and obstetric surgeon, Mr Alec Bourne, for performing a surgical abortion on a 14 year old girl who had been raped. In his address to the jury at the Old Bailey in that case, Macnaghten J held that an abortion would not be unlawful, within the terms of section 58 of the Offences Against the Person Act 1861, if the operation were performed for the purpose of preserving the pregnant woman's life.

He reached this conclusion by referring to the offence of child destruction contained in the Infant Life (Preservation) Act 1929, section 1.⁽²²⁾ The statutory proviso to that offence provides that a person will not be guilty of child destruction if they have acted in good faith for the purpose of preserving the life of the mother.⁽²³⁾ Macnaghten J was of the opinion that a similar proviso should be read into section 58 of the Offences Against the Person Act 1861, despite the absence of those particular words in that section. Thus, a person would not be guilty of the crime of unlawful abortion if they had acted in good faith to preserve the

life of the mother. Glanville Williams subsequently argued that Macnaghten J's interpretation of section 58 relied on the defence of necessity:

Macnaghten J's direction is also a striking vindication of the legal view that the defence of necessity applies not only to common law but even to statutory crimes. It is true that the direction proceeded in some slight degree on the analogy of the child destruction statute, which contains an express exemption for the preservation of the life of the mother; but the exception in the one statute was not in itself a ground for reading a similar exception into another. The only legal principle on which the exception could be based was the defence of necessity...The defence of necessity involves a choice of values and a choice of evils, and the choice made by the judge appears clearly from his statement that 'the unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.' Apparently the interest of the mother in living a single extra day is preferred to the life of the child.(24)

According to Macnaghten J, the jury could conclude that a doctor had operated for the purpose of preserving the pregnant woman's life if the doctor had held 'the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the pregnancy would be to make the woman a *physical or mental wreck*.'(25)

Macnaghten J's interpretation of the law therefore did not confine permissible abortions to those performed to save a woman's life in the strictest sense: the sense of saving her from 'instant death'.(26) His interpretation also allowed abortions performed to save a woman's health from being 'wrecked'. Wreckage remained undefined,(27) but there was little doubt that Macnaghten J's test demanded a very high level of danger to health before abortion would be justified.(28) The test limited permissible abortions to those for 'saving the life or preserving the longevity of the mother.'(29) In the jury's opinion the abortion performed by Mr Bourne had satisfied this test, and he was acquitted of the charge against him.

This meaning given to unlawful in this context by Macnaghten J represented a considerable liberalisation of English abortion law, as until *R v. Bourne* there was thought to be no common law defence implied in sections 58 or 59 of the Offences Against the Person Act 1861.(30) The defence outlined by Macnaghten J nonetheless was restrictive.

Two subsequent English cases may have further liberalised the test in *R v. Bourne*, by moving the legal emphasis away from concern solely with preserving the pregnant woman's life, to introduce preserving her health as an alternative legal justification for abortion.(31) The first was the 1948 case *R v. Bergman and Ferguson*.(32) Morris J's address to the jury in this case was interpreted as indicating 'that where serious injury to health is feared the

court will not look too narrowly into the question of danger to life.'⁽³³⁾ The second case was the 1958 case *R v. Newton and Stungo*.⁽³⁴⁾ In that case, Ashworth J stated that abortions could be lawfully performed '... in good faith for the purpose of preserving the life or health of the woman.' He then went a little further: 'When I say health I mean not only her physical health, but her mental health.'

Notwithstanding these two cases, the statement of the law in *R v. Bourne* was widely assumed to represent the legal position throughout the United Kingdom, until the Abortion Act 1967 effected substantial further liberalisation of the abortion law in England, Wales and Scotland.⁽³⁵⁾

It was also widely assumed that *R v. Bourne* represented the legal position in Australia. This assumption was not challenged in any Australian court until 1969.

The 'common law jurisdictions': judicial reform

Victoria

The Menhennitt ruling

Judicial reform of the Australian law regulating abortion began in 1969 in Victoria. In that year, Menhennitt J of the Supreme Court of Victoria delivered his landmark ruling in the case of *R v. Davidson*.⁽³⁶⁾ The case involved the prosecution of a Melbourne doctor, Dr Ken Davidson, under the Victorian statutory provisions that criminalise unlawful abortion. Specifically, he was charged under section 65 of the *Crimes Act 1958* (Vic), with four counts of unlawfully using an instrument to procure a miscarriage, and with one count of conspiring unlawfully to procure a miscarriage.

Menhennitt J explicitly invoked the general legal defence of necessity⁽³⁷⁾ and instructed the jury that acting with intent to procure a miscarriage would only be lawful if the accused held an honest belief on reasonable grounds that the abortion was both 'necessary' and 'proportionate'. The onus lay upon the Crown to establish unlawfulness by proving the absence of either necessity or proportion.⁽³⁸⁾ 'Necessary' in this context meant the abortion was necessary to preserve the pregnant woman from a serious danger to her life or to her physical or mental health, beyond the normal dangers of pregnancy and childbirth, that would result if the pregnancy continued. 'Proportionate' meant the abortion was in the circumstances not out of proportion to the danger to be averted.⁽³⁹⁾ The jury applied Menhennitt J's interpretation of the law and acquitted Dr Davidson of the charges against him.

The interpretation of unlawful adopted by Menhennitt J in *R v. Davidson* was less restrictive than the test established in the earlier English case of *R v. Bourne*. The Menhennitt ruling permitted abortion to avert a 'serious danger' to the pregnant women's health, thereby considerably reducing the level of danger to health required before an abortion could be performed lawfully. The Menhennitt ruling by no means established, however, that the law allowed a doctor to perform an abortion on other than health grounds. It certainly did not permit abortion on the basis that the pregnant woman simply did not wish to continue with the pregnancy.

The Menhennitt ruling was silent on the question of whether an abortion could only be performed lawfully if the procedure itself was being performed by a qualified medical practitioner. On one view, the Menhennitt ruling implicitly imposed this as a legal requirement. On another view, the fact that the accused in *R v. Davidson* happened to be a doctor did not mean the legal test outlined by Menhennitt J would be inapplicable to situations where an abortion was performed by someone other than a doctor.

Missed opportunities to re-examine the Menhennitt ruling: the Heath, McGoldrick, Backwell and Right to Life cases

Menhennitt J's statement of the law in *R v. Davidson* continues to represent the legal position in Victoria. There has been no judicial re-examination of the meaning of unlawful abortion in Victoria since that case. There have, however, been four occasions on which such re-examination was likely or possible.

The first occasion was a criminal case that came before Southwell J of the Victorian County Court in 1972. In that case, *R v. Heath*,⁽⁴⁰⁾ a doctor was prosecuted for performing eight allegedly unlawful abortions. In the face of expert medical evidence that failure to terminate these pregnancies would have exposed the women in question to serious risk of injury to their physical or mental health, the jury acquitted the accused doctor of one charge. It could not reach agreement, however, on the other seven charges. The prosecution then decided not to continue its case against the doctor in respect of these unresolved charges. This result may be read as an acknowledgment that application of the Menhennitt ruling in this case would not produce a conviction. Perhaps more importantly, it may be read as an acknowledgment that a conviction of this doctor on the basis of any other interpretation of the law would not survive appeal to a higher court, because the view of the law advanced in *R v. Davidson* would be upheld if so challenged.

The second occasion was the investigation in 1986 of the abortion practice of a Melbourne doctor, Dr Ian McGoldrick. He was charged under the Victorian provisions that criminalise

unlawful abortion. It was alleged that Dr McGoldrick had carried out abortions without holding an honest and reasonable belief that the terminations were necessary to preserve the life or health of the women in question. The charges were dismissed in June 1987 and therefore resulted in no judicial comment on the Menhennitt ruling.(41) Again, this result may be read as an acknowledgment both of the unlikelihood of convicting this defendant under the Menhennitt ruling, and of the unlikelihood that a superior court would offer a different interpretation of the law.

The third occasion was a civil case that ultimately came before the Victorian Court of Appeal in 1994. This case, *Backwell v. AAA*,(42) involved a successful negligence action brought by a woman in respect of treatment she had received on a donor insemination program in 1983. The program was run at an infertility clinic in Melbourne with which the defendant, Dr June Backwell, was associated. The plaintiff had joined the program because she had suffered eight early miscarriages in 20 months due to extreme tissue incompatibility with her husband. She also suffered from Rh-disease which meant that she needed to be inseminated with semen from an Rh-negative donor to prevent severe complications in any subsequent pregnancy. On the donor insemination program, the plaintiff was inadvertently inseminated with donor semen intended for another patient. That semen came from a donor who was Rh-positive and of a different racial origin from the plaintiff's husband.

The plaintiff was subsequently diagnosed as pregnant. She claimed that Dr Backwell had then told her she would have to terminate the pregnancy, because: she would not be able to pass the child off as her husband's (the sperm donor was of Spanish/Egyptian origin and her husband was not); 'if the press got hold of it the clinic would be closed down'; the press would 'hound' the plaintiff; and, if she did not have the abortion, she would not continue to receive treatment at the clinic and would never get onto any other infertility program in Australia.(43)

Dr Backwell admitted she had made these statements and that they were threats. She claimed, however, that she had been motivated only by the plaintiff's well-being as she believed that it was inadvisable for the plaintiff to continue a pregnancy that could involve complications due to Rhesus incompatibility.(44) Dr Backwell also admitted that she had failed to discuss matters with the plaintiff that she should have discussed if she had been acting in the plaintiff's best interests at the time. These matters were: the plaintiff's previous history of miscarriages; her views about abortion, and her religious or moral beliefs (she was a Roman Catholic and believed abortion was wrong); and what the plaintiff's husband might think about the situation.(45)

The plaintiff further alleged that Dr Backwell had improperly failed to advise her of the following: that there was a chance the pregnancy had resulted from earlier inseminations with the correct semen, that if the pregnancy was due to insemination with the wrong sperm there was likely to be a spontaneous miscarriage, that tests could be carried out to determine whether the foetus was Rh-positive, and that counselling would assist the plaintiff.(46) The plaintiff gave evidence that the result of Dr Backwell's behaviour was that she believed she had no alternative to terminating the pregnancy. Accordingly, she sought and obtained an abortion. Since the abortion had been performed, the plaintiff had suffered from anxiety and clinical depression.

The plaintiff alleged that Dr Backwell had provided her with negligent treatment. First, because she had been responsible for the incorrect insemination of the plaintiff, and secondly, in respect of her subsequent behaviour towards the plaintiff. She claimed that that subsequent behaviour had shown a 'contumelious, arrogant and wanton disregard for the plaintiff' and had been motivated by profit and preservation of her own reputation and character at the expense of the plaintiff's well-being.(47) The plaintiff sought damages to compensate her for the physical and psychiatric injuries she had suffered as a result of Dr Backwell's allegedly negligent behaviour. She also sought exemplary damages-damages that are awarded to punish a defendant and act as a deterrent-in respect of Dr Backwell's response to the incorrect insemination and subsequent pregnancy.

The jury accepted the plaintiff's version of events and agreed that Dr Backwell had been negligent in these respects and awarded the plaintiff compensatory damages of \$60 000 and exemplary damages of \$125 000, plus interest. This was the first Australian case in which exemplary damages have been awarded in respect of the behaviour of a doctor towards a patient.(48) The defendant appealed against this award to the Full Court of Appeal of Victoria. The Court of Appeal agreed that Ashley J had erred in aspects of his charge to the jury on the question of exemplary damages and reduced the damages award. The Court of Appeal affirmed, however, that Dr Backwell's behaviour called for 'the most severe condemnation' and for 'a substantial award of exemplary damages'.(49) The plaintiff therefore was awarded \$60 000 by way of exemplary damages.

This not inconsiderable amount of money was awarded to punish behaviour that had amounted to a coercive and threatening interference with the plaintiff's decision about whether to continue this pregnancy. To some extent, therefore, the result in this case may be seen as legal recognition of the plaintiff's right to be given the opportunity to make her own decision about continuing her pregnancy, in accordance with her personal and strongly held beliefs about the morality of abortion.

That statement is qualified because none of the judges in this case discussed the extent to which their implicit recognition of this legal right in this context might be inconsistent with the existence of the Victorian provisions that criminalise unlawful abortion. Such discussion could have led to a more liberal reassessment of the Menhennitt ruling. Alternatively, it could have led to an affirmation or restriction of that ruling, and a cogent explanation of why it is deemed appropriate for the criminal law to intrude upon a woman's decision-making about abortion. The Victorian judges' failure to provide any such clarification was something of a disappointment. The unusual facts of the case had provided the most senior court in Victoria with a rare opportunity to point out-or justify-the inconsistency of characterising a woman's abortion decision as one that must be respected, because it is highly personal to that woman and her sense of morality, in one legal context but not in another.

An application for special leave to appeal to the High Court against the decision in *Backwell v. AAA* was refused on 5 August 1996.

The fourth occasion on which there was an opportunity for judicial re-examination of the meaning of unlawful abortion in Victoria was an administrative law case that came before the Federal Court of Australia in 1994 and 1995. The case was *Right to Life Association (NSW) Inc v. Secretary, Department of Human Services and Health and Another*.⁽⁵⁰⁾ The litigant in this case was the Right to Life Association (NSW), a 'pro-life' lobby group. In 1994 it initiated a legal action in the Federal Court of Australia challenging the failure of the Secretary of the Commonwealth Department of Human Services and Health to halt clinical trials in Sydney and Melbourne of the drug mifepristone (also known as RU486 or the 'abortion pill'). The trials, which formed part of a multi-centre study organised by the World Health Organization, involved administration of RU486 to test its efficacy as a post-coital contraceptive and as an abortifacient. RU486 has not been approved for general clinical use in Australia, and no application for approval has yet been submitted.

In 1994 the Right to Life Association had written to the Secretary of the Department of Human Services and Health, alleging that the conduct of the trials contravened the State laws in New South Wales and Victoria that criminalise unlawful abortion, and asking him to stop the trials. The Secretary's written reply advised that 'certain abortions are legal in both NSW and Victoria', that there was no evidence that the abortion laws were not being complied with, and that accordingly he would not stop the trials.⁽⁵¹⁾

The Right to Life Association sought review of this refusal under the *Administrative Decisions (Judicial Review) Act 1977* (Cwth). It based its claim on regulations made under the

Therapeutic Goods Act 1989 (Cwth) that impose conditions on therapeutic goods used solely for experimental purposes in humans, including the following:

...the Secretary must not, at any time:

(i) have become aware that to conduct or continue the trial would be contrary to the public interest; and

(ii) have directed that the trial not be conducted, or be stopped...(52)

The Right to Life Association argued that this condition imposed an obligation on the Secretary to investigate possible breaches of the State criminal law in Victoria and New South Wales relating to abortion, because such breaches would be 'contrary to the public interest', and that the Secretary had not discharged this obligation. The Right to Life Association accordingly sought:

-
- a declaration that RU486 was being used in the trials as an abortifacient and the trials therefore were contrary to the public interest;
-
- a declaration that the conduct of the trials involved breaches of the criminal provisions in New South Wales and Victoria that criminalise unlawful abortion; and
-
- an order that the Secretary further consider his decision according to law.(53)

A single judge of the Federal Court of Australia, Lindgren J, dismissed the Right to Life Association's application.(54) In February 1995 this result was upheld by the Full Federal Court comprising Lockhart, Beaumont and Gummow JJ.(55) Lindgren J at first instance reached his conclusion on the basis that the Right to Life Association lacked standing to bring the administrative law challenge, as it was not a 'person aggrieved' under the *Administrative Decisions (Judicial Review) Act 1977* (Cwth). On appeal, Lockhart and Beaumont JJ agreed that the action must fail because the litigant lacked standing. Gummow J also concluded that the application for review must fail, but did so on the basis that there had been no reviewable 'decision' by the Secretary, and that it therefore was unnecessary to decide the standing issue. Lindgren, Lockhart and Gummow JJ also agreed that the Secretary had been under no positive obligation to investigate possible breaches of State law, Beaumont J holding it was preferable not to decide this question. No judge, however, examined the merits of the Right to Life Association's arguments concerning the alleged unlawfulness of the clinical trials.

The Federal Court therefore did not make any clarifying statements about the legal position in both Victoria and New South Wales in relation to unlawful abortion. A clarification of that law would have been both useful and timely, given the doubt that had been created several months earlier by the Newman ruling in New South Wales,(56) and which presumably had partly motivated the Right to Life Association to initiate these proceedings. The only hint offered by the Federal Court as to its possible interpretation of the abortion laws in Victoria and New South Wales was contained in the judgment of Lockhart J:

It is not difficult to find examples in history where laws on the statute book have become outmoded and crimes that were theoretically grave crimes punishable by heavy penalties were in fact rarely, if ever, the subject of prosecution because the thinking of society had undergone a change which had not yet found its way into legislative reform. Merely to say that a State (or Territory) law may be infringed if the drug Mifepristone is used in the conduct of experiments with respect to human beings would be a criminal offence under State law does not necessarily conclude the question of public interest.(57)

Lockhart J went on, however, to expressly decline to examine the issue further. While averting to 'a debate as to whether the relevant criminal statutes which prohibit *unlawful* abortion apply in circumstances where the abortion is necessary in the interests of the health of the mother', he concluded that '[n]o necessary or useful purpose is served by examining that question further'.(58)

The Federal Court was able to avoid addressing the abortion question because of the position it adopted on the standing question. That position was that the Right to Life Association was not a 'person aggrieved' with standing to challenge the Secretary's decision because it had not demonstrated that it was affected by the decision in any way to an extent greater than the public generally.(59) In reaching this result, however, Lockhart J adopted an approach to interpretation of 'a person aggrieved' that can be described as a reversal of a trend in Australian administrative law towards a more liberal interpretation of that phrase for the purposes of the *ADJR Act*.(60) Gummow J adopted a similarly restrictive approach to the meaning of 'a person aggrieved', although his comments were obiter only as he did not consider it necessary to decide the standing question.(61) In the Full Federal Court, only Beaumont J adopted an interpretation of 'a person aggrieved' that was consistent with the trend toward liberalising the approach to standing under the *ADJR Act*.(62)

Given that even the more liberal approach to standing applied by Beaumont J led to a conclusion that the Right to Life Association was not 'a person aggrieved', it would be going too far to state that Lockhart and Gummow JJ's more restrictive approach was influenced by a desire to deny standing to an interest group whose focus is opposing abortion. It would

not be going too far, however, to conclude that the approach of these judges in the *Right to Life* case could make it more difficult for other interest groups-including 'pro-choice' and other 'pro-life' abortion lobby groups-to bring actions under the *ADJR Act*.

These problems aside, the result in the *Right to Life* case was consistent with the general principle that civil courts are reluctant to interfere with matters relating to the criminal law, as possible breaches of State criminal law are matters for the State prosecuting authority.(63) Courts in Australia and England have applied this principle invariably to refuse to intervene at the request of individual third parties to stop the performance of an allegedly unlawful abortion.(64) This has been the case even where the third party is the putative father of the foetus.(65) The *Right to Life* case therefore supports this line of judicial authority.

New South Wales

The Levine ruling

The test outlined in *R v. Davidson* was followed in New South Wales in 1971 in the landmark case *R v. Wald*.(66) This important case also involved an unsuccessful prosecution of five people under the New South Wales provisions that make unlawful abortion a crime.(67) The accused were a doctor and an anaesthetist who performed abortions at the Heatherbrae abortion clinic in Bondi, an orderly at the clinic, the owner of the clinic premises, and a doctor who referred patients to the clinic. The defendants in this case were prosecuted for unlawfully using an instrument with intent to procure the miscarriage of a woman contrary to section 83 of the *Crimes Act 1900* (NSW), with conspiring to commit such an offence, and with aiding and abetting the commission of such an offence.

In his address to the jury in this case, Levine DCJ of the District Court of New South Wales adopted, but then expanded and liberalised, the earlier Menhennitt ruling. He did this by stating that a doctor could consider the effects of economic and social factors upon the health of the pregnant woman, when assessing whether a proposed abortion would be 'necessary' and 'proportionate' in the circumstances.

Thus, according to Levine DCJ, an abortion would be lawful if there was 'any economic, social or medical ground or reason' upon which a doctor could base an honest and reasonable belief that an abortion was required to avoid a 'serious danger to the pregnant woman's life or to her physical or mental health'. The accused need not have believed that the woman's health was in 'serious danger' at the time of consultation, merely that her

health 'could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy, if uninterrupted.'(68)

The Levine ruling expanded the grounds on which a doctor was permitted to conclude that a pregnant woman faced a risk to her health, and in this respect was somewhat more liberal than the earlier Menhennitt ruling in Victoria. The Levine ruling retained the requirement that she face a 'serious danger' to her health before abortion would be justified. Like the Menhennitt ruling, therefore, the Levine ruling only authorised abortion on health grounds. It did not authorise abortion in any case where a doctor was willing to accede to a pregnant woman's request that her pregnancy be terminated. This was despite assertions by counsel for the accused in *R v. Wald* that abortion should only be considered unlawful in New South Wales if performed on a pregnant woman without her proper consent.(69) Levine DCJ did not accept this argument.

Unlike the Menhennitt ruling, however, the Levine ruling does apparently impose a requirement that the termination procedure be performed by 'duly qualified medical practitioners' in order to be lawful.(70)

Missed opportunities to re-examine the Levine ruling: the Skinner, Liverpool Women's Health Centre and Smart cases

In the decade following the Levine ruling, there were three important occasions on which courts in New South Wales had (or almost had) the opportunity to re-examine or apply the Levine ruling. None of these cases produced any judicial disagreement with the interpretation of the law that had been offered in *R v. Wald*.

The first case involved the prosecution and conviction in December 1972 of Dr Rellee Skinner for conspiring to unlawfully procure the miscarriage of two women, who he had referred for their abortions to a person without medical qualifications. In 1974 Dr Skinner successfully appealed to the New South Wales Court of Appeal against his subsequent removal from the register of medical practitioners. In the course of its judgment in this case, the Court of Appeal stated that 'the conception of the law relating to abortion which was prevalent at the time of the offences [has] since [been] shown to be erroneous,' and that the situation of the two women 'would have warranted therapeutic abortions according to the principles established in the courts over the last two or three years.'(71) The court also noted that the fact that abortion was now legally available for therapeutic purposes now meant it was most unlikely that Dr Skinner would repeat the offence of referring women to unqualified practitioners.(72) These statements, and the court's decision to reinstate Dr Skinner on the basis that it was in the public interest that he should resume medical

practice, imply agreement with the interpretation of the law offered by Levine DCJ in *R v. Wald*.

The second case resulted from an abortion that was performed in 1975 at the Liverpool Women's Health Centre on a 15 1/2 year old without the knowledge or permission of her parents. The doctor who had performed the abortion was charged with unlawfully procuring a miscarriage under section 83 of the *Crimes Act 1900* (NSW), and a nurse who worked at the clinic was charged with aiding and abetting. Both defendants were committed for trial, but the charges were subsequently dropped. There was therefore no opportunity for a court to address the argument that the defendants had acted unlawfully, on the basis that the doctor had concluded the abortion was required to avert damage to the pregnant girl's mental and physical health without actually examining the patient herself, but solely in reliance on discussions the girl had had with the nurse.(73)

The third case was the 1981 prosecution and conviction in the New South Wales District Criminal Court of Dr George Smart in relation to an abortion he had performed on a 17 year old. She had been seven months' pregnant at the time and no other medical practitioner would agree to terminate the pregnancy. The evidence indicated that Dr Smart had not asked her about the state of her physical or mental health, within the terms of the Levine ruling, before performing the procedure. The medically unorthodox method that Dr Smart had used to perform this abortion (suction curette, then forceps) had killed the foetus but failed to extract it, and had necessitated hospitalisation of the woman and the performance of emergency surgery on her. Dr Smart's conviction under section 83 of the *Crimes Act 1900* (NSW) made him the first-and to date only-medical practitioner in New South Wales to be convicted for unlawfully procuring a miscarriage. Dr Smart appealed against his conviction to the New South Wales Court of Criminal Appeal, but his ill health and subsequent death meant that this court never heard the case. Had that court done so, it presumably would have commented on whether the Levine ruling represented the correct interpretation of when an abortion is lawful in New South Wales, and in respect of precisely which aspects of Dr Smart's behaviour legal sanction was appropriate.(74)

The Helsham Ruling

The Levine ruling was next considered by a New South Wales court in the 1982 case *K v. Minister for Youth and Community Services*.(75) That case involved a 15 1/2 year old who was a ward of the State. She was 12 weeks pregnant and wished to have an abortion. Her guardian, the Minister for Youth and Community Services, refused to give permission for this to happen. The only reason he gave for his refusal was that he considered it was too late for the abortion to be lawfully performed. The ward's mother initiated legal proceedings on

her daughter's behalf, seeking court orders to enable the procedure to be performed. Helsham CJ in the Equity Division of the NSW Supreme Court granted such orders. He did so in exercise of the court's inherent or *parens patriae* jurisdiction to intervene to ensure that decisions are made in a minor's best interests. The orders directed the Minister to give all necessary consents to enable the ward to be released from her residential institution for the purpose of terminating the pregnancy.

In the course of his judgement, Helsham CJ rejected the suggestion that the proposed abortion would be unlawful. He based this opinion on the assumption that the Levine ruling represented the correct statement of the law in New South Wales. He made that assumption because the Minister had not challenged the Levine ruling in his submissions to the court. Helsham CJ recalled that the Levine ruling allows an abortion to be performed where there is an honest belief on reasonable grounds that the procedure is:

necessary to preserve the woman involved from serious danger to her life or physical or mental health and that in the circumstances the danger of the operation [is] not out of proportion to the danger intended to be averted.(76)

He also reiterated that '[r]easonable grounds can stem from social, economic or medical bases.'(77) In applying the Levine test to the facts of this case, he concluded there was 'ample' evidence that 'the social and medical situation of this girl' constituted reasonable grounds to justify an abortion under the Levine ruling.(78) He further concluded that this evidence also indicated that it was vital to the ward's welfare that her request for an abortion be granted:

...the adverse effects on her of being forced to bear her child are likely to be so grave that they make it essential. She is fifteen and a half and has been up against it all her life. Those who are best placed to judge the likely social and psychological effects of being forced against her will to carry this child have all advised that the pregnancy be terminated. ...Acting as far as possible as I think a wise parent would act in all the circumstances I ...will permit this girl to have an abortion.(79)

The Newman ruling

The Levine ruling was not the subject of any judicial challenge or criticism until 1994. In April of that year, however, the precise meaning of the Levine ruling was cast into doubt when Newman J of the Supreme Court of New South Wales delivered his judgement in the civil case *CES and Another v. Superclinics (Australia) Pty Ltd.*(80)

The plaintiff in the *Superclinics* case was a woman who became pregnant in 1986. At the time she was 21 years old and a full-time student with limited financial resources. Although she visited a medical clinic five times to discover why she had not menstruated, her pregnancy was not diagnosed until she was at least 19 weeks pregnant. She was advised that performing an abortion on her at that stage of pregnancy would be medically unsafe. She therefore proceeded with the pregnancy and gave birth to a healthy child.

After the child's birth the plaintiff was unable to continue her studies for financial and personal reasons. Her relationship with the child's father was not stable and ended around a year after the child's birth. Some time after this she began receiving psychiatric treatment for anxiety and clinical depression, associated with ambivalent feelings towards her daughter and inability to come to terms with the way this unwanted pregnancy had affected her life.

The plaintiff brought a civil action against the proprietor of the clinic and the clinic doctors. She alleged they had been negligent in their failure to diagnose and inform her about her pregnancy. She claimed that as a result of these failures she was denied the opportunity to have an abortion performed at a time when it was medically safe to do so, and that this had resulted in her giving birth to a child she did not want. She argued that she should be compensated for the losses she suffered as a consequence of not being able to choose to terminate her pregnancy. These losses included the costs of raising the child.

Although there had been earlier rulings by courts in New South Wales indicating that parents of a disabled child have the right to recover damages if a doctor's negligence deprived them of the opportunity to abort,⁽⁸¹⁾ there was no case law in that State establishing that the parents of a healthy child have such a right.⁽⁸²⁾ The central and obvious issue in the *Superclinics* case therefore was whether, as a matter of public policy in New South Wales, the parents of a healthy child should be compensated for the negligent deprivation of the opportunity to prevent the child's birth by terminating the pregnancy.

Newman J did not discuss this central and obvious issue. Instead, he surprised everyone—including the defendants, who had not pleaded the defence of illegality—by using a reinterpretation of the New South Wales provisions that criminalise unlawful abortion to refuse to award damages to the plaintiff.⁽⁸³⁾

Newman J concluded that, although the clinic proprietor and doctors responsible for the care of the plaintiff had breached the legal duty of care they owed her, damages could not be awarded because all she suffered as a result was the loss of an opportunity to perform an illegal act. That illegal act was the abortion she would have sought had she known earlier

that she was pregnant. Newman J stated that allowing the plaintiff to receive damages in this case would be as 'grotesque' as allowing a bank robber to be compensated for the negligent behaviour of another person involved in the robbery.

It was Newman J's opinion that, had the abortion that the plaintiff had no opportunity to seek in fact taken place, it would have violated the New South Wales provisions that criminalise 'unlawful abortion'. He reached this conclusion on the basis that there was no evidence before him to suggest that the plaintiff's life or her physical or mental health was seriously endangered by her pregnancy, as required under the Levine ruling for an abortion to be lawful.

The plaintiff had not asserted that the pregnancy had posed a risk to her life or to her physical health. She had claimed, however, that the abortion would have been lawful on the basis that there was evidence the pregnancy had posed a serious danger to her mental health. In rejecting this argument, Newman J indicated that nothing less than evidence from a psychiatrist consulted by the pregnant woman during her pregnancy would have convinced him there was a serious danger to her mental health. There was no such evidence in this case as the plaintiff's general practitioner had not referred her to a psychiatrist during her pregnancy. Evidence from the plaintiff's general practitioner that there had been a serious danger to her mental health was not enough, according to Newman J, to satisfy the test in *R v. Wald*. Nor was the fact that the plaintiff had been referred for psychiatric assessment and treatment *after* the birth of her child as a result of continuing with this unwanted pregnancy.

Additionally and controversially, Newman J made no reference to, or assessment of, social and economic factors that might have indicated that continuing with the pregnancy would have posed a serious danger to the mental health of the plaintiff.

Despite citing and purporting to follow the test in *R v. Wald*, therefore, Newman J provided a more restrictive definition than had Levine DCJ of when an abortion would be lawful in New South Wales. He did this by narrowing the circumstances in which it could be shown that an abortion was justified to avert a 'serious danger' to the pregnant woman's mental health. His ruling seemed to introduce an entirely new procedural requirement: in order for an abortion to be performed lawfully under this ground, the need for the abortion to avert the danger to the woman's mental health must have been confirmed by a psychiatrist, who had examined the woman prior to the abortion. Newman J's ruling also left considerable doubt as to when, if ever, social and economic factors could be said to pose a sufficiently serious danger to a pregnant woman's mental health to justify an abortion and render it lawful.

One of the consequences of Newman J's approach, therefore, was widespread doubt and speculation in New South Wales as to exactly when an abortion would be lawful. All that was certain was that his reinterpretation and application of the relevant law was far stricter than that offered by Levine DCJ two decades years earlier. A second, and less widely discussed, consequence of Newman J's approach was that no woman suing health care providers in respect of injuries inflicted during a negligently performed abortion would be able to recover compensation, unless she was able to prove that the abortion had been lawfully performed according to Newman J's strict but ill-defined test.

The Kirby ruling

An appeal against the findings of Newman J in the *Superclinics* case was heard in 1995 by the Court of Appeal of New South Wales. The court delivered its judgment in September 1995.⁽⁸⁴⁾ By a majority of 2:1, it overturned Newman J's conclusion that illegality barred the plaintiff from being awarded damages for the consequences of her lost opportunity to abort.⁽⁸⁵⁾

Kirby A-CJ and Priestley JA both stated that Newman J had erred in concluding the abortion that would have been sought by the plaintiff would have been unlawful. They both held that the evidence did not justify Newman J's conclusion that the hypothetical abortion the woman would have sought necessarily or probably would have been unlawful under the Levine ruling. The third judge, Meagher JA, supported Newman J's interpretation and application of the Levine ruling.

Of these three judges, only Kirby A-CJ offered a detailed discussion and analysis of the test advanced in *R v. Wald*. His view of when an abortion is not unlawful in New South Wales was in the result more liberal than both the Newman ruling and the Levine ruling.

First, Kirby A-CJ emphasised that a referral to a psychiatrist was not necessary to establish there had been a serious danger to a pregnant woman's mental health for the purposes of the Levine ruling. He criticised Newman J's failure to accept the evidence given by the plaintiff's general practitioner that such a danger existed.⁽⁸⁶⁾

Secondly, Kirby A-CJ made it clear that, under the Levine ruling, a doctor is entitled to consider social and economic factors when assessing whether a woman's mental health would be seriously endangered if her pregnancy continued.⁽⁸⁷⁾

Thirdly, Kirby A-CJ liberalised the Levine ruling, stating that the serious danger to a pregnant woman's health should not be limited to dangers that would arise during the

pregnancy. He stated that although the Levine ruling did seem to assert that only dangers that would arise during the pregnancy were relevant to the lawfulness of an abortion, such a limitation was not justified:

There seems to be no logical basis for limiting the honest and reasonable expectation of such a danger to the mother's psychological health to the period of the currency of the pregnancy alone. Having acknowledged the relevance of other economic or social grounds which may give rise to such a belief, it is illogical to exclude from consideration, as a relevant factor, the possibility that the patient's psychological state might be threatened *after* the birth of the child, *eg* due to the very economic and social circumstances in which she will then probably find herself. Such considerations, when combined with an unexpected and unwanted pregnancy, would, in fact, be most likely to result in a threat to the mother's psychological health *after* the child was born when those circumstances might be expected to take their toll.(88)

In support of this reinterpretation of the law, Kirby A-CJ cited the similar conclusion reached by de Jersey J of the Supreme Court of Queensland in *Veivers v. Connolly*,(89) a judgment delivered several months after the Newman ruling in 1994.

Kirby J went on to find that Newman J therefore had erred in not considering the effect that the plaintiff's economic and social circumstances were likely to have on her mental health after the birth of her child. According to Kirby A-CJ, this had lead Newman J wrongly to conclude that an abortion sought by the plaintiff would have been unlawful:

[There was] evidence before Newman J that the plaintiff's mental health had been seriously affected in a perfectly predictable way after the birth of the child. This was the result of the combined pressures of having an unwanted baby when in an unstable emotional relationship. This had, in turn, forced her to give up her studies. It had prevented her from obtaining full-time employment in her chosen discipline. The effects of such factors both on the mother's mental health ... are not to be trivialised. Nor are they unusual in today's society.(90)

Fourthly, Kirby A-CJ pointed out that it would be very difficult, in any criminal prosecution of a doctor for unlawfully terminating a pregnancy, to persuade a jury that the doctor lacked an honest and reasonable belief that there was a serious danger to a woman's mental health. He attributed this difficulty partly to the essentially subjective nature of the 'honest and reasonable' belief that must be shown to be absent before the unlawfulness of an abortion can be established.(91) He pointed out that the case law had not established a list of criteria against which the honesty and reasonableness of the doctor's belief could be

assessed. Kirby A-CJ further argued that it would be undesirable and indeed impossible to provide such a list given the 'wide variety of particularities', including social and economic factors, which will arise for consideration in each case.(92) He also noted that individual doctors do not agree as to when a pregnancy poses a sufficiently serious danger to a woman's mental health to justify its termination. He then inferred that any jury assessing whether a doctor had possessed the requisite 'honest and reasonable' belief must be influenced by the fact that some Australian doctors would much more readily conclude than others that a pregnant woman's mental health was seriously threatened by her pregnancy:

... Beliefs as to the relative danger posed to the mental health of a pregnant woman wishing to terminate a pregnancy will inevitably vary. For example, they may vary according to the particular institutions and medical practitioners consulted. Some, for reasons of religious instruction or personal conscience, could not conceive of any circumstances where termination would be necessary or proportionate. But even in institutions and among medical practitioners (probably the majority) who do not take this strict view, variations will occur. This would be so particularly by reference to the changing economic and social conditions of Australian society today. A jury's assessment of the reasonableness of such beliefs would doubtless take these considerations into account.(93)

Kirby A-CJ thereby offered a reinterpretation of the Levine ruling according to which the meaning of 'unlawful' abortion is in effect determined by a doctor's subjective beliefs about when an abortion is appropriate, based on that doctor's assessment of the impact of social and economic factors on the health of a woman seeking abortion. His approach therefore arguably legitimises the provision of abortion services 'on request', but only if those services are provided by doctors who consider that abortion should be provided on request because forcing a woman to continue with an unwanted pregnancy would inevitably have a negative and serious impact on her mental health. This result seems to fulfil a legal prophesy made by Glanville Williams in 1952:

So far there has been no indication in the American or English cases that abortion would be legally justified on [social or economic grounds *per se*] ... It seems unlikely that the Judges would ever feel themselves able to stretch either the words of statutes or the doctrine of necessity to cover any of those considerations... However - and this cannot be too strongly emphasised - some of these considerations may enter indirectly (at least in those jurisdictions where the mother's health as well as her life can be considered) by giving rise to the practitioner's belief that it would be injurious to the mother to allow her to give birth to the child. In particular, severe worry about the consequences of having the child is one of the factors that may affect the mother's mental health.

... If the law allows the doctor to take account of the strain that would be imposed on the mother's health by bringing up the child after birth, it will have taken a long step towards allowing abortion on social grounds.(94)

It should not be forgotten, however, that the Kirby ruling does not allow doctors to provide abortions to women whose mental and physical health they consider to be entirely robust and unthreatened by continuing the pregnancy. However low his ruling set the minimum level of threat to a pregnant woman's health that can lead a doctor to conclude that the threat is 'serious', Kirby A-CJ did not actually state that an abortion will be lawful whenever a pregnant woman desires it and a doctor is willing to perform it.

Kirby A-CJ's test retains the notion that, in the absence of a serious risk to her life or physical health, a pregnant woman cannot obtain a lawful abortion unless she has or is threatened by some kind of mental instability. Thus the law in New South Wales continues to state that a woman can only legitimately choose to terminate a pregnancy if she is in some way actually or potentially 'unwell'. A competent and entirely healthy adult woman does not have a legal right to terminate her pregnancy. The law also firmly establishes that it is people other than the pregnant woman who ultimately determine whether she will obtain the abortion she seeks. Liberal as the Kirby ruling may be, whether an abortion is lawful under that test depends on the *doctor's* subjective belief that abortion is justified on health grounds (and then, if an attempt is made to enforce the law, on an assessment of that belief by a judge or jury). It does not depend on the *pregnant woman's* subjective belief that the abortion is justified for social, financial or other reasons; and she can only lawfully obtain an abortion if she is willing and able to convince a doctor that the abortion is justified on health grounds.

A High Court Ruling?

In April 1996 the High Court of Australia granted special leave to appeal against the findings of the New South Wales Court of Appeal in the *Superclinics* case.(95) In September 1996 the (then) Chief Justice of the High Court-Brennan CJ-granted an application by the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference to be admitted as *amicus curiae* (friend of the court). He also admitted the Abortion Providers' Federation of Australasia.

The Women's Electoral Lobby also prepared an application to be similarly admitted as *amicus curiae*. Before this application or the case itself could be heard, however, the parties to the action settled out of court in October 1996.

Had the High Court heard this case, it would have been obliged to examine, for the first time, the meaning of unlawful in the context of the NSW criminal provisions that prohibit unlawful abortion. In the course of such examination, presumably the High Court would have addressed the arguments put by the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference, claiming that both *R v. Wald* and *R v. Davidson* were wrongly decided, and should be overruled. Part of that argument was a claim that the defence of necessity has no application in the context of abortion. The High Court's response to that argument would have had important legal implications beyond New South Wales, the jurisdiction in which the *Superclinics* case arose. It would additionally have affirmed or eroded the legal validity of the judicial statements on this matter in Victoria and Queensland, and it would have provided guidance as to the appropriate interpretation of the relevant laws in the Australian Capital Territory, Western Australia and Tasmania.

In the absence of a High Court ruling in the *Superclinics* case, the Kirby ruling in the New South Wales Court of Appeal continues to represent the legal position on abortion in that State.

Australian Capital Territory

The wording of the statutory provisions that criminalise unlawful abortion in the Australian Capital Territory⁽⁹⁶⁾ is exactly the same as the wording of the equivalent provisions in New South Wales. In addition, the criminal law in both the Australian Capital Territory and New South Wales is governed by common law principles of criminal liability rather than being codified.⁽⁹⁷⁾ This means that courts in the ACT view the interpretive approach of courts in New South Wales as highly persuasive on criminal matters. It therefore has long been assumed that the legal position on abortion in the Australian Capital Territory is the same as the legal position established at any given time by case law in New South Wales.⁽⁹⁸⁾ This assumption has never been tested in a court.

From 1978 the law in the Australian Capital Territory additionally required an abortion to be performed in a public hospital.⁽⁹⁹⁾ The legislation imposing this hospitalisation requirement was repealed in 1992.

The Code jurisdictions: judicial reform and untested law

Queensland

The defence in section 282

Queensland's Criminal Code does not contain a definition of unlawful for the purposes of the provisions that criminalise unlawful abortion.(100) It does, however, contain a defence that allows anyone to perform a surgical operation for the 'benefit' of the patient, or 'upon an unborn child for the preservation of its mother's life,' if the performance of the operation is 'reasonable, having regard to the patient's state at the time and to all the circumstances of the case,' and provided the procedure is carried out in good faith and with reasonable care and skill. That defence is contained in section 282 of the Criminal Code.

The first reported case containing any reference to this defence in relation to abortion was the 1955 decision of the Queensland Court of Criminal Appeal in *R v. Ross & McCarthy*.(101) The case involved prosecution of a medical practitioner, Dr Arthur Ross, and Mr Thomas McCarthy and Mrs Ada McCarthy under section 224 of the Queensland Criminal Code in connection with an abortion performed on the kitchen table of a suburban house in Brisbane. All three defendants were found guilty as charged, and appealed against their convictions on a range of grounds, most of which related to evidentiary issues. Their appeals were successful. All three convictions were quashed, and a new trial was ordered in the case of the McCarthys.

Only passing reference was made to section 282 of the Criminal Code in *R v. Ross & McCarthy*. The judgment of Mansfield SPJ, with which Mack J concurred, stated that the Crown had been under a duty to negative the provisions of section 282 in order to establish that the defendants had been guilty of criminal behaviour.(102) Mansfield SPJ also responded briefly to the appellants' contention that the trial judge had misdirected the jury as to the meaning of the words 'preservation of the mother's life' in section 282. He stated that it had been sufficient for the trial judge simply to read these words to the jury without attempting to explain them, because the words 'preservation' and 'life' do 'not bear any technical meaning.' He said that although the judge in *R v. Bourne* had explained these words to the jury, no such explanation had been needed in this case.(103) These comments did not seem to be a disapproval of the statement of the law in *R v. Bourne*.(104) but neither were they a clear affirmation that the test outlined in that earlier English case represented the legal position in Queensland.

The McGuire ruling

In the early 1980s, judges in Queensland began to indicate in obiter that the section 282 defence authorises abortions that satisfy the test advanced in *R v. Davidson*.(105) The applicability of the Menhennitt ruling in Queensland was confirmed in 1986 by McGuire DCJ of the District Court in *R v. Bayliss and Cullen*.(106)

That case involved prosecution of two medical practitioners, Dr Peter Bayliss and Dr Dawn Cullen, under the Queensland provisions that criminalise abortion. Specifically, they were charged under section 224 of the Queensland Criminal Code in respect of an abortion they had performed at the Greenslopes Fertility Control Clinic in Brisbane. The jury in this case acquitted both doctors. It did so after being directed by McGuire DCJ to apply the test in *R v. Davidson*. In a lengthy judgment, McGuire DCJ reviewed relevant case law in Australia and other common law jurisdictions, discussed academic commentary on those cases, and analysed the text and history of relevant provisions of Queensland's Criminal Code. In concluding that the defence in section 282 of the Criminal Code imported the Menhennitt ruling, McGuire DCJ also stated his approval of the reliance in that case upon the doctrine of necessity as a rationale for that ruling.(107)

R v. Bayliss and Cullen put an end to doubts as to whether the liberalising judicial reform introduced in Victoria almost twenty years earlier applied in Queensland. The McGuire ruling contained an important reminder, however, that the 1969 Victorian reform had not authorised abortion unless the pregnant woman faced a serious danger to her health:

... It is a humane doctrine devised for humanitarian purposes; but it cannot be made the excuse for every inconvenient conception. ... it is only in exceptional cases that the doctrine can lawfully apply. This must be clearly understood.

The law in this state has not abrogated its responsibility as guardian of the silent innocence of the unborn. It should rightly use its authority to see that abortion on a whim or caprice does not insidiously filter into our society. There is no legal justification for abortion on demand.(108)

McGuire DCJ also seemed unprepared to accept the expansion of the test in *R v. Davidson* in the subsequent New South Wales case of *R v. Wald*. He referred to the latter case in his judgment, and included discussion of the liberalising effect of allowing social and economic factors to be considered when assessing risk to the pregnant woman's health, but then expressly approved only the statement of the law in *R v. Davidson*.(109) This seems to have been because of a perceived danger that adopting the interpretation of 'unlawful' in *R v. Wald* might pave the way for legal recognition of social and economic factors per se as grounds for abortion.(110)

Like the test in *R v. Wald*, however, the interpretation of the Queensland law offered by McGuire DCJ seems to indicate that an abortion will not be lawful unless performed by a qualified medical practitioner.(111)

Finally, McGuire DCJ indicated that it was his view that the legal test advanced in *R v. Davidson*, which he had affirmed as part of Queensland law, lacked sufficient certainty and clarity. He stated, however, that any changes to that legal test required the 'more imperative authority' of Parliament or a higher court.(112)

The de Jersey ruling

The result in *R v. Bayliss & Cullen* was affirmed by de Jersey J of the Supreme Court of Queensland in the 1994 case *Veivers v. Connolly*.(113) That case involved a civil action by the mother of a severely handicapped child, who had been born in 1976, against the doctor who had been responsible for her medical care during the pregnancy. The plaintiff alleged that the doctor had negligently failed to diagnose that she had suffered from rubella during that pregnancy, and had thereby deprived her of the opportunity to terminate the pregnancy, to avert the likelihood that she would give birth to a seriously malformed infant. She sought compensation for the consequences of being deprived of this opportunity to abort. The court upheld her claim. It awarded her damages for her own pain and suffering, and for the past and future costs involved in providing medical and other care for this severely disabled child. The total award of just over \$900 000 was discounted by five per cent to account for the possibility that the plaintiff would not have been able to obtain an abortion even if she had been in a position to seek one.

In his judgment, De Jersey J discussed whether the abortion in question would have been lawful under the Queensland Criminal Code. In doing so he affirmed that the words 'for the preservation of the mother's life' in section 282 of the Criminal Code allow abortions to be performed in circumstances including those where the operation is 'necessary to preserve the woman from a serious danger to her mental health which would otherwise be involved should the pregnancy continue.'(114) He also rejected the defendant's claim that the only relevant 'serious danger to mental health' could be one that arose during the period of the pregnancy itself. It was instead his view that the relevant danger to mental health could be as in this case-one 'which would not fully afflict [the woman] in a practical sense until after the birth.'(115) This conclusion both clarified and liberalised the meaning of unlawful abortion in Queensland. It also enabled De Jersey J to conclude that there would have been no legal obstacle to performing an abortion in this case.(116)

The paternal injunction cases

In addition to the above rulings, two cases clarifying another important aspect of abortion law were decided in Queensland in the 1980s. Each of these cases involved an application to

the court for an injunction restraining a pregnant woman from terminating her pregnancy. In each case the application was made by the putative father of the foetus in question.

The first case, *K v. T*, came before a single judge of the Queensland Supreme Court in 1983. The applicant in this case was a man who was neither married to nor in a *de facto* relationship with the respondent. They had had sexual intercourse on only one occasion, and the respondent had become pregnant as a result. She had informed him of her intention to have an abortion, on the basis that it would be 'best for everyone.' The applicant sought to prevent this because he was strongly opposed to abortion. He wanted her to continue with the pregnancy, with his financial support, and then surrender the child for adoption. In the Supreme Court, Williams J refused his application for an injunction to restrain the respondent from causing or permitting the pregnancy to be terminated.

Williams J gave three reasons for refusing the application. The first reason was that the court's inherent *parens patriae* jurisdiction, which enabled it to intervene to protect vulnerable subjects of the Crown, including infants, did not extend to a foetus. This was because a foetus lacks legal personality, unless and until it is born alive.(117) The second reason was that it was not appropriate for the court to intervene, either on behalf of the applicant or on behalf of the foetus, to protect and preserve any *future* legal rights the applicant might acquire to apply for custody of a child once it was born.(118) The final reason given by Williams J for refusing to grant an injunction was that, even if the proposed abortion would have been illegal under Queensland's Criminal Code, the applicant lacked standing to bring legal proceedings to restrain a possible breach of the criminal law, which is a matter for public officials rather than private citizens.(119)

The applicant in *K v. T* appealed to the Full Supreme Court of Queensland. The Attorney-General of Queensland joined the proceedings on the relation of the original applicant. This was intended to overcome the third of the obstacles to a successful application identified by Williams J at first instance: namely, that the applicant lacked standing to seek an injunction to restrain a breach of the criminal law. The Full Supreme Court in *Attorney-General (ex rel Kerr) v. T* rejected the appeal. In a joint judgment, Campbell CJ, Andrews SPJ and Connolly J concluded that it would be inappropriate in this case for a civil court to exercise its discretion to grant the Attorney-General's request for an injunction to restrain the commission of a criminal offence. The court held that the court's discretion to grant such an injunction should only be exercised in exceptional cases: cases where a criminal offence is repeatedly committed due to an inadequate penalty in the Criminal Code, or cases where there is an emergency. The court held that the instant case fell into neither category.(120) The court also affirmed the conclusion of Williams J that, because a foetus lacks legal

personality, it could not be protected using the court's inherent or *parens patriae* jurisdiction.(121)

An application was made to the High Court for special leave to appeal against the decision of the Queensland Supreme Court in *Attorney-General (ex rel Kerr) v. T*, and for an interlocutory injunction. The application was heard and dismissed by Gibbs CJ. He affirmed the lower courts' view that it would be inappropriate for a civil court to issue an injunction in this case to restrain a possible breach of the criminal law, stating it was unjustifiable to assume that the respondent would be convicted of breaching the Criminal Code if she had an abortion and was ever prosecuted in relation to it.(122) He also affirmed the lower courts' conclusion that the law does not regard a foetus as a person whose existence can be protected by the courts, because it lacks legal rights until it is born and has a separate existence from its mother.(123) He went on to say that, even if this latter view were wrong, the applicants would still fail:

There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be overstepped if an injunction were to be granted in the present case.(124)

The second case in which an injunction was sought to restrain a pregnant woman from having an abortion was decided in Brisbane in 1989 by Lindenmayer J of the Family Court of Australia. In that case, *In the Marriage of F*,(125) the applicant sought an injunction restraining his estranged wife from terminating her pregnancy. Lindenmayer J dismissed the application. He affirmed that there were no common law rights that would support the husband's application. Specifically, he concluded that the so-called 'right to procreate' claimed by the applicant did not extend to giving him a right to force his wife to continue her pregnancy against her wishes, even if it was not clear that the proposed abortion would be legal.(126) He also concluded that, because a foetus lacks legal personality and cannot have rights until it is born, a foetus has no common law rights that could be enforced by the applicant on its behalf.(127)

Lindenmayer J did acknowledge, however, that the Family Court had jurisdiction to grant the injunction sought. That jurisdiction was conferred by section 114(1) of *the Family Law Act 1975* (Cwth), which empowers the court to make such order as it considers 'proper' with respect to proceedings that relate to a matter 'arising out of the marital relationship'.(128) Lindenmayer J concluded, however, that it would not be 'proper' to grant the applicant husband an injunction in this case.

He gave three reasons justifying this conclusion. The first reason was that the marriage between the parties to the case seemed to have broken down. Lindenmayer J's second reason was that granting the injunction would force the respondent to proceed with a pregnancy she did not want, and to give birth to a child she did not want and which she might resent, which he felt cast doubts on both her will and capacity to carry out her functions as a mother. His third reason was that granting the injunction would compel the respondent 'to do something in relation to her own body which she does not wish to do', which would be 'an interference with her freedom to decide her own destiny.' He acknowledged that refusing the injunction could be said to allow the respondent 'to interfere with the destiny of the intended child,' but said that this objection was answered by his finding that the foetus had no legal right to be born which the court could protect. He also acknowledged that refusing the injunction could be said to allow the respondent to override her husband's 'interest in having his intended offspring born,' but answered this objection by saying that, in the circumstances of this case, that interest was 'subordinate to the legitimate interest of the wife in being left free to decide a matter which affects her far more directly than it does the husband.'(129)

The maternal-foetal attack case

There have been no cases involving prosecution of doctors under the Queensland laws that criminalise abortion since 1986. In 1996, however, Hoath DCJ of the District Court of Queensland heard a case involving a prosecution under those laws that was of a different kind.

The case, *R v. Lippiatt*,(130) arose from an attack on a pregnant woman in Queensland by her estranged partner. At the time of the attack, which involved a karate kick to her stomach, she was seven and a half months pregnant. The attack resulted in a stillbirth. The accused was charged with assault causing bodily harm to the pregnant woman. Unusually, he was also charged with acting unlawfully in an attempt to procure a miscarriage, under the Queensland provisions that make unlawful abortion a crime. The defendant pleaded guilty to both charges and was sentenced to nine years' imprisonment.

The decision to lay the additional charge against the accused in this case was novel because Australian prosecutions under the laws that criminalise abortion, when they do occur, have hitherto related to the performance of an abortion in a medical context, at the request of the pregnant woman who has chosen to end the pregnancy. They have not related to the very different situation where a pregnancy ends as the result of a violent physical attack on a woman, during a pregnancy with which she presumably wishes to continue.

The application of Queensland's abortion laws to this latter situation in *R v. Lippiatt* seemed to be motivated by the prosecutorial authority's desire to bring the accused to specific and separate legal account for the demise of the victim's child. This could not have been done by prosecuting the accused for murder or manslaughter, because the child in *R v. Lippiatt* was born dead.(131) Nor was there any foeticide offence in Queensland law under which the accused could have been charged in relation to assaulting and killing the foetus in utero.(132) There was, however, one other way in which the accused could have been punished in relation to killing the victim's foetus, namely in the ordinary course of sentencing after his conviction for assaulting the pregnant woman. It is not clear why this alternative was considered inadequate in *R v. Lippiatt*.

Tasmania

The statutory provisions that criminalise abortion in Tasmania are sections 134 and 135 of the Tasmanian Criminal Code. These provisions seem to be subject to the following defence:

It is lawful for a person to perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances.(133)

The wording of this defence resembles that of the Queensland statutory defence(134), except that it lacks the words 'or upon an unborn child for the preservation of its mother's life'.(135) Whether or not an abortion is lawful under the same circumstances as in Queensland therefore is uncertain.

Further uncertainty is introduced by section 165 of the Tasmanian Criminal Code, which additionally prohibits causing the death of 'a child who has not become a human being in such a manner that he would have been guilty of murder if such child had been born alive', unless the death is caused by 'means employed in good faith for the preservation of its mother's life.'(136)

Although there were prosecutions and convictions up until the 1960s under sections 134 and 135 of the Tasmanian Criminal Code, these did not produce case law clarifying the effect of these provisions.(137) The legal position in Tasmania therefore is very unclear.

The Statutory reform jurisdictions: legislative reform

South Australia

In 1969, the same year that liberalising judicial reform of Australian abortion law began in Victoria, South Australia enacted legislation that made the clarified the law criminalising abortion in that State. Following the approach of the reforms introduced in England and Scotland by the Abortion Act 1967, the South Australian legislation introduced a statutory definition of when an abortion is not 'unlawful'.(138) That definition is to be read into the pre-existing and unrepealed statutory provisions that create the crime of unlawful abortion.(139)

Under the South Australian legislation an abortion cannot be performed late in pregnancy unless it is performed in good faith solely to preserve the life of the pregnant woman. The cut-off point is specified as the stage of pregnancy where the foetus has become 'a child capable of being born alive,' a point which the legislation sets at prima facie 28 weeks of pregnancy but which might arise in some cases from around 22-23 weeks of pregnancy.(140)

Earlier in pregnancy, however, an abortion can be performed by a qualified medical practitioner provided her or she is of the opinion, formed in good faith, that either the 'maternal health ground' or the 'foetal disability' ground is satisfied. The 'maternal health' ground permits abortion if more risk to the pregnant woman's life, or to her physical or mental health (taking into account her actual or reasonably foreseeable environment), would be posed by continuing rather than terminating the pregnancy.(141) The 'foetal disability' ground permits abortion if there is a substantial risk that the child would be seriously physically or mentally handicapped if the pregnancy were not terminated and the child were born.(142) There have been no cases interpreting the South Australian legislation. The wording of the 'maternal health' ground, however, suggests that it is at least as liberal as the legal test in New South Wales under the Kirby ruling. This is especially true in the very earliest stages of pregnancy, when terminating a pregnancy almost invariably poses less risk to the health of a woman than continuing with pregnancy.(143) The 'foetal disability' ground further liberalises the law as it allows early abortion on the basis of foetal abnormality even if the pregnant woman's mental or physical health would not be threatened by giving birth to a seriously disabled child. Neither ground, however, permits abortion for the reason only that the pregnancy is unwanted.

The medical practitioner's opinion that either of these grounds is satisfied must be shared by a second qualified medical practitioner.(144) In addition, the abortion must be performed in a prescribed hospital in order to be lawful.(145) Further, the pregnant woman must have been resident in South Australia for at least two months before the abortion.(146) These requirements concerning the second medical opinion, hospitalisation and the woman's are waived in emergency situations. These are situations where the doctor

is of the opinion that the procedure is immediately necessary to save the life, or to prevent grave injury to the physical or mental health of the pregnant woman.(147)

The legislation specifies that no person is under any legal duty 'to participate in any treatment authorised by this section to which he has a conscientious objection.'(148)

Regulations made under the South Australian legislation require medical practitioners involved in abortions to complete a certificate stating the legal ground on which the abortion in question was justified.(149) The regulations also require completion of a notice containing information about each termination of pregnancy.(150) This includes information about the woman's age, marital status, reproductive history, the abortion method used, more detailed information about the medical condition of the pregnant woman or the foetus that legally justified the termination, and subsequent medical complications (if any). This documentation must be sent to the Director-General of Medical Services within 14 days of the abortion, and the doctor must keep copies for three years after the abortion.

The regulations additionally list almost 80 hospitals in South Australia that are prescribed hospitals in which abortions may be lawfully performed.(151) They also require the chief executive officer of a hospital where abortions are performed, to inform the Director-General of Medical Services each month of the total number of pregnancies terminated at that hospital by named individual doctors.(152)

Northern Territory

Legislative changes introduced in the Northern Territory in 1974 also introduced a statutory explanation of when an abortion is not 'unlawful.'(153) As in South Australia, that definition is to be read into the pre-existing and unrepealed statutory provisions that create the crime of unlawful abortion.(154)

The Northern Territory legislation permits abortion up to 14 weeks of pregnancy where either the 'maternal health ground' or the 'foetal disability ground' is satisfied. The legislation defines these grounds in the same way as in South Australia.(155) Although there is no case law on the matter, the Northern Territory legislation apparently permits abortion at this stage of pregnancy on similarly liberal grounds as in South Australia.

The Northern Territory legislation additionally requires an abortion at this stage of pregnancy to be carried out in a hospital, by a gynaecologist or obstetrician. A second

doctor must share the opinion that either the 'maternal health ground' or the 'foetal disability ground' is satisfied.

Any medical practitioner may lawfully terminate a pregnancy of up to 23 weeks if the doctor believes in good faith that it is immediately necessary to prevent grave injury to the pregnant woman's physical or mental health.(156) Any medical practitioner may lawfully terminate a pregnancy at any stage of pregnancy if the doctor believes in good faith that it is for the purpose only of preserving the pregnant woman's life.(157)

The Northern Territory law also provides that where the pregnant woman is aged under 16 years, 'or is otherwise incapable in law of giving her consent', the medical practitioner terminating a pregnancy must obtain the consent 'of each person having authority in law' to consent on her behalf.(158)

The Northern Territory legislation specifies that no person is under any legal duty 'to procure or to assist in procuring the miscarriage of a woman or girl or to dispose of or to assist in disposing of an aborted foetus if he has a conscientious objection thereto.'(159)

Western Australia

The defence in section 259

Until recently the legal status of abortion in Western Australia was apparently the same as in Queensland. As in Queensland, the Western Australian Criminal Code did not contain a definition of unlawful for the purposes of the Criminal Code provisions that made unlawful abortion a crime: sections 199-201. The Western Australian Criminal Code did, however, contain a provision that was worded almost identically to section 282 of the Queensland Criminal Code. That provision-section 259 of the Western Australian Criminal Code-allowed anyone to perform a surgical operation for the 'benefit' of the patient, or 'upon an unborn child for the preservation of the mother's life,' if the performance of the operation was 'reasonable, having regard to the patient's state at the time and to all the circumstances of the case,' and provided the procedure was carried out in good faith and with reasonable care and skill.

Unlike in Queensland, however, there were no judicial rulings explaining the meaning of 'unlawful' abortion in Western Australia and interpreting sections 119-201 and section 259 of the Western Australian Criminal Code in this context. It was nonetheless widely assumed that the meaning of 'unlawful' abortion advanced by courts in Queensland, adopting the legal test that applies in Victoria, represented the legal position in Western Australia.(160)

The Davenport legislation

In early 1998 it was announced that two Perth doctors were to be prosecuted under section 199 of the Western Australian Criminal Code, in respect of an allegedly unlawful abortion performed in 1996 at the Nanyarra abortion clinic in Perth. This subsequently led to the passage of legislation introducing Australia's most liberal abortion law to date. The legislation was introduced into the upper house of the Western Australian Parliament in March 1998 as a Private Member's Bill by Cheryl Davenport MLC (ALP).(161)

The *Acts Amendment (Abortion) Act 1998* (WA) was passed by the Western Australian Parliament on 20 May 1998.(162) It repealed old sections 199-201 of the Western Australian Criminal Code and replaced them with a new section 199. That new section provides that it is unlawful to perform an abortion unless the abortion is performed by a medical practitioner 'in good faith and with reasonable care and skill', and the performance of the abortion is justified under new section 334 of the *Health Act 1911* (WA).

An abortion will be justified under section 334 of the *Health Act 1911* (WA) if one of four grounds have been satisfied. The first ground essentially allows abortion on request. It allows abortion if the pregnant woman has given 'informed consent.'(163) This is defined to mean 'consent freely given by the woman' after a counselling requirement has been satisfied. That counselling requirement demands that an independent medical practitioner (not the doctor who performs the abortion, nor any doctor who assists in performing the abortion) has done three things:

-
- 'properly, appropriately and adequately' provided the pregnant woman with counselling about the 'medical risk' of abortion and of carrying a pregnancy to term;
-
- offered to refer the pregnant woman for 'appropriate and adequate counselling' about 'matters relating to' abortion and to carrying a pregnancy to term; and
-
- informed the pregnant woman that 'appropriate and adequate counselling' will be available to her should she wish it after the abortion is performed or after she carries the pregnancy to term.(164)

If the pregnant woman is aged under 16 and is being supported by a parent or guardian, she will not be regarded as having given informed consent unless that person has been told about the proposed abortion, and that person 'has been given the opportunity to participate

in counselling process consultations between the woman and her medical practitioner as to whether the abortion is to be performed.'(165)

The other three grounds under which an abortion is permitted are more restrictive than the first, but do not impose any legal requirement that the pregnant woman be offered counselling. The second ground is that the pregnant woman 'will suffer serious personal, family or social consequences' if the abortion is not performed.(166) The third ground is that 'serious danger to the physical or mental health' of the pregnant woman will result if the abortion is not performed.(167) The fourth ground is that the pregnant woman's pregnancy 'is causing serious danger to her mental health.'(168)

Any one of these four grounds will only legally justify an abortion performed up to 20 weeks of pregnancy. After that time, an abortion cannot be performed lawfully unless two doctors agree that 'the mother or the unborn child' has a 'severe medical condition [that] justifies the procedure.' These two doctors must be members of a panel of at least six doctors appointed for this purpose by the Minister. Additionally, a late term abortion must be performed in a facility approved for these purposes by the Minister.(169)

The new law explicitly provides that no 'person, hospital, health institution, other institution or service' is under a duty to participate in the performance of any abortion.(170)

Importantly, the new legislation also changes the legal consequences of performing an unlawful abortion. The most onerous penalty is imposed on abortionists who are not medical practitioners. They will be liable to imprisonment for five years, unless their behaviour comes within the terms of new section 259 of the Criminal Code. That section replaces the defence in the old section 259, discussed above. It is identical to that old section except that it now refers to 'surgical or medical treatment' rather than just 'surgical treatment', presumably so that lawful abortions could include those performed with abortifacient drugs if those methods are ever approved for general use in Australia.

Doctors who perform abortions otherwise than in accordance with the new Western Australian law will no longer be liable to imprisonment: a fine of \$50 000 is imposed. Women seeking or obtaining abortions are no longer subject to any legal sanction in Western Australia.

The Western Australian legislative reforms additionally require the Western Australian Health Minister to conduct a review of 'the operation and effectiveness' of these new abortion provisions three years after the new legislation comes into effect.(171)

Child Destruction

The lawfulness of abortion in every State and Territory of Australia, except New South Wales and possibly Tasmania, is also affected by a separate crime of 'child destruction.' This crime only applies to abortions performed late in pregnancy.

The crime of child destruction generally carries more severe penalties than the crime of unlawful abortion.

The English Model - Victoria and South Australia

Two Australian States, Victoria and South Australia, have legislation that make it a crime to act with intent to destroy 'a child capable of being born alive' before it has an existence independent of its mother, unless the act is done in good faith solely to preserve the mother's life.(172) Evidence that the woman in question had been pregnant for 28 weeks or more is considered to be prima facie proof that she was carrying 'a child capable of being born alive'. The penalty for committing child destruction is ten years' imprisonment in Victoria and life imprisonment in South Australia.

These legislative provisions copied the child destruction offence contained in section 1 of the Infant Life (Preservation) Act 1929.(173) That offence was created by the UK Parliament to provide legal protection for 'unextruded' babies during the birth process. Such babies were protected neither by the crime of unlawful abortion (which only protects the foetus in utero) nor by homicide laws (which only protects a child once it has been born alive(174)). By making it a crime intentionally to destroy a 'child capable of being born alive' and by introducing a legal presumption that a foetus is such a child from the twenty-eighth week of pregnancy, however, this child destruction offence extended legal protection beyond the actual period of birth. The offence also offers legal protection to the 'child capable of being born alive' while it is still in utero. At the later stages of pregnancy, therefore, an abortion may potentially contravene both this child destruction offence and the criminal prohibition on unlawful abortion.(175)

There is no Australian case law clarifying the meaning of either the Victorian or the South Australian child destruction provisions. Some guidance may come from the two English cases offering interpretations of section 1 of the Infant Life (Preservation) Act 1929.(176) These cases indicate that, in respect of pregnancies of less than 28 weeks' gestation, a foetus is 'a child capable of being born alive' if it would be able to breathe if born at that stage of pregnancy. That question is to be decided 'on the balance of probabilities.'(177) It is unclear from these cases whether the child must be able to breathe without medical assistance in

order to satisfy this test. It is clear from these cases, however, that the child's statistical chance of longer-term survival if born at that stage of pregnancy is not legally relevant when assessing if it is 'a child capable of being born alive.'(178)

The Australian equivalents of the English child destruction offence therefore might protect fetuses as early in pregnancy as 22-23 weeks. This is the very earliest point at which foetal lung development could sustain breathing, with the aid of a ventilator. This boundary is unlikely to be pushed back by medicine in the foreseeable future.(179)

The English cases do not make it clear what kind of proof a court would require to rebut the statutory presumption that a foetus at 28 or more weeks of pregnancy is not 'a child capable of being born alive'. It therefore is possible that a court would consider abortions performed at that late stage of pregnancy to be automatically unlawful under the Victorian and South Australian child destruction provisions.

The Code Jurisdictions - Western Australia, Queensland, the Northern Territory and Tasmania

Queensland

The child destruction offence in section 313(1) - 'preventing a child from being born alive'

Section 313(1) of Queensland's Criminal Code provides that it is a crime, 'when a woman is about to be delivered of a child,' to prevent that child from being born alive. There have been no cases in Queensland explaining when section 313(1) may be applicable.

The wording of this provision suggests it may be restricted to situations where delivery is imminent. If this is the case, section 313(1) might only apply to behaviour that kills a foetus late in pregnancy, when a pregnant woman is about to go into labour. On the other hand, there were some suggestions by McGuire J in *R v. Bayliss & Cullen* to the effect that section 313(1) may protect any 'viable' foetus, which would mean the Queensland provision would apply in the kind of situations covered by the Victorian, South Australian and English child destruction offences.(180) Whichever view is correct, it is not clear from the wording of section 313(1) whether its application depends on the foetus in question having the capacity to breathe (with or without medical assistance), or on it having a significant chance of longer-term survival, if it had been born instead of being killed at that stage.

The penalty for violating section 313(1) is life imprisonment.

A new foeticide offence in section 313(2) - 'destroying the life of an unborn child'

In 1996 the Queensland Criminal Code Advisory Working Group recommended to the Queensland Attorney-General that section 313 be amended by inserting new provisions to create a child destruction offence along the lines of the South Australian and Victorian offences discussed above. It was recommended that new subsections 313(2) and (3) be introduced to make it a crime to unlawfully assault a pregnant woman and destroy the life of 'a child capable of being born alive,' and to state that evidence that the woman had been pregnant for a period of 24 weeks or more would be prima facie proof that she was carrying a child capable of being born alive.(181)

These recommendations were adopted and incorporated into the Criminal Code Amendment Bill 1996 (Qld), the overall purpose of which was to 'update and streamline' Queensland's Criminal Code.(182) As well as proposing legal protection for a 'child capable of being born alive' from being killed, this Bill additionally proposed protecting such a foetus from grievous bodily harm and from the transmission of a serious disease.(183)

During passage of this Bill through the Queensland Parliament in March 1997, however, the relevant provisions were amended by replacing the reference to 'child capable of being born alive' with reference to 'a child.' The amendment also removed the reference to 24 weeks of pregnancy as the time at which there would be a presumption that this legal protection extended to a foetus.(184)

The amended section 313 came into effect on 1 July 1997. Thus it is now a crime under section 313(2) unlawfully to assault a pregnant woman and destroy the life of, do grievous bodily harm to, or transmit a serious disease to, 'the child' before its birth. The penalty for this new offence is life imprisonment.

There is no suggestion in this new provision that criminal liability is confined to the later stages of pregnancy. Arguably a 'child' for these purposes includes a foetus at any stage of its gestation, from the very beginning of pregnancy. This provision therefore may be best described as a foeticide offence rather than a new offence of child destruction.

The precise scope of the new section 313(2) foeticide offence remains unclear. It certainly would apply to the kind of behaviour that occurred in *R v. Lippiatt*, which indicates that it is unlikely that future cases involving violent assaults on pregnant women will result in prosecutions under the Queensland provisions that make unlawful abortion a crime.(185) It is less clear, however, whether the new section 313(2) could be applied in the context of medical abortion. Arguably the word 'unlawfully' in section 313(2) would limit its application in that context to those medical abortions that are already prohibited under the

Queensland provisions that criminalise unlawful abortion, and thus to abortions that do not satisfy the test in *R. v. Bayliss & Cullen*.

Western Australia

Section 290 of the Western Australian Criminal Code is equivalent to the child destruction provision in section 313(1) of the Queensland Criminal Code. The Western Australian provision similarly provides that it is a crime, 'when a woman is about to be delivered of a child,' to prevent that child from being born alive. The penalty for violating section 290 is life imprisonment.

As is the case with the relevant Queensland provision, this Western Australian child destruction offence arguably is applicable only to situations where a foetus is killed late in pregnancy. Exactly how late, however, remains unclear. The following comment on section 290 was made in obiter by Murray J in the recent case *Martin v. The Queen*:

The meaning of the phrase 'when a woman is about to be delivered of a child' is uncertain. Does it mean at or about the time of birth? If so, why is it so limited, or is it a case that a woman is regarded as being about to be delivered of a child at any time when she is pregnant and carrying a live foetus? ... [Noting] the uncertainties in the proper interpretation of s 290, which may be left for another day, it is sufficient for present purposes to conclude that there is nothing in the wording of that section which would necessarily require it to be applied to conduct of the accused person which is closely connected in time with the birth of a dead child.(186)

These comments by Murray J reflect the opinion he gave in 1983 as Crown counsel when conducting a review of the Western Australian Criminal Code, that section 290 potentially applies from the twenty-fourth week of pregnancy.(187)

Section 290 of the Western Australian Criminal Code was not amended in the recent legislative changes to the abortion laws in that State.

Northern Territory

Section 170 of the Northern Territory Criminal Code is worded in nearly identical terms to the child destruction provisions in Western Australia and Queensland. It provides that it is a crime 'when a woman or girl is about to be delivered of a child' to prevent that child from being born alive. This crime is punishable by life imprisonment.

There have been no cases interpreting this provision and clarifying the circumstances in which a person may be liable for child destruction in the Northern Territory.

Tasmania

The criminal law of Tasmania does not contain a statutory provision that clearly applies only to the termination of late term pregnancies. The Tasmanian provision that most closely resembles a child destruction offence is section 165 of the Tasmanian Criminal Code. It prohibits causing the death of 'a child who has not become a human being in such a manner that he would have been guilty of murder if such child had been born alive', unless the death is caused by 'means employed in good faith for the preservation of its mother's life'.

There are no statutory or judicial interpretations of the meaning of 'a child who has not become a human being', and hence no guidance as to at what stage of pregnancy a foetus would be protected by this section. Arguably section 165 might apply at any stage of pregnancy, in which case this provision might be better described as forming part of the Tasmanian law that establishes the crime of unlawful abortion

The penalty for contravening section 165 is 21 years' imprisonment, and/or a fine, as the sentencing judge deems appropriate in the circumstances of each case.

[The ACT and NSW](#)

Australian Capital Territory

Section 40 of the *Crimes Act 1900* (ACT) establishes a child destruction offence that prohibits behaviour 'occurring in relation to a childbirth and before the child is born alive' that 'prevents the child from being born alive' or 'contributes to the child's death.' The crime is punishable by 15 years' imprisonment.

Again, there is no case law explaining the meaning of section 40. The words 'in relation to a childbirth' suggest, however, that section 40 only applies to abortions performed at the very end of pregnancy, when delivery has already commenced or is very imminent.

New South Wales

The *Crimes Act 1900* (NSW) contains no provision that may be described as a child destruction offence. The only somewhat relevant provision is section 42, which makes it a crime-punishable by 14 years' imprisonment-to maliciously inflict grievous bodily harm on a child 'during or after' its delivery. This offence clearly only applies in situations where a

pregnant woman's labour has already commenced. It does not apply where the foetus is still in utero.

Homicide

The criminal law in every Australian State and Territory prohibits unlawful homicide. This may be described as the killing of a human being which is not justified or excused by law. There are various categories of homicide, which broadly follow a basic distinction between the more serious crime of murder and the less serious crime of manslaughter. The detail of the legal rules governing liability for different kinds of homicide varies, however, between the different States and Territories. The following discussion averts to the detail of these rules, and the differences between them, only where they are relevant to the potential application of the law of homicide to abortion.(188)

Under Australian law a foetus in utero cannot be the victim of any kind of homicide, regardless of the stage of pregnancy at which it is killed.(189) A foetus can only be the victim of murder or manslaughter if it is born in a living state. For these purposes, a child is born in a living state when it-but not necessarily the umbilical cord, placental tissue or afterbirth-is completely extruded from the pregnant woman's body.(190) Except in the Australian Capital Territory, and in New South Wales for murder prosecutions, a child need not have breathed to be considered born alive. Nor is it necessary that the child be viable in the sense that it has the capacity to stay alive.(191) A functioning heart is probably sufficient.(192) Birth includes surgical removal of the child from its mother, as in the case of birth by Caesarean section, as well as vaginal delivery.

Thus where a foetus is killed in utero in the course of an abortion there can be no prosecution for homicide.(193) The legal situation is different, however, where an abortion does not produce a dead foetus. The law of homicide may apply if the foetus is born alive according to the above definitions, but then dies as a result of its prematurity.(194) Authorities for this under English common law are the old cases *R v. West* (195) (which involved a murder prosecution) and *R v. Senior* (196) (which involved a manslaughter prosecution). A similar result was reached in a more recent case involving a manslaughter prosecution under the Queensland Criminal Code, *R v. Castles*.(197) In that case, the accused, who lacked medical qualifications, had attempted to abort a pregnancy of between 20 and 24 weeks by injecting warm water into her uterus. Two days later the pregnant woman gave birth to a child who apparently had breathed before dying two hours later. At the commencement of the trial, Lucas J of the Supreme Court of Queensland stated that although this was a 'most unusual indictment for manslaughter,' it was nonetheless one in which a verdict of guilty would have been open on the evidence given at the committal

proceedings. The evidence subsequently presented to the court, however, introduced a reasonable doubt as to whether the child had in fact been born alive. Accordingly, Lucas J stated that the case should not go to the jury. He also expressed the view that it would have been more appropriate to have charged the accused with the crime of unlawful abortion, under section 224 of the Queensland Criminal Code.

It is possible that the law of homicide might also apply if the foetus is born alive but dies as the result of injuries inflicted during the abortion. That conclusion may be supported by recent English and Australian decisions involving violent attacks on pregnant women, where the foetus has been damaged but subsequently has been born alive, the child has then died as a result of its injuries, and where the attacker has been prosecuted for homicide in relation to the child's death.

An important case of this kind was the decision of the English Court of Appeal in *Attorney-General's Reference (No 3 of 1994)* (1998). In that case, a man had stabbed his pregnant girlfriend in her lower abdomen. At that time she was 24-26 weeks' pregnant. The attack caused the woman to go into premature labour. She gave birth to a child who was seriously damaged due to the stab wounds she had received in utero. The child lived for four months after her birth. The accused was charged with the child's murder. The trial court ruled there was no case to answer. The Court of Appeal, however, was of the opinion that, although under English law no-one could be liable for murder or manslaughter for killing a foetus in utero, both offences could be committed where a child's death results from injury to its mother during her pregnancy. The Court of Appeal did also state that in obiter that this conclusion would *not* render a doctor who carried out an abortion liable to conviction for murder, if the foetus were born alive but subsequently died, provided that abortion had otherwise been lawfully performed. (199) That statement has attracted criticism, (200) however, and no subsequent case has arisen to confirm that it does represent the legal position in either England or in any Australian jurisdiction.

The recent Western Australian case *Martin v. The Queen* (201) is also relevant on this point. The appellant in that case had stabbed his de facto wife in her lower back during her twenty-eighth week of pregnancy. As a result she had suffered substantial loss of blood which led to a deficiency in the blood supply to the foetus. This in turn caused damage to the foetal brain. Two months after the attack, the woman gave birth. The child was born alive but suffered massive brain damage from which he died seven months later. The accused was charged with manslaughter. He appealed against his conviction, claiming that a homicide charge could not be brought under the Western Australian Criminal Code in respect of behaviour that had taken place when the alleged victim was still a foetus in utero. The Western Australian Court of Criminal Appeal rejected the appeal and the argument that

a homicide charge can only be brought if the victim was, at the time of the attack, a person recognised by the law as a person who may be killed. The court affirmed that the prosecution could be brought in respect of injuries inflicted on it before its birth which ultimately led to its death, because the child in question had been born alive.

In reaching this conclusion, the court placed reliance on section 271 of the Western Australian Criminal Code, which provides that a person is deemed to have killed a child (for the purposes of the relevant homicide offences) when that child dies in consequence of that person's behaviour 'before or during its birth.' The court held that there was no reason to limit the application of section 271 to behaviour occurring at or shortly before the child's birth. Rather, that section should be viewed as applicable to acts and omissions damaging the foetus in utero at any stage of pregnancy.⁽²⁰²⁾ The Criminal Codes in Queensland and the Northern Territory contain provisions worded identically to section 271,⁽²⁰³⁾ which arguably renders it more likely that the courts in those jurisdictions would follow the approach of the Western Australian court in *Martin v. The Queen*. The absence of such a statutory provision in other Australian jurisdictions, however, would not necessarily inhibit courts in those jurisdictions from reaching the same conclusion on the basic question of whether liability for homicide can attach in this kind of case.

It should be noted that the court's reasoning and conclusion in *Martin v. The Queen* was consistent with decisions in other (non-Code) Australian jurisdictions recognising that, if and only if it is born alive, a child may bring a civil action in respect of damage caused by negligent behaviour that took place before its birth⁽²⁰⁴⁾ or even its conception.⁽²⁰⁵⁾ Although the court in *Martin v. The Queen* did not specifically address this matter, the court's approach arguably was also consistent with the conclusion that liability for homicide can attach in respect of the subsequent death of a child resulting from an otherwise lawfully performed abortion.⁽²⁰⁶⁾

It is also possible that the law of homicide could apply to a failure to attempt to sustain a child born alive after the performance of an otherwise lawful abortion. There have been no prosecutions along these lines in Australia. The only known English prosecution of this kind, *R v Hamilton*,⁽²⁰⁷⁾ involved a doctor who was alleged to have left a living abortus to die. The magistrate held there was no case to answer and the prosecution was dismissed. The English Court of Appeal averted to this issue in *Attorney-General's Reference (No 3 of 1994)* but declined to express any opinion on the matter.⁽²⁰⁸⁾

Endnotes

2. See further: L. Cannold, *Feminism, Morality and the Hard Choices Women Make* Allen & Unwin, Sydney, 1998; M. O'Donovan and J. Stuparich (ed), *The Abortion Debate: Pro-Life Essays*, ACT Right to Life Association, Canberra, 1994; A. Gutman and D. Thompson, *Democracy and Disagreement* Cambridge Massachusetts, Belknap Press (Harvard University), 1996.
3. See further: Expert Panel of Women's Committee of National Health and Medical Research Council (NHMRC), *An Information Paper on Termination of Pregnancy in Australia*, AGPS, Canberra, 1996; L. Ryan, M. Ripper and B. Buttfield, *We Women Decide: Women's Experience of Seeking Abortion in Queensland, South Australia and Tasmania 1985-1992*, Flinders University, Adelaide, 1994.
4. See A. Rahman, L. Katzive and S. Henshaw, 'A Global Review of Laws on Induced Abortion, 1985-1997,' *International Family Planning Perspectives*, vol. 24, no. 2, 1998, p. 56.
5. See generally A. Dix et al, *Law for the Medical Profession in Australia*, 2nd ed, Butterworths-Heinemann, Melbourne, 1996; B. Bennett, *Law and Medicine*, Law Book Company, Sydney, 1997; P. MacFarlane, *Health Law: Commentary and Materials*, 2nd ed, Federation Press, Sydney, 1995.
6. See P. Gillies, *Criminal Law*, 3rd ed, Law Book Company, Sydney, 1993, p. 10; *Brennan v. R* (1936) 55 CLR 253 *per* Dixon and Evatt JJ; *Stuart v. R* (1974) 134 CLR 426 *per* Gibbs J.
7. Gillies, *supra* n 5, p. 10.
8. The Criminal Code in each of Queensland (first enacted in 1899) and Western Australia (first enacted in 1902) is based on a draft written in 1897 by Sir Samuel Griffith, then Chief Justice of the Supreme Court of Queensland. The Tasmanian Criminal Code (first enacted in 1924) was influenced by the Griffith model but differs in many respects. The Northern Territory Code (first enacted in 1983) is in many ways 'more individual, indeed almost idiosyncratic', incorporating aspects of the Griffith model, the Tasmanian Criminal Code and New Zealand's Criminal Code of 1893: E. Edwards et al. *The Criminal Codes: Commentary and Materials*, 4th ed, Law Book Company, Sydney, 1992, pp. 3-4.
9. One example of this divergence is the different interpretations given by Australian and English courts to the defence of intoxication; another is their different approach to defining the elements of murder at common law: Gillies, *supra* n 5, p. 9.
10. *Crimes Act 1958* (Vic), ss. 65 and 66; *Crimes Act 1900* (NSW), ss. 82, 82 and 84; *Crimes Act 1900* (ACT), ss. 42, 43 and 44; *Criminal Code Act 1899* (Qld), ss. 224,

225 and 226; *Criminal Code Act 1924* (Tas), ss. 134 and 135; *Criminal Law Consolidation Act 1935* (SA), ss 81 and 82; *Criminal Code Act 1983* (NT), ss. 172 and 173.

11. The Western Australian Parliament recently repealed ss. 199-201 of the *Criminal Code 1913* (WA) and replaced these provisions with a new s. 199. See further *infra*.
12. Except in the Northern Territory, and now in Western Australia.
13. For discussion of when a pregnancy begins for the purposes of the crime of unlawful abortion, and thus when it is possible to 'procure a miscarriage', see N. Cica, 'The Inadequacies of Australian Abortion Law', *Australian Journal of Family Law* vol. 5, 1991, pp. 49-51.
14. 24 & 25 Vict. c. 100.
15. 7 Will. 4 & 1 Vict. c 85.
16. 9 Geo. 4 c. 31.
17. 43 Geo. 3 c. 58.
18. W. Blackstone, *Commentaries on the Laws of England*, pp. 129-130; J. Barry, 'The Law of Therapeutic Abortion', *Proceedings of the Medico-Legal Society of Victoria*, vol. 3, 1938, p.212. See G. Williams, *The Sanctity of Life and the Criminal Law*, Knopf, New York, 1957, p. 152; E. Coke, *Institutes of the Laws of England*, Part III p. 50. For a discussion of the early English abortion statutes see K. Petersen, *Abortion Regimes*, Dartmouth Publishing, Aldershot, 1993, pp. 19-21; B. Dickens, *Abortion and the Law*, McGibbon & Kee, London, 1966, pp. 20-28; and J. Keown, *Abortion, Doctors and the Law*, Cambridge University Press, Cambridge, 1988, pp. 3-47.
19. In all Australian States and Territories except Western Australia, the wording of the original offence indicates this implicitly: see: I. Kennedy and A. Grubb, *Medical Law: Text with Materials*, 2nd ed, Butterworths, London, 1994, p. 865; L. Crowley-Smith, 'Therapeutic Abortions and the Emergence of Wrongful Birth Actions in Australia', *Journal of Law and Medicine*, vol. 3, 1996, p. 359. In Western Australia, the wording of the new offence explicitly states that an abortion will not be unlawful in specified circumstances.
20. See Cica, *supra* n 12 at 38-43. This tripartite classification system is taken from Royal Commission on Human Relationships, *Final Report: Volume 3*, AGPS, Canberra, 1977, p. 137, modified to take account of the recent changes to the law in Western Australia.
21. Until recently the laws in Western Australia also fell into this category.
22. [1938] 3 All ER 615; [1939] 1 KB 687. For discussion of this case, see Petersen, *supra* note 17, pp. 63-5.

23. For discussion of this offence, see *infra*.
24. *Infant Life (Preservation) Act 1929* (UK), s. 1(1).
25. Williams, *supra* n 17, p 152. *C.f. R v. Woolnough* [1977] 2 NZLR 508, where a majority of the New Zealand Court of Appeal, interpreting legislative provisions similar to s. 58 of the *Offences Against the Person Act 1861*, criticised and rejected an approach based on the doctrine of necessity. Richmond P in particular (at 516-7) criticised the 'extreme vagueness' of that doctrine. He said that the court should not 'confine its approach to this question by reference to the so-called general defence of necessity in the common law,' but should instead make a 'value judgment' and accept the responsibility entrusted to it by the legislature of 'drawing a line between those abortions which are and those which are not lawful.'
26. [1938] 3 All ER 615 at 619, emphasis added.
27. *ibid*.
28. In *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] 2 WLR 279 at 298, Lord Diplock described this reference to wreckage as 'a vivid phrase borrowed from one of the witnesses, but unfortunately lacking in precision.'
29. Macnaughten J himself acknowledged that he was advocating a 'reasonable' rather than a 'wide and liberal' interpretive approach: [1938] 3 All ER 615 at 619.
30. Williams, *supra* note 17, p. 163.
31. Kennedy and Grubb, *supra* note 18, p. 864. *C.f. Keown, supra* note 17, pp. 52-57, citing dicta in *R v. Collins* [1898] 2 *British Medical Journal* 59 at 129 *per* Grantham J and *R v. Wilhelm* (1858) 17 *Med. Tim. Gaz.* 658 *per* Bramwell B.
32. *R v. Woolnough* [1977] 2 NZLR 508 at 515 *per* Richmond P.
33. Unreported, Central Criminal Court, May 1948. See (1984) 1 *British Medical Journal*, 1008.
34. Williams, *supra* n 17, p. 164.
35. [1958] Crim LR 469. See J. Havard, 'Therapeutic Abortion' [1958] Crim LR 600.
36. See Kennedy and Grubb, *supra* note 18. For discussion of abortion law in Northern Ireland, see J. Kingston, A. Whelan and I. Bacik, *Abortion and the Law*, Round Hall Sweet & Maxwell, Dublin, 1997, chapter 8.
37. [1969] VR 667.
38. *C.f. R v. Bourne* [1938] 3 All ER 615, where Macnaughten J's interpretation of unlawful arguably also relied on the defence of necessity, but where the judge himself did not acknowledge such reliance. See discussion, *supra*.
39. *ibid.*, p. 672.

40. *ibid.*
41. February 1972, Victorian County Court, unreported, *per* Southwell J. See *The Age* 19/2/72 and K. Breen, V. Plueckhahn and S. Cordner, *Ethics, Law and Medical Practice*, Allen & Unwin, Sydney, 1997, p. 282.
42. S. Siedlecky and D. Wyndham, *Populate and Perish: Australian Women's Fight for Birth Control*, Allen & Unwin, Sydney, 1990, p. 99.
43. [1997] 1 VR 182 *per* Brooking, Tadgell and Ormiston JJA.
44. *AAA v. BBB*, 12 September 1994, Supreme Court of Victoria (Ashley J), unreported charge to the jury, p. 1230.
45. *ibid.*, pp. 1253-4.
46. *ibid.*, p. 1264.
47. *ibid.*, pp. 1372 and 1223.
48. *ibid.*, pp. 1370-1.
49. See further J. Rush, 'Exemplary Damages - An Exemplary Damages Case', unpublished paper delivered at BLEC Advanced Medical/Legal Seminar, 25 August 1995.
50. *Backwell v. AAA* [1997] 1 VR 182 at 215-6 *per* Ormiston JA, with whom Brooking JA concurred.
51. (1995) 128 ALR 238. Hereafter referred to as the *Right to Life* case.
52. (1995) 128 ALR 238 at 244.
53. *Therapeutic Goods Regulations* (Cwth), reg 12(1A), Sch 5a Item 3(e).
54. (1995) 128 ALR 238 at 256.
55. (1994) 125 ALR 337.
56. (1995) 128 ALR 238.
57. See discussion *infra*.
58. (1995) 128 ALR 238 at 244-5.
59. *ibid.*, p. 255.
60. *ibid.*, p. 255 *per* Lockhart J.
61. This argument is made in M. Spry, 'A 'Person Aggrieved' Under the *ADJR Act*: Three Recent Cases on Standing' *Australian Journal of Administrative Law* vol. 3, no. 2, 1996 p. 120. See further M. Allars, 'Standing: the Role and Evolution of the Test' (1991) 20 FLR 101.
62. Spry, *ibid.*, pp. 126-7.
63. *ibid.*, p. 126. Spry argues that this trend was also followed by Sackville J of the Federal Court in two cases in which he had previously held that environmental conservation groups were 'persons aggrieved' for the purposes of the *ADJR Act*: *Tasmanian Conservation Trust Inc v. Minister for Resources*

- (1995) 127 ALR 580; *North Coast Environment Council Inc v. Minister for Resources* (1995) 127 ALR 617.
64. (1995) 128 ALR 238 at 170 *per* Gummow J; at 269 *per* Beaumont J.
65. See further *In the Application of Kathleen May Harrigan*, High Court of Australia, 1982, unreported; discussed in J. Scutt, 'Disturbing Connections - Artificial and Natural Conception and the Right to Choose' in J. Scutt, ed *The Baby Machine*, McCulloch Publishing, Melbourne, 1988, p. 162.
66. *Attorney-General (Qld) (ex rel Kerr) v. T* (1983) 46 ALR 275; *F v. F* (1989) 13 Fam LR 189; *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276; *C v. S* [1988] 1 QB 135. See discussion *infra*.
67. (1972) 3 DCR (NSW) 25 at 29.
68. The relevant provisions are ss. 82 - 84 of the *Crimes Act 1900* (NSW).
69. *ibid.*
70. *ibid.*, p. 28. See C. Henry, 'Abortion Retried', *Alternative Law Journal*, vol. 20, no. 5, 1995, p. 240.
71. See *ibid.*, p. 29.
72. *Sydney Morning Herald* 11 January 1975, quoted and discussed in K. Coleman, *Discourses on Sexuality: The Modern Abortion Debate*, unpublished Macquarie University doctoral thesis, 1991, p. 274.
73. Coleman, *supra* n 71, p. 274.
74. *ibid.*, p. 276.
75. *ibid.*, p. 275-6.
76. [1982] 1 NSWLR 311.
77. *ibid.*, p. 318.
78. *ibid.*
79. *ibid.*
80. *ibid.*, p. 326.
81. Supreme Court of New South Wales, 18 April 1994, unreported. Hereafter referred to as the *Superclinics* case. For criticism of the approach of Newman J in this case, see C. Tricker, 'Sex, Lies and Legal Debate: Abortion Law in Australia' *Sydney Law Review*, 1995, p. 446.
82. *Kambouroglou v. The Women's Hospital (Crown Street)*, Supreme Court of New South Wales (Toose J), 2 December 1980, unreported.
83. *Cf. Allen v. Bloomsbury Health Authority* [1993] 1 All ER 651; *Dahl v. Purnell*, (1992) 15 Qld Lawyer Reps 33.
84. The important issue of whether recovery of damages in respect of the birth of a healthy child would be against public policy therefore was not addressed until Newman J's ruling was reviewed by the Court of Appeal of New South

Wales. At that stage the relevant public policy considerations were explored in some detail by Kirby P and to a lesser extent by Meagher JA.

85. *CES and Another v. Superclinics (Australia) Pty Ltd and Others* (1995) 38 NSWLR 47. For a detailed discussion of this case, see R. Graycar and J. Morgan, 'Unnatural Rejection of Womanhood and Motherhood: Pregnancy, Damages and the Law - A Note on *CES v. Superclinics (Aust) Pty Ltd*' *Sydney Law Review*, vol. 18, 1996, p.323.
86. Of the two judges in the majority on this point, however, only one- Kirby A-CJ- concluded that the plaintiff should be compensated for the costs of raising her child. The other majority judge, Priestley JA, stated that the plaintiff could have surrendered the child after its birth for adoption, and that her failure to do so amounted to *a novus actus interveniens*. Priestley JA said that this meant that the costs of bringing up the child therefore were not caused by the defendants' negligence, but by the plaintiff's 'choice' to keep her child. The third judge, Meagher JA, agreed that the plaintiff's decision not to surrender her child for adoption barred recovery of damages. He characterised this decision as a failure to mitigate her loss.
87. (1995) 38 NSWLR 47 at 64-65.
88. *ibid.*, pp. 59-60.
89. *ibid.*, p. 60.
90. [1995] 2 Qd R 326 at 329. See discussion *infra*.
91. (1995) 38 NSWLR 47 at 65.
92. *ibid.*, p. 63.
93. *ibid.*, p. 66 and p. 63.
94. *ibid.*, p. 66.
95. G. Williams, 'The Law of Abortion', *Current Legal Problems*, vol. 5, 1952.
96. *Superclinics v. CES* (No S88 of 1996); *Nafte v. CES* (No. S91 of 1996).
97. The relevant provisions are ss. 42-44 of the *Crimes Act 1900* (ACT).
98. On codification, see discussion *supra*.
99. See discussion *supra* and Cica, *supra* note 12 at 40.
100. Under the *Termination of Pregnancy Act 1978* (ACT).
101. *Criminal Code Act 1899* (Qld), ss. 224-226.
102. [1955] St R Qd 48 *per* Mansfield SPJ, Mack and Townley JJ.
103. *ibid.*, p. 80 *per* Mansfield SPJ.
104. *ibid.*, p. 81 *per* Mansfield SPJ.
105. See *R v. Bayliss & Cullen*, (1986) 9 Qld Lawyer Reps 8 at 21-22.

106. *K v. T* [1983] 1 Qd R 396 at 398 *per* Williams J (obiter); *Re Bayliss*, Supreme Court of Queensland,
24 May 1985, OS No 376 of 1985, unreported, *per* McPherson J (obiter).
107. [1986] 9 Qld Lawyer Reps 8.
108. *ibid.*, p. 33.
109. *ibid.*, p. 45 *per* McGuire DCJ.
110. See *ibid.*, p. 26-7 and p. 45.
111. *ibid.*, p. 26-7.
112. See *ibid.*, p. 33.
113. *ibid.*, p. 45.
114. [1995] 2 Qd R 326. See L. Crowley-Smith, 'Veivers v. Connolly Revisited' *Queensland Law Society Journal*, 1995, p. 391.
115. [1995] 2 Qd R 326 at 329.
116. *ibid.*, p. 329.
117. Compare the approach of Newman J in the *Superclinics* case, discussed *supra*.
118. [1983] 1 Qd R 396 at 400-401, citing *Paton v. BPAS Trustees* [1979] 1 QB 276 at 279 *per* Sir George Baker P
and *Watt v. Rama* [1972] VR 353 *per* Winneke CJ and Pape J at 360.
119. *ibid.*, pp. 401-402.
120. *ibid.*, pp. 402-403.
121. [1983] 1 Qd R 404 at 405-6.
122. *ibid.* at 402-3, relying on *Paton v. British Pregnancy Advisory Service Trustees* [1979] 1 QB 276 at 279
per Sir George Baker P.
123. (1983) 57 ALJR 285 at 286.
124. *ibid.* at 286, relying on *Paton v. BPAS Trustees* [1979] 1 QB 276 at 279 *per* Sir George Baker P.
125. *ibid.* at 286.
126. (1989) 13 Fam LR 189.
127. *ibid.* at 193, relying on *Paton v. BPAS* [1979] 1 QB 276 at 282 *per* Sir George Baker P.
128. *ibid.* at 194, relying on *Paton v. BPAS* [1979] 1 QB 276 at 279 *per* Sir George Baker P, *K v. T* [1983] 1 Qd R 396 at 401,
Attorney-General (Ex rel Kerr) v. T [1983] 1 Qd R 404 at 406-7 and
Attorney-General (Qld) (Ex rel Kerr v. T (1983)
57 ALJR 285 at 286.
129. Lindenmayer J also stated that this jurisdiction is *not* conferred by s. 70C(1) of the *Family Law Act 1975* (Cwth),

which empowers the court to make orders in relation to a child, on the basis that the term 'child' in that section refers only to a living child: *ibid.* at 194-5.

130. *ibid.*, p. 198.

131. District Court of Queensland *per* Hoath J, 24 May 1996, unreported.

132. See *infra*.

133. See *infra*. Also see B. Faust, 'Tragedy born of silence' *The Australian*, 1 June 1996; 'Karate man jailed for kicking unborn child to death' *The Canberra Times*, 25 May 1996; 'Gentle giant' kicked unborn son dead' *The Sydney Morning Herald*, 27 May 1996.

134. *Criminal Code Act 1924* (Tas), s. 51(1).

135. And therefore that of the old Western Australian statutory defence, the meaning of which has not been tested.

See discussion *infra*.

136. See Cica, *supra* note 12 at 41.

137. See *infra*.

138. For example, the comments by Gibson J in *R v. Luttrell* (unreported, 1963 Tasmanian Judgments 326), the only recorded case since the early 1960s involving prosecution under the Tasmanian abortion provisions, relate to sentencing issues rather than to the content of the legal rules that criminalise abortion.

See H. Finlay, 'Abortion - Right or Crime?' *University of Tasmania Law Review*, vol. 10, 1990, p. 8.

139. The South Australian reform introduced a new s. 82A, containing this definition, into the

Criminal Law Consolidation Act 1935 (SA).

140. *Criminal Law Consolidation Act 1935* (SA), ss. 81 and 82. See Cica, *supra* note 12 at 41-42.

141. *ibid.*, s. 82A(7)-(8). These provisions are best described as establishing the crime of child destruction and are discussed in more detail later in this paper.

142. *ibid.*, s. 82A(1)(a)(i).

143. *ibid.*, s. 82A(1)(a)(ii).

144. Cica, *supra* note 12 at 64.

145. *ibid.*, s. 82A(1)(a).

146. *ibid.*, s. 82A(1).

147. *Criminal Law Consolidation Act 1935* (SA), s. 82A(2).
148. *ibid.*, s. 82A(1)(b).
149. *ibid.*, s. 82A(5).
150. *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulations 1996*, reg 5(1) and (2);
the prescribed form is found in Schedule 1 Part A. These regulations came into operation on 1 September 1996
and revoked the *Abortion Regulations 1970* (SA).
151. *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulations 1996*, reg 5 (3);
the prescribed form is found in Schedule 1 Part B.
152. *ibid.* Schedule 3.
153. *ibid.*, reg 6; the prescribed form is found in Schedule 2.
154. The *Criminal Law Consolidation Ordinance (No 2) 1973* (NT) introduced a new s. 174, containing this definition,
into the *Criminal Law Consolidation Act & Ordinance 1876-1969* (NT) [now the *Criminal Code Act 1983* (NT)].
155. *Criminal Code Act 1983* (NT), ss. 172 and 173.
156. *ibid.*, s. 174(1)(a).
157. *ibid.*, s. 174(1)(b).
158. *ibid.*, s. 174(1)(c).
159. *ibid.*, s. 174(4)(b).
160. *ibid.*, s. 174(2).
161. See N. Cica, 'Ordering the Law on Abortion in Australia's "Wild West"' *Alternative Law Journal*, vol. 23, no. 2, 1998, p. 89.
162. See *ibid.*
163. This legislation came into effect on 26 May 1998.
164. *Health Act 1911* (WA), s. 334(3)(a).
165. *ibid.*, s. 334(5).
166. *ibid.*, s. 334(8).
167. *ibid.*, s. 334(3)(b).
168. *ibid.*, s. 334(3)(c).
169. *ibid.*, s. 334(3)(d).
170. *ibid.*, s. 334(7).
171. *ibid.*, s. 334(2).
172. *Acts Amendment (Abortion) Act 1998* (WA), s. 8.
173. *Crimes Act 1958* (Vic), s. 10 and *Criminal Law Consolidation Act 1935* (SA), ss. 82A(7)-(8). The Victorian provision

does not explicitly refer to the exception for acts done in good faith for the sole purpose of preserving the mother's life.

It instead specifies that the destruction must be performed 'unlawfully' to constitute a crime. Arguably, the word 'unlawfully'

in the Victorian provision implicitly incorporates the exception for acting in good faith to preserve the mother's life.

See Cica, *supra* note 12 at 43.

174. 19 & 20 Geo 5, c 34

175. See *infra*. Also see L. Waller, 'Any Reasonable Creature in Being,' *Monash Law Reports*, vol. 13, 1987, p. 41.

176. See Williams, *supra* n 94 at 130 and 146. Note that legislative reforms passed in 1991 by the UK Parliament mean

that the child destruction offence in the *Infant Life (Preservation) Act 1929* no longer applies to any abortion performed

in England, Scotland or Wales in accordance with the Abortion Act 1967.

177. *C v. S* [1988] QB 135 and *Rance v. Mid-Downs Health Authority* [1991] 1 QB 587.

178. *Rance v. Mid-Downs Health Authority* [1991] 1 QB 587 at 688.

179. See Cica, *supra* n 12 at 43-44.

180. A pregnant woman can be given steroid treatment to enhance foetal lung development, but this is only effective

from around 26 weeks' gestation.

181. (1986) 9 Qld Lawyer Reps 8 at 34-37.

182. *Report of the Criminal Code Advisory Working Group to the Attorney-General*, Brisbane, July 1996.

183. This Bill also repealed the much-criticised and unproclaimed 1995 *Criminal Code* which had been introduced the

previous year to replace the 1899 *Criminal Code*: see Criminal Law Amendment Bill 1996 (Qld) - Explanatory Notes, p. 1.

184. See *ibid.*, p. 12 (Clause 47).

185. These amendments were introduced by Liz Cunningham MP (Independent, Gladstone) and were supported by the

Queensland Government.

186. *Criminal Code Act 1899* (Qld), ss. 224-226.

187. WA Court of Criminal Appeal, 4 April 1996, unreported, pp. 7-8. See further discussion of this case *infra*.

188. *The Criminal Code: A General Review*, Perth, 1983; see also S. Gabriel, 'Child Destruction: A Prosecution Anomaly

Under Both the Common Law and the *Criminal Codes*, *Criminal Law Journal*, vol. 21, 1997, pp.35-6.


189. For a detailed explanation of the legal rules governing homicide in the common law jurisdictions (Victoria, NSW and the ACT) see Gillies, *supra* n 5, chapter 25 and D. Brown et al., *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* 2nd ed, Federation Press, Sydney, 1996, vol. 1, chapter 5. For a detailed explanation of the legal rules governing homicide in the Code States (Queensland, Western Australia, the Northern Territory and Tasmania), see Edwards et al., *supra* n 7, chapter 10.
190. The following is based on Cica, *supra* n 12 at 56. See also Gillies, *supra* n 5, pp. 605-6.
191. Queensland, Western Australia, Tasmania and the ACT there is a statutory definition of birth for these purposes, which applies to both murder and manslaughter prosecutions: *Criminal Code 1899* (Qld) s. 292, *Criminal Code* (WA), s. 262, *Criminal Code* (Tas) s. 153(4), *Crimes Act 1900* (ACT) s. 10. In New South Wales, the relevant definition with respect to murder prosecutions is found in the *Crimes Act 1900* (NSW), s. 20, and with respect to manslaughter prosecutions the common law definition of birth in *R v. Hutty* [1983] CLR 338 at 339 applies. That common law definition also applies with respect to both murder and manslaughter in South Australia, Victoria and the Northern Territory.
192. See P. Bates, 'Legal Criteria for Distinguishing Between Live and Dead Human Foetuses and Newborn Children,' *UNSW Law Journal*, 1983, p. 143.
193. Williams, *Textbook of Criminal Law* 1983, p. 290; *c.f.* J. Mason and R. McCall Smith *Law and Medical Ethics* 3rd ed, Butterworths, London, 1991, p. 114.
194. Williams, *supra* n 94, p. 304.
195. Bates, *supra* n 191, pp. 149-150; J. Keown, 'Homicide, Fetuses and Appendages' *Cambridge Law Journal*, 1996, pp. 207-9.
196. (1848) 2 Cox CC 500 *per* Maule J.
197. (1832) 1 Mood CC 346; 168 ER 1298.
198. [1969] QWN 36.

199. [1996] 2 WLR 412.
200. That is, performed in accordance with the Abortion Act 1967, which defines when an abortion will be lawful in England, Wales and Scotland.
201. See Keown, *supra* n 194 at 209.
202. WA Court of Criminal Appeal, 4 April 1996, unreported, *per* Ipp, Wallwork and Murray JJ.
203. *Per* Murray J at pp. 8-9, with whom Ipp and Wallwork JJ concurred.
204. *Criminal Code Act 1899* (Qld), s. 294; *Criminal Code Act 1983* (NT), s. 158.
205. *Watt v. Rama* [1972] VR 353; *Lynch v. Lynch* (1991) 25 NSWLR 411; *X and Y v. Pal* (1991) 23 NSWLR 26.
206. *Kosky v. The Trustees of the Sisters of Charity* [1982] VR 961.
207. See in particular transcript p. 10 *per* Murray J.
208. *The Times*, 16 September 1983. See Mason and McCall Smith, *supra* n 191, pp. 117-8.
209. [1996] 2 WLR 412 at 421.

[Top](#)

×

Parliament Calendar

March 2018						
Mon	Tue	Wed	Thu	Fri	Sat	Sun
26	27	28	1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26 	27	28	29	30	31	1

Senate
 House
 Joint
 Other
 Public holiday
 Senate sitting

House sitting
Both sitting
🗳️ Senate 2/3 cutoff
O Senate estimates

Today's events:

Wed

21

Mar

[Senate sitting](#)

Duration: Day 3 of 4

[Save to private calendar](#)

Wed

21

Mar

[Senate Committee Public Hearing](#)

4:30 PM

Location: CANBERRA, ACT: Senate Committee Room 2S1, Parliament House

[Save to private calendar](#)

Wed

21

Mar

[Senate Committee Public Hearing](#)

5:00 PM

Location: CANBERRA, ACT: Committee Room 2S3, Parliament House

[Save to private calendar](#)

Wed

21

Mar

[Inquiry Report Tabling Debt Agreement Reform](#)

[Save to private calendar](#)

Wed

21

Mar

[Inquiry Report Tabling ASD](#)

[Save to private calendar](#)

Wed

21

Mar

[Inquiry Report Tabling Enterprise Incentives](#)

[Save to private calendar](#)

Wed

21

Mar

[Welcome to Parliament House tour](#)

Location: Parliament House

[Save to private calendar](#)

Wed

21

Mar

[Discover Parliament House tour](#)

[Save to private calendar](#)

-
- [Full Events Calendar](#)
 - [Sitting Calendar](#)
 - [Senate Events](#)
 - [House Events](#)
 - [Committee Events](#)
 - [Visit Parliament Events](#)

Senate

- [Senate](#)
- [Work of the Senate](#)
- [Dynamic Red](#)
- [Senators](#)
- [Senate Seating Plan](#)

House of Representatives

- [House of Representatives](#)
- [House of Representatives chamber and business documents](#)
- [Live Minutes](#)
- [Members](#)
- [House of Representatives Seating Plan](#)

Get informed

- [News & Events](#)
- [Watch Parliament](#)
- [About Parliament](#)
- [Education Resources](#)
- [Parliamentary Library](#)
- [International Program](#)

Bills

- [Bills before Parliament](#)
- [Assented Bills of previous Parliaments](#)
- [Tariff Proposals](#)

- [Legislative Instruments](#)

Committees

- [Committees](#)

Get involved

- [Getting involved in Parliamentary Committees](#)
- [Petitions](#)
- [Connect with us](#)
- [Contact](#)

Visit Parliament

- [What's on](#)
- [Things to Do](#)
- [Art@Parliament](#)
- [Shop & Eat](#)
- [Plan your Visit](#)
- [Media Rules and Filming Applications](#)

Website features

- [My Parliament - Log in](#)
- [Remote Users - Log in](#)
- [ParlInfo Search](#)
- [APH website survey](#)
- [Employment](#)
- [A - Z Index](#)
- [Glossary](#)
- [RSS feeds](#)
-

Parliamentary Departments

- [Department of the Senate](#)
- [Department of the House of Representatives](#)
- [Department of Parliamentary Services](#)
- [Parliamentary Budget Office](#)
- [Parliamentary Library](#)

-
-
-
-
-