Transitions and Controversies in Australian Abortion Law, 2001-2021

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ABSTRACT

The articles in this thesis make a sustained argument for abortion law reform in Australia. The reform advocated is that the law should guarantee a woman's right to abortion, which would be reflected in the practical reality that abortion care would be treated by the law in the same manner as any other form of health care. Some of the articles in this thesis adopt a multijurisdictional approach to critiquing the law from this perspective, while others focus on either ancillary issues to abortion law, such as safe access zones, or provide an analysis of the law in a single jurisdiction. There are two articles in this thesis that engage with the primary counterargument to a woman's right to abortion, namely foetal personhood, in order to highlight the spurious nature of this opposing view. As the articles cover a timespan of approximately two decades, the articles also serve to track abortion law reform that has occurred during this period in all jurisdictions.

DECLARATION

I certify that this thesis:

1. does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university;

2. and the research within will not be submitted for any other future degree or diploma without the permission of Flinders University; and

3. to the best of my knowledge and belief, does not contain any material previously published or written by another person except where due reference is made in the text.

Signed.....

Date.....22/04/2023.....

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CONTEXTUAL STATEMENT

1. Introduction: Impetus and Perspective

The publications in this thesis are all sole authored peer reviewed articles, published in high quality journals. All the articles were double blind refereed, with one article having three such referees.[1] Four of the eight articles were lead articles for the journal issue in which they appear.[2] Most of the articles deal with aspects of Australian abortion law directly, in an obvious doctrinal manner, whereas two articles focus upon significant theoretical issues associated with abortion; namely, theology and moral philosophy. [3] As a cohesive whole, the articles constitute a significant original contribution to knowledge in providing a sustained argument for abortion law reform consistent with the feminist objective of recognising a woman's right to abortion. Collectively, the articles also develop a set of criteria against which the current law may be evaluated, and proposed reforms may be assessed. The specific purpose and focus of each article will be discussed in the sections below.

As the title of this thesis indicates, I have been researching and publishing on Australian abortion law (and related areas) for two decades.[4] The state of the law has changed dramatically during this period. The articles in this thesis represent an original contribution to the environment within which legislative reform became possible. Prior to discussing the significance of each of these articles, I wish to first provide some personal context; namely, the impetus for the research, and the philosophical and/or political perspective that frames that research, both of which have their origins three decades ago.

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[1] See Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35(1) *Sydney Law Review* 1.
[2] See Mark J Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (2020) 39(2) *University of Tasmania Law Review* 61; Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1); Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (2013) 31(2) *Monash Bioethics Review* 37; Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1.
[3] See, respectively, Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (2007) 10(2) *Flinders Journal of Law Reform* 271; Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (n 2).
[4] Beginning with the article Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229, and ending with the article Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2). I continue to publish in the area but have only included publications for the period 2001-2020 in this thesis. For a recent publication not contained in this thesis see: Judith Dwyer, Mark Rankin, Margie Ripper and Monica Cations, 'Is there still a need for abortion-specific laws? The capacity of the health framework to regulate abortion care' (2021) 46(2) *Alternative Law Journal* 141.

It must be acknowledged at the outset that many concepts that will be mentioned immediately below, such as equality, patriarchy, rights, gender, and subordination (among others) are controversial, and meanings are disputed and varied.[5] The same might be said of the foundational discourses of jurisprudence and feminism itself. However, this contextual statement is not the place for any detailed theoretical analysis of these notions. Many of those discussions were made in my LLM thesis (which is mentioned below). Furthermore, and more importantly, none of the articles in this PhD thesis deal with such issues in any detail, so to do so in this contextual statement might seem disingenuous. Thus, what follows is an expression of my own views on these matters in a straightforward, direct, and brief fashion, in order to highlight my own philosophical/political perspective, and thereby provide personal context for the articles within this PhD thesis.

As mentioned above, the philosophical/political perspective that permeates the articles in this thesis first began to take shape three decades ago. In early 1992, having completed both a Bachelor of Laws (University of Adelaide) and a Graduate Diploma in Legal Practice (University of South Australia), I was admitted as a Barrister and Solicitor of the Supreme Court of South Australia. I was then at a career crossroads and presented with two clear choices: begin practicing as a lawyer or continue my education. I chose the latter and enrolled in a Diploma in Social Sciences (Women's Studies) at Flinders University. This diploma required completion of four coursework topics and a 20,000 word dissertation. The coursework topics were *Gender in Australian History*, *Women in Contemporary Australian Society*, *History of Feminist Thought (Hons)*, and *Feminist Theory*. My thesis had the verbose title of *Indirect Discrimination: An Instrument of Feminist Jurisprudence (an analysis of Australian case law in order to determine whether the concept of indirect discrimination is capable of embodying a feminist theory of equality)*. It was during the course of this diploma that I developed an interest in feminist jurisprudence; in particular, exploring ways in which the law might be altered to further feminist goals.

Motivated by this interest, upon completion of the Diploma in Social Sciences (Women's Studies) I enrolled part-time in the Master of Laws ('LLM') at Flinders University. This research degree involved completing a 70,000 word dissertation. The thesis, titled *Australian Abortion Law: A*

[5] It should also be noted that this contextual statement will refer to 'woman' and 'women' in the interests of consistency with terminology utilised in the articles in this thesis and in most of the relevant legislation. However, the author acknowledges that there will be individuals that will seek access to abortion services that do not identify as women. This issue of gender identification is a complex issue beyond the scope of this contextual statement.

Critique, was submitted in 1996 and I was awarded the degree shortly thereafter. This Master's thesis, despite a literal reading of its title, did not focus on the law as such, but rather made the philosophical and political argument that restrictive abortion laws (defined simply as any laws that prevented women from exercising a right to abortion) constituted an unjustified violation of fundamental human rights and should therefore be repealed on that basis. In particular, the argument was made that restrictive abortion laws served to deny women their basic human rights to bodily integrity,[6] self-determination,[7] and most significantly equality.[8] Furedi argues that all such rights are inextricably linked,[9] and to deny women these rights is to deny women their humanity.[10]

It was recognised in this thesis that rights discourse is problematic from a feminist perspective because, as feminists argued at the time, the concept of 'rights' is the invention of traditional liberalism that speaks in individualistic,[11] capitalist, masculinist and adversarial terms, yet proclaims to be objective and universal, which may have the effect of furthering women's subordination by reinforcing and legitimising the male standard as the norm.[12] This was argued to

[6] See, eg, Christyne L Neff, 'Woman, Womb, and Bodily Integrity' (1991) 3(2) *Yale Journal of Law and Feminism* 327. Furedi makes the argument that the 'inviolability of bodily integrity' is more important than all other rights: see Ann Furedi, *The Moral Case for Abortion: A Defence of Reproductive Choice* (Palgrave Macmillan, 2nd ed, 2021) 124-129. Similarly, Petchesky insists that bodily integrity is 'a positive and necessary condition for full human participation in social and communal life': Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (Longman, 1984) 378. For a comprehensive study of how the law has treated this most fundamental right see Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *Cambridge Law Journal* 566. It is of interest to note that Herring and Wall argue that bodily autonomy and bodily integrity are conceptually different: at 576-581. Concluding that: '[t]he right to bodily integrity is non-reducible to the principle of autonomy since the right to bodily integrity is concerned with the body as the point of integration between a person's subjectivity and the remainder of the objective world': at 588. See also Smyth who argues that: 'the strongest alternative to claiming abortion on the basis of a right to choice has been to assert women's right to bodily integrity, in a context where citizenship is consequent on embodied individuation. This provides a sound normative base from which feminist claims for reproductive freedom can be made, without relying on dualistic constructions of gender and sexuality': Lisa Smyth, 'Feminism and abortion politics: Choice, rights, and reproductive freedom' (2002) 25(3) *Women's Studies International Forum* 335, 343.

[7] See, eg, Kathryn Kolbert, 'A Reproductive Rights Agenda for the 1990's' (1989) 1 *Yale Journal of Law and Feminism* 3; Petchesky (n 6) 374-375, 387; Furedi (n 6) 181-200.

[8] See, eg, Catharine A MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100(5) *Yale Law Journal* 1281, 1308-1311. It is arguable that the right to equality is the foundational right as all other human rights stem from the right to equality; in that if inequality prevails any other rights are rendered largely meaningless. Cf Furedi, who makes the point that the right to bodily integrity, defined as the right to make your own choices concerning your own body, is the basic right that frames both liberal thought and the individual: see Furedi (n 6) 184-186. Indeed, Furedi states that '[c]ontrol over one's body is an essential part of being an individual with needs and rights': at 129.

[9] See Furedi (n 6) 126.

[10] See ibid 200.

[11] The individualism inherent within rights discourse is also problematic in the sense that it diverts attention from class interests: see Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, 1990) 16.

[12] See, eg, Elizabeth Kingdom, *What's Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh University Press, 1991); Petchesky (n 6) 392; Katarina Tomasevski, *Women and Human Rights* (Zed Books, 2nd ed, 1995); Katherine De Gama, 'A Brave New World? Rights Discourse and the Politics of Reproductive Autonomy' (1993) 20(1) *Journal of Law and Society* 114; Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human

be especially the case with regard to the right to formal equality, which demands the comparative assessment of treating individuals the 'same' in any given situation,[13] thus entrenching the male as the 'model of humanity,'[14] and the definitive 'legal person'.[15] Formal equality also ignores history,[16] and thereby leaves untouched issues of power and privilege, effectively masking gender inequality.[17]

Furthermore, in the abortion context rights discourse is especially problematic as it has been utilised to set foetal rights against women's rights, despite the absurdity of framing conflicting rights in a self-evidently interdependent relationship; that is, it is ludicrous to set the rights of the foetus against the rights of the woman that carries that foetus.[18] Put simply, as the foetus resides in the pregnant woman's body, the foetus and the pregnant woman have identical interests: the pregnant woman's interests.[19]

Nonetheless, the LLM thesis determined that highlighting the human rights violations inherent in maintaining restrictive abortion laws was an objective worth pursuing in the interests of women's substantive equality.[20] The thesis determined that although there are risks inherent in utilising

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Rights' (1990) 12(4) *Human Rights Quarterly* 486. Similar conclusions might be made with respect to the dominant concept of law itself. For example, Davies explains that: 'Law is not neutral as regards social order, but rather creates, normalises and replicates social life. At the same time, by perpetuating the idea that abstract individualism is gender-neutral and race-neutral, and that the person is a natural rather than constructed feature of social life, law obscures its own role in producing social relations': Margaret Davies, 'Keynote: Reforming Law – The Role of Theory' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 11, 12. See also Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2016) 13.

[13] It is of interest to note that Littleton consequently argues for a model of 'equality as acceptance' which insists that 'equality need not be limited to sameness, but can…be applied across difference': Christine Littleton, 'Equality and Feminist Legal Theory' (1987) 48(4) *University of Pittsburgh Law Review* 1043, 1057.

[14] Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990) 147. See also Zillah Eisenstein, *The Female Body and the Law* (University of California Press, 1988) 42-43; Nicola Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14(4) *Journal of Law and Society* 411, 413-417; Thornton (n 11) 100-101.

[15] Indeed, Hunter suggests that women are conceptualised in the law as less than a legal person: see Hunter (n 12) 13-18. Hunter further explains that: 'A significant consequence of the masculinity of the legal person is that women struggle to attain legal subjectivity. Again, this point may be understood both empirically and symbolically. Empirically, to the extent that law is built around an ideal type to which they do not conform, it creates problems for women and fails to take into account their lived reality and experiences': at 14. Naffine makes the salient point that traditional conceptions of this 'legal person' never consider that person as pregnant: Ngaire Naffine, 'Who are law's persons? From Cheshire cats to responsible subjects' (2003) 66(3) *Modern Law Review* 346, 365.

[16] See Lacey (n 14) 413.

[17] See Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985) 163, 206.

[18] See, eg, Smyth (n 6) 337.

[19] This would extend to the pregnant woman deciding the value of the foetus, if any: see, eg, Furedi (n 6) 201-202.

[20] Without going into unwarranted definitional detail, the view of substantive equality adopted in the thesis was one that owed much to the 'dominance' or 'subordination' approach, which views 'equality' as a question of the distribution of power and inequalities are assessed from the standpoint of the subordination of women to men: see, eg, Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 40-44; Ann Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95(7) *Yale Law Journal* 1373, 1395. From this

rights discourse in this way, as a right to abortion is an essential step towards attaining reproductive freedom, the benefits outweigh those risks.

The concluding argument made was that, as the modern liberal democratic state has a moral obligation to respect, maintain and enforce the fundamental rights to equality and liberty for all its citizens,[21] such a state has a moral obligation to repeal all restrictive abortion laws. This conclusion was based on the premise that unless women are able to freely decide whether to remain pregnant, and thus have a right to demand an abortion if they so desire, women's rights to equality and liberty are not respected, maintained or enforced. In other words, to fail to repeal such laws means that the modern liberal democratic state is failing to meet its basic theoretical foundation.[22]

This pragmatic approach to engagement with rights discourse, the law, and the Australian legal system has been the focus of my research ever since. The articles in this PhD thesis do not repeat the above arguments made in my Master's thesis, but rather rest upon the conclusions made therein. That is, the articles in this thesis that discuss the law assume (either implicitly or expressly) that restrictive abortion laws constitute a violation of women's basic human rights, that abortion law reform is an appropriate avenue to address this issue, and that governments in all Australian jurisdictions have a moral duty to do so. Building on this assumption, the original contribution to knowledge that the articles in this thesis provide is to articulate doctrinal

'anti-subordination' perspective, policies and laws are thereby judged in terms of whether they perpetuate this 'sexual hierarchy': Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection' (1986) 61(6) *New York University Law Review* 1003, 1007-1008. Of course, this model of equality may be criticized as possessing elements of essentialism and determinism – see, eg, Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 76-81 – but for reasons already highlighted this PhD thesis is not the place for detailed analysis of these concepts.

[21] Thornton makes the point that these two basic rights are 'counterpoised' in the sense that '[f]reedom is maximised when conservativism is in the ascendancy, equality when progressivism triumphs': Margaret Thornton, 'Feminism and the Changing State: The Case of Sex Discrimination' (2006) 21(50) *Australian Feminist Studies* 151, 153. Thornton also makes the point that this is a generalisation that ignores the important differences between social liberalism and neoliberalism. See also Goldblatt, who contends that such civil and political rights are insufficient to ensure both equal participation in democratic societies and gender equality, and that in order to achieve these ends social and economic rights must also be guaranteed: see Beth Goldblatt, 'Claiming women's social and economic rights in Australia' (2017) 23(2) *Australian Journal of Human Rights* 261, 261. Goldblatt also argues that 'neoliberalism intrudes into women's social and economic rights…[which]…has negative implications for women's democratic participation': at 262.

[22] This is similar to Munro's argument that liberalism should live up to its ideals: see Vanessa Munro, *Law and Politics and the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing, 2007) 51-61.

parameters for law reform that would ensure a woman's right to abortion,[23] and to assess existing reforms by reference to those parameters.[24]

In terms of the particular branch of feminism that my perspective most comfortably aligns with, the articles in this thesis indicate an affinity, or at least consistency, with a form of liberal feminism.[25] That is, in advocating for law reform,[26] one is implicitly accepting that utilising the law and the legal system to further feminist objectives is an appropriate approach to take, and this may be described as a foundational principle or 'belief' of liberal feminism.[27] Other branches of more radical feminism might argue that utilising 'the master's tools' in this manner is a deleterious strategy if the achievement of feminist goals is desired. Indeed, some schools of radical feminism further hold that a cisgender male (and especially a white, middle-class cisgender male) cannot be a feminist by virtue of the fact that such a person cannot know what it is to be a woman in a patriarchal world. I tend to agree with the logic of both of these radical feminist positions.

However, most of the articles in this thesis self-evidently engage with the law, which presupposes that such engagement can be productive. At first glance, this results in a contradiction of personal philosophical principles, but philosophy does not need to be viewed in such 'pure' or absolute terms; one may generate a pragmatic political philosophy from seemingly disparate ideas if the goal of that philosophy is practical change.[28]

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[23] Supplemented by an analysis of the ancillary issue of safe access to abortion services: see Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2); and an examination of the arguments for foetal personhood: see Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3); Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (n 2).

[24] In terms of the content of those parameters, this is especially articulated in the questions posed in the 2011 article quoted below: see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 5.

[25] The author notes that there exist overlapping theoretical positions within contemporary feminism that incorporate different aspects of the former 'schools' of feminist thought that were prevalent in the 1990s (such as liberal feminism) and that focusing on a distinct branch is thus simplistic and somewhat outdated. Nonetheless, the personal perspective described here was formed in the 1990s so reference to distinct branches of feminism that existed then is unavoidable.

[26] It should be noted that such 'law reform' is defined as changing the content of doctrinal law and does not encapsulate 'conceptual reform' that would involve altering the 'concept of law'. For a discussion of such conceptual reform: see Davies, 'Keynote: Reforming Law – The Role of Theory' (n 12) 16-20. Davies further explains that law reform might also be defined as cultural change: at 20-23; which involves changing 'the cultural presuppositions which constitute the conditions for thinking and talking about law and its concept': at 23. Davies also concludes that such distinctions between content, concept and cultural reform are 'artificial': at 23.

[27] See Hunter for a succinct critique of liberalism, or rather 'liberal legalism', which she defines as a 'set of assumptions found within law in societies and regimes…in which liberalism is the dominant political philosophy': Hunter (n 12) 13.

[28] It should also be noted that 'what a theory requires in a practical sense is not always evident': Davies, 'Keynote: Reforming Law – The Role of Theory' (n 12) 23.

Furthermore, it should be noted that, although the law is gendered,[29] it is not perpetually fixated upon the pursuit of patriarchal interests because law 'cannot be understood as having an essential character. It is neither simply an instrument of social coordination nor one of oppression.'[30] As Hunter explains, the law is complex and often contradictory, so engagement with the law to achieve feminist objectives is an uncertain, but not necessarily foolhardy, strategy to adopt.[31] Outcomes from that engagement might be contrary to the purpose of the reform in question, but outcomes might also be beneficial. There is simply no way to predict outcomes with any certainty.[32]

In addition, the view that one cannot simultaneously adopt aspects of both liberal reformist feminism and approaches aiming for fundamental change, neglects to factor in the complex relationship between law reform and more fundamental legal change.[33] Put simply, traditional content law reform may 'accumulate into something larger over time'.[34] This is especially pertinent when the reform in issue impacts upon women's reproductive freedom, as 'reproductive freedom is, inescapably, the core issue of women's equality and liberty.'[35]

Restrictive abortion laws self-evidently preclude reproductive freedom because they deny women power over their own reproductive capacity and thereby constitute an effective means of reproductive control.[36] Laws that serve to deny women the right to freely decide whether to remain pregnant reinforce women's social inequality and preclude women's 'full participation in

[29] See, eg, ibid.
[30] Hunter (n 12) 25.
[31] See ibid.
[32] See ibid. This is further supported by a pluralist view of law, which is 'more pervasive and less cohesive, a dispersed set of practices and values, not necessarily emanating from a single place, and experienced and performed differently by different groups of people': Davies, 'Keynote: Reforming Law – The Role of Theory' (n 12) 14. See also Jenny Morgan, 'Abortion Law Reform: The Importance of Democratic Change' (2012) 35(1) *UNSW Law Journal* 142, who concedes the dangers inherent in abortion law reform: at 147-148; but, on the basis of the 2008 Victorian reforms, emphasises 'the worth and benefits of pursuing access to abortion via the parliamentary process': at 173.
[33] As Davies explains: '[c]hanging the content of law over time may also change its shape and contours, and such changes are also connected to shifts in cultural presuppositions': Davies, 'Keynote: Reforming Law – The Role of Theory' (n 12) 23.
[34] Ibid 16.
[35] Sylvia A Law, 'Rethinking Sex and the Constitution' (1984) 132(5) *University of Pennsylvania Law Review* 955, 1028. See also Colker, who concludes that reproductive freedom is equality: Ruth Colker, 'Equality Theory and Reproductive Freedom' (1994) 3(1) *Texas Journal of Women and the Law* 99, 122. Fletcher provides an innovative approach to this issue, suggesting that: 'when we consider in general terms how law has tended to respond to the process of reproduction, we find that it is less likely to regard subjects as having reproductive *rights* and more likely to find that subjects have reproductive *responsibilities*…[and]…some legal subjects are generally regarded as having more of a reproductive responsibility than others…[and that]…the debate about feminist claims to reproductive rights emerged from a sociolegal background in which women were constructed as the bearers of reproductive responsibility': Ruth Fletcher, 'Legal Forms and Reproductive Norms' (2003) 12(2) *Social & Legal Studies* 217, 230-231.
[36] Indeed, Petchesky argues that the control of reproduction for the benefit of men as a class is the essence of patriarchy: see Petchesky (n 6) 384.

society.'[37] As Olsen states, such laws 'reflect and broadly reinforce the subordination of women…[and are]…part of the systematic oppression and devaluation of women.'[38] Reproductive freedom requires abortion on demand, or a right to abortion. Or to put this another way, as I argue in the articles in this thesis, reproductive freedom requires that abortion care be treated by the law in the same manner as any other health care, which necessitates repealing all restrictive abortion laws, and thereby allowing current general health law to regulate abortion.[39]

Of course, this is not to say that repealing restrictive abortion laws, and creating a situation of abortion on demand, would thereby result in reproductive freedom and women's substantive equality because another crucial aspect of reproductive freedom (among many others) is the right to decide whether to become pregnant, which remains elusive in contemporary society.[40] Nonetheless, establishing a right to abortion is an essential step in creating the conditions necessary for reproductive freedom. Certainly, if women can decide whether they wish to remain pregnant, then reproductive freedom is thereby enhanced.

To summarise and conclude this personal framing, I contend that a right to abortion, which would effectively exist if restrictive abortion laws were repealed and abortion was regulated in the same manner as any other health care provision, is a right worth pursuing, and an objective to which I could contribute. This is the impetus for, and lens through which, the research contained in this PhD thesis was conducted, and the articles in this thesis were all written to elaborate this perspective and to assess efforts at law reform in relation to it.[41]

In terms of the structure of the remainder of this contextual statement, it is divided into seven sections. The first and seventh sections are the introduction and conclusion respectively. Sections two, three and four deal with the specific articles of this thesis as indicated below.

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[37] Liz Beddoe, 'Reproductive justice, abortion rights and social work' (2022) 10(1) *Critical and Radical Social Work* 7, 8.
[38] Frances Olsen, 'Unravelling Compromise' (1989) 103(1) *Harvard Law Review* 105, 120. See also Reva Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44(2) *Stanford Law Review* 261, 360-361; and MacKinnon, who states that procreation provides 'a crucial occasion, pretext, and focus for the subordination of women to men in society': MacKinnon (n 8) 1308.
[39] There is no question that the current Australian health law system is already capable of doing so: see Dwyer et al (n 4).
[40] See, eg, Snelling, who makes the point that the decriminalisation of abortion is 'simply one issue on a broad spectrum of sexual and reproductive health issues' that comprises 'reproductive justice', which 'is concerned not only with reproductive rights, but with matters of social justice': Jeanne M Snelling, 'Beyond Criminalisation: Abortion Law Reform in Aotearoa New Zealand' (2022) 30(2) *Medical Law Review* 216, 217-218.
[41] The six articles dealing with abortion law directly were clearly written in this context, while the other two articles on theology and moral philosophy contained in this thesis do so implicitly, as they critique the conservative view on foetal personhood that underpins much of the resistance to pro-choice abortion law reform.

The second section of this contextual statement discusses four articles that deal directly with abortion law and suggested reforms, namely (in the order that the articles appear in this thesis): Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229; Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29(2) *Monash University Law Review* 316; Mark J Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (2018) 44(1) *Monash University Law Review* 32; and Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1.

The third section of this contextual statement discusses two articles that address the theological and secular conservative views on foetal personhood, namely: Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (2007) 10(2) *Flinders Journal of Law Reform* 271; and Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (2013) 31(2) *Monash Bioethics Review* 37. Although somewhat tangential to the literal abortion law focus of all the other articles in this thesis, as anti-choice campaigners have consistently utilised the alleged personhood of the foetus to resist pro-choice abortion law reform, these articles serve a similar purpose to the more legalistic articles.

The last section discussing specific articles deals with two articles that have been written on what may be described as ancillary or outstanding issues to abortion law more directly defined. These two articles address the issues of the offence of child destruction and the establishment of safe access zones around premises that provide abortion services, respectively: Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35(1) *Sydney Law Review* 1; and Mark J Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (2020) 39(2) *University of Tasmania Law Review* 61.

Sections five and six present new research, and simultaneously serve to highlight the impact and original contribution to knowledge of the articles in this thesis. Section five canvasses and critiques the various legislative reforms that have occurred throughout Australia since 2011, that being the year of my last article studying legislative reforms in all Australian jurisdictions,[42] and will

[42] See Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2). Although this thesis contains four articles published post-2011, one of those dealt with aspects of moral philosophy, and the other three either discussed ancillary issues to abortion law, or focused on the law in only one jurisdiction: see, respectively, Rankin, 'Can One Be Two? A Synopsis of the Twinning

emphasise the influence that the articles in this thesis have had on such legislative reforms. There is a need for this discussion as there have been legislative developments in the majority of jurisdictions since 2011, so this thesis might seem incomplete without discussing these reforms.

Section six will focus on my work with the South Australian Abortion Action Coalition ('SAAAC').[43] Over several years, this group championed legislative reform that led to changes in the law in South Australia, both in terms of creating safe access zones,[44] and in the decriminalisation of the practice of abortion.[45] I was a principal legal advisor for SAAAC throughout its existence and was a founding member. My productive performance in this role was only made possible as the result of the research conducted in generating the articles in this thesis and the professional reputation that those publications bestowed. In addition, my work for SAAAC may be described as an instance of research translation, whereby the knowledge gained in researching and drafting the articles in this thesis was applied to achieve the practical outcome of legislative reform.[46] This section will also provide a critique of such legislation from the perspective adopted throughout this contextual statement.

The conclusion to this contextual statement will briefly reference the basic arguments presented in the preceding sections and further emphasise the significance of the articles contained within this thesis; thereby making the case for the award of the degree.

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and Personhood Debate' (n 2); Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1); Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2); and Mark J Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (2018) 44(1) *Monash University Law Review* 32.

[43] It should be noted that the preferred acronym for the South Australian Abortion Action Coalition is 'saaac'. This contextual statement utilises the capitalised 'SAAAC' in the interests of compliance with the *Australian Guide to Legal Citation*: see Melbourne University Law Review Association Inc and Melbourne Journal of International Law Inc, *Australian Guide to Legal Citation* (4th ed, 2018).

[44] See *Health Care (Safe Access) Amendment Act 2020* (SA).

[45] See *Termination of Pregnancy Act 2021* (SA).

[46] It should be noted that definitions of both 'research translation' and 'translational research' are contested and evolving: see, eg, Daniel G Fort, Timothy M Herr, Pamela L Shaw, Karen E Gutzman and Justin B Starren, 'Mapping the evolving definitions of translational research' (2017) 1(1) *Journal of Clinical and Translational Science* 60. However, for the purposes of this contextual statement a broad definition will suffice, whereby research translation 'is considered as a process through which knowledge is used or applied to achieve [practical] outcomes': Australian Council of Learned Academies, *Translating research for economic and social benefit: country comparisons* (Final Report, November 2015) 24.

2. Australian Abortion Law in the early 21st Century

At the turn of the 21st century all jurisdictions in Australia maintained restrictive abortion laws that were based to varying degrees, and in some jurisdictions almost verbatim,[47] on sections 58 and 59 of the *Offences Against the Person Act UK* (1861). Abortion was thus defined as a serious crime throughout Australia. Although four jurisdictions had passed further legislation dealing specifically with abortion, it nonetheless remained a serious crime in all of these 'reform' jurisdictions.[48] There were defences available to the offence of abortion, some legislative, and some derived from the common law, but these were arguably only available to the medical profession,[49] and of limited scope. Other than Western Australia and the Australian Capital Territory ('ACT'), which had both engaged in abortion law reform in 1998,[50] abortion law in all other jurisdictions had remained effectively unchanged for three decades or more.

The law as it existed throughout Australia at the turn of the 21st century is the subject of the first article in this thesis: Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229. This article adopted a comprehensive approach to the issue, canvassing and critiquing the law in all Australian jurisdictions, and engaging in a comparative analysis of that law. There had been little scholarship in terms of a comprehensive and comparative analysis of Australian abortion law at the time, as the limited number of articles published on Australian abortion law by the late 20th century tended to be confined to discussions of specific jurisdictions, or analyses of particular aspects of the law. By the turn of the 21st century there had been only one significant article that had provided a comprehensive review and analysis of the law in all Australian

[47] See, eg, the relevant historical versions of: *Crimes Act 1958* (Vic) ss 65-66; *Crimes Act 1900* (NSW) ss 82-84; and *Crimes Act 1900* (ACT) ss 42-44.
[48] For such 'further' legislation see the relevant historical versions of: *Criminal Law Consolidation Act 1935* (SA) s 82A; *Criminal Code Act 1983* (NT) s 174; *Criminal Code Act Compilation Act 1913* (WA) s 199 and *Health (Miscellaneous Provisions) Act 1911* (WA) s 334; and *Health Regulation (Maternal Health Information) Act 1998* (ACT).
[49] That is, legislation in all jurisdictions made it clear that only medical practitioners could lawfully perform abortions (in certain circumstances), as the statutory defences potentially applicable to the offence of abortion were only available to medical practitioners, and courts echoed that determination by holding that only medical practitioners could avail themselves of any applicable common law defences to unlawful abortion: see, eg, *R v Trim* [1943] VLR 109, 116-117; *R v Carlos* [1946] VLR 15, 19; *R v Davidson* [1969] VR 667, 672; *R v Wald* [1971] 3 DCR (NSW) 25, 28-29. Cf *The Queen v Anderson* [1973] 5 SASR 256, 271.
[50] See *Criminal Code Act Compilation Act 1913* (WA) s 199, as amended by *Acts Amendment (Abortion) Act 1998* (WA); and *Health Regulation (Maternal Health Information) Act 1998* (ACT). The ACT had also passed the *Termination of Pregnancies Act 1978* (ACT), but this had been repealed by the *Termination of Pregnancy (Repeal) Act 1992* (ACT).

jurisdictions, but this had been published in 1991, so was somewhat outdated by 2001.[51] The 2001 article in this thesis filled a lacuna in scholarship in that regard. It is thus, unsurprisingly, the most cited article in this thesis,[52] and has been referenced in various parliamentary and law reform body reports.[53]

The article had two primary purposes. First and foremost, it sought 'to provide a comprehensive and up-to-date statement of the law with regard to abortion in every jurisdiction in Australia.'[54] In doing so, the article also aimed to highlight that: 1. abortion was a criminal offence in all jurisdictions in Australia; and 2. women did not have a right to abortion in any jurisdiction in Australia. One might say that proposition '2' inevitably flows from proposition '1' as 'while abortion remains a subject for Australian criminal law, it can never be a right possessed by Australian women.'[55] However, although abortion was a crime in all jurisdictions, it nonetheless remained accessible in all jurisdictions (to varying degrees). This apparent legal inconsistency was the result of legislative enactments and judicial pronouncements that had created defences to the crime of abortion for medical practitioners. Thus, provided an abortion was performed by a medical practitioner that had ostensibly satisfied the elements of the applicable defence, such abortions were available to Australian women despite the fact that abortions were prima facie unlawful.[56]

The article argued that although this state of affairs was preferable to a literal reading of the legislation, such 'liberalisation, or decriminalisation, of the law…[had]…not conferred any rights

[51] See Natasha Cica, 'The Inadequacies of Australian Abortion Law' (1991) 5(1) *Australian Journal of Family Law* 37. See also Alison Duxbury and Christopher Ward 'The International Law Implications of Australian Abortion Law' (2000) 23(2) *UNSW Law Journal* 1. This later article did canvass the law in each jurisdiction, but only did so briefly, as the article focused primarily on an international law approach to the issue.

[52] Refereed journal articles that have cited Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) are too numerous to list here, so I will simply provide the following (non-exhaustive) list of journals in which such articles appear: Journal of Bioethical Inquiry, Australasian Parliamentary Review, Criminal Law Journal, Journal of Law and Medicine, University of Tasmania Law Review, Deakin Law Review, Sydney Law Review, Adelaide law Review, Flinders Law Journal, Australian Historical Studies, Monash University Law Review, University of New South Wales Law Journal, Alternative Law Journal, Victorian Historical Journal, and Australian Feminist Law Journal. In the case of the Monash University Law Review, the University of New South Wales Law Journal, and the Journal of Law and Medicine there have been multiple articles that have cited the above article.

[53] See, eg, Health, Communities, Disability Services and Domestic Family Violence Prevention Committee, 55th Parliament, *Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland* (Report No 24, August 2016) 7; South Australian Law Reform Institute ('SALRI'), *Abortion: A Review of South Australian Law and Practice* (Report 13, October 2019) 54, 59, 106, 469.

[54] Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 229.

[55] Ibid 252.

[56] Of course, such 'availability' was markedly different between jurisdictions for legal reasons explained within the article.

upon women with regard to abortion, but…[had]…simply resulted in the medicalisation of abortion.'[57] This was the other purpose of the article: to highlight that the basic rights of women had not been recognised by any Australian government by the turn of the 21st century. The defences created, either through legislation or the common law, had been created for the medical profession, and not for women.[58] Indeed, such defences were often expressly made unavailable to women charged with the crime of abortion.[59] The judiciary especially made it clear that a woman's desire to terminate her pregnancy was no legal justification for doing so.[60] In any case, the article made the argument that this medicalisation of abortion effectively excluded a woman's right to abortion,[61] because it served 'to remove from the woman concerned the power to make the reproductive decision about her own body.'[62] The article concludes that:

> If women are to be accepted by our governments as full moral persons, they must be granted the right to make their own decisions about their own bodies. An essential step towards this goal is the removal of abortion from the realm of criminal law.[63]

This objective of removing the regulation of abortion from the criminal law became the guiding principle or theme for all the articles in this section. As such it constitutes one of the critical building blocks of the original contribution to knowledge of the articles in this thesis; namely, to advocate for specific feminist oriented law reform. This focus was especially evident with respect to the second article discussed in this section, Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29(2) *Monash University Law Review* 316. This article was intended to be read in conjunction with the 2001 article in order to fully satisfy the objective of providing a current and comprehensive statement of abortion law in each jurisdiction. That is, shortly after the publication of the 2001 article both Tasmania and the

[57] Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 231.
[58] The article also made the ancillary point that the common law defences established in some jurisdictions for members of the medical profession, which were based on the common law principle of necessity, were inherently uncertain and fragile. This issue was dealt with in detail in Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) and will be further discussed below.
[59] See, eg, *R v Davidson* [1969] VR 667, 672; and *R v Wald* (1971) 3 DCR (NSW) 25, 29. In 'reform' jurisdictions the legislation made it similarly clear that the statutory defences were only available to the medical profession: see, eg, the relevant historical version of *Criminal Law Consolidation Act 1935* (SA) ss 81(1), 82A.
[60] See, eg, *R v Wald* (1971) 3 DCR (NSW) 25, 28-29; and *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, 45.
[61] This is not a novel argument. For earlier discussions of this view see, eg, Kerry Petersen, 'Abortion: Medicalisation and Legal Gatekeeping' (2000) 7(3) *Journal of Law and Medicine* 267, 269-271; Sheila McLean, 'Women, Rights, and Reproduction' in Sheila McLean (ed), *Legal Issues in Human Reproduction* (Aldershot, 1989) 213, 227.
[62] Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 252.
[63] Ibid.

ACT engaged in major abortion law reform,[64] so the claim of the 2001 article that such a statement was provided was rendered incomplete. The methodology adopted in this 2003 article – that of offering a critique of the law, involving a comparative analysis, that is focused on 'the effect of the legislation on the criminality of abortion, and the influence it has upon a woman's right to abortion'[65] – was practically identical to that utilised in the 2001 article. Given the recent legislative developments discussed in this 2003 article (ie. Tasmania enacted the relevant legislation in 2001 and the ACT did so in 2002), it is of interest to note that it was the first article to canvass and critique the amended law in both jurisdictions.[66]

In addition to being the pioneer in this respect, the article also served to highlight how abortion law reform can go either way, in the sense that Tasmania chose to enact restrictive abortion laws, that although provided some legal clarity on the issue, nonetheless maintained abortion as a crime and thereby precluded a woman's right to abortion,[67] whereas the ACT went from restrictive laws (some enacted as recently as 1998) to arguably the most liberal laws in Australia in 2002.[68] Of particular note in that regard is that the ACT legislation of 2002 sought to remove abortion from the realm of the criminal law,[69] and thereby 'moved towards the recognition of a woman's right to abortion.'[70] However, the article also makes the point throughout that all such reform, in common with all other Australian jurisdictions, had been commenced with the objective of achieving the medicalisation of abortion, consistently with the interests of the medical profession, rather than with the goal of recognising a woman's right to abortion. The article was particularly critical of the

[64] See *Criminal Code Amendment Act (No 2) 2001* (Tas); *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT).
[65] Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29(2) *Monash University Law Review* 316, 317. As mentioned previously, the two issues are obviously linked 'as one cannot have a right to a crime': at 317.
[66] The article has been cited in a number of publications, including: Journal of Bioethical Inquiry, Australasian Parliamentary Review, Journal of Law and Medicine, Deakin Law Review, Sydney Law Review, Adelaide law Review, Flinders Law Journal, Australian Historical Studies, Monash University Law Review, and University of New South Wales Law Journal. It has also been cited in parliamentary and law reform body reports: see, eg, SALRI (n 53) 59.
[67] Tasmania embarked upon further abortion law reform in 2013, and this legislation will be discussed in subsection 5.2 of this contextual statement.
[68] See Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 327.
[69] This was substantially achieved, in that as a result of the 2002 legislation there is no longer any reference to abortion in the *Crimes Act 1900* (ACT). However, the 2002 legislation also created two new offences - 1. performing an abortion in a non-approved facility; and 2. the performance of an abortion by a non-medical practitioner – thus precluding a determination of total decriminalisation of abortion. In addition, there remained the offence of child destruction in the ACT, which has implications for what constitutes a lawful abortion: see Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 330-332. This issue is the subject of detailed analysis in Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1), which is discussed in section 4 of this contextual statement.
[70] Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 327.

Tasmanian legislation in that respect.[71] Indeed, the article holds that the Tasmanian legislation, in adopting aspects of both the South Australian and the Western Australian legislation, merely 'results in repeating the mistakes of others.'[72]

On a positive note, from a feminist perspective, the article also determines that although the ACT law 'does not grant any rights to women',[73] by largely removing abortion from the criminal law and providing for 'the medical regulation of the practice… there now exists effective abortion-on-demand in the ACT',[74] as the ACT legislation 'leave[s] space for women to make their own decisions…with respect to abortion, as they do not have to surmount the hurdle of the legal tests that exist in other jurisdictions.'[75] Thus, the article concludes that the ACT is the standard by which all other jurisdictions should henceforth be comparatively assessed.[76]

An assessment of a specific jurisdiction was the subject matter of the third article canvassed in this section, Mark J Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (2018) 44(1) *Monash University Law Review* 32. This article is out of chronological order in terms of publication date for this section, but I have placed it here because it analyses legislation that had not been amended since its enaction prior to federation (and such legislation had itself been adopted almost verbatim from 1861 UK legislation), and had not received significant judicial interpretation since 1971.[77] The article could have been written at any time over the ensuing four decades.[78]

The aim of this article was to highlight that although accessing abortion services in New South Wales ('NSW') was comparatively straightforward, this situation was largely due to a liberal

[71] See ibid 321-323, 325-326.
[72] Ibid 320.
[73] Ibid 334.
[74] Ibid 334.
[75] Ibid 335.
[76] See ibid 327, 335. The ACT engaged in further reform after 2002, that is discussed in both the 2011 article and the 2020 article, but the underlying principles from 2002 were retained, if not enhanced. These reforms will be canvassed later in this section and in subsection 5.6 of this contextual statement.
[77] See *R v Wald* (1971) 3 DCR (NSW) 25. Although other cases since *Wald* have dealt with abortion law, the basic principles of *Wald* have always been followed. This has occurred as recently as 2006 by Simpson J in *R v Sood [No 3]* [2006] NSWSC 762. It was also followed by the majority of the New South Wales Court of Appeal in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.
[78] However, the arguments advanced in this article had a narrower application by 2018, as prior to 2008 the arguments made in the article could equally apply to Victoria. That is, abortion law in Victoria and New South Wales was virtually identical until the enactment of the *Abortion Law Reform Act 2008* (Vic). The arguments made in the article were also relevant to Queensland (although less so for reasons explained in the 2001 article) prior to the passing of the *Termination of Pregnancy Act 2018* (Qld). It is also submitted that the publication date, combined with the passing of the *Abortion Law Reform Act 2019* (NSW), has resulted in few citations for this article. That is, once the NSW legislation was enacted, the article would have only historical interest. It was, however, cited in the major Australian publication dealing with abortion law within that limited period: see SALRI (n 53) 59.

interpretation of the law by the NSW judiciary,[79] and that this interpretation was fragile in its reasoning, rested on shaky foundations, and was probably bad law.[80] Although it might at first glance seem unproductive from a pro-choice position to point out legal flaws in a regime of relatively easy access to abortion services, the purpose behind exposing these defects in the law was to provide further impetus for legislative action on the issue; namely, the decriminalisation of abortion in NSW. It is worth noting that the NSW Parliament sought to decriminalise abortion shortly after this article was published.[81]

The article provides a comprehensive analysis of the common law as it applied to abortion, with a focus upon *R v Davidson*[82] and *R v Wald*.[83] The article then provides a detailed historical examination of the common law principle or defence of necessity that forms the basis of the above mentioned decisions, highlighting that 'the necessity defence is not theoretically coherent as it applies to the offence of abortion.'[84] Indeed, the article argues that there exist authoritatively established elements of the necessity defence that many abortions performed in NSW might fail to meet.[85] In addition, the point made throughout the article is that the necessity defence is complex, vague, unpredictable, inconsistent and uncertain, and on that basis alone should not be the foundation for lawful access to abortion services, as it places such services in a precarious position. The article argues that the provision of abortion services in NSW should rest 'upon a more solid legal foundation';[86] specifically advocating for abolishing the offence of abortion.

Critiquing the criminality of abortion was a consistent theme in all the articles so far canvassed in this section. The final article discussed in this section, Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1, continues this theme, but goes considerably further. This article, published a decade after my first article on abortion, also provides a comprehensive analysis of the law in all Australian jurisdictions, but the inquiry is more focused on

[79] It is worth noting that this liberal approach did not confer any rights upon women; it simply allowed the medical profession to perform abortions with relative impunity.
[80] See Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 66-67.
[81] See *Abortion Law Reform Act 2019* (NSW). This legislation will be discussed in further detail in subsection 5.4 of this contextual statement.
[82] [1969] VR 667.
[83] (1971) 3 DCR NSW 25.
[84] Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 35.
[85] The article focuses in particular on *R v Loughnan* [1981] VR 443 as the most authoritative source for such elements. It is of interest to note that the necessity defence has received recent judicial comment in *Veira v Cook* [2021] NSWCA 302, but this case will not be discussed in this thesis as the defence no longer has any significant application to abortion in NSW as a result of the *Abortion Law Reform Act 2019* (NSW).
[86] Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 68.

critiquing the law from a specific feminist perspective. The critique offered is thus more direct and philosophically transparent, and the conclusions reached are more obviously political. That is, although the 2001 article had sought to highlight that abortion was a criminal offence in every jurisdiction, and that the medicalisation of abortion that had been achieved in some jurisdictions had not resulted in the conferral or recognition of any abortion rights for women, it did not target in detail the particular elements of the law in each jurisdiction that would need to be addressed in order to recognise a right to abortion.[87] The 2011 article does so by asking specific questions of the law in each jurisdiction, namely:

> 1. Is abortion, *prima facie*, a crime, and, if so, can a woman be charged for procuring, or attempting to procure, her own abortion?; 2. Do reasons/defences for abortion need to be provided or satisfied in order to constitute lawful abortion, and, if so, does the law require one or more medical practitioners to sign off with respect to such reasons/defences to constitute lawful abortion?; 3. Does the law require the abortion to be performed in a prescribed facility, or by a particular specialist medical practitioner for it to be lawful?; 4. Are there gestational time limits for lawful abortion?; and 5. Can medical practitioners remove themselves from the process via conscientious objection to the procedure?[88]

It was argued in the 2011 article that these questions were pertinent to establishing how far each jurisdiction was from recognising a woman's right to abortion. The article thus significantly furthered one of the overarching original contributions to knowledge of the articles in this thesis; namely, to provide an assessment of existing laws with respect to the parameters of recognising women's human rights. Put simply, unless a negative answer could be provided to all the above questions, a particular jurisdiction would fall short of such recognition. That is, for abortion to be a woman's right: 1. abortion cannot be a crime; 2. a particular woman's reasons for an abortion should not be assessed as one does not have to provide reasons to exercise a right, and to do so would be 'inconsistent with the full recognition of such a right';[89] 3. there should be no medically unjustified or unnecessary conditions that serve to 'hinder the exercise of a woman's right to abortion';[90] 4. 'the exercise of a woman's right to abortion should not be conditional upon the

[87] The 2011 article also differentiates itself from the 2001 article by discussing throughout the article the two issues of the absurdity of defining abortion as an inchoate offence, and the nature and adverse implications from a woman's rights perspective of allowing for the conscientious objection of health professionals.
[88] Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 5.
[89] Ibid 6.
[90] Ibid.

gestational age of the foetus';[91] and 5. 'the exercise of the right to abortion should not be conditional upon a medical practitioner's exercise of his/her conscience'.[92] This is not to say that abortion should be unregulated, as this would have adverse health consequences for women, but simply that it should be no more regulated than is medically justified. In other words, the article argues that, for women to have a right to abortion, it must be treated by the law in the same manner as any other medical procedure or service. The article makes the point throughout that an essential step in this process is for medical abortion to be solely regulated by health law.[93]

The article provides a concise statement at the conclusion of each discussion of the law in each jurisdiction as to the manner in which the above questions have been answered. Thus, the article provides a quick reference tool as to whether a particular jurisdiction has recognised a woman's right to abortion, and if not, how far that jurisdiction is from that objective, and what further reform is required in that regard. As mentioned above, this is an important original contribution to knowledge in terms of the analysis and assessment of existing laws. It is argued in this article, that other than the ACT in 2002 and Victoria in 2008 (and Western Australia in 1998, although less so), no other jurisdictions had achieved much of merit in terms of reaching this goal. At the time both Queensland and NSW had adopted a liberal judicial interpretation of the law, such that it enabled a permissive practice, especially in NSW, but as the 2018 article highlighted, this was a precarious regime given its legal basis.

There is some unavoidable repetition of material covered in the 2001 article, as all Australian jurisdictions were subjected to the above explained interrogation, and many jurisdictions had not altered their position since 2001.[94] However, the 2011 article also canvasses and critiques new developments in the Northern Territory (in 2006), Queensland (in 2009), and especially Victoria (in 2008). Indeed, the Victorian legislation is examined at some length, as the determination is made in the article that this legislation comes closest to recognising a woman's right to abortion, and thus should be the template for other jurisdictions to follow. This subsequently occurred to differing extents in most jurisdictions post-2011, and such reforms will be discussed in section 5 of this contextual statement.

[91] Ibid.
[92] Ibid.
[93] See ibid 31, 35, 37, 45, 48.
[94] The 2011 article has also not been cited to the extent of the 2001 article, but has been cited in articles in the following prestigious publications: Journal of Law and Medicine, Sydney Law Review, Adelaide Law Review, and Monash University Law Review. It has also been cited in parliamentary and law reform body reports: see, eg, New South Wales Parliamentary Research Service, *Abortion law: a national perspective* (Briefing Paper No 2, May 2017) 18, 57; SALRI (n 53) 59, 126.

3. Confronting Foetal Personhood

This section discusses two articles that depart from the largely legalistic analysis provided in the other articles in this thesis, and instead deal with issues of theology and moral philosophy, respectively: Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (2007) 10(2) *Flinders Journal of Law Reform* 271; and Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (2013) 31(2) *Monash Bioethics Review* 37. Neither of these articles discuss the law in any substantial manner, but the purpose of both articles is consistent with the overarching goal of all the articles in this thesis: namely, to advocate for law reform that would guarantee a right to abortion, both in a legal and practical sense. Whereas the other articles in this thesis critique the relevant law and provide recommendations for such reform, the above two articles approach the issue from another direction and seek to counter the primary argument utilised against such reform; that being the 'conservative' view on foetal personhood.[95] The conservative view on foetal personhood, that holds the foetus to be a person from conception, and thereby a being that possesses rights, and in particular the right to life, is the predominant political weapon wielded by those resisting abortion law liberalisation.[96] In terms of its political application to the abortion debate, this conservative position may be framed succinctly as follows: abortion at any stage involves the killing of a person, so there can never be a right to abortion.[97] Despite the obvious and fundamental theoretical flaw of this position – namely, that even if the foetus is a person, and therefore has a right to life, this does not of itself logically preclude a right

[95] The use of the label 'conservative' in this context requires some explanation. The conservative view on foetal personhood is 'conservative' in the sense that it tends to be aligned with right-wing and Christian-informed political positions, which are typically collapsed within the broader ideology of social conservatism. The conservative view on foetal personhood may be founded upon theological and/or secular arguments. The Catholic Church provides the classic theological argument: see, eg, Pope John Paul II, 'The Gospel of Life: *Evangelium Vitae*' (1995) 87 *Acta Apostolicae Sedis* 401. For established ostensibly secular arguments in this regard see, eg, John T Noonan Jr, 'Deciding Who Is Human' (1968) 13 *Natural Law Forum* 134; Richard Werner, 'Abortion: The Moral Status of the Unborn' (1974) 3(2) *Social Theory and Practice* 201. For a more recent defence of the conservative view see Francis J Beckwith, *Defending Life: A Moral and Legal Case Against Abortion Choice* (Cambridge University Press, 2007).

[96] For a discussion of how the assertion of foetal personhood and rights are often utilised by anti-abortion groups to resist abortion law reform see Martha Shaffer, 'Foetal Rights and the Regulation of Abortion' (1994) 39(1) *McGill Law Journal* 58.

[97] It should be noted that although this statement represents the baseline position of all advocates of the conservative view on foetal personhood, some members of that camp hold the extreme view that abortion can therefore never be permitted in any circumstances, whereas other proponents of the conservative view take a more moderate stance, and although opposing a right to abortion nonetheless allow for some abortions in specific exceptional cases: see, eg, Germain Grisez, *Abortion: The Myths. the Realities, and the Arguments* (Corpus Books, 1970) 332-346.

to abortion[98] - the argument nonetheless continues to have some political and social power.[99] Indeed, in contemporary Australian society foetal personhood is perhaps the only argument against a right to abortion that might be expressed publicly.[100]

The impetus for these two articles was simultaneously political and personal. It was political for the reasons outlined above; to confront the opposing argument to a woman's right to abortion. It was personal in the sense that I felt that my research was incomplete without having dealt with this opposing argument in some way. In terms of how to engage with this rival position, I saw little point in preaching to the converted on these issues, so in both articles my intended audience were (hypothetical) members of the Australian public that believed that the foetus was a person, for theological and/or secular reasons, but were otherwise rational beings.[101] Both articles sought to enter into a dialogue with such imagined readers, aiming to plant seeds of doubt in the minds of such individuals as to the strength of this conservative position on foetal personhood. In order to

[98] That is, no right is absolute, as all rights are relative, and operate within an environment of competing rights and associated obligations. For example, an assailant's right to life does not preclude an intended victim from exercising their right to self-defence and directly killing their assailant. In addition, one might argue that abortion simply involves the removal of the foetus from a woman's body, and not the direct killing of the foetus; thus, abortion does not violate any right to life that the foetus may possess as it does not constitute the direct killing of the foetus. These issues will be discussed further later in this section. For the classic analysis of these issues see Judith Jarvis Thomson, 'A Defense of Abortion' (1971) 1(1) *Philosophy and Public Affairs* 47. Furthermore, the conservative position assumes that there exists a right to life, which is debatable: see, eg, Jonathan Glover, *Causing Death and Saving Lives* (Penguin Books, 1977) 39-59, 114-115, 138-146. Glover essentially makes the utilitarian argument that there is nothing inherently wrong with killing a person as an action is only wrong insofar as it causes suffering or reduces happiness.

[99] However, it should be noted that in Australia there exists majority support for the decriminalisation of abortion, and that this support has existed for some decades now: see Monica Cations, Margie Ripper and Judith Dwyer, 'Majority support for access to abortion care including later abortion in South Australia' (2020) 44(5) *Australian and New Zealand Journal of Public Health* 349, 349. Indeed, this recent study indicates that the majority of South Australians support abortion being treated like any other health care, which is, effectively, a situation of abortion on demand: at 352. It has also been suggested that the majority of Catholics in Australia are 'pro-choice': see Katherine Betts, 'Attitudes to Abortion in Australia: 1972 to 2003' (2004) 12(4) *People and Place* 22, 24.

[100] That is, one might suggest that resistance to a right to abortion is based upon patriarchal concerns, such as a desire to deny women reproductive freedom, and thereby maintain the subordination of women, but such objectives would be unlikely to be promulgated openly in 21st century Australia. Another argument sometimes offered to justify restrictive abortion laws is that it is in the interests of women's health to have such laws. This has always been a spurious argument, in that legal abortion has for decades been clearly somatically safer than childbirth, and legal abortion has always been somatically safer than illegal abortion, but even more so now that it is sufficiently clear that current health law would adequately regulate the practice of abortion conducive to women's health interests if women were granted a right to abortion: see, eg, Dwyer et al (n 4). For relatively early findings that abortion is somatically safer than childbirth, and legal abortion is somatically safer than illegal abortion: see Christopher Tietze and Stanley K Henshaw, *Induced Abortion: A World Review, 1986* (Alan Guttmacher Institute, 1986) 107-111. For similarly early studies concluding that abortion does not generally have deleterious psychological impacts: see Sarah Romans-Clarkson, 'Psychological Sequelae of Induced Abortion' (1989) 23(4) *Australian and New Zealand Journal of Psychiatry* 555.

[101] That is, it should be noted that although certain religious beliefs might be described as irrational, the holders of those beliefs are not necessarily irrational beings: see, eg, Laurence Iannaccone, Rodney Stark and Roger Finke, 'Rationality and the "religious mind"' (1998) 36(3) *Economic Inquiry* 373, 377-387.

do so the articles approach the issue from an ostensibly disinterested perspective,[102] so as not to immediately alienate a reader that holds the conservative position. Furthermore, rather than confronting the conservative view directly with relevant counter arguments,[103] the articles instead offer a critique of the conservative view on foetal personhood by assessing certain aspects of the promulgated basis for that view without necessarily refuting the fundamental principles upon which that perspective rests.

The articles endeavour to emphasise that the conservative view on foetal personhood, whether based upon theological or secular principles, is neither internally consistent nor persuasively argued; thereby highlighting the inherently fragile nature of the conservative view (either theological or secular), thus diluting the political and social power of that view, and (hopefully) causing the more reasonable holders of that view to question the relative strength of their beliefs in that regard. The 2007 article, Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (2007) 10(2) *Flinders Journal of Law Reform* 271, targets the theological basis for the conservative position on foetal personhood, using the Catholic Church's position as the classic example of that perspective, and the 2013 article, Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (2013) 31(2) *Monash Bioethics Review* 37, exposes the weaknesses in both the broader theological and secular conservative view by critiquing a common criticism of that view.

These articles might be construed as granting irrational and/or insubstantial arguments legitimacy. Hence, prior to discussing them, it is necessary to provide some personal philosophical context. First, it should be emphasised at the outset that the foetus is neither a legal nor moral person at

[102] That is, rather than the implicit or express feminist perspective apparent in the other articles discussed in this contextual statement.

[103] As many scholars have persuasively done: see, eg, the established arguments of Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) 57(1) *Monist* 43; Jane English, 'Abortion and the Concept of a Person' (1975) 5(2) *Canadian Journal of Philosophy* 233; Michael Tooley, *Abortion and Infanticide* (Clarendon Press, 1983). Indeed, from a rational perspective it is a relatively easy task to counter the conservative position on foetal personhood. That is, without going into unnecessary detail, many, if not all, secular conservative arguments for foetal personhood rely on the 'potentiality principle' and/or speciesism; namely, the propositions that whatever is potentially a person is a person, and whatever is human is a person. Neither argument is particularly strong as one may simply point out that whatever is potentially a person is *a fortiori* not yet a person, and unless one can explain why being genetically human carries any moral significance in terms of personhood, speciesism may be criticised along the same lines as sexism or racism. These issues will be discussed further later in this section. The theological conservative position is founded upon unproven and unmeasurable (and arguably irrational) principles, such as the existence of god(s) and the immortal soul, and may logically be refuted on that basis alone. This is not to say that religious views are inherently illegitimate in any public debate on moral dilemmas, only that such views cannot be the sole basis for purportedly rational decision making. For a detailed analysis on the role of religion in this respect see Jurgen Habermas, 'Religion and the Public Sphere' (2006) 14(1) *European Journal of Philosophy* 1.

any stage of gestation. The fact that the foetus is not a legal person is indisputable,[104] while the assertion that the foetus is not a moral person is, as I argue, the most persuasive view on foetal personhood.[105] Of course, the classical masculinist philosophical debate on foetal personhood,[106] although interesting, presupposes a fallacy; namely, that the foetus may be treated as an abstract individual, thereby ignoring the fact that the foetus exists within a woman's body, so cannot possibly be treated as such. The focus on foetal personhood also obscures the fact that whatever moral status is attributed to the foetus, there is no doubt about the pregnant woman's moral and legal personhood,[107] and 'it is impossible to accord any rights or status to the foetus… without compromising and diminishing those of the woman in whose body it resides.'[108] It should also be recognised that, like all moral issues, no objectively 'correct' position on foetal personhood exists in any case;[109] one may only conclude that a certain argument is more justified and thereby persuasive than another. Putting these issues aside, of the myriad theories proposing criteria for moral personhood, the arguments that focus on self-consciousness and non-momentary interests as the keys to moral personhood are the most convincing.[110] It certainly seems logical to conclude that only self-conscious beings may have a right to life because only a being conscious of itself, with a past and future, would value its own continued existence.[111] As mentioned above, defining

[104] This has been the common law position for centuries, either implicitly (by virtue of the fact that the foetus cannot be the victim of homicide: see, eg, Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (W Clarke & Sons, 1791) 47-50; *R v Poulton* (1832) 5 C & P 329, 330; *R v Hutty* [1953] VLR 338, 339; *Barrett v Coroner's Court of South Australia* (2010) 108 SASR 568, 573–575) or expressly. Perhaps the most pertinent statement is made by Justice Lindenmayer, in concluding that the foetus 'has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother': *In the Marriage of F* (1989) 13 Fam LR 189, 194. Indeed, Justice Lindenmayer went so far as to label the foetus a 'non-person': at 197. See also *Attorney General (Qld) (ex rel Kerr) v T* (1983) 46 ALR 275, 277 (Gibbs CJ); *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 279 (Baker P). Similar determinations are evident in legislation: see, eg, *Criminal Code Act 1924* (Tas) s 153(4). This lack of foetal personhood has been described as a 'fundamental premise of both civil and criminal law': SALRI (n 53) 12.

[105] It should be noted at this stage that the scholarly debate on foetal personhood was at its most active in the latter half of the 20th century, especially during the 1970s and 1980s; hence, the reliance in this section on the classic texts from that era.

[106] A detailed discussion of moral personhood is not necessary for the purposes of this contextual statement, as neither of the articles discussed in this section deal with moral personhood generally, but rather discuss quite specific issues within that broader and expansive discourse. Specifically, it is only certain aspects of the conservative view on foetal personhood that are examined in the two articles discussed in this section.

[107] See Furedi (n 6) 117.

[108] Ibid 118.

[109] See, eg, Neville Cox, 'Causation, Responsibility and Foetal Personhood' (2000) 51(4) *Northern Ireland Legal Quarterly* 579, 596.

[110] For such arguments: see, eg, John Harris, *The Value of Life: An Introduction to Medical Ethics* (Routledge & Kegan Paul, 1985) 18-27; Tooley (n 103); Warren (n 103). Of course, the definition of self-consciousness is itself a contested notion. For present purposes, the simplistic definition of being aware of one's own existence with continuity of consciousness overtime will suffice – see, eg, Tooley (n 103) 359. It should also be noted that providing a definition does not, in itself, provide a means by which to measure the foetus against that definition.

[111] See, eg, Harris (n 110), who defines a moral person as 'any being capable of valuing its own existence': at 18. Cf Joshua Stein, 'Valuing Life as Necessary for Moral Status' (2016) 9(1) *Neuroethics* 45.

personhood by reference to such criteria results in the conclusion that the foetus is not a moral person.[112] However, this is not to say that the foetus should be granted no value, but rather that any value attributed to the foetus is to be determined entirely by the woman carrying the foetus. This conclusion is based on the incontrovertible facts that a pregnant woman is unquestionably a person, that the foetus is part of her body, and that the foetus is nothing without her. Put simply, there is no one more qualified to determine the status of the foetus than the woman carrying the foetus.

Second, as mentioned briefly above, determining whether or not the foetus is a moral person does not carry the ramifications that advocates of the conservative view assert. Putting aside the inherent absurdity of setting the interests of the foetus against the interests of the pregnant woman,[113] even if we hold that the foetus is a full moral person and engage in the problematic task of assessing this conflict, this still does not justify restrictive abortion laws (nor condemn abortion as immoral) because the fact that the foetus resides within the woman's body means that the rights of the pregnant woman outweigh any rights the foetus may possess. Certainly, foetal rights could never justify the unconditional use of a woman's body without her consent regardless of what those rights were determined to be.[114]

In addition, it might be argued that a person's right to life only serves to morally condemn the intentional and direct killing of that particular person, and does not extend to creating an obligation on other moral persons to continue to provide the means necessary for that person's continued survival.[115] In this sense, abortion may be viewed as the removal of the foetus from the woman's body, and thus not a contravention of the foetus' right to life, as X's right to life does not

[112] Indeed, Tooley believes that a self-conscious being, and thus a moral person, does not exist until an infant is approximately 3 months of age: Tooley (n 103) 332. Some scholars also hold that although self-consciousness is a necessary criterion for personhood, it is not sufficient: see, eg, Warren (n 100) 55-58. Indeed, it has been argued (as a strategy for opposing abortion) that many of the arguments presented for the moral permissibility of abortion would also allow for the moral permissibility of infanticide: see, eg, David Hershenov and Rose Hershenov, 'If Abortion, then Infanticide' (2017) 38(5) *Theoretical Medicine and Bioethics* 387.

[113] It is absurd because the foetus and the woman carrying it self-evidently have identical interests because the foetus is part of the woman's body; thus, the woman's interests, whatever they may be, are also necessarily the foetus' interests. Or, to frame this another way, as the foetus is not a separate individual from the pregnant woman, to argue that the foetus has interests in conflict with the pregnant woman is to make the non-sensical argument that one may have a conflict of rights with oneself: see Beverly Wildung Harrison, *Our Right to Choose: Toward a New Ethic of Abortion* (Beacon Press, 1983) 212. Thus, to argue that laws that affect women detrimentally may be justified in the interests of the foetus is ludicrous because, as the foetus is part of the pregnant woman, whatever harms the pregnant woman harms the foetus.

[114] See, eg, Thomson (n 98) 53-54.

[115] This argument is best illustrated by Thomson's classic violinist case: see ibid 48-49. For a critique of Thomson and her reliance on atomistic individualism see Donald P Judges, 'Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion' (1995) 73(4) *North Carolina Law Review* 1323, 1360-1368.

obligate Y to do whatever is necessary to keep X alive. A pregnant woman, in having an abortion, is simply denying the foetus continued use of her body, which is her right,[116] and the foetus' right to life does not extend to creating an obligation on the woman to continue to provide use of her body against her will.[117] Abortion may thus be viewed as a form of indirect killing, whereby the intention is to remove the foetus from the pregnant woman's body, with the foreseen consequence that the foetus will not survive this removal, but as only direct killing is an immoral contravention of a person's right to life, abortion does not violate the foetus' right to life.[118] Furthermore, even if abortion is defined as the intentional and direct killing of the foetus, this is still not necessarily immoral, as there are no absolute rights in any case, and the relativity of rights defines self-defence as a moral action.[119]

Despite such rational (and thereby persuasive) arguments concerning foetal personhood and the resolution of the (absurd) conflict of rights issue,[120] the conservative view described at the beginning of this section continues to have support. It is arguable that such devotion in the face of rational counter arguments stems largely from adherence to immovable first principles. Thus, as mentioned above, in order to engage with such individuals, the innovative approach taken in the

[116] Indeed, to suggest otherwise violates the basic assumption of ethics that there must be a moral distinction between persons and objects; that is, to claim that X has a right to Y's body is to claim that X has a right to treat Y as an object: see, eg, Sara Ann Ketchum, 'The Moral Status of the Bodies of Persons' (1984) 10(1) *Social Theory and Practice* 25, 32.

[117] This line of argument adopts an individualist approach, which may be contrasted with the ethic of care approach of relational feminism. For a comprehensive analysis of both rights based and ethics of care assessments of abortion: see Judges (n 115). Judges seeks to combine rights-based arguments and ethic of care arguments in creating a vision of care-informed rights: at 1389-1397; such that relational feminism may also support abortion rights: at 1400-1412. For a sustained critique of relational feminism see Pamela S Karlan and Daniel R Ortiz, 'In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda' (1992-1993) 87(3) *Northwestern University Law Review* 858. Karlan and Ortiz even go so far as to label relational feminism 'somewhat dangerous and misguided': at 860; especially as it makes defending abortion rights difficult: at 861, 882. Conversely, Herring makes the argument that an ethic of care approach can be pro-choice, as there is a crucial difference between an unwanted and wanted pregnancy in the sense that an unwanted pregnancy is a non-caring relationship, and thus of no moral value from an ethics of care perspective. Thus, abortion should be provided in the case of an unwanted pregnancy as this not only ends a non-caring relationship, but also results in freeing the woman concerned to engage in further caring relationships, which constitutes a public good from an ethics of care perspective: see Jonathan Herring, 'Ethics of Care and the Public Good of Abortion' (2019) 1 *University of Oxford Human Rights Hub Journal* 1, 14-24.

[118] See, eg, Tooley (n 103) 42-44; Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (MIT Press, 1975) 27-30. Of course, this argument must necessarily concede that a right to abortion is only a right to terminate a pregnancy, and not a right to demand the death of the foetus: see, eg, Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Allen & Unwin, 1987) 68-71.

[119] See Thomson (n 98) 50-53. There are issues with defining abortion as an act of self-defence, in that a particular pregnancy may not constitute an immediate physical threat to the pregnant woman's 'life'. However, if 'life' is viewed more broadly to include 'life prospects': English (n 103) 237-239; or 'quality of life' considerations: Alison Jaggar, 'Abortion and a Woman's Right to Decide' (1973) 5(1) *Philosophical Forum* 347, 351; the argument is solid. In addition, it is arguable that the physiological ramifications of pregnancy itself constitute a physical threat sufficient to justify abortion as an act of self-defence: see Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (Oxford University Press, 1996).

[120] Again, it should be noted that the 'rationality' proclaimed here is framed by individualism.

two articles discussed in this section is to move beyond the conventional repudiation of the conservative position, and instead critique that position without necessarily refuting the basic principles of the conservative view being examined. This methodology is most evident in the 2007 article that analyses the Catholic Church's perspective on foetal personhood.

The Catholic Church may be described as the most prominent and powerful advocate of the conservative theological view on foetal personhood.[121] This view holds the foetus to be a moral person because the foetus is endowed with a soul from conception, and any being with a soul is a person.[122] Instead of refuting the Church's first principles (such as the existence of the Judeo-Christian god, or the immortal soul), the article Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (2007) 10(2) *Flinders Journal of Law Reform* 271 offers a critique of the Church's position largely by reference to the Church's promulgated statements on the relevant issues. Indeed, the article expressly accepts the Church's five presuppositions relevant to its position on foetal personhood as follows:

> 1. that the Judeo-Christian God exists (hereafter 'God'); 2. that souls exist; 3. that persons are those beings endowed with souls; 4. that souls are infused by God; and 5. that the process of ensoulment functions according to the hylomorphic tradition, which results in souls only being infused by God when the organic body is sufficiently developed to receive that soul.[123]

This methodology is innovative as it significantly differs from the usual pro-choice response to this conservative position, which is simply to hold such presuppositions to be irrational, and consequently deride the theological conservative position on foetal personhood solely on that basis.[124] However, as mentioned at the beginning of this section, the intended audience for this article were those that held this view on foetal personhood, and the aim of the article was to constructively engage with that audience in order to elicit some questioning of the strength of that view. Furthermore, as is explained in the article, 'it is hypocritical to condemn an idea merely on

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[121] This refers to the official position of the Church and not the views of individual Catholics who may adopt quite divergent positions. For a comprehensive study of the various positions taken by prominent Catholics on this issue: see Hans Lotstra, *Abortion: The Catholic Debate in America* (Irvington Publishers, 1985) especially at 275-276. For a brief description of the manner in which the Church has asserted its view politically: see Karen Coleman, 'The Politics of Abortion in Australia: Freedom, Church, and State' (1988) 29 *Feminist Review* 75, 84-86. See also Loane Skene and Malcolm Parker, 'The Role of the Church in Developing the Law' (2002) 28(4) *Journal of Medical Ethics* 215, 215-16; Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3) 272-273.

[122] That is, '[i]t has always been, and continues to be, Church teaching that the *only* criterion (both necessary and sufficient) for personhood is the possession of a soul': Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3) 276.

[123] Ibid 274.

[124] See, eg, Paul Bassen, 'Present Sakes and Future Prospects: The Status of Early Abortion' (1982) 11(4) *Philosophy and Public Affairs* 314, 326-327.

the basis that it stems from a belief system, when rationalism is itself a belief system.'[125] Thus, the article invites the reader into a conversation in asking the question: '*Taken on its own terms*, is the Church's position internally consistent, persuasively argued, and thereby relatively credible?'[126]

In answering this question, the article provides a detailed analysis of the Church's position on foetal personhood and the changing nature of that position over the centuries, the problematic arguments for the process and timing of ensoulment, and the issues with the current theory/belief of immediate animation as compared with past theories/beliefs of delayed ensoulment. As a consequence of this analysis, the article argues that the Church's 'promotion of its view as uncomplicated, absolute, and immutable is disingenuous, as the Church's real position is far more complex, uncertain, and, ultimately, fragile.'[127] In particular, the article highlights the fundamental internal inconsistency that although the Church is now definite in its position that the foetus is a person from conception, and has always been certain that only a being endowed with a soul is a person, the Church nonetheless has yet to commit to the position that the foetus has a soul from conception.[128] In answer to the question quoted above, the article concludes that 'the Church's position is not credible, even according to its own precepts, as it is both internally inconsistent and unpersuasive.'[129] As explained above, the hope was that as this conclusion was reached without refuting the Church's first principles, it may have an impact upon those that hold the theological conservative view on foetal personhood. This is probably a naïve hope,[130] and, in any case, the article's success in that regard is beyond the expertise of this author to measure, but the innovative approach of the article, in accepting such first principles in countering the theological conservative position, should have a political impact nonetheless as it serves to repudiate any claims to certainty and immutability made by advocates for this position.

The secular conservative view on foetal personhood is more varied and complex than the theological approach, but proponents of this view essentially adopt either the potentiality

[125] Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3) 273. Rationalism may be described as a belief system because the only way to prove that rational argument is to be preferred to other types of analysis is by relying upon the first principles of rational argument; that is, ultimately one must conclude that rational argument is superior to other forms of argument because rational argument is more rational: see, eg, Margaret Davies, *Asking the Law Question* (Lawbook, 5th ed, 2023) 369-375.
[126] Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3) 274.
[127] Ibid 275.
[128] See ibid 278-279. Furthermore, the Church provides no sustained argument as to why immediate ensoulment is to be preferred to delayed ensoulment in any case, which may account for the Church's failure to adopt immediate ensoulment with any certainty: at 281-285.
[129] Ibid 285.
[130] Especially if one concludes that this position on the moral status of the foetus is actually in the end not about reason but rather dogma and emotional attachment; hence it cannot (despite the surrounding rhetoric) be counteracted by logical argument.

principle or a form of speciesism. The potentiality principle holds that whatever has the potential to be a person, is a person.[131] Speciesism defines personhood as being a member of the species *Homo sapiens*; that is, only and all human beings can be persons.[132] The two arguments tend to be conflated in the secular conservative view, as highlighted by an early proponent of this view: 'if one is ever a human being one has been human since conception, and further, being human is the morally relevant criterion for a right to life.'[133] Essentially, the argument is that because an adult human being is a person, then it follows that a foetus is a person because it is clearly genetically human and has the potential to become an adult. Yet, defining moral personhood solely by reference to membership of a species views personhood as an endowment, rather than an achievement, and thus confuses biology with morality, which cannot be the basis of moral personhood, and may be criticized on similar grounds as sexism or racism,[134] while arguing that potential equates to actual is nonsensical because F's that are potential P's are self-evidently not yet P's.[135]

However, despite such commonality within the varied secular conservative theories, the field is too diverse to discuss succinctly, and certainly any such discussion is well beyond the scope of one article. Thus, the approach taken in Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (2013) 31(2) *Monash Bioethics Review* 37 is to focus on one particularly strong criticism of the conservative view that is applicable to both theological and secular positions; namely, the biological phenomenon of monozygotic twinning. This criticism, labelled in the article as the 'twinning argument',[136] contends that, as monozygotic twinning occurs after conception, the conservative view on foetal personhood, that holds the foetus to be a person from conception, is by this biological fact alone rendered implausible.[137] More specifically, the twinning argument proposes that, as both theological and secular conservative positions on foetal

[131] One of the established advocates of this view is Noonan – see, eg, Noonan (n 95) 134-136.
[132] For the classic analysis of the origins of, and issues with, speciesism: see Peter Singer, *Animal Liberation* (Harper, 4th ed, 2009) 271-347.
[133] Werner (n 95) 219.
[134] That is, being a member of a particular species is no more morally significant, in and of itself, than being a member of a particular sex or race: see, eg, Peter Singer, 'Speciesism and Moral Status' (2009) 40(4) *Metaphilosophy* 567, 572-573. See also Warren (n 103) 56. For an interesting defence of speciesism see Alan Holland, 'On Behalf of Moderate Speciesism' (1984) 1(2) *Journal of Applied Philosophy* 281.
[135] See, eg, Marvin Kohl, *The Morality of Killing: Sanctity of life, Abortion, and Euthanasia* (Peter Owen Publishers, 1974) 42-43. For a defence of the moral import of the potentiality of the foetus: see Jim Stone, 'Why Potentiality Matters' (1987) 17(4) *Canadian Journal of Philosophy* 815.
[136] See Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (n 2) 40-41.
[137] See, eg, Barry Smith and Berit Brogaard, 'Sixteen Days' (2003) 28(1) *Journal of Medicine and Philosophy* 45; David W Shoemaker, 'Embryos, Souls, and the Fourth Dimension' (2005) 31(1) *Social Theory and Practice* 51.

personhood hold ontological individuality to be a necessary criterion for personhood,[138] the fact that the foetus may divide into two distinct organisms (which may subsequently recombine into one individual organism, and then further divide into two individual organisms again) up until approximately two weeks after conception,[139] means that the foetus cannot be a person from conception.[140]

The purpose of the article was to examine the merits of this twinning argument as it applied to both the theological and secular conservative positions on foetal personhood. As the twinning argument operates against the secular conservative view in a different manner to which it seeks to refute the theological conservative view, the article deals with each position separately. With respect to the theological position, the twinning argument essentially asks:

> If the soul is indivisible, and is in existence at conception, then what happens to the soul when the pre-implantation embryo splits into two distinct organisms, that may go on to become two distinct human persons, or remain as distinct pre-implantation embryos for a period, but then recombine into the one individual person?[141]

Advocates of the twinning argument conclude that, as 'souls cannot split or fuse, no soul is present, and accordingly no person exists, while twinning and recombination are possible.'[142] The twinning argument works against the secular conservative position by pointing out that a 'being capable of self-replication or division cannot be an individual',[143] and the secular conservative view holds that only individuals may be persons.

In assessing the strength of the twinning argument against the conservative position on foetal personhood, the article steadfastly aims to adopt a neutral position in order to engage with readers that hold the conservative view,[144] and indeed although the article highlights the dubious nature of the conservative position on foetal personhood, it concludes that the twinning argument

[138] See Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (n 2) 40.
[139] For a more detailed discussion of the biological phenomenon of twinning and recombination see ibid 37-39, 43-46.
[140] The twinning argument against foetal personhood is not relevant once the embryo's cells are no longer totipotent, but rather become differentiated, at which point twinning and/or recombination are no longer possible. That is, the twinning argument may be utilised to counter the conservative position that the foetus is a person from conception, but not any position that holds the foetus to be a person at some point after differentiation, which occurs approximately two weeks after conception. The article accordingly concedes that the discussion only applies to the pre-implantation embryo: see ibid 43.
[141] Ibid 41.
[142] Ibid 41-42.
[143] Ibid 42. Or, to put it another way, 'the ability to replicate or divide precludes ontological individuality': at 46.
[144] The article also accepts, in order to maintain objectivity and retain the interest of the hypothetical reader described in this section, that souls exist and that 'ontological individuality is a necessary condition of full moral personhood': Ibid 42-43.

is not as airtight a repudiation of the conservative view as advocates of the twinning argument suggest.[145] However, the article also makes the point that, in terms of continuity, the possibility that we may have experienced twinning and/or recombination during our embryonic development (and we cannot know whether or not this occurred), means that 'the most we can say with absolute certainty is that we existed subsequent to loss of totipotency',[146] at which point such twinning and/or recombination becomes impossible.

Although the article contends that the twinning argument raises serious doubts as to the merits of the conservative view on foetal personhood, it ultimately concludes that the twinning argument is not fatal to that conservative view.[147] However, complete refutation of the conservative view is unnecessary. The political point of the articles discussed in this section was only to create doubt in the minds of those that hold the conservative view on foetal personhood; not to entirely repudiate it.[148] Establishing doubt with respect to the conservative view on foetal personhood is sufficient in terms of effectively countering the primary argument against a right to abortion because a pregnant woman's legal and moral personhood is indisputably beyond doubt, and restrictive abortion laws are inconsistent with that incontrovertible personhood.

4. Ancillary and Outstanding Issues

This section discusses two articles that deal with ancillary and outstanding issues with respect to Australian abortion law: Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35(1) *Sydney Law Review* 1; and Mark J Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (2020) 39(2) *University of Tasmania Law Review* 61. These issues may be described as 'ancillary' because neither safe access zones nor the offence of child destruction directly affect the

[145] The conclusion reached with respect to the secular conservative view is that although the twinning argument raises awkward issues for that perspective, as indivisibility is not a necessary condition for individuation, the twinning argument does not disprove the secular conservative view: see ibid 43-50. With respect to the theological conservative view, the article similarly concludes that although the twinning argument raises serious doubts as to the merits of that view, it does not irrefutably disprove that view: at 50-56.
[146] Ibid 57.
[147] See ibid 58-59.
[148] It should be noted that the academic discourse concerning moral personhood is far more complex and varied than this section indicates, and the articles discussed in this section only brush the surface of this vast field of philosophical enquiry. However, as explained at the outset, the objectives of both articles were necessarily limited for reasons already highlighted, and one of those purposes was to satisfy a personal need for scholarly 'completeness', which I contend was achieved by the publication of these two articles.

legality of abortion per se.[149] However, both issues are simultaneously 'outstanding' concerns because these matters indirectly shape either the law or practice of abortion.

That is, abortion may be substantially decriminalised, as it has been in most jurisdictions, by removing abortion from the ambit of the criminal law, but if other related offences, namely the offence of child destruction,[150] are maintained, the extent of any purported decriminalisation remains uncertain and incomplete. Thus, the article analysing the offence of child destruction is a crucial part of the paramount original contribution to knowledge of the articles in this thesis that assess abortion law and proposed reforms in terms of their impact in ascribing abortion rights to women. Furthermore, in jurisdictions that have both decriminalised abortion and abolished such related offences, access to these now completely legal health services is considerably hindered, and a woman's right to abortion is thereby diminished, if protests and other forms of harassment of patients and/or health practitioners may occur at the premises that provide such abortion services.[151] Thus, in terms of the original contribution to knowledge referred to immediately above, the article on safe access zones advances that perspective in the sense that it deals with a supplementary, but essential, issue that ensures that any rights to abortion that women possess may be freely exercised. It is appropriate to have the discussion of these articles as the penultimate section in this contextual statement as the issues canvassed in these articles are either matters that have been most recently legislated for (in the case of safe access zones),[152] or remain unresolved concerns in jurisdictions that have otherwise effectively decriminalised abortion.[153]

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[149] This is especially the case with respect to safe access zones, which is amply illustrated by the fact that both NSW and South Australia enacted legislation to create safe access zones: see *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW); *Health Care (Safe Access) Amendment Act 2020* (SA); prior to enacting legislation that decriminalised abortion: see *Abortion Law Reform Act 2019* (NSW); *Termination of Pregnancy Act 2021* (SA).

[150] There do exist other related offences that might impact upon abortion law or the practice of abortion, such as the offence of concealment of birth, but a discussion of such offences is beyond the scope of this thesis. For examples of the offence of concealment of birth: see *Criminal Law Consolidation Act 1935* (SA) s 83; *Crimes Act 1900* (ACT) s 47; *Criminal Code Act 1899* (Qld) s 314; *Criminal Code Act Compilation Act 1913* (WA) s 291. It should be noted that the ACT offence does not apply if 'the body disposed of had issued from the mother's body before the end of the 28th week of pregnancy': *Crimes Act 1900* (ACT) s 47(2).

[151] It should be noted that the need for safe access zones around such premises are necessitated by the more fervent extremists of the conservative position on foetal personhood addressed in the preceding section.

[152] See *Health Care (Safe Access) Amendment Act 2020* (SA); and *Public Health Amendment (Safe Access Zones) Act 2021* (WA).

[153] For example, arguably the most liberal abortion law regime in Australia, the ACT, retains the offence of child destruction: see *Crimes Act 1900* (ACT) s 42. As does Queensland, Western Australia, and the Northern Territory: see *Criminal Code Act 1899* (Qld) s 313(1); *Criminal Code Act Compilation Act 1913* (WA) s 290; *Criminal Code Act 1983* (NT) s 170. However, it should be noted that the Queensland offence no longer applies to a termination of pregnancy performed under the *Termination of Pregnancy Act 2018* (Qld): see *Criminal Code Act 1899* (Qld) s 313(1A).

The first article discussed in this section deals with those unresolved concerns; namely, the offence of child destruction. This article, Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35(1) *Sydney Law Review* 1, was the lead article in that issue of the *Sydney Law Review*, one of the most eminent law journals in Australia. The article's purpose was twofold: 1. to highlight that the majority of Australian jurisdictions maintained the archaic offence of child destruction;[154] and 2. to explore the potential adverse implications this may have for the legality and practice of abortion in those jurisdictions.

The offence of child destruction ostensibly applies to protect a child 'during the process of birth.'[155] However, the significant determination made in the article is that the offence of child destruction actually criminalises causing the death of a 'child capable of being born alive',[156] which potentially protects the foetus in utero from as early as the second trimester of pregnancy.[157] The article argues that this 'creates serious legal uncertainty',[158] and 'potential overlap between lawful medical abortion and the offence of child destruction.'[159] That is, an abortion may be otherwise lawful, but if performed on a foetus protected by the offence of child destruction, that abortion would nonetheless constitute a felony.[160] Put another way, in 'jurisdictions that retain the offence of child destruction it thus becomes unclear as to what actually constitutes a lawful medical abortion.'[161] Consequently, the article recommends that the offence of child destruction be abolished.[162]

To arrive at this conclusion, the article embarked upon a detailed analysis of the content and potential scope of the offence of child destruction, which involved thorough consideration of the

[154] It should be noted that only the ACT continues to label the offence 'child destruction': see *Crimes Act 1900* (ACT) s 42. Other jurisdictions now refer to the offence by different designations, such as 'killing unborn child': see, eg, *Criminal Code Act 1983* (NT) s 170; or 'preventing birth of live child': see, eg, *Criminal Code Act Compilation Act 1913* (WA) s 290.

[155] Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1) 2. This apparent limited scope of the offence is based on a literal reading of the relevant sections. For example, *Criminal Code Act 1983* (NT) s 170 states: 'Any person who, when a woman or girl is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of an offence and is liable to imprisonment for life.'

[156] See, eg, historical version of *Criminal Law Consolidation Act 1935* (SA) s 82A(7).

[157] Perhaps even as early as 16 weeks gestation: see Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1) 21-22.

[158] Ibid 3.

[159] Ibid 10.

[160] See, eg, ibid 12. Or as the article succinctly states: 'the maintenance of the offence may serve to make the lawful unlawful': at 3.

[161] Ibid 23.

[162] The article also suggests that such abolition of the offence of child destruction be accompanied by 'the expansion of the definition of serious or grievous bodily harm to a (pregnant) woman to include the destruction of the foetus, other than in the course of a medical procedure': Ibid 26. The reason underpinning this proposed expanded reform is the protection of pregnant women from assaults that cause the death of the foetus.

principles of statutory interpretation,[163] especially as applied to the meaning of the phrase 'child capable of being born alive.' The article then provided a comprehensive historical examination of the common law 'born alive' rule,[164] including a discussion of the legally recognised indicators of 'sign of life',[165] and how early in the pregnancy such signs might be detected.[166] As mentioned above, the conclusion reached in the article is that the offence of child destruction, which protects any 'child capable of being born alive', may potentially protect the foetus in utero, which raises the alarming 'possibility that certain otherwise lawful medical abortions may be unlawful as they constitute the offence of child destruction.'[167]

Such a comprehensive study of the offence of child destruction, and its implications for the law of abortion, had not previously been published in Australia.[168] The article has accordingly been cited in a number of other articles in scholarly journals,[169] and referenced in law reform reports.[170] The arguments advanced in the article remain relevant as a number of jurisdictions that have otherwise decriminalised abortion (to varying degrees) retain the offence of child destruction.[171]

The second and final article discussed in this section, Mark J Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (2020) 39(2) *University of Tasmania Law Review* 61, deals with an issue that has now been effectively resolved in all Australian jurisdictions. However, at the time of publication of this article, the jurisdictions of South Australia and Western Australia had yet to enact legislation creating safe access zones. The article aimed to suggest an appropriate legislative template for those jurisdictions to follow, based upon a detailed comparative analysis and critique of the safe access zone legislation existing in all other jurisdictions.

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[163] See ibid 3-12.
[164] See ibid 14-20.
[165] See ibid 16-20. The phrase 'sign of life' is utilised by the courts: see, eg, *Barrett v Coroner's Court of South Australia* (2010) 108 SASR 568, 575.
[166] See Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1) 20-22.
[167] Ibid 23.
[168] There was, however, some UK scholarship on the issue: see, eg, Victor Tunkel, 'Late Abortions and the Crime of Child Destruction: (1) A Reply' [1985] *Criminal Law Review* 133. It should also be noted that some of these issues were raised previously in a different context in Kristin Savell, 'Is the "Born Alive" Rule Outdated and Indefensible?' (2006) 28(4) *Sydney Law Review* 625.
[169] For example, articles in the Alternative Law Journal, Journal of Law and Medicine, Adelaide Law Review, ILSA Journal of International and Comparative Law, Monash University Law Review, and International Journal of Law, Humanities and Social Science.
[170] See, eg, Queensland Law Reform Commission ('QLRC'), *Review of termination of pregnancy laws* (Report 76, June 2018) 13, 204; SALRI (n 53) 59.
[171] See *Crimes Act 1900* (ACT) s 42; *Criminal Code Act Compilation Act 1913* (WA) s 290; *Criminal Code Act 1983* (NT) s 170.

Safe access zones may be described as 'legislatively designated areas around premises that provide abortion services, within which certain conduct is prohibited'.[172] The conduct prohibited covers a wide range of actions, including protests and other forms of communication with persons attempting to access premises at which abortions are provided.[173] The geographical extent of safe access zones is usually defined as the area within 150 metres from such premises.[174] The purpose of safe access zones is 'to promote public health and protect the safety, wellbeing, privacy and dignity of persons (both patients and staff) accessing abortion service facilities.'[175] The article critiques the legislation in each jurisdiction predominantly from the perspective of 'the extent to which the legislation meets' this purpose.[176]

In achieving its primary aim of developing an appropriate legislative template for South Australia and Western Australia, the article discusses the purpose of safe access zones in some detail, with a focus on the need to protect women's basic human rights to dignity, privacy and reproductive rights generally.[177] The article also provides a constitutional law analysis of the competing right affected by safe access zones: the implied freedom of political communication.[178] This analysis included a discussion of the meaning and scope of the implied right, in addition to outlining the requisite tests involved in assessing whether particular legislation is invalid on the basis of such legislation being an unconstitutional infringement of this implied right. A number of High Court cases on the issue are examined, but the focus is upon *Clubb v Edwards*,[179] in which the High Court determined the constitutional validity in this respect of both the Tasmanian and Victorian safe

[172] Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 61.
[173] See, eg, the Tasmanian legislation definition of 'prohibited behaviour': '(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or (c) footpath interference in relation to terminations; or (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or (e) any other prescribed behaviour': *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1).
[174] The exception to this position is the ACT, in which the 'protected area' is 'not less than' 50 metres from the 'protected facility': *Health Act 1993* (ACT) s 86(3)(a); but may be larger if that is necessary to 'ensure the privacy and unimpeded access for anyone entering, trying to enter or leaving the protected facility': at s 86(3)(b).
[175] Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 62. This purpose is reflected both in judicial pronouncements and expressions of legislative intent: see, eg, *Clubb v Edwards, Preston v Avery* (2019) 267 CLR 171, 213 (Kiefel CJ, Bell and Keane JJ), 236 (Gageler J), 260-261 (Nettle J); *Public Health and Wellbeing Act 2008* (Vic) s 185A.
[176] Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 64.
[177] See ibid 61-64.
[178] See ibid 64-69.
[179] (2019) 267 CLR 171.

access zone legislation.[180] The High Court ultimately held that the legislation in both jurisdictions was constitutionally valid.

As a consequence, the article compares and critiques the safe access zone legislation in all jurisdictions under the assumption that all such legislation is prima facie constitutionally valid, as all such legislation has been 'guided, to varying degrees',[181] by the Tasmanian safe access zone legislation. Indeed, the article suggests that the Tasmanian model is the best example of safe access zone legislation meeting its purpose.[182] In terms of an appropriate legislative template for South Australia and Western Australia the article provides 'a blend' of the Tasmanian and Victorian models that the article contends most effectively meets the purpose of safe access zone legislation.[183]

Although this article was, in common with the 2013 article discussed above, the lead article for the journal issue in which it appears, compared to the 2013 article it has negligible citations because at the time of publication only two jurisdictions had yet to enact legislation creating safe access zones around premises that provided abortion services, and those two jurisdictions enacted such legislation soon after the article was published.[184] The article thus had limited time in which to be cited in academic journals, or to be referenced in reports. However, the article represents a notable example of research translation,[185] in that the research undertaken for the article had a clear legislative impact, and, as outlined above, that was the purpose of the article.[186] Specifically, the research for this article was undertaken over a period during which I was advising various members of the South Australian Parliament concerning safe access zone legislation, including assisting in the drafting of such legislation, and the legislative model I promoted was eventually enacted.[187] The research that was the basis for this article was thus instrumental in the

[180] That is, *Reproductive Health (Access to Terminations) Act 2013* (Tas); *Public Health and Wellbeing Act 2008* (Vic).
[181] Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 71.
[182] See ibid 72.
[183] See ibid 79-81.
[184] See *Health Care (Safe Access) Amendment Act 2020* (SA); *Public Health Amendment (Safe Access Zones) Act 2021* (WA). The article provides a brief postscript analysing the proposed legislation (ie. Health Care (Safe Access) Amendment Bill 2020 (SA), and Public Health Amendment (Safe Access Zones) Bill 2020 (WA)) that was before the South Australian and Western Australian parliaments at the time of publication of the article: see Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 81-82.
[185] See above n 46.
[186] Indeed, the title of the article would indicate such an objective.
[187] See *Health Care (Safe Access) Amendment Act 2020* (SA). Note: this legislation was not an exact reflection of the legislative template suggested in the 2020 article, but it was very close, and, more importantly, achieved the desired objective of protecting the rights, dignity, safety and privacy of patients and staff accessing premises in which abortion services are provided.

establishment of safe access zones in South Australia. Further examination of this parliamentary process, and the political and legal impact that other publications contained in this thesis have had on abortion law reform, will be the subject of further discussion in sections five and six of this contextual statement.

5. Post 2011 Reforms: The 'Decriminalising' Legislation

This section will canvass the major changes in the law in various jurisdictions that have occurred since 2011, that being the publication year of my last article examining the law in all Australian jurisdictions.[188] The section will offer a critique of such law reform from the perspective of how close each jurisdiction is to defining abortion care as health care,[189] and thereby guaranteeing a woman's right to abortion.[190] This examination will also serve to highlight the contribution the articles in this thesis have made to this law reform.[191] The impact of my research in this regard was especially marked with respect to the most recent South Australian legislation.[192]

5.1. Commonalities and Issues

It has been a consistent argument throughout the relevant articles in this thesis that the offence of abortion should be abolished,[193] for reasons explained in those articles and previously in this contextual statement. It is now the case that all Australian jurisdictions have legislated to

[188] See Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2).
[189] As explained in section 1 of this contextual statement, for women to have a right to abortion, (as an essential feature of the broader right to reproductive freedom), abortion care must be treated by the law in the same manner as any other health care. As Sheldon explains: 'abortion services might simply be regulated by the same mass of general criminal, civil, administrative and disciplinary regulations that govern all medical practice': Sally Sheldon, 'British Abortion Law: Speaking from the Past to Govern the Future' (2016) 79(2) *Modern Law Review* 283, 316.
[190] This was the approach taken in the 2011 article, in which certain questions were asked of the law in each jurisdiction, in order to arrive at a determination as to how far each jurisdiction was from recognising a woman's right to abortion. For a discussion of the appropriateness of this methodology see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 5-7.
[191] Not merely in the sense that such legal interventions are shaped by the available scholarly background and knowledge, which is arguably the nature of legal transformation, but in the more specific sense that various law reform commission and parliamentary reports that were influential in subsequent law reform reference many of the articles in this thesis.
[192] See *Health Care (Safe Access) Amendment Act 2020* (SA); *Termination of Pregnancy Act 2021* (SA). This legislation, and this author's role in that reform process, will be discussed in section 6.
[193] See, eg, Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 229, 252; Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 317, 326, 334; and Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 68-70.

decriminalise abortion, to varying degrees, and with contrasting levels of success. Some of these reforms have already been discussed in previous sections dealing with specific articles in this thesis, and those that have remained largely unchanged since 2011 will not be the subject of further detailed analysis in this section.[194] The jurisdictions of Tasmania, the Northern Territory, Queensland, NSW, and South Australia have embarked upon significant legislative initiatives on decriminalising abortion since 2011, and this section will discuss such legislation. This section will not refer to safe access zone legislation in jurisdictions other than South Australia, as such legislation was adequately critiqued in the 2020 article in this thesis,[195] which was discussed in section 4 of this contextual statement. The South Australian safe access zone legislation will be discussed in the next part dealing with my work with SAAAC as I was not only involved in drafting early versions of the enacted legislation but was instrumental in its passage through the South Australian Parliament.

From the outset, it should be noted that no jurisdiction has yet achieved the goal of treating abortion care in the same manner as other health care.[196] For this objective to be reached, as argued throughout the articles presented for this dissertation, there can be no conditions placed upon the lawful provision of abortion care that are not clinically justified and medically substantiated.[197] Some jurisdictions are closer to this objective than others,[198] but all jurisdictions

[194] Those jurisdictions in which the relevant legislation has remained largely unaltered since 2011 are Western Australia, ACT, and Victoria. For a discussion of this legislation see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2). It should, however, be noted that the ACT legislation was amended by the *Health (Improving Abortion Access) Amendment Act 2018* (ACT). This legislation substituted new sections for much of Part 6 of the *Health Act 1993* (ACT), which deals with abortion and safe access zones. The changes made to the provisions on safe access zones were too minor to warrant mention, but the 2018 legislation did clarify an important issue with respect to the practice of abortion. This amendment is commented on further below.

[195] See Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2). This article did not provide analysis of either the South Australian or Western Australian safe access zone legislation, which were both enacted after the article was published: see *Health Care (Safe Access) Amendment Act 2020* (SA); *Public Health Amendment (Safe Access Zones) Act 2021* (WA); but did briefly discuss the Health Care (Safe Access) Amendment Bill 2020 (SA) and the Public Health Amendment (Safe Access Zones) Bill 2020 (WA) in a postscript to the article. Further discussion of the Western Australian legislation is not necessary for the purposes of this contextual statement, while the South Australian legislation will be discussed in the next section.

[196] Without unnecessarily repeating previous arguments, it should be noted that the position adopted throughout this contextual statement, and in many of the articles in this thesis, is that abortion care should be treated by the law in the same manner as other health care. By doing so the law would then be effectively recognising a woman's right to abortion.

[197] That is, abortion should be regulated by general health law, rather than abortion specific legislation. For a discussion of how this would function in practice: see Dwyer et al (n 4).

[198] As has been previously noted, Victoria and the ACT have enacted the soundest legislation in this respect. For a detailed discussion of the ACT legislation: see Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 327-335; and for an analysis of the Victorian legislation: see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 39-46.

continue to treat abortion care differently to other health care. The most obvious instance of this differential treatment is that, despite ostensibly abolishing the offence of abortion, all jurisdictions nonetheless maintain a residual crime of abortion.[199] On a more positive note from a women's rights perspective, with the exception of Western Australia, all jurisdictions have specifically legislated such that no jurisdiction retains an offence for a 'woman who consents to, assists in, or performs a termination on herself'.[200]

The crime relevant to abortion that exists in all jurisdictions is that of an unqualified person performing or assisting in the performance of an abortion, including the provision and/or administration of abortifacients.[201] In all jurisdictions this constitutes a serious crime punishable by lengthy imprisonment.[202] In some jurisdictions it is also a crime if a qualified person fails to meet the legislative conditions prescribed for the provision of lawful abortion care.[203] However, in all jurisdictions that maintain this type of qualified person offence the punishment is either pecuniary,[204] or determined by applicable health law and/or relevant professional disciplinary bodies.[205]

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[199] Some jurisdictions also retain the offence of child destruction, which carries implications for implicit upper gestational limits for lawful abortion. This issue will not receive further analysis in this section, as it was sufficiently dealt with in Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1), and discussed in section 4 of this contextual statement.

[200] *Termination of Pregnancy Act 2018* (Qld) s 10. For similar provisions in other jurisdictions see *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT) s 3; *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 8; *Abortion Law Reform Act 2008* (Vic) s 11 and *Crimes Act 1958* (Vic) s 65(2); *Criminal Code Act 1983* (NT) s 208A(4); *Abortion Law Reform Act 2019* (NSW) s 12; *Termination of Pregnancy Act 2021* (SA) s 16. In Western Australia there has not been as specific a repeal of any offence against the woman concerned, but the relevant legislative provisions (namely, *Criminal Code Act Compilation Act 1913* (WA) s 199 and *Health (Miscellaneous Provisions) Act 1911* (WA) s 334) do not refer to acts committed by the woman herself, so one may reasonably assume that no crime exists with respect to the pregnant woman.

[201] This contextual statement will not study this issue in detail, but it should be noted that maintaining a residual offence of abortion is problematic from a women's rights perspective and will be the subject matter of a future publication from this author.

[202] See *Criminal Code Act Compilation Act 1913* (WA) s 199(3); *Criminal Code Act 1924* (Tas) s 178D(1); *Criminal Code Act 1983* (NT) ss 208A(1)-(2); *Criminal Code Act 1899* (Qld) ss 319A(1)-(2); *Crimes Act 1900* (NSW) ss 82(1)-(2); *Crimes Act 1958* (Vic) s 65(1); *Health Act 1993* (ACT) ss 81-82; *Termination of Pregnancy Act 2021* (SA) ss 14(1)-(2).

[203] The definitions of 'qualified' and 'unqualified' in this regard differ between jurisdictions, but for the purposes of this contextual statement a broad definition/distinction will suffice as follows: a 'qualified' person is a registered health practitioner, and in many jurisdictions a registered medical practitioner.

[204] See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 199(2).

[205] In such cases, the individual in question might well be subject to complaints, fines and/or other disciplinary proceedings within their profession for failing to meet standards of professional conduct by not meeting the requirements of the law in this respect, but no crime has necessarily been committed by that failure: see, eg, *Termination of Pregnancy Act 2018* (Qld) s 9; *Abortion Law Reform Act 2019* (NSW) s 10; *Termination of Pregnancy Act 2021* (SA) s 17. This approach is consistent with recommendations 8 and 9 of the SALRI report: see SALRI (n 53) 18, 25, 144. The possible exception to this is the Northern Territory, in which an otherwise qualified person ceases to be such if the abortion is not performed 'in accordance with the *Termination of Pregnancy Law Reform Act 2017*': *Criminal Code Act 1983* (NT) s 208A(5). In such cases, the otherwise qualified person may arguably be charged with the more serious unqualified person offence that carries a potential penalty of 7 years imprisonment: at ss 208A(1)-(2). It should also be noted that in the ACT, the offence of performing a surgical abortion by a qualified person in a non-approved

In all jurisdictions other than the ACT and South Australia, the applicable offences remain in the criminal law.[206] In the ACT, the *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT) ensured that all criminal law provisions on abortion were abolished,[207] such that abortion is no longer a criminal law concern, and the practice is now governed by applicable health law.[208] Notwithstanding this achievement, certain abortions remain an offence under the *Health Act 1993* (ACT): 1. performing a surgical abortion (as distinct from a medical abortion)[209] in a non-approved facility;[210] and 2. the performance of an abortion by an unqualified person.[211] In South Australia, the *Termination of Pregnancy Act 2021* (SA) removed abortion from the ambit of criminal law legislation but created the new offence of '[t]ermination of pregnancy by unqualified person' within that abortion specific legislation.[212]

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facility carries a maximum pecuniary penalty of $8,000, or 6 months imprisonment, or both: see *Health Act 1993* (ACT) s 83. For penalty unit amounts see *Legislation Act 2001* (ACT) s 133.

[206] That is, although the *Acts Amendment (Abortion) Act 1998* (WA) s 4 repealed the previous sections establishing an offence of abortion (see repealed *Criminal Code Act Compilation Act 1913* (WA) ss 199-201), it simultaneously inserted a new s 199 into the *Criminal Code Act Compilation Act 1913* (WA) that made it unlawful for a non-medical practitioner to perform an abortion, or for a medical practitioner to perform an abortion without meeting the conditions of a lawful abortion under *Health (Miscellaneous Provisions) Act 1911* (WA) s 334: see *Criminal Code Act Compilation Act 1913* (WA) s 199(1). Similarly, in Tasmania the *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 14 repealed *Criminal Code Act 1924* (Tas) ss 134-135, 164 but simultaneously inserted *Criminal Code Act 1924* (Tas) s 178D, which created the offence of '[t]ermination by person other than medical practitioner'. In the Northern Territory the *Termination of Pregnancy Law Reform Act 2017* (NT) s 20 repealed Division 8 of the *Criminal Code Act 1983* (NT), but inserted section 208A, which repeated much of Division 8 in establishing the offence of '[t]ermination of pregnancy performed by unqualified person.' In Queensland the *Termination of Pregnancy Act 2018* (Qld) s 22 repealed *Criminal Code Act 1899* (Qld) ss 224-226, but *Termination of Pregnancy Act 2018* (Qld) s 25 inserted *Criminal Code Act 1899* (Qld) s 319A, making it an offence for an unqualified person to perform an abortion. In NSW the *Abortion Law Reform Act 2019* (NSW) repealed ss 82-84 of the *Crimes Act 1900* (NSW), which made abortion, prima facie, a criminal offence punishable by lengthy imprisonment, but simultaneously inserted an amended s 82 of the *Crimes Act 1900* (NSW) which created the new offence of 'termination of pregnancy performed by unqualified person', which is punishable by 7 years imprisonment: see *Crimes Act 1900* (NSW) ss 82(1)-(2). In Victoria the *Abortion Law Reform Act 2008* (Vic) s 11 repealed *Crimes Act 1958* (Vic) ss 65-66 but then substituted new ss 65-66. Section 66 abolished the common law offence of abortion (if there ever was one), while section 65 created the new crime of 'abortion performed by unqualified person': see *Crimes Act 1958* (Vic) s 65(1).

[207] That is, *Crimes Act 1900* (ACT) ss 44-46 were repealed and any common law offence of abortion was abolished: see *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT) s 3.

[208] The *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT) made amendments to the *Medical Practitioners Act 1930* (ACT), which were moved without amendment into the *Health Professionals Act 2004* (ACT), and then into the *Health Act 1993* (ACT) pt 6, in which the regulation of abortion currently resides.

[209] This distinction was the result of amendments enacted by the *Health (Improving Abortion Access) Amendment Act 2018* (ACT). Surgical abortion is now defined as 'a surgical procedure or any other procedure or act (other than the administration or supply of an abortifacient) that causes a pregnancy to end prematurely': *Health Act 1993* (ACT) s 80(1); and medical abortion is defined as 'the prescription, supply or administration of an abortifacient': at s 80(2). This is a significant practical development because it means that a woman may now go to her general practitioner (in person or via telemedicine), receive a prescription for an abortifacient, and administer it herself in the comfort of her own home. To further this objective, the 2018 legislation made it clear that a pharmacist (or a person assisting a pharmacist) commits no offence by supplying an abortifacient 'in accordance with a prescription': at s 81(2)).

[210] See *Health Act 1993* (ACT) s 83.

[211] See ibid ss 81-82.

[212] *Termination of Pregnancy Act 2021* (SA) s 14. As mentioned above, the South Australian legislation will receive more detailed analysis in section 6.

This contextual statement is not the place to enter into a detailed analysis of these residual offences, nor make an argument for their repeal.[213] It will suffice for present purposes to point out the indisputable: that the existence of such abortion specific offences necessarily results in a finding that abortion care is not being treated in the same manner as other health care, as no other health care is similarly explicitly criminalised. This is not to say that an unqualified person performing other medical procedures would not be subject to being charged for an offence under general health law and/or criminal law; the point is simply that in other forms of health care the legislature has not specifically criminalised such behaviours.[214] The reason such conduct is not expressly targeted by the legislature is that the need is already met by general health law and criminal law.[215] The same may be said of the performance of an abortion by an unqualified person: it is prima facie unlawful under such generally applicable health law and/or criminal law provisions. Thus, to expressly create an offence for an unqualified person to terminate a pregnancy is to distinguish abortion care from all other forms of health care for no credible legal purpose. Furthermore, the maintenance of such offences means that each jurisdiction has, at best, only achieved partial decriminalisation of abortion,[216] which not only adversely affects the provision of abortion services to the detriment of the health of women accessing those services,[217] but also infringes upon women's rights more broadly.[218]

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[213] As mentioned above, this will be the purpose of further research and publications by this author.

[214] That is, if an unqualified person performs surgery on another, or administers a drug outside the appropriate regulatory framework, this would constitute an offence, either under the general criminal law, or pursuant to applicable health law, but particular actions are not specified. For example, it would be a crime for an unqualified person to remove another person's appendix, but such behaviour is not specifically criminalised in the sense of it being an explicit offence for an unqualified person to remove another person's appendix; rather, it is an offence for an unqualified person to perform surgery, and the removal of an appendix constitutes an instance of surgery.

[215] Put simply, it is an offence in every jurisdiction for a person to provide a regulated health service without being a recognised health practitioner: see, eg, *Health Act 1993* (ACT) s 127. In addition, as one cannot consent to serious bodily harm in such circumstances: see, eg, *R v Holmes* (1993) 2 Tas R 232; surgery performed by an unqualified person will constitute a serious offence in every jurisdiction. Indeed, in some jurisdictions it might constitute an aggravated offence to, for example, wounding, inflicting bodily harm, assault occasioning actual bodily harm, and so forth: see, eg, *Crimes Act 1900* (ACT) s 48A(2). For the relevant wounding, inflicting bodily harm, and assault occasioning actual bodily harm provisions in the ACT: see at ss 21, 23, 24.

[216] See Suzanne Belton, Felicity Gerry and Virginia Stulz, 'A reproductive rights framework supporting law reform on termination of pregnancy in the Northern Territory of Australia' (2018) 6(2) *Griffith Journal of Law & Human Dignity* 25, 26. Again, this is not to say that such actions should not be criminal, but rather that such actions should not be specifically criminalised. That is, the performance of an abortion by an unqualified person would remain an offence if this residual offence of abortion was abolished, but it would simply constitute an instance of the general offence of providing a health service that does not meet general health law requirements, rather than an expressly abortion specific offence.

[217] SALRI noted that defining abortion as a crime has adverse health effects on women: see SALRI (n 53) 133-134. See also Ronli Sifris and Suzanne Belton, 'Australia: Abortion and Human Rights' (2017) 19(1) *Health and Human Rights Journal* 209, 211.

[218] See, eg, Morgan (n 32) 149; Belton, Gerry and Stulz (n 216) 25, 31-34, 38, 42-44. Put simply, Belton, Gerry and Stulz contend that continued criminalisation is 'contrary to international obligations under CEDAW and maintains social stigma': at 42.

In a comparable manner, all jurisdictions expressly provide for conscientious objection with regard to abortion care, despite the fact that relevant professional standards, codes of conduct, and guidelines already provide for conscientious objection (and permit a refusal to participate on that basis) with respect to any medical procedure or health service.[219] In some jurisdictions the abortion specific conscientious objection provisions simply reflect such standards and guidelines, thereby making them superfluous,[220] while in other jurisdictions the provisions are arguably inconsistent with those standards and guidelines, thereby creating unnecessary legal complexity and perhaps confusion amongst health practitioners as to which process should be followed.[221]

In Victoria, Queensland and the Northern Territory, the abortion specific conscientious objection provisions stipulate that if a health practitioner has a conscientious objection to abortion, that practitioner must not only make that objection known to the patient, but then refer the patient to another practitioner that has no such objection.[222] This is consistent with professional standards

[219] See, eg, Australian Health Practitioner Regulation Agency & National Boards, *Code of Conduct* (June 2022) cl 1.3(f); Australian Medical Association, *AMA Position Statement: Conscientious Objection* (March 2019); Nursing and Midwifery Board of Australia, Australian Health Practitioner Regulation Agency, *Code of conduct for nurses* (March 2018, as updated June 2022) cl 4.4(b); Pharmaceutical Society of Australia, *Code of Ethics for Pharmacists* (2017) 12; Medical Board, Australian Health Practitioner Regulation Agency, *Good medical practice: a code of conduct for doctors in Australia* (October 2020) cl 3.4.6. It should be noted that such refusal is not permitted in an emergency situation: see, eg, Australian Medical Association (n 219) cl 2.1; Australian Health Practitioner Regulation Agency & National Boards (n 219) cl 1.4. This condition on the exercise of conscientious objection in cases of emergency is reflected in most abortion specific provisions on conscientious objection: see *Termination of Pregnancy Law Reform Act 2017* (NT) s 13; *Abortion Law Reform Act 2008* (Vic) ss 8(3)-(4); *Termination of Pregnancy Act 2021* (SA) s 11(5); *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 6(3)-(4); *Abortion Law Reform Act 2019* (NSW) s 9(5); *Health Act 1993* (ACT) s 84A(2); *Termination of Pregnancy Act 2018* (Qld) s 8(4). In some jurisdictions an emergency situation is defined as existing when the abortion is necessary to preserve the life of the woman concerned: see *Termination of Pregnancy Law Reform Act 2017* (NT) s 13; *Abortion Law Reform Act 2008* (Vic) ss 8(3)-(4); *Health Act 1993* (ACT) s 84A(2)(a). In Tasmania the condition of emergency is satisfied when 'a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury': *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 6(3)-(4). In all other jurisdictions reference is simply made to an 'emergency': see *Termination of Pregnancy Act 2021* (SA) s 11(5); *Termination of Pregnancy Act 2018* (Qld) s 8(4); *Abortion Law Reform Act 2019* (NSW) s 9(5). The exception to all this is Western Australia, which grants a broad right of refusal to participate 'in the performance of any abortion' with no apparent limitations: *Health (Miscellaneous Provisions) Act 1911* (WA) s 334(2).

[220] One might argue that the relevant health practitioner codes of conduct and/or ethical standards are not law, so legislation is required to give legal substance to such standards. However, whenever those standards are repeated in legislation a failure to meet them (eg. a failure to refer a patient) does not carry a legislatively imposed penalty. In such instances the health practitioner is simply liable to disciplinary action for that failure: see, eg, *Abortion Law Reform Act 2019* (NSW) s 10; *Termination of Pregnancy Act 2018* (Qld) s 9); essentially, the same disciplinary action that might result from a failure to meet the non-legislative health practitioner standards. Furthermore, to argue that the health practitioner standards carry no legal substance or consequence is to ignore the fact that a failure to meet such standards might well be the basis for a civil action against such a health practitioner for professional negligence. For a discussion of the law of negligence as it applies to health care: see Tina Cockburn and Des Butler, 'Negligence' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 3rd ed, 2018) 271, 296-329.

[221] Such provisions also arguably place 'personal morals ahead of professional obligations': Belton, Gerry and Stulz (n 216) 43.

[222] See *Abortion Law Reform Act 2008* (Vic) s 8(1); *Termination of Pregnancy Act 2018* (Qld) ss 8(2)-(3); *Termination of Pregnancy Law Reform Act 2017* (NT) ss 11(2), 12(2).

and guidelines that emphasise that a health practitioner's conscientious objection to a procedure or service should not impede a patient's access to appropriate health care,[223] and that the conscientious objector must 'ensure the person has alternative care options',[224] which arguably creates an obligation to refer the patient to another practitioner in order to access the health care requested.[225] In the ACT, Western Australia, Tasmania, South Australia, and NSW, no such referral is mandated,[226] which is arguably inconsistent with such professional standards and guidelines.[227] However, such legislation does not expressly prohibit a conscientious objector from referring a patient, which perhaps enlivens those professional standards and guidelines such that there exists an obligation to refer in any case. Regardless, the fact that all jurisdictions have specifically legislated for conscientious objection in the provision of abortion care, when this issue is sufficiently catered for within relevant professional standards, codes of conduct, and/or guidelines, thereby distinguishes abortion care from other forms of health care.[228]

The above points concerning the maintenance of the residual offence of abortion and the specific provision for conscientious objection with respect to abortion care meet one of the ancillary objectives of this section: to indicate that, in every jurisdiction, further law reform is required in order to realise the goal of treating abortion care in the same manner as other forms of health care. Notwithstanding this determination, this section will examine the legislative reforms that

[223] See, eg, Australian Medical Association (n 219) cls 1.5, 2.2, 2.3; Medical Board (n 219) cls 3.4.6-3.4.7. This rule stems from the first principle of health care, which is to prioritise patient care: see, eg, Australian Health Practitioner Regulation Agency & National Boards (n 219) cl 1.1; Medical Board (n 219) cl 3.1.

[224] Nursing and Midwifery Board of Australia (n 219) cl 4.4(b). See also Australian Health Practitioner Regulation Agency & National Boards (n 219) cl 1.3(f).

[225] Cf Anna Walsh and Tiana Legge, 'Abortion Decriminalisation in New South Wales: An Analysis of the Abortion Law Reform Act 2019 (NSW)' (2019) 27(2) *Journal of Law and Medicine* 325, who make the point that an obligation not to impede patient access to the service requested does not necessarily result in a further obligation to refer the patient: at 334-335.

[226] See *Health Act 1993* (ACT) s 84A; *Health (Miscellaneous Provisions) Act 1911* (WA) s 344(2); *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6(1). In both NSW and South Australia, the situation is slightly different in that referral is mentioned as an option, but is not a requirement. That is, in South Australia and NSW the medical practitioner with the conscientious objection may either transfer the care of the patient or simply 'give information to the person on how to locate or contact a medical practitioner who, in the first practitioner's reasonable belief, does not have a conscientious objection to the performance of the termination': *Abortion Law Reform Act 2019* (NSW) s 9(3)(a); *Termination of Pregnancy Act 2021* (SA) s 11(3)(a). In both jurisdictions this obligation to provide information is met if the medical practitioner provides information approved by the Minister (in South Australia) or the Secretary of the Ministry of Health (in NSW) for that purpose: see *Termination of Pregnancy Act 2021* (SA) s 11(4); *Abortion Law Reform Act 2019* (NSW) s 9(4).

[227] See, eg, the Australian Health Practitioner Regulation Agency & National Boards (n 219) which makes it clear that health practitioners must not allow their 'moral or religious views or conscientious objection to deny patients access to healthcare': at cl 1.3(f).

[228] As was the case with the residual offence of abortion, it is beyond the scope of this contextual statement to provide further analysis on conscientious objection, as none of the articles in this thesis deal with the concept in any detail.

have occurred since 2011. Consistent with the methodology established in the 2011 article in this thesis, the relevant issues in terms of assessing this legislation include:

1. whether reasons must be provided by a woman in seeking a lawful abortion;
2. whether medically unnecessary (and thereby medically unjustified) processes must be satisfied in order to perform a lawful abortion, such as a requirement for two medical practitioners to agree on the appropriateness of the abortion, or a condition that only specialists may lawfully perform abortions, or the provision of mandatory counselling, or an insistence that abortions may only be lawfully performed in prescribed facilities; or
3. whether there exist gestational limits on the practice of lawful abortion.[229]

As explained previously in both this contextual statement and within various articles in this thesis, a jurisdiction that possesses any of the above traits is thereby not a jurisdiction in which abortion care is treated in the same manner as other forms of health care, and consequently not a jurisdiction that fully recognises a woman's right to abortion.[230] The legislation enacted since 2011 will be critiqued in chronological order of enactment.

5.2. Tasmania

Tasmania has engaged in a number of legislative reforms of abortion law,[231] culminating in the *Reproductive Health (Access to Terminations) Act 2013* (Tas).[232] As to the positive aspects of the 2013 legislation, the most significant is that abortion on demand now effectively exists provided the woman concerned is not more than 16 weeks pregnant,[233] and provided the termination is performed by a medical practitioner with the woman's consent.[234] There is no requirement for counselling, the involvement of more than one medical practitioner, nor the necessity that the abortion be performed in an approved facility. Thus, it may be argued that, up until 16 weeks

[229] This is not an exhaustive list but will suffice for the purposes of this contextual statement. For an explanation as to why such issues are significant in terms of assessing whether the law is consistent with recognising a woman's right to abortion see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 4-6.
[230] It should be noted that there have been suggestions for national uniform legislation on abortion: see Belton, Gerry and Stulz (n 216) 47. Although a constitutional possibility once abortion is removed from the criminal law (as the criminal law is a reserve legislative power of the States), such legislation appears highly unlikely at present.
[231] For a discussion of such past reforms see Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 317-326.
[232] That is, this legislation certainly bettered the legislation that preceded it: see *Criminal Code Act 1924* (Tas) ss 134-135, 164 as repealed by *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 14.
[233] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 4.
[234] Ibid. Terminating a pregnancy includes either using an instrument or drug to 'discontinue' the pregnancy: at s 3.

gestation, the termination of a pregnancy in Tasmania is treated in a similar manner to any other medical procedure or health issue.[235]

Terminations post 16 weeks gestation may also be performed by any medical practitioner (with the woman's consent), but only provided that medical practitioner:

> (a) reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and (b) has consulted with another medical practitioner who reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated.[236]

In making the above assessments, the medical practitioners 'must have regard to the woman's physical, psychological, economic and social circumstances.'[237] The second medical practitioner consulted need not have personally examined the woman concerned, but at least one of the two medical practitioners must specialise in 'obstetrics or gynaecology',[238] the sourcing of which may cause delay. The required assessment post 16 weeks gestation is also arguably redundant as childbirth is always a greater somatic risk to a woman than the termination of a pregnancy by a qualified health practitioner,[239] so the conditions for lawful abortion post 16 weeks will arguably be met in every instance.[240] On a positive note from a women's rights perspective, there is no

[235] See Ronli Sifris, 'Tasmania's reproductive health (Access to Terminations) Act 2013: An analysis of conscientious objection to abortion and the "obligation to refer"' (2015) 22(4) *Journal of Law and Medicine* 900, 901. Aside from the gestational limit, this was the recommendation made in the article Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65). This article was exceedingly critical of Tasmanian abortion law at the time the article was published: at 317-326; and made the argument for reform that was reflected in this feature of the *Reproductive Health (Access to Terminations) Act 2013* (Tas).

[236] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 5(1).

[237] Ibid s 5(2).

[238] Ibid s 5(3).

[239] See, eg, Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36(2) *Oxford Journal of Legal Studies* 334, 343-344. This is especially the case in the early stages of pregnancy when early medication abortion ('EMA') remains available: see Anne O'Rourke, Suzanne Belton and Ea Mulligan, 'Medical Abortion in Australia: What are the Clinical and Legal Risks? Is Medical Abortion Over-regulated?' (2016) 24(1) *Journal of Law and Medicine* 221, who make the point that there are 'negligible medical risks associated' with the use of abortifacients such as mifepristone: at 221; and that such medication has less adverse health consequences than paracetamol: at 227. See also Nathalie Kapp, Elisabeth Eckersberger, Antonella Lavelanet and Maria Isabel Rodriguez, 'Medical abortion in the late first trimester: a systematic review' (2019) 99(2) *Contraception* 77, 84; Sifris and Belton (n 217) 212. Even late term abortions remain comparatively safer procedures than childbirth, as evidenced by the fact that the maternal mortality rate for lawful abortion, throughout Australia, has been less than 1 per 100,000 for some time now: see, eg, Caroline de Costa, 'Induced Abortion and Maternal Death' (2013) 15(1) *O&G Magazine* 37, 37; yet the maternal mortality rate for childbirth is approximately 8 per 100,000: see, eg, Pregnancy Outcome Unit, Prevention and Population Health Directorate, Wellbeing SA, Government of South Australia, *Maternal and Perinatal Mortality in South Australia 2019* (August 2022) 3. This Pregnancy Outcome Unit report found that in South Australia for the five-year period from 2015-2019 the maternal mortality rate for childbirth was 8.2 per 100,000: at 3.

[240] Put simply, somatic complications from abortion are rare: see, eg, South Australian Abortion Reporting Committee, Wellbeing SA, *Annual Report for the Year 2021* (January 2023) 9-11. It has also been proven for some time now that

longer an express nor implicit upper limit to lawful abortion.[241] Thus, although there are increased restrictions on lawful abortion post 16 weeks gestation, an abortion may be performed at any time under those conditions.

Nonetheless, it remains the case that the law stipulates conditions on post 16 weeks gestation abortions that are not medically necessary. That is, the clinical practice may well differ with respect to different gestation abortions (and sometimes quite markedly so), but the legality should not. Applicable health law, professional ethics and standards, and clinical guidelines will determine best health practice in any given situation. To mandate different legal treatment based on gestation rather than clinical needs (including patients' interests) is to treat abortion differently to other health care, in which medically unjustified legal conditions on practice do not exist.

5.3. Queensland

This medically unjustified focus on gestation is also a feature of the recent Queensland legislation. The *Termination of Pregnancy Act 2018* (Qld) is, with some minor changes, the enactment of the Draft Termination of Pregnancy Bill 2018 put forward by the Queensland Law Reform Commission ('QLRC') in its 2018 report.[242] The Queensland Parliament thus took what the QLRC described as the 'combined' approach,[243] which incorporates a gradualist position on the status of the foetus,[244] with restrictions on accessing abortion services increasing as the gestational age of the foetus increases because, as the QLRC explained, 'the interests of the fetus have increasing weight'[245] and 'as the fetus develops, its interests are entitled to greater recognition and protection'.[246] This view ignores two crucial facts: 1. it is arguably a doubtful, and certainly a contestable, moral/philosophical position to take as to whether the foetus has interests that warrant legal protection; and 2. any such legal protection afforded the foetus necessarily erodes

abortion does not, generally, have any deleterious psychological effects: see Romans-Clarkson (n 100). Thus, it is hard to imagine a case in which an abortion could be described as posing a greater risk to the health of a pregnant woman than childbirth itself.

[241] That is, no upper limit is expressed in the relevant abortion specific legislation, and that legislation also repealed the offence of child destruction: see *Criminal Code Act 1924* (Tas) s 165 as repealed by *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 14; which, if maintained, places an implicit upper limit on lawful abortion: see Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1).

[242] See QLRC (n 170) app F. It should also be noted that this report cited the article Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1), in determining whether to recommend abolishing the offence of child destruction: see QLRC (n 170) 13, 204. Unfortunately, the QLRC did not recommend such abolition, finding that it was unnecessary in the circumstances: at 206.

[243] QLRC (n 170) 59.

[244] See ibid 274.

[245] Ibid 6. It should be noted that the QLRC adopted the US spelling of foetus; namely, 'fetus'.

[246] Ibid 94.

any legal protection and/or rights afforded the pregnant woman.[247] The Queensland approach thus infringes upon the rights of an actual person, on the basis of an implicit determination upon an issue that is philosophically intractable, and for which there is no societal consensus, which is a completely inappropriate determination for the law to make. As there exists a lack of philosophical and/or societal unanimity of opinion on the status of the foetus, the law must take 'a minimalist, morally neutral position'.[248] To do otherwise arguably 'undermines the legitimacy' of our legal system.[249]

Putting this issue aside, there are some positive aspects to the 2018 legislation. In particular, provided an abortion is performed by a qualified person, it is prima facie lawful, and it is implicit that any failure by a qualified person to comply with the conditions stipulated under the *Termination of Pregnancy Act 2018* (Qld) will not be penalised criminally, but rather the qualified person will be left to such professional disciplinary proceedings and consequences as might eventuate with non-compliance with the statutory standards of any other medical procedure.[250]

The most commendable aspect of the Queensland legislation, from a feminist perspective, is that for terminations of no more than 22 weeks gestation, provided the termination is performed by a medical practitioner, there now effectively exists a situation of abortion on demand.[251] After 22 weeks gestation the medical profession (not the woman concerned) is granted the decision-making power, as a medical practitioner may only perform a termination of pregnancy if:

> (a) the medical practitioner considers that, in all the circumstances, the termination should be performed; and (b) the medical practitioner has consulted with another medical practitioner who also considers that, in all the circumstances, the termination should be performed.[252]

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[247] See the relevant discussion and appropriate sources cited in sections 1 and 4 of this contextual statement.
[248] Andrew McGee, Melanie Jansen and Sally Sheldon, 'Abortion law reform: Why ethical intractability and maternal morbidity are grounds for decriminalisation' (2018) 58(5) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 594, 595.
[249] Ibid 596.
[250] See *Termination of Pregnancy Act 2018* (Qld) s 9. See also Queensland Law Reform Commission, *Review of termination of pregnancy laws* (Report 76, June 2018) 105-106.
[251] See *Termination of Pregnancy Act 2018* (Qld) s 5. It is also made expressly lawful for other registered health practitioners 'in the practice of the practitioner's prescribed health profession' to assist the medical practitioner in the performance of the termination of pregnancy: at s 7. Such provisions were modelled on the *Abortion Law Reform Act 2008* (Vic). It should be noted that the 2011 article in this thesis argued that the Victorian legislation, although not without fault, was nonetheless a useful legislative template for other jurisdictions to consider: see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 39-47.
[252] *Termination of Pregnancy Act 2018* (Qld) s 6(1).

As to the matters that must be considered in forming this assessment, the relevant medical practitioners must consider:

> (a) all relevant medical circumstances; and (b) the woman's current and future physical, psychological and social circumstances; and (c) the professional standards and guidelines that apply to the medical practitioner in relation to the performance of the termination.[253]

The criticism of superfluous requirements may be directed against the above provisions,[254] as a medical practitioner must contemplate these matters in any case.[255] As a point of difference with the Tasmanian position, neither the medical practitioner performing the abortion, nor the second medical practitioner consulted, need be obstetricians or gynaecologists, or similar 'specialists'.[256] Nonetheless, the requirement of a second opinion is medically unjustified, and not legislatively mandated in any other medical procedure.[257] Notwithstanding this prescribed second opinion issue, although one cannot say that there exists abortion on demand post 22 weeks gestation (as there now arguably is up until 22 weeks gestation), it is the case that a woman seeking such an abortion should receive it unless there are medical reasons to deny that request.[258] That is, there is no test that the woman concerned must satisfy, beyond the standard medical considerations applicable to all medical procedures.

On a further positive note, there now appears to be no upper gestational limit on lawful abortions, as although Queensland retains the offence of child destruction,[259] amendments made by the *Termination of Pregnancy Act 2018* (Qld) to the *Criminal Code Act 1899* (Qld) mean that provided a person performs, or assists in performing, a termination of pregnancy in accordance with the

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[253] Ibid s 6(2).

[254] SALRI also make the point that such criteria are inherently 'problematic', and even the broad criterion of 'in all the circumstances' is 'so vague as to be meaningless': SALRI (n 53) 209.

[255] That is, in any medical procedure the relevant health practitioner must consider all the medically relevant factors, including the patient's circumstances, and applicable professional standards and guidelines.

[256] This is also a significant point of difference with the NSW legislation that stipulates that post 22 weeks gestation both the performing medical practitioner, and the consulting medical practitioner, must be 'specialists': *Abortion Law Reform Act 2019* (NSW) ss 6(1)(a)-(b).

[257] Which is not to say that it might be best clinical practice to seek a second opinion in certain circumstances; it is just not medically warranted to prescribe such a second opinion in all cases. Sheldon argues that the requirement of two medical practitioner opinions serves a bureaucratic rather than medical purpose: see Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (n 239) 345; and that this requirement of two opinions 'is at the heart of the medical control' of abortion: Sheldon, 'British Abortion Law: Speaking from the Past to Govern the Future' (n 189) 314.

[258] It should also be noted that none of the conditions in the legislation need to be met in 'emergency' situations when 'the medical practitioner considers it is necessary to perform the termination to save the woman's life or the life of another unborn child': *Termination of Pregnancy Act 2018* (Qld) s 6(3).

[259] See *Criminal Code Act 1899* (Qld) s 313(1). The offence is actually labelled 'killing unborn child' but is the equivalent of the offence of child destruction in other jurisdictions.

Termination of Pregnancy Act 2018 (Qld), they commit no criminal offence under the child destruction provision.[260]

5.4. New South Wales

The *Abortion Law Reform Act 2019* (NSW) was broadly modelled on the above 2018 Queensland legislation,[261] but is more problematic for reasons explained below. In common with Queensland, in NSW a medical practitioner may perform a termination of pregnancy upon the request of the woman concerned,[262] provided she is no more than 22 weeks pregnant.[263] However, unlike the situation in Queensland, the medical practitioner must first obtain the woman's 'informed consent'.[264] This is defined as consent given 'freely and voluntarily' and in accordance with applicable guidelines.[265] One might argue that the provision is thereby arguably redundant as informed consent so defined is already 'an integral aspect of health law and practice'.[266]

The medical practitioner must also 'assess whether or not it would be beneficial to discuss with the person accessing counselling about the proposed termination',[267] and 'if, in the medical practitioner's assessment, it would be beneficial and the person is interested in accessing counselling, provide all necessary information to the person about access to counselling'.[268] This

[260] See ibid s 313(1A) as inserted by *Termination of Pregnancy Act 2018* (Qld) s 24. However, this arguably means that any failure to meet the requirements of a lawful abortion pursuant to the *Termination of Pregnancy Act 2018* (Qld) enlivens the child destruction provisions, even for a qualified person performing or assisting in that abortion. As explained previously, in the interests of achieving legal clarity and certainty, the offence is best abolished, rather than attempting such piecemeal exceptions: see Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1).

[261] It has been said that the NSW legislation 'largely reproduces the Queensland legislation': see New South Wales Parliamentary Research Service, *Issues Backgrounder: Abortion and the Reproductive Health Care Reform Bill 2019* (Number 3, August 2019) 6. It should also be noted that the related briefing paper on abortion cited the article Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2), including quoting from it in some instances: see NSW Parliamentary Research Service, *Abortion law: a national perspective* (n 94) 18, 57.

[262] See *Abortion Law Reform Act 2019* (NSW) s 5(1). In common with the Queensland legislation, in terms of assistance, registered health practitioners, in the practice of their health profession, may assist the medical practitioner, including a 'nurse, midwife, pharmacist or Aboriginal and Torres Strait Islander health practitioner, or another registered health practitioner prescribed by the regulations': at s 8(1).

[263] Ibid s 5(1). It should be noted that the legislation refers to 'person' rather than 'woman'. As mentioned earlier, this contextual statement will refer to 'woman' in the interests of consistency, but the author acknowledges that some individuals seeking abortion services will not identify as women.

[264] Ibid s 5(2). Unless an emergency situation exists, and it is not practicable to do so: at s 5(3).

[265] Ibid sch 1.

[266] SALRI (n 53) 22. However, it should be noted that such applicable guidelines, in relation to the performance of an abortion, may be decided upon by the Secretary of the Ministry of Health, and may place further burdens on informed consent with respect to abortion care than are prescribed in other forms of health care: see *Abortion Law Reform Act 2019* (NSW) s 14.

[267] *Abortion Law Reform Act 2019* (NSW) s 7(1)(a).

[268] Ibid s 7(1)(b).

echoes some features of the Western Australian legislation of 1998,[269] but unlike the situation in Western Australia, this is not a requirement for mandatory counselling,[270] but merely a requirement that an assessment be made as to whether the person concerned would benefit from access to counselling.[271] Furthermore, in practice it may have little effect, as a medical practitioner might satisfy the provision by simply asking whether the woman concerned wants information with respect to access to counselling.

After 22 weeks gestation the legal situation becomes more restrictive than it is in Queensland because only a 'specialist medical practitioner' may perform the termination,[272] and only if s/he, and another specialist medical practitioner that s/he has consulted, 'considers that, in all the circumstances, there are sufficient grounds for the termination to be performed'.[273] In making this assessment both specialist medical practitioners must consider:

> (a) all relevant medical circumstances, and (b) the person's current and future physical, psychological and social circumstances, and (c) the professional standards and guidelines that apply to the specialist medical practitioner in relation to the performance of the termination.[274]

In other words, identical conditions as exist in Queensland, except that the two medical practitioners involved must be specialists.[275] As indicated earlier with respect to the Queensland legislation, there is no clinical necessity for two opinions, and certainly no clinical requirement for two specialist opinions, or for a specialist to perform the procedure. That is, although an abortion post 22 weeks gestation is a more serious procedure than early abortion, and in some circumstances might require second opinions and/or specialists, this should be decided on a case-by-case clinical basis according to good health practice, and the patient's best interests, not

[269] See *Health (Miscellaneous Provisions) Act 1911* (WA) ss 334(3)(a), 334(5).
[270] See ibid s 334(5)(a).
[271] For a discussion of the NSW counselling provisions: see Walsh and Legge (n 225) 328-331.
[272] *Abortion Law Reform Act 2019* (NSW) s 6(1). Informed consent must also be obtained: at s 6(1)(c). 'Specialist medical practitioner' is defined as '(a) a medical practitioner who, under the Health Practitioner Regulation National Law, holds specialist registration in obstetrics and gynaecology, or (b) a medical practitioner who has other expertise that is relevant to the performance of the termination, including, for example, a general practitioner who has additional experience or qualifications in obstetrics': at sch 1.
[273] Ibid ss 6(1)(a)-(b).
[274] Ibid s 6(3). The guidelines may be issued by the Secretary of the Ministry of Health: at s 14.
[275] In addition, the legislation allows for the Secretary of the Ministry of Health to 'issue guidelines about the performance of terminations' and 'a registered health practitioner performing a termination, or assisting in the performance of a termination, must perform the termination in accordance with the guidelines': Ibid ss 14(1), 14(3). As noted above, such guidelines might well restrict the practice of abortion further. This occurred with the guidelines issued concerning abortions for the sole purpose of sex selection: see Health and Social Policy ('HSP'), NSW Government, *Prevention of Termination of Pregnancy for the Sole Purpose of Sex Selection* (GL2021008, 23 June 2021). This issue will be discussed further below.

arbitrarily by the law.[276] To dictate the necessity of such specialists in advance 'undermines patient autonomy',[277] and indicates that abortion is clearly not being treated like any other medical procedure. In addition, the legislation mandates that, in cases of an abortion at post 22 weeks gestation, the 'specialist medical practitioner must provide all necessary information to the person about access to counselling, including publicly-funded counselling.'[278] Although some women might desire such information, to mandate its provision demeans a woman's decision-making ability as it presupposes that she has not already considered all such matters and seriously contemplated the termination she is requesting.[279] Nonetheless, the provision does not mandate counselling itself,[280] which would constitute a serious insult to the pregnant woman's agency and autonomy, but rather only compels the provision of information relevant to accessing counselling; thus, the decision to engage with counselling remains solely the woman's to make.

NSW also departs from the Queensland template by demanding that post 22 weeks gestation terminations must be performed in a hospital or 'approved health facility',[281] which, again, might well be clinically appropriate in some instances, but should not be dictated in advance.[282] On a positive note, there appears to be no upper gestational limit for lawful abortions in NSW.[283]

The requirement of specialists, the mandated provision of counselling information, and the necessity of approved facilities for abortions post 22 weeks gestation, when none of these conditions are medically necessary, means that the NSW legislation treats abortion care differently to other health care. This conclusion is reinforced by the fact that the *Abortion Law Reform Act 2019* (NSW) also creates problematic issues that were not present in any other jurisdiction.[284]

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[276] The SALRI report recommended that neither specialists nor two medical opinions should be mandated: see SALRI (n 53) 19, 26, 28, 242, 348.
[277] Ibid 19.
[278] *Abortion Law Reform Act 2019* (NSW) s 7(2).
[279] See SALRI (n 53) 278-280.
[280] As is the case in Western Australia: see *Health (Miscellaneous Provisions) Act 1911* (WA) s 334(5)(a). For a discussion of the issues with mandatory counselling see SALRI (n 53) 278-280.
[281] *Abortion Law Reform Act 2019* (NSW) s 6(1)(d). Such approval is made via the Secretary of the Ministry of Health: at s 13. It should be noted that there is no requirement that 'any ancillary services necessary to support the performance of a termination be carried out only at the hospital or approved health facility at which the termination is, or is to be, performed': at s 6(2). It should be further noted that 'ancillary services' includes tests, other medical procedures, treatments and services, and the 'administration, prescription or supply of medication': at s 6(6).
[282] See, eg, Sheldon, who makes the point that this approved facility criterion is 'unsupported by any current medical evidence base': Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (n 239) 345. It should be noted that NSW does follow Queensland in specifically removing all such requirements for a lawful abortion in cases of 'emergency' when 'the medical practitioner considers it necessary to perform the termination to (a) save the person's life, or (b) save another foetus': *Abortion Law Reform Act 2019* (NSW) *s* 6(5).
[283] That is, no reference is made to an upper gestational limit in the *Abortion Law Reform Act 2019* (NSW), and NSW does not have a child destruction provision, that might otherwise place an implicit limit on lawful abortions. A further positive of the legislation is that it facilitates confidential data collection: at s 15.
[284] That is, until South Australia followed NSW in this respect: see *Termination of Pregnancy Act 2021* (SA) ss 7, 12.

Specifically, provision is made for when an attempted termination results 'in a person being born.'[285] In such a case, the legislation states that a health practitioner may exercise their duty to provide that person 'with medical care and treatment',[286] and that 'the duty owed by a registered health practitioner to provide medical care and treatment to a person born as a result of a termination is no different than the duty owed to provide medical care and treatment to a person born other than as a result of a termination.'[287] This is a ludicrous statement.[288] Assuming being 'born' in this context follows the common law definition of being fully extruded from the mother and exhibiting 'any sign of life, no matter how faint or fleeting',[289] it is self-evidently the case that a health practitioner does not owe the same duties to a foetus so 'born' (ie. one that is unwanted and may 'live' for only a moment) compared to a viable, wanted newborn. This provision is extremely insulting to the woman having the abortion, as it defines her as a mere vessel for the foetus that is so 'born'.

The other problematic provision is that concerning terminations for sex selection. The *Abortion Law Reform Act 2019* (NSW) makes the statement that '[p]arliament opposes the performance of terminations for the purpose of sex selection'.[290] Recent guidelines provided by the Minister pursuant to section 14 of the *Abortion Law Reform Act 2019* (NSW) have expressly stated that if the request for an abortion is motivated 'for the sole purpose of sex selection…[then]…the practitioner must not perform the termination, unless not performing the termination will cause significant risk to the woman's health or safety.'[291] Given that the legislation does not expressly impose upon the pregnant woman concerned any obligation to justify her request for a termination, it seems unlikely that the pregnant woman concerned would volunteer such a motivation for the termination of her pregnancy, so one would expect few refusals to perform terminations on this basis.[292] In addition, as there is no reliable evidence that the performance of

[285] *Abortion Law Reform Act 2019* (NSW) s 11(1).
[286] Ibid s 11(2).
[287] Ibid s 11(3).
[288] It should be noted that this section was one of many late amendments to the Bill made by the National Party's Niall Blair. For a list of all such amendments: see Parliament of New Wales, The House In Review, *In Review: Abortion Law Reform Act 2019* (Website) <https://thehouseinreview.com/2019/10/02/in-review-abortion-law-reform-act-2019/>.
[289] Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1) 19. See also R v *Iby* (2005) 63 NSWLR 278; *Barrett v Coroner's Court of South Australia* (2010) 108 SASR 568.
[290] *Abortion Law Reform Act 2019* (NSW) s 16(1).
[291] HSP (n 275) 1.
[292] The most recent report from the Secretary of the Ministry of Health on the extent to which terminations are being performed for the purpose of sex selection (prepared pursuant to an obligation to so report under *Abortion Law Reform Act 2019* (NSW) s 16) indicates that less than 0.02 per cent of abortions in the reporting period were performed for the sole purpose of sex selection: see Secretary of the Ministry of Health, *Review of termination of pregnancy for the purpose of sex selection in NSW* (December 2020) 7, 14.

terminations for the purpose of sex selection is occurring to any significant extent in NSW,[293] there seems little point in the provision.[294] The condition serves only to unduly complicate what is already a complex area of law. Furthermore, the reason why a woman wants to terminate her pregnancy should be irrelevant from a legal standpoint; such reasons may be relevant from a clinical perspective but should have no bearing on the legality of the procedure.

This is not say that sex selection in abortion is not philosophically nor morally problematic. Indeed, as it seems clear from an analysis of societies in which sex selection is comparatively common that female foetuses will be terminated more so than male foetuses,[295] it presents a feminist dilemma. As indicated throughout this contextual statement and the articles within this thesis, an unfettered right to abortion is necessary to protect women's rights to equality, bodily integrity, self-determination, and autonomy (among other rights), yet a preference for males in sex selection abortions necessarily defines females as inferior, which negatively affects women as a class. This tension has been framed as an example of the ongoing conflict between liberal feminism (with its focus on individual rights) and radical feminism (with its focus on substantive and collective outcomes).[296] Whilst acknowledging this complex philosophical friction, it is nonetheless this author's opinion that in the interests of reproductive freedom the abortion right must be absolute. Thus, if a woman wants to terminate her pregnancy for the purposes of sex selection, then that is her right.[297] Steps might well be taken to reduce the incidence of abortions undertaken for this reason, but those steps cannot include making that decision or termination unlawful if a woman's right to abortion is to be fully respected.[298]

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[293] Ministry of Health (n 292) 7, 14. This was the argument made by the opponents to this amendment to the Bill. The sex selection provisions are the creation of the Liberal Party's Damien Tudehope. For a discussion of these amendments: see Parliament of New South Wales (n 288). For a discussion of the passage of this provision through the NSW Parliament: see Walsh and Legge (n 225) 326-328. It should be noted, however, that sex selection is an issue in some Asian countries: see Belinda Bennett and Heather Douglas, 'Abortion' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 3rd ed, 2018) 473, 492-493.

[294] Another argument made by SALRI to not adopt this aspect of the NSW legislation is that any such prohibition on abortions for the purpose of sex selection would be largely unenforceable: see SALRI (n 53) 330-331.

[295] See, eg, Naryung Kim, 'Breaking Free from Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the United States' (1999) 17(3) *UCLA Pacific Basin Law Journal* 301, 317-320; April L Cherry, 'A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?' (1995) 10(2) *Wisconsin Women's Law Journal* 161, 168-175; Colleen Davis and Heather Douglas, 'Selective reduction of fetuses in multiple pregnancies and the law in Australia' (2014) 22(1) *Journal of Law and Medicine* 155, 171-172.

[296] See Cherry (n 295) 165-166, 208-216.

[297] See, eg, Walsh and Legge (n 225) 328; SALRI (n 53) 330.

[298] Obviously, this is a far broader and more complex issue than such a determination indicates. However, it is beyond the scope of this contextual statement to enter into a detailed analysis of the issue, so the above simplification must suffice.

In any case, in summarising the NSW legislation from the perspective explained earlier in this contextual statement, although the *Abortion Law Reform Act 2019* (NSW) achieved the paramount objective of largely removing abortion from the criminal law (other than abortions performed by unqualified persons),[299] due to the existence of the complex and medically unnecessary provisions referred to above, it cannot be said that NSW law treats abortion in the same manner as other forms of health care.[300]

5.5. The Northern Territory

The Northern Territory has been comparatively active on abortion law reform,[301] with the most recent reform occurring in 2021.[302] In the Northern Territory an abortion may lawfully be performed by a medical practitioner,[303] through 'surgical procedure' or the administration of a 'termination drug',[304] on a woman of any age,[305] and at any premises, provided the woman is not more than 24 weeks pregnant,[306] but only if the medical practitioner 'considers the termination is appropriate in all the circumstances'.[307] In making this determination the medical practitioner must have regard to:

[299] See *Crimes Act 1900* (NSW) s 82.
[300] Thus, the suggestions for reform made in the 2018 article in this thesis were not implemented, as this article argued for the simple abolition of the offence of abortion (with no further conditions), so that the suspect and uncertain common law principles of the defence of necessity would no longer be relevant, and thereby enabling abortion to be treated like any other medical procedure: see Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 68-70. Similar suggestions for reform were also made in Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2), which were quoted in New South Wales Parliamentary Research Service, *Abortion law: a national perspective* (n 94) 18, 57.
[301] The Northern Territory first engaged with abortion law reform in 1974 (ie. the enactment of *Criminal Code Act 1983* (NT) s 174, based on the 1969 South Australian legislation), then in 2006 (ie. the redrafting of *Criminal Code Act 1983* (NT) s 174, and the relocating of those provisions into the *Medical Services Act 1982* (NT) s 11), and then in 2017: see *Termination of Pregnancy Law Reform Act 2017* (NT). Initially this 2017 legislation allowed relatively easy access to abortion only until 14 weeks gestation, but recent amendments have extended that time period to 24 weeks gestation: see *Termination of Pregnancy Law Reform Legislation Amendment Act 2021* (NT) s 5, which amended *Termination of Pregnancy Law Reform Act 2017* (NT) s 7.
[302] See *Termination of Pregnancy Law Reform Legislation Amendment Act 2021* (NT). Although this legislation was enacted after the *Termination of Pregnancy Act 2021* (SA), so this discussion is thereby not in chronological order, as the South Australian legislation is relevant to the next section dealing with my involvement with SAAAC, it seemed sensible to discuss it in that section, rather than prior to discussing the Northern Territory legislation. Furthermore, the 2021 Northern Territory legislation made amendments to the 2017 Northern Territory legislation, rather than providing an entirely new basis for Northern Territory abortion law.
[303] See *Termination of Pregnancy Law Reform Act 2017* (NT) s 6(1).
[304] Ibid.
[305] See ibid s 4. Prior to the 2017 legislation, further conditions applied if the woman was under 16 years of age: see repealed *Medical Services Act 1982* (NT) s 11(5).
[306] See *Termination of Pregnancy Law Reform Act 2017* (NT) s 7.
[307] Ibid.

(a) all relevant medical circumstances; and (b) the woman's current and future physical, psychological and social circumstances; and (c) professional standards and guidelines.[308]

As explained with respect to the Queensland and NSW legislation, mandating that the relevant medical practitioner only perform an abortion when 'appropriate in all the circumstances', and compelling consideration of the above factors in that respect, is arguably superfluous as it does not add value to what a medical practitioner is obliged to do with respect to any medical procedure: that is, act in accordance with applicable health law, and professional standards and guidelines, and make an informed clinical decision on the available medical evidence and in the patient's best interests. In addition, it might be argued that specifically mandating these requirements only serves to delay the process of accessing an abortion because a medical practitioner may thereby seek to make especially sure that all such legislative requirements are met, rather than simply perform the safe and common medical procedure that is being requested.[309] More problematic from a woman's rights perspective is that the provision effectively serves to remove the abortion decision from the woman concerned; that is, the legislation makes it clear that the medical practitioner decides whether the abortion is 'appropriate in all the circumstances',[310] which serves to erode the pregnant woman's 'agency and autonomy'.[311] In the other jurisdictions discussed above, the abortion decision is initially the pregnant woman's to make, but then becomes, at a certain gestation, the decision of the medical profession.[312] In the Northern Territory, it is never the woman's decision, and there exists no abortion on demand at any stage, as the medical profession are granted legal gatekeeping power in this regard for the duration of any pregnancy.

After 24 weeks gestation the medical practitioner that performs the termination of pregnancy must have 'consulted with at least one other medical practitioner who has assessed the woman',[313] and each medical practitioner must consider the termination 'appropriate in all the

[308] Ibid. Such standards and guidelines may be set by the Chief Health Officer: see *Termination of Pregnancy Law Reform Regulations 2017* (NT) rr 5-7.
[309] The relative safety of abortion has been highlighted earlier. The fact that it is a common procedure is based on data that suggests that approximately one third of Australian women will have an abortion: see, eg, SA Health, *Standards for the Management of Termination of Pregnancy in South Australia* (March 2017) 6; Belton, Gerry and Stulz (n 216) 28; SALRI (n 53) 113.
[310] *Termination of Pregnancy Law Reform Act 2017* (NT) s 7.
[311] Ronli Sifris, Tania Penovic and Caroline Henckels, 'Advancing Reproductive Rights through Legal Reform' (2020) 43(3) *UNSW law Journal* 1078, 1081.
[312] That is, in Tasmania, Queensland, and NSW, although the abortion decision is taken out of the woman's hands at certain gestations, at which point the abortion will only be lawful if the requisite medical practitioners conclude that it is appropriate to perform the abortion, up until those gestational limits the abortion decision is solely the woman's to make.
[313] *Termination of Pregnancy Law Reform Act 2017* (NT) s 9(a).

circumstances',[314] upon an assessment of the identical issues as quoted above with respect to a termination of not more than 24 weeks gestation.[315] Both of the requisite two medical practitioners must have personally examined the woman concerned in arriving at this assessment, which does not reflect current clinical practice, and is likely to cause delay in accessing the service, especially in remote areas.[316] This requirement of two opinions has been described as outdated, unnecessary, and possessing no cogent basis.[317] Finally, although no upper limit is mentioned in the *Termination of Pregnancy Law Reform Act 2017* (NT), the Northern Territory maintains the offence of child destruction, which may serve to place an implicit upper limit on lawful abortions.[318] This is problematic for a number of reasons, not the least of which is that upper legal limits tend to have negative health consequences for women.[319]

5.6. Post 2011 Legislation: A Summary of Failure

As indicated above, the legislation enacted since 2011 in the jurisdictions of Tasmania, Queensland, NSW, and the North Territory all have issues from a feminist perspective, and none of these jurisdictions treat abortion care in the same manner as other forms of health care. Consequently, none of these jurisdictions has fully recognised a woman's right to abortion. The jurisdictions of Tasmania and NSW are especially problematic in this regard as Tasmania only allows an unfettered right to abortion up until 16 weeks gestation, while the NSW legislature has attached a number of onerous, complex and medically unjustified conditions on the performance of a lawful abortion.

In Queensland, although there exists effective abortion on demand up until 22 weeks gestation, after 22 weeks the decision-making power moves to the medical profession, and a second medical opinion is required. The mandated assessment post 22 weeks is not particularly arduous, and arguably consistent with the requirements of good clinical practice in any case, but granting the

[314] Ibid s 9(b).
[315] See ibid.
[316] This issue with remote patients is alleviated somewhat if the patient is not more than 14 weeks pregnant, in which case a medical practitioner may 'direct an authorised ATSI health practitioner, authorised midwife, authorised nurse or authorised pharmacist to assist in the performance of a termination': Ibid s 8(1). It should also be noted that, in common with most other jurisdictions, the Northern Territory legislation makes it clear that an abortion may lawfully be performed in any circumstances when an 'emergency' exists and 'the medical practitioner considers the termination is necessary to preserve the life of the woman': at s 10.
[317] See SALRI (n 53) 348.
[318] See *Criminal Code Act 1983* (NT) s 170. Indeed, by maintaining the offence of child destruction, the Northern Territory has arguably enacted conflicting legislation as a foetus at 24 weeks gestation is likely to be a 'child capable of being born alive', and thus arguably protected by those child destruction provisions. For a discussion of such issues see Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1).
[319] See, eg, World Health Organization, *Safe abortion: technical and policy guidance for health systems* (Department of Reproductive Health and Research, 2nd ed, 2012) 93-94.

medical profession decision-making power, rather than allowing the pregnant woman to make her own decision about her own body, is insulting to the woman concerned, and the compulsory second opinion is medically unjustified. There also exists an implicit valuation of the foetus that underpins the legislation, which is problematic from a feminist perspective. In the Northern Territory, although the required post 24 weeks gestation assessment is probably consistent with best health practice, the legislation specifically grants the power to make the requisite abortion decision to the medical profession, and not the woman concerned.[320] Post 24 weeks gestation the North Territory, in common with Queensland and NSW post 22 weeks gestation, and Tasmania post 16 weeks gestation, requires a medical unjustified second opinion. However, unlike Queensland, Tasmania and NSW, the Northern Territory also has an implicit upper limit on lawful abortions as a result of maintaining the offence of child destruction.[321]

In summary, the post 2011 legislation in the above jurisdictions may be described as retrograde in choosing to erode women's rights by placing medically unwarranted obstacles in the way of women seeking an abortion. This failure by those legislatures is especially disappointing given that superior legislation, in terms of treating abortion care more as health care, already existed in the ACT and Victoria,[322] and might have been constructively built upon by the above jurisdictions. This is not to say that either the ACT or Victoria have achieved the goal of treating abortion care solely as health care, as both jurisdictions have retained medically unnecessary conditions on providing lawful abortions.[323] For example, although in Victoria there arguably exists a situation of abortion on demand (ie. a woman may request an abortion, and a medical practitioner may perform that abortion, or a registered pharmacist or registered nurse may supply and/or administer drugs to

[320] This is problematic because, as Forster and Jivan explain: 'There is no compelling reason to prefer medical practitioners over pregnant women and girls as the decision-makers in abortion. Even when termination requires medical advice, there is no compelling reason why practitioners should not, as in any other medical decision, provide the appropriate advice to assist the woman or girl to make the best decision for herself': Christine Forster and Vedna Jivan, 'Abortion Law in New South Wales: Shifting from Criminalisation to the Recognition of the Reproductive Rights of Women and Girls' (2017) 24(4) *Journal of Law and Medicine* 850, 863.

[321] As noted above, although Queensland maintains the offence of child destruction, that offence is no longer applicable to an abortion performed in accordance with the *Termination of Pregnancy Act 2018* (Qld): see *Criminal Code Act 1899* (Qld) s 313(1A).

[322] As stated above, this legislation will not be discussed in detail in this section as it has been critiqued in the 2011 article in this thesis. For a discussion of the ACT and Victorian legislation: see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 35-39, 39-46. For further discussion of the ACT legislation see Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 327-335.

[323] Forster and Jivan also make the point that neither Victoria nor the ACT 'fully recognises the reproductive rights of women and girls' because both models, in different ways, create 'regimes of medicalisation in which medical practitioners are given paternalistic gatekeeping responsibilities in relation to women's access to abortion': Forster and Jivan (n 320) 851. Forster and Jivan also make the point that such laws are at odds with women's basic human rights: at 862.

cause an abortion) up until 24 weeks gestation,[324] post 24 weeks gestation further clinically unjustified conditions apply (including the requirement of a second medical opinion), similar to those existing in Queensland and NSW post 22 weeks gestation, and in the Northern Territory post 24 weeks gestation.[325] Such conditions indicate that abortion is not being treated in the same manner as other health care, and that at post 24 weeks gestation the decision is no longer solely the pregnant woman's to make.[326]

In the ACT, no such second opinion is mandated regardless of gestation, and abortion is regulated solely through health law.[327] In the ACT, the 'prescription, supply or administration of an abortifacient'[328] is lawful if the prescription is provided by a medical practitioner,[329] and a pharmacist (or 'a person assisting a pharmacist')[330] supplies the abortifacient in in accordance with that prescription.[331] A surgical abortion is lawful if performed by a medical practitioner in an approved facility,[332] and any person may assist a medical practitioner in carrying out a surgical abortion.[333] Thus, despite retaining a residual offence of abortion for non-medical practitioners,[334] expressly providing for conscientious objection in the provision of abortion services,[335] and mandating that surgical abortions must be performed in approved facilities,[336] the ACT is the jurisdiction that comes closest to treating abortion care in the same manner as other health care.[337] This conclusion is reinforced by the fact that all other jurisdictions also maintain an

[324] See *Abortion Law Reform Act 2008* (Vic) ss 4, 6.
[325] That is, post 24 weeks gestation a medical practitioner may only perform an abortion if that medical practitioner 'reasonably believes that the abortion is appropriate in all the circumstances': Ibid s 5(1)(a); and 'has consulted at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances': at s 5(1)(b). This assessment requires that the medical practitioners consider '(a) all relevant medical circumstances; and (b) the woman's current and future physical, psychological and social circumstances': at s 5(2). This level of commonality is unsurprising given that Queensland, NSW and the Northern Territory all based this aspect of their respective legislation, to varying degrees, on the Victorian model.
[326] As Morgan notes, the Victorian legislation: 'configures women as responsible decision-makers, at least until the foetus is at 24 weeks' gestation. After that time, their responsibility is constrained by the requirements to consult with two doctors': Morgan (n 32) 172. See also Forster and Jivan who conclude that prior to 24 weeks there exists 'an unfettered right to choose abortion…but after 24 weeks that right is removed and authority shifts from the woman herself to members of the medical profession who become gatekeepers of her right': Forster and Jivan (n 320) 854.
[327] See *Health Act 1993* (ACT) pt 6.
[328] Ibid s 80(2).
[329] See ibid s 81(1).
[330] Ibid s 81(2)(b).
[331] See ibid s 81(2).
[332] See ibid ss 82-83.
[333] See ibid s 82 (2)
[334] See ibid ss 81-82.
[335] See ibid s 84A.
[336] See ibid s 83.
[337] It should be noted that the publications in this thesis vacillate between Victoria and the ACT in terms of what jurisdiction possesses the preferred legislation in this respect: see Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65), in which the ACT is held up as the best legislative template for other jurisdictions to follow; and Rankin, 'The Disappearing Crime of Abortion and the Recognition of a

unqualified person offence and expressly cater for conscientious objection.[338] In addition, the application procedure required to receive the designation of 'an approved medical facility' is not arduous, and weighted in favour of the applicant;[339] consequently, there should be no shortage of such facilities.[340]

Thus, the primary criticism of the ACT legislation (and a criticism that cannot be directed against most other jurisdictions) is that the ACT maintains the offence of child destruction,[341] which may create an implicit upper gestational limit upon lawful abortions.[342] As oft repeated, there may be an upper limit for a safe abortion based upon medical concerns, but there should be no arbitrary legal limit,[343] as this is not only clinically unnecessary, but detrimental to the pregnant woman's health.[344] Nonetheless, unlike all other jurisdictions, the ACT stands alone in not mandating an arbitrary gestational limit upon which further (more restrictive) regulation is required. Perhaps most significantly, unlike any other jurisdiction, in the ACT, regardless of gestation, there is no requirement to specifically justify the abortion by reference to legislatively mandated criteria.[345] This means that the decision remains the woman's to make regardless of gestation, which also allows medical practitioners in the ACT to provide advice and services appropriate to each patient's individual circumstances, which is best practice from a clinical perspective. To reiterate:

Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2), in which Victoria is held in slightly higher esteem in that regard. However, since the 2011 article was published the ACT enacted the *Health (Improving Abortion Access) Amendment Act 2018* (ACT), which improved the law in the ACT by distinguishing between medical and surgical abortion, such that the ACT now possesses, in this author's opinion, the superior legal regime for the regulation of abortion in Australia.

[338] See the above discussion on these issues in subsection 5.1.

[339] That is, any person can apply to the Minister 'to have a medical facility, or a part of a medical facility, approved to carry out surgical abortions': *Health Act 1993* (ACT) s 84(1); and the Minister 'must approve' such applications 'if reasonably satisfied the medical facility is suitable': at s 84(2).

[340] Nonetheless, to repeat, the requirement of such 'approved' facilities is unnecessary from a clinical perspective: see, eg, SALRI (n 53) 27, 192.

[341] See *Crimes Act 1900* (ACT) s 42.

[342] See Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1).

[343] See, eg, Belton, Gerry and Stulz (n 216) 41.

[344] As SALRI have explained: 'Abortions occurring later in gestation are especially likely to involve complex medical circumstances, including serious or fatal fetal abnormalities where the diagnosis is delayed, the prognosis is uncertain, or the fetus is one of a multiple pregnancy; or complex personal circumstances, including late recognition of pregnancy, delayed access to services, social and geographic isolation, domestic or family violence, socio-economic disadvantage, or mental health issues': SALRI (n 53) 215. See also Snelling (n 40) 234-235.

[345] That is, in every other jurisdiction, at some point, it is mandated that the medical practitioner(s) must be satisfied of certain criteria. SALRI has made the point that any such specified criteria for defining lawful abortion should be avoided: see SALRI (n 53) 19, 27, 207-210.

the determination may thus readily be made that the ACT legislation comes closest to establishing an environment whereby abortion is (almost) treated like any other health care.[346]

From a feminist perspective, it is to be lamented that, given the opportunity to build on the ACT legislative achievements so described, none of the jurisdictions discussed in this section did so. In terms of creating a legal regime in which abortion care is treated in the same manner as other health care, thereby recognising a woman's right to abortion, the way forward is clear: 1. abolish all abortion specific offences, including unqualified person offences; 2. abolish any child destruction offence that may persist;[347] and 3. repeal any abortion specific legislation,[348] including legislation that mandates the meeting of particular criteria for a lawful abortion,[349] or establishes upper gestational limits, or provides for abortion specific conscientious objection.[350] Once this is achieved general health law and relevant health practitioner regulatory codes and standards will regulate the provision of abortion services, consistent with best clinical practice, and in the patient's interests. As mentioned above, no jurisdiction has yet realised this goal, but South Australia was recently potentially poised to do so, which will be discussed in the next section.

[346] See Sifris and Belton (n 217) 211; Victorian Law Reform Commission ('VLRC'), *Law of Abortion* (Final Report 15, March 2008) 7. The ACT Model, but with no mandated approved facility, and with no gestational limit, was also the model preferred by SALRI: see SALRI (n 53) 18, 239.
[347] For reasons outlined in Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1).
[348] The exception to this is safe access zone legislation, which will be required in the short term for reasons outlined previously: see Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 63.
[349] As Sheldon explains, all such criteria constitute 'clinically unwarranted impediments to the provision of high quality abortion services': Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (n 239) 347.
[350] This is, essentially, a simplified restating of the questions from the 2011 article that provided the original contribution to knowledge of establishing clearly defined criteria against which abortion law may be assessed: see Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 5.

6. SAAAC and South Australian Abortion Law Reform

6.1. The South Australian Legislation Prior to 2021

South Australia was the first Australian jurisdiction to pass legislation reforming the law of abortion in 1969,[351] but was the last jurisdiction to attempt to decriminalise abortion.[352] Indeed, prior to the *Termination of Pregnancy Act 2021* (SA), although there existed statutory defences for medical practitioners to the crime of performing an abortion,[353] it was nonetheless prima facie the case that any person that performed or attempted to perform an abortion, either surgically or through the administration of abortifacients, faced life imprisonment if found guilty of the offence,[354] and it mattered not whether the woman concerned was even pregnant, provided the requisite intent to procure an abortion was evident.[355] Most alarmingly from a woman's rights perspective, in South Australia prior to 2021 a woman could be charged with an offence for terminating, or attempting to terminate, her pregnancy (through use of instrument or administration of abortifacient with that intent),[356] and she faced life imprisonment if found guilty.[357]

[351] This legislation inserted section 82A into the *Criminal Law Consolidation Act 1935* (SA). This provision reflected a number of features of the *Abortion Act 1967* (UK). For a discussion of this UK legislation: see Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (n 239) 337-347. It should be noted that subsection 6.1 of this contextual statement summarises more detailed content available in articles in this thesis: see Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 243-246; Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 7-11.

[352] That is, in terms of the broad legislative trend in other jurisdictions to move the legal regulation of abortion from the criminal law to health law (although the criticism should be noted that this might result in a 'shift from criminalisation to medicalisation': see Forster and Jivan (n 320) 856), South Australia was the last jurisdiction to regulate the practice of abortion entirely under the criminal law.

[353] The offences were contained in *Criminal Law Consolidation Act 1935* (SA) ss 81-82, and the defences were to be found in s 82A(1)(a), such that lawful abortions might be performed by legally qualified medical practitioners in specific circumstances, despite abortion remaining an offence. The legislation also made it clear that an abortion that fell outside those conditions remained unlawful: at s 82A(9). Cf Heath and Mulligan, who argue that medical abortion was not criminal in practice in South Australia because the purpose of the law was to preserve women's health, and that compliance with that statutory scheme was prima facie lawful and so medical practitioners need not have feared prosecution: see Mary Heath and Ea Mulligan, 'Abortion in the Shadow of the Criminal Law? The Case of South Australia' (2016) 37 *Adelaide Law Review* 41, 42-43, 66.

[354] See *Criminal Law Consolidation Act 1935* (SA) s 81(2).

[355] See ibid s 81(2). A person who supplied or procured abortifacients or instruments, knowing that they were intended to be utilised to procure an abortion (whether or not the woman concerned was pregnant), faced a maximum penalty of three years imprisonment: at s 82.

[356] See ibid s 81(1).

[357] See ibid s 81(1). It should be noted that the prosecution would have to prove that she had been pregnant at the relevant time: at s 81(1).

Prior to 2021, for an abortion to have been lawful in South Australia, it must have been performed by:

> [A] legally qualified medical practitioner in a case where he and one other legally qualified medical practitioner are of the opinion, formed in good faith after both have personally examined the woman - (i) that the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated; or (ii) that there is a substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped.[358]

In making the above determination (ie. with respect to criterion (i)) it was the case that 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment.'[359] Thus, criterion (ii) above was probably superfluous because in such instances of foetal abnormality it is arguable that the mental health of the pregnant woman would be adequately at risk pursuant to criterion (i), but, either way, these tests were not, at least theoretically, low bars.[360] The requirement that two medical practitioners needed to personally examine the woman concerned and then certify an opinion that the requisite conditions were satisfied, amply signified that the decision-making power resided with the medical profession, rather than the woman concerned. The extended process of securing two opinions also served to create delay in accessing what was otherwise a safe and common medical procedure and/or health service. This was especially the case for women living in rural and remote environments, where obtaining the requisite two medical opinions may have been difficult without extensive travel. This problem was exacerbated by the fact that the legislation also allowed for conscientious objection without an obligation to refer the patient to another health practitioner that had no such objection,[361] and it was mandated that the abortion must be performed in a prescribed hospital.[362] In addition, somewhat incongruously in the national health environment, an abortion would not be lawful unless the

[358] Ibid s 82A(1)(a). Such opinions needed to also be appropriately certified: at s 82A(4)(a).
[359] Ibid s 82A(3).
[360] On the other hand, it should be noted, as discussed above in relation to the Tasmanian legislation, that terminating a pregnancy usually constitutes less risk to maternal health than childbirth, so the conditions are met, theoretically, in most cases presented: see above nn 239-240.
[361] See *Criminal Law Consolidation Act 1935* (SA) s 82A(5). In common with other jurisdictions that allow for conscientious objection, a health practitioner could not so object in situations of emergency when treatment was 'necessary to save the life, or to prevent grave injury to the physical or mental health, of a pregnant woman': at s 82A(6).
[362] Ibid s 82A(1). Such prescribed hospitals were determined by the Governor making regulations declaring same: at s 82A(4)(d).

woman concerned had resided in South Australia for at least two months.[363] Finally, as South Australia maintained the offence of child destruction, an abortion would not be lawful if the foetus was 'a child capable of being born alive.'[364] This was the legal situation that existed at the time of the formation of SAAAC in 2016, of which I was a founding member.

6.2. SAAAC: The Early Stages

The genesis of SAAAC was the *Law and Society Association of Australia and New Zealand Conference 2015*, held at Flinders Law School, Flinders University, Adelaide, South Australia, from 30 November to 3 December 2015. At this conference I, along with Barbara Baird, Clare Parker, and Sally Sheldon were invited panel members and presenters for the Sub-Plenary Session Panel Discussion 'Decriminalising Abortion', convened by Mary Heath. I presented a summary on 'Australian Abortion Law'. At the conclusion of this session, capitalising on the presence of the panel members and other participants at the conference that shared a common agenda, a meeting was organised for the next day and from there SAAAC was gradually built, with formal monthly meetings occurring from early 2016.[365] The co-convenors of SAAAC throughout its existence were Barbara Baird and Brigid Coombe. The members of SAAAC were from diverse areas, but were predominantly academics,[366] pro-choice activists, health practitioners, legal practitioners, and health administrators. As a result of my publications in the area – that is, the articles in this thesis – I became a primary legal advisor for SAAAC.[367]

[363] Ibid s 82A(2). That is, unless an emergency situation existed: at s 82A(1)(b). SALRI has suggested that this previous residency requirement 'serves no useful purpose': SALRI (n 53) 31, 248.

[364] *Criminal Law Consolidation Act 1935* (SA) s 82A(7). It was further stipulated that a foetus was 'a child capable of being born alive' at 28 weeks gestation, but could be so defined at an early gestation: at s 82A(8). The legislation also provided a defence to this crime; namely, that the abortion was performed 'in good faith for the purpose only of preserving the life of the mother': at s 82A(7). For further discussion on this issue see Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1).

[365] Up until September 2016 the group was a nameless collective, but at that meeting the group was officially designated the South Australian Abortion Action Coalition.

[366] It should be noted that most of the academics in SAAAC were associated with Flinders University, including Barbara Baird, Brigid Coombe, Catherine Kevin, Judith Dwyer, Prudence Flowers, and Monica Cations. There were also academics from other South Australian universities that played a significant role, including Margie Ripper and Erica Millar. It should also be noted that this is not an exhaustive list of those academics that contributed to the work of SAAAC over the years.

[367] For obvious reasons, this section focuses on this author's role in SAAAC and advocating for law reform in South Australia. However, it must be emphasised at the outset that the important work of other members of SAAAC, in establishing politician databases, drafting media releases, advising health providers, meeting with parliamentarians, designing and facilitating workshops, creating and maintaining websites, fundraising, organising political actions and rallies, developing supporter networks, and drafting factsheets (among many other items of business), were at least as significant as this author's contributions. It should also be noted that much of the following discussion concerning SAAAC relies on minutes of meetings and this author's contemporaneous notes, neither of which are capable of appropriate citation.

However, the original primary focus of SAAAC was in terms of abortion practice, rather than law reform; specifically, improving access to abortion care, especially for women living in rural and remote areas. That is, although decriminalisation was always an objective for SAAAC, in the early stages of the group it was only one of a number of priorities as many members of SAAAC initially felt that the law, although not without its issues, was nonetheless adequate, and desired improvements to access might be made within that legal regime. This impression was largely based on the fact that the quality of abortion care that had evolved in South Australia since the 1969 amendments referred to above was arguably the gold standard in Australia, and there was apprehension that any law reform might jeopardise that practice, and the relatively easy access to abortion care that South Australian women living in metropolitan areas were experiencing in 2016.[368] I nonetheless continued to maintain that law reform should be the paramount goal of SAAAC. In May 2016, based largely on the research undertaken for the 2011 article in this thesis,[369] I made a detailed presentation to the members of SAAAC arguing that law reform should be the group's primary focus, and canvassed the various preferred models for such reform; in particular, the ACT and Victorian legislation were highlighted in this respect. Consistently with the recommendations made in the articles in this thesis, and in this contextual statement, I proposed that the law reform required was simply to abolish any offence of abortion, and thereby enable generally applicable health law to regulate abortion practice. I made similar presentations during SAAAC meetings in June 2016.

By late June 2016 SAAAC agreed that such a minimalist legislative model was appropriate but concerns still remained, especially amongst health practitioners and health care administrators, as to what effect law reform might have on the practice of abortion. These concerns were further raised in meetings in July and August 2016, and by the September 2016 meeting it was again being seriously questioned by SAAAC whether decriminalisation was the best means by which to secure improved public health services for abortion. Indeed, at the September 2016 meeting the primary focus of SAAAC changed from decriminalisation to taking action in other areas to increase access to abortion care (although decriminalisation remained the long term goal of SAAAC).

[368] In this regard, it should be noted that there are always risks with embarking upon abortion law reform; specifically, that the law may move in the other direction: see Morgan (n 32) 147-148. However, Morgan makes the point that Parliament is the best venue for such reform, and that 'parliaments are certainly capable of enacting progressive reform legislation on abortion': at 142.

[369] See Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2).

Over the remainder of 2016 and into early 2017 this focus progressively returned to law reform, due in part to myself and others arguing that the decriminalisation of abortion was an essential first step towards the primary objective of improving access to abortion care.[370] By the end of 2017 SAAAC was advocating for law reform that would create a legal environment whereby abortion care was treated by the law in the same manner as other forms of health care.[371] In other words, SAAAC championed complete decriminalisation of abortion, arguing that the law at the time was inconsistent with women's reproductive rights, dominant societal moral values, health professional ethical standards, and best clinical practice. [372]

By late June 2018 decriminalisation (and the simultaneous establishment of safe access zones) was again the official primary objective of SAAAC, and a *Campaign Strategy Plan* to further this goal was developed in July 2018. Working groups were accordingly created in August 2018 and I joined the 'Politicians Group', which engaged with policy advisors, journalists, and especially politicians with a view to persuading same that the above objective should be met as soon as possible.[373] Largely due to these efforts, in late September 2018 a draft Bill for the decriminalisation of abortion had been prepared by the Office of Parliamentary Counsel at the request of Tammy Franks MLC.[374] I was supplied with a copy of this draft Bill and consequently provided extensive comment on all aspects of the Bill for both SAAAC and Tammy Franks MLC. I made the point that the Bill was so poorly drafted that it did not constitute an improvement on the current law, as it served to excessively overcomplicate the law,[375] and indeed failed to clearly abolish the offence of abortion itself. The next draft of the Bill provided by the Office of Parliamentary Counsel in October 2018 was an improvement on the previous Bill, yet was still too complex and unwieldy.[376] Based on the research reflected in the articles in this thesis, I argued that SAAAC needed to

[370] A number of representations at SAAAC meetings throughout 2017 were made by this author and others in support of SAAAC adopting this objective.
[371] This objective was expressed politically by SAAAC as 'abortion care is health care': see SAAAC (Website) <https://saabortionactioncoalition.com/>.
[372] This conclusion was reflected in the SALRI report: see SALRI (n 53) 16, 49, 348. However, this is not to demean the achievements of the 1969 South Australian legislature (for a canvassing and discussion of the relevant parliamentary debates on the issue in 1969: see Clare Parker, 'A Parliament's right to choose: Abortion law reform in South Australia' (2014) 11(2) *History Australia* 60, 72-78), nor the quality and accessibility of the abortion services that developed as a result of that law reform. At the time the 1969 amendments to the *Criminal Law Consolidation Act 1935* (SA) were passed, such amendments were innovative, and the law so reformed led, in time, to perhaps the most liberal abortion practice regime in Australia for some years.
[373] Such engagement was through letters, email correspondence and in person or online meetings.
[374] See Abortion Law Reform Bill 2018 (SA) [draft of 20/09/2018].
[375] For example, among other issues the Bill sought to establish an 'Abortion Advisory Council' and a 'South Australian Abortion Code of Practice': see ibid divs 1, 2.
[376] For example, the October 2018 draft still ought to establish a 'South Australian Abortion Code of Practice': see Abortion Law Reform Bill 2018 (SA) [draft of 11/10/2018] pt 2.

advocate for repeal of the current law and nothing else; that is, that there should be no abortion specific legislation.[377]

SAAAC agreed with this objective and I then entered into detailed email correspondence with Tammy Franks MLC and various legislative editors of the Office of Parliamentary Counsel, and explained that, in order for the law to treat abortion in the same manner as other forms of health care, what was required was quite simple, and based on the *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT), as improved in the Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 (Qld):[378] namely, abolish the offence of abortion and create no further abortion specific provisions in any legislation.

This was achieved in the third iteration of the South Australian Bill: the Statutes Amendment (Abortion Law Reform) Bill 2018 (SA). This Bill sought to simply repeal sections 81, 82, 82A and 83 of the *Criminal Law Consolidation Act 1935* (SA),[379] and no further adjustments to the criteria for a lawful abortion were made.[380] I was provided with a draft of this Bill in November 2018, and I recommended the Bill to SAAAC because, if enacted, this Bill would have resulted in abortion care being regulated solely by generally applicable health law. Along with other members of SAAAC, I attended a number of meetings at Parliament House in late November/early December 2018 with various members of parliament from across the political spectrum. I held briefings with Katrine Hildyard MP, Tammy Franks MLC, Connie Bonaros MLC, Frank Pangallo MLC, Irene Pnevmatikos MLC and Michelle Lensink MLC, expounding the positive attributes of the Bill in order to generate bi-partisan support for the Bill. The Bill was introduced in the Legislative Council by Tammy Franks MLC and read a first time on 5 December 2018. In conjunction with other members of SAAAC, I drafted briefing notes for parliamentary supporters of the Bill, highlighting likely questions from opponents to the Bill, and suggesting appropriate responses to such questions raised, and participated in major parliamentary briefings at Parliament House during December 2018 and January 2019, that were well attended. Judith Dwyer and I also finalised a factsheet on the 'Regulation of abortion care' that was provided to all parliamentarians.[381] This factsheet sought to alleviate concerns from some members of parliament that once abortion was removed from the

[377] Aside from the ancillary issue of establishing safe access zones around premises that provide abortion services.
[378] This legislation was introduced into the Queensland Parliament but failed to get sufficient support to move beyond the Bill stage.
[379] See Statutes Amendment (Abortion Law Reform) Bill 2018 (SA) cls 3-6.
[380] The Bill did also cater for 'health access zones': see ibid cl 7; but this is an ancillary issue to the lawfulness of abortion, and will be discussed further below in relation to the legislation enacted specifically for that purpose.
[381] See SAAAC, *Factsheet 11: Regulation of abortion care* (Web Page) <https://saabortionactioncoalition.files.wordpress.com/2019/12/fact-sheet-11.pdf>.

criminal law it would become largely unregulated. The factsheet made it clear that applicable health law and regulations would adequately regulate abortion care once the practice was fully decriminalised.[382]

Unfortunately, the South Australian Parliament was prorogued before the Bill reached beyond the second reading stage, so the Statutes Amendment (Abortion Law Reform) Bill 2018 (SA) lapsed. However, its introduction, combined with the lobbying of SAAAC on the issue, prompted the Attorney-General Vickie Chapman MP to refer the matter to the South Australian Law Reform Institute ('SALRI') on 28 February 2019. The terms of reference were:

> [T]o inquire into and report in relation to the topic of abortion, with the aim of modernising the law in South Australia and adopting best practice reforms. SALRI was requested to undertake proper investigation and provide recommendations for reform based on best clinical practice in this area and taking guidance from other jurisdictions in considering the most suitable way to achieve proper reform of abortion laws in South Australia.[383]

This effectively paused vigorous campaigning by SAAAC on the issue of decriminalisation as it was clear from discussions with members of parliament that no legislative action on this issue would be taken until the SALRI report was published.[384]

6.3. The SALRI Report

The SALRI report was handed down in October 2019, with recommendations consistent with suggestions for law reform made in the relevant articles in this thesis. This was unsurprising given that the articles in this thesis were extensively cited and quoted throughout the report.[385] The articles cited were: Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229; Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the

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[382] In her speech during the second reading of the Bill on 27 February 2019, Tammy Franks MLC utilised much of the information detailed in this document in her support of the Bill and to address these trepidations: see South Australia, *Parliamentary Debates*, Legislative Council, 27 February 2019, 2779-2782 (Tammy Franks).

[383] SALRI (n 53) 1.

[384] Nonetheless, members of SAAAC remained active. For example, once this author and Mary Heath had perused every factsheet ensuring legal conclusions were correctly stated, all factsheets were published online and provided to parliamentarians in February/March 2019. All 11 factsheets are available at: SAAAC, *Get The Facts* (Web Page) <https://saabortionactioncoalition.com/fact-sheets/>. Note: Work on the factsheets had begun in May 2016, but were not finalised until February 2019. This author and other members of SAAAC also made detailed written submissions to SALRI during the consultation process.

[385] See SALRI (n 53) 54, 59, 106, 126, 469. The submissions this author made during the consultation process, founded on the research undertaken for the articles in this thesis, was also cited and quoted in the report: at 58, 59, 124, 155, 383, 468.

Australian Capital Territory' (2003) 29(2) *Monash University Law Review* 316; Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1; Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35(1) *Sydney Law Review* 1; Mark J Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (2018) 44(1) *Monash University Law Review* 32.

SALRI made its view clear at the outset in stating that 'the present law relating to abortion in South Australia…no longer reflects contemporary clinical practice or medical advances, and undermines the autonomy of women.'[386] The first recommendation of the report was that '[a]bortion should be treated as a health issue rather than as a criminal law matter and women's autonomy and best health care should be respected and promoted.'[387] In terms of the legislation recommended, the SALRI report advocated for similar legislation to the ACT model discussed above,[388] but without any prescribed facility condition or upper gestational limits for lawful abortion,[389] such that 'an abortion [would be] lawful at all gestational stages with the woman's consent, and if performed by an appropriate health practitioner.'[390] This would necessitate removing abortion from the criminal law,[391] and thereby allowing applicable health law to regulate abortion practice. SALRI emphasised that there should be no 'specified criteria for access to lawful abortion',[392] thus removing the medical profession as legal gatekeepers to the practice,[393] and ensuring that women's autonomy and decision-making power were respected.[394] In other words, the SALRI legislative template 'would regulate abortion in the same way as any other medical

[386] Ibid 16. The concern for women's autonomy was a primary focus of the report and is reiterated throughout the document: see, eg, at 17, 19, 30, 49, 52, 133, 207-208, 260, 262, 279, 282, 319, 446.
[387] Ibid 17, 24, 52.
[388] See ibid 27, 239. SALRI also indicated that, if the ACT model was not chosen, then similar legislation to the Victorian model would be an appropriate alternative: at 28.
[389] SALRI made the point that demanding a prescribed facility was 'at odds with current clinical practice and undermines equitable and effective access': Ibid 192. Similarly, SALRI reported no clinical necessity for upper gestational limits to lawful abortion and concluded that any such limits would be 'inappropriate': at 28, 242.
[390] Ibid 18. It should be noted that SALRI recommended that 'health practitioner' should not be confined to a medical practitioner: at 26, 175.
[391] See ibid 24. It should be noted that SALRI nonetheless also recommended creating an offence for an unqualified person (defined as a non-health practitioner) to perform an abortion: at 25-26, 158-159. As mentioned previously, the issue of whether such a residual offence is appropriate will not be further analysed in this contextual statement, as it is not the subject of detailed analysis in any of the article in this thesis.
[392] Ibid 27, 210. See also at 207-209.
[393] See ibid 240.
[394] See ibid 209.

procedures.'[395] As mentioned above, this is the model for law reform proposed in the relevant articles in this thesis, and to which the SALRI report referred.[396]

6.4. SAAAC: Safe Access Zone Legislation

As the South Australian Parliament was prorogued within a few months of the SALRI report being published no decriminalisation legislation was initially proposed on the basis of the report's recommendations. However, the Attorney-General Vickie Chapman MP made a commitment to introduce legislation decriminalising abortion once her office had an opportunity to consider the findings of the SALRI report. Consequently, SAAAC turned its full attention to advocating for the establishment of safe access zones around premises that provided abortion services.[397] Safe access zones are necessary in terms of allowing patients unimpeded access to appropriate health care, and health professionals unimpeded access to their place of employment. It has also been said that 'safe access zones represent a crucial vehicle for protecting women's fundamental rights.'[398] This was thus a direct practical expression of SAAAC's basic objective to improve access to abortion,[399] but it was also a politically strategic decision as it was felt that parliamentary support for such legislation would be easier to generate than support for the complete decriminalisation of abortion, which although consistent with the SALRI report recommendations, would be more politically controversial.[400] Furthermore, the hope was that enacting safe access zone legislation would perhaps create a legislative environment more conducive to the impending decriminalisation legislation.[401]

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[395] Ibid 48.

[396] See above n 385.

[397] This is the term utilised in most jurisdictions (ie. NSW, Western Australia, Victoria, the Northern Territory and Queensland), but in the ACT it is labelled a 'protected area' or 'protected facility': see *Health Act 1993* (ACT) s 85; and in Tasmania simply an 'access zone': see *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9.

[398] Ronli Sifris and Tania Penovic, 'Anti-Abortion Protest and the Effectiveness of Victoria's Safe Access Zones: An Analysis' (2018) 44(2) *Monash University Law Review* 317, 340. It has been argued that safe access zones are necessary to ensure that women may exercise their right to privacy: see Sifris and Belton (n 217) 213-214. Others mention additional rights, such as reproductive rights, that safe access zones protect: see, eg, Forster and Jivan (n 320) 858-359.

[399] Indeed, the establishment of safe access zones had been an objective of SAAAC since June 2016.

[400] That is, as indicated in section 3 of this contextual statement, the primary counter argument against a woman's right to abortion is foetal personhood, and the complete decriminalisation of abortion would likely be strongly opposed on that basis, whereas the arguments against safe access zones have arguably less emotive content, being based on the rights of persons wishing to protest at premises that provide abortion services, such as arguments concerning the implied freedom of political communication.

[401] It should be noted that safe access zone legislation usually only arises post decriminalisation of abortion: see Sifris and Belton (n 217) 217-218. However, there was an exception to this 'rule', as NSW passed safe access zone legislation while abortion remained, prima facie, a criminal offence: see *Public Health Amendment (Safe Access Reproductive Health Clinics) Act 2018* (NSW), which inserted Part 6A of the *Public Health Act 2010* (NSW), prior to abortion being decriminalised by the *Abortion Law Reform Act 2019* (NSW).

As a result of the research conducted in writing the article Mark J Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (2020) 39(2) *University of Tasmania Law Review* 61, I was in a position to take the lead on this issue in terms of providing written and oral advice to members of parliament, drafting briefing notes, and commenting on drafts of the relevant legislation. Such work had begun prior to the release of the SALRI report, and a Bill was introduced in both the Legislative Council and the House of Assembly in September 2019,[402] based on the Victorian legislative model,[403] as suggested in the above article.[404]

However, I was critical of some aspects of this Bill. First, the Bill distinguished itself from other jurisdictions by providing a maximum penalty of 2 years imprisonment for prohibited behaviour within a protected zone,[405] which would have been the most severe penalty in Australia. Most other jurisdictions have the option of fines or imprisonment, or both.[406] I explained to the drafters of the Bill that the greater the penalty the more likely the legislation would be deemed a disproportionate infringement on the implied freedom of political communication,[407] and suggested, based on the argument made in the 2020 article in this thesis, that the Bill should be amended to both allow for a fines option, and to reduce the maximum imprisonment penalty to 12 months, consistent with the Tasmanian and Victorian safe access zone legislation, that had both received High Court approval.[408]

The Bill also sought to capture a wide area, as not only was the relevant prohibited communication not limited to communicating with persons leaving or entering the protected premises,[409] but the Bill designated all public and private hospitals as protected areas, not only

[402] See Health Care (Health Access Zones) Amendment Bill 2019 (SA), introduced by Tammy Franks MLC in the Legislative Council and by Natalie Cook MP in the House of Assembly.
[403] See *Public Health and Wellbeing Act 2008* (Vic) Part 9A.
[404] See Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 79-81. This was also the SALRI recommendation: see SALRI (n 53) 33-34, 436-437.
[405] See Health Care (Health Access Zones) Amendment Bill 2019 (SA) cl 3 that proposed to insert section 48D into the *Health Care Act 2008* (SA).
[406] See, eg, *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(2).
[407] For a discussion of this issue see Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 64-69.
[408] See *Clubb v Edwards, Preston v Avery* (2019) 267 CLR 171, which approved the *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(2) and the *Public Health and Wellbeing Act 2008* (Vic) s 185D.
[409] That is, the Bill made it unlawful 'to communicate, or attempt to communicate, with a person about the subject of abortion' without reference to where that communication was taking place: see Health Care (Health Access Zones) Amendment Bill 2019 (SA) cl 3 that proposed to insert section 48B into the *Health Care Act 2008* (SA).

hospitals that provided abortion services.[410] I argued that the Bill was too broad in this respect and consequently would be likely to be held to be an unjustified infringement on the implied freedom of political communication, and accordingly made the recommendation to the drafters of the Bill to narrow the scope of the Bill, such that the relevant prohibited communications were limited to those able to be seen or heard by persons accessing premises that provided abortion services, in order to ensure constitutional validity.

The original Bill passed the Legislative Council but lapsed due to prorogation in the House of Assembly. However, a new Bill was introduced by Natalie Cook MP in the House of Assembly on 3 June 2020 which incorporated all of the above recommendations.[411] The second reading debates for this Bill occurred on 17 June 2020. In preparation for these debates, I drafted lengthy notes for Natalie Cook MP, with a focus on addressing issues that might be raised by opponents to the Bill. During the subsequent parliamentary debates, I was in live contact with Natalie Cook MP on WhatsApp, so that I could provide her with appropriate text answers to questions that were being asked of her during those debates.

Prior to a third reading of the Bill, in mid-July 2020 Barbara Baird and I attended a lengthy meeting with the Attorney-General Vickie Chapman MP, in order to persuade her to advocate for the Bill the next time it was before the House of Assembly; thereby establishing bipartisan support for the Bill. During this meeting I answered questions concerning the constitutional validity of the Bill and its purpose and purported effect. Furthermore, as members of the Attorney-General's party had expressed reservations concerning prohibiting silent prayer outside premises that provided abortion services, it was crucial that the Attorney-General was convinced not to support amendments to the Bill that would exclude silent prayer from the definition of prohibited behaviour because, as explained by the High Court, to allow silent prayer would be to largely defeat the objectives of safe access zone legislation, as such actions would have the effect of impeding patient and worker access to premises that provide abortion services.[412]

[410] See Health Care (Health Access Zones) Amendment Bill 2019 (SA) cl 3 that proposed to insert section 48B into the *Health Care Act 2008* (SA).
[411] See Health Care (Safe Access) Amendment Bill 2020 (SA). That is, the penalty for engaging in prohibited behaviour was reduced to $10,000 or 12 months imprisonment: see cl 4 that proposed to insert section 48D into the *Health Care Act 2008* (SA); and the prohibited communication was narrowed to 'communicate by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving protected premises and that is reasonably likely to cause distress or anxiety': at cl 4 that proposed to insert section 48B into the *Health Care Act 2008* (SA).
[412] See *Clubb v Edwards, Preston v Avery* (2019) 267 CLR 171, 206 (Kiefel CJ, Bell and Keane JJ).

I also held further meetings with parliamentary supporters of the Bill, namely Natalie Cook MP, Tammy Franks MLC, Connie Bonaros MLC, and Irene Pnevmatikos MLC, in mid July 2020, in order to assist in adequately preparing for the upcoming debates on the Bill. I also attended a joint online meeting with Natalie Cook MP, Tammy Franks MLC, Jayne Stinson MP and the Minister for Health and Wellbeing Stephen Wade MLC (and others) concerning the exemption for journalists under the Bill.[413] I argued that no such exception to prohibited behaviour should be granted because it was unnecessary and could present a legal loophole for anti-abortion protestors. That is, I explained in that meeting that authentic journalists acting in good faith and in the public interest would not be committing an offence in any case, but to expressly legislate for that exception might allow anti-abortion activists to adopt the mantle of 'journalists', and thereby the protection of the provision, as the Bill provided too wide a definition of 'journalist'. This argument was eventually accepted, and the Bill was amended by omitting the journalist exception to prohibited behaviour. During the second reading debates on 22 July 2020, I again assisted Natalie Cook MP with providing answers to questions asked of her via WhatsApp texts during said parliamentary debates.

In August 2020, I attended further meetings with Tammy Franks MLC, Natalie Cook MP and the Attorney-General Vickie Chapman MP, drafted letters to send to all parliamentarians explaining the benefits of the Bill, and provided radio interviews as required in support of the Bill. In early September 2020 I attended further meetings with Tammy Franks MLC, and drafted further letters in consultation with Natalie Cook MP for parliamentarians likely to be supporting the Bill. Such letters outlined what exact phrases to utilise in addressing potential questions raised by opponents to the Bill. The Bill was passed in the House of Assembly on 23 September 2020, and was passed in the Legislative Council on 11 November 2020, then assented to on 19 November 2020.

The *Health Care (Safe Access) Amendment Act 2020* (SA) made amendments to the *Health Care Act 2008* (SA) such that 'health access zones' were established around 'protected premises', defined as 'premises at which abortions are lawfully performed'.[414] The protected zone was

[413] See Health Care (Safe Access) Amendment Bill 2020 (SA) cl 4 that proposed to insert section 48D(2)(c) into the *Health Care Act 2008* (SA). This provision expressly excluded 'the recording of images, or the communication of information by a journalist reporting on a matter of public interest (whether related to the subject of abortions or otherwise) for publication in a news medium, or a cameraperson or other person genuinely assisting a journalist in such reporting' from the definition of prohibited behaviour.

[414] *Health Care Act 2008* (SA) s 48B. Note: further references will be made to the *Health Care Act 2008* (SA) rather than the *Health Care (Safe Access) Amendment Act 2020* (SA) as this amending legislation made amendments to the *Health Care Act 2008* (SA).

designated as 'any public area located within 150 metres of the protected premises'.[415] The 'prohibited behaviour' within that zone was listed as any of the following:

> (a) to threaten, intimidate or harass another person; or (b) to obstruct another person approaching, entering or leaving protected premises; or (c) to record (by any means whatsoever) images of a person approaching, entering or leaving protected premises; or (d) to communicate by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving protected premises and that is reasonably likely to cause distress or anxiety.[416]

The maximum penalty for engaging in any such conduct within a health access zone is '$10,000 or imprisonment for 12 months.'[417] In common with the Victorian legislation the South Australian legislation also included a statement as to the object of health access zones, which was 'to ensure the safety, wellbeing, privacy and dignity of people accessing abortion services, as well as health professionals and other people providing abortion services.'[418] Although the police are granted wide powers to direct persons to leave a health access zone,[419] no express search and seizure power is granted, unlike the Northern Territory, Tasmanian and Victorian legislation.[420] Nonetheless, the *Health Care (Safe Access) Amendment Act 2020* (SA) achieved its stated purpose and was consistent with the recommendations I made to the proponents and drafters of the legislation as outlined above, based on the analysis provided in the 2020 article in this thesis.[421] As explained in section 4 of this contextual statement, my involvement in the passing of this legislation, based on knowledge acquired in researching and writing the 2020 article in this thesis, constitutes productive research translation, as such research was clearly converted into a practical outcome for the benefit of society.

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[415] *Health Care Act 2008* (SA) s 48B.
[416] Ibid s 48B.
[417] Ibid s 48D. The publication or distribution of recordings 'of a person approaching, entering or leaving protected premises if the recording contains information that— (a) identifies, or is likely to lead to the identification of, the other person; and (b) identifies, or is likely to lead to the identification of, the other person as having accessed protected premises' carries a maximum penalty of $10,000: at s 48F.
[418] Ibid s 48C.
[419] See ibid ss 48E(1)-48E(2). If a person refuses or fails to comply with such a direction, or renters the health access zone within 24 hours after such a direction, that person commits an offence with the maximum penalty of a $10,000 fine: at ss 48E(4)-48E(5).
[420] See *Termination of Pregnancy Law Reform Act 2017* (NT) s 16(2); *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 9(5)-9(6); *Public Health and Wellbeing Act 2008* (Vic) ss 185F-185G.
[421] No further analysis of this legislation will be provided in this contextual statement as to do so would be repetitious given that the issues regarding safe access zone legislation have already been the subject of lengthy discussion and comparative analysis in Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2).

6.5. SAAAC: The 'Decriminalisation' Legislation

In September 2020, while the above mentioned safe access zone legislation was being finalised, the Attorney-General Vickie Chapman MP provided a draft of the Termination of Pregnancy Bill 2020 (SA) to SAAAC for comment. Each of the legal practitioner members of SAAAC were accordingly requested by SAAAC to provide a written analysis of the draft Bill. I assessed the draft Bill consistent with the methodology established in the 2011 article in this thesis and explained earlier in subsection 5.1 with respect to the analysis of the post 2011 legislation in other jurisdictions.

The Termination of Pregnancy Bill 2020 (SA) was purportedly drafted in response to the recommendations made for law reform in the SALRI report, which, as mentioned above in subsection 6.3, advocated for minimalist legislation that would remove abortion from the criminal law and thereby enable the provision of abortion services to be regulated by applicable health law without the need for abortion specific conditions.[422] The draft Bill failed in this respect, providing for both a residual offence of abortion for unqualified persons, and abortion specific conscientious objection provisions.[423] However, on a positive note the draft Bill did seek to repeal sections 81, 82, and 82A of the *Criminal Law Consolidation Act 1935* (SA) referred to above, and no further offences were created within that criminal law legislation.[424] Under the draft Bill abortions would be lawful if performed by a medical practitioner on a person not more than 22 weeks and 6 days pregnant.[425] After that period the draft Bill mirrored the Queensland legislation in only allowing abortions in cases where two medical practitioners considered the abortion appropriate in all the circumstances.[426] The draft Bill also allowed for other registered health practitioners (not being medical practitioners) to assist a medical practitioner in performing an abortion, and to supply and administer abortifacients provided the person being so treated was not more than 63 days pregnant.[427] If a registered health practitioner (including a medical practitioner) failed to meet the

[422] Although it should be noted that the SALRI report did recommend creating an offence for an unqualified person (defined as a non-health practitioner) to perform an abortion, which is self-evidently an abortion specific condition: see SALRI (n 53) 25-26, 158-159.
[423] See Termination of Pregnancy Bill 2020 (SA) [draft of 12/08/2020] cls 8, 10. It also provided for abortion specific liability issues, confidentiality, and data collection conditions: at cls 9, 14-15.
[424] See ibid sch 1, pt 2. Although a new offence of 'termination of pregnancy by unqualified person' was stipulated in the Bill itself: at cl 10.
[425] See ibid cl 5(1).
[426] See ibid cls 5(2), 6(1).
[427] See ibid cls 5(1)(b), 7.

conditions for a lawful abortion under the draft Bill, such a person was only susceptible to ordinary disciplinary proceedings, rather than being liable to be charged with a criminal offence.[428]

In providing written comment on this draft Bill in late September 2020, I suggested, consistently with previous statements made in this contextual statement, and with the recommendations made for law reform in the relevant articles in this thesis, that:

1. there should be no criteria for lawful abortion other than those reflective of standard health practice; namely, that the abortion be performed by a registered health practitioner upon the request of the pregnant woman. To do otherwise is to place the abortion care decision within the hands of the medical profession contrary to patient autonomy;
2. the above clinically based assessment should not change regardless of gestation;
3. although it might be medically appropriate in some circumstances, two medical practitioner opinions should not be mandated;
4. there should be no residual offence of abortion for unqualified persons; and
5. there should be no clinically unjustified abortion specific provisions, in particular, abortion specific conscientious objection clauses.

In other words, I indicated that the draft Bill contained inappropriate and unnecessary provisions, and that all that was required legislatively was the repeal of sections 81, 82, 82A, and 83 of the *Criminal Law Consolidation Act 1935* (SA). Upon such repeal a lawful abortion would be defined as an abortion performed by a registered health practitioner at the pregnant woman's request.[429]

I met with the Attorney-General Vickie Chapman MP in late September 2020 to explain and commend the above proposed amendments to the draft Bill. Unfortunately, the Attorney-General declined to make the suggested amendments to the Bill. SAAAC was then compelled to resolve to either support the Bill as it stood, or campaign for an improved Bill. Given the political climate (assessed through past dialogue and interactions with parliamentarians as detailed in this section) SAAAC decided to champion the Bill despite its flaws, and SAAAC entered full campaigning mode in early October 2020. My work in that respect involved: assisting in drafting an information pack and explanatory notes for parliamentarians explaining all aspects of the Bill; drafting answers to potential questions during the parliamentary debates for supporters of the Bill; fact checking explanatory documents and briefing notes; liaising with Reproductive Choice Australia, Public Health Association Australia, and the Human Rights Law Centre to present a combined front in support of the Bill; and consulting with members of parliament as required. Of particular focus

[428] See ibid cl 13.
[429] This is, essentially, abortion on demand: see QLRC (n 170) 58; VLRC (n 346) 93.

was drafting factsheets and notes with Judith Dwyer to counter the anti-choice argument that removing abortion from the criminal law would result in the practice becoming largely unregulated.[430]

The Termination of Pregnancy Bill 2020 (SA) was introduced in the Legislative Council by the Minister for Human Services Michelle Lensink MLC on 14 October 2020.[431] During the second reading debates on 12 November 2020, amendments were moved by Nicola Centofanti MLC that would have effectively rendered the Bill nugatory.[432] Fortunately, such amendments failed to gather sufficient support, but the event confirmed the need for SAAAC to continue vigorously defending the Bill. Other more positive amendments were also moved, such as extending the period for lawful abortion only involving one medical practitioner from 22 weeks and 6 days to 24 weeks gestation (moved by Irene Pnevmatikos MLC), and removing the qualification that a registered health practitioner (not being a medical practitioner) could only perform an abortion through administering abortifacients up until 63 days gestation (moved by Michelle Lensink MLC). The Pnevmatikos proposed amendment was defeated, but the Lensink proposed amendment was successful. The Bill as amended passed the Legislative Council on 3 December 2020 and was received in the House of Assembly on the same day.

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[430] It is beyond the scope of this contextual statement to provide a detailed analysis of how abortion care would be regulated by generally applicable health law, and national, state, and industry regulatory bodies, in addition to health practitioner standards and codes of ethics once abortion is no longer an offence. It will suffice to say that the health framework is more than adequately equipped to do so, given that there exist more than 20 South Australian and approximately 70 Commonwealth health statutes that would apply to abortion once the practice is decriminalised, and myriad health practitioner standards and disciplinary bodies that would serve to further regulate the practice of abortion: see SAAAC, *Factsheet 11: Regulation of abortion care* (n 381). See also SALRI, *A suitable legislative framework for termination of pregnancy in South Australia: Fact Sheet 4 – Current health regulation of terminations* (April 2019); Dwyer et al (n 4). For an in-depth discussion of health care regulation see Fiona McDonald, 'Regulation of Health Professionals and Health Workers' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 3rd ed, 2018) 647, 647-694.

[431] This Bill had some minor amendments to the draft Bill discussed above. For example, the definition of 'assist' was added: see Termination of Pregnancy Bill 2020 (SA) cl 3; it was made clear that in arriving at a determination that the abortion was appropriate 'in all the circumstances' after 22 weeks and 6 days gestation, the requisite medical practitioner(s) were required to consider 'all relevant medical circumstances' and 'the professional standards and guidelines that apply to the medical practitioner in relation to the performance of the termination': at cl 6(2); and a registered health practitioner with a conscientious objection was no longer obliged to transfer the patient's care to another registered health practitioner with no such objection, but could simply provide the patient 'with information on how to locate or contact such a registered health practitioner': at cl 8(1)(e)(ii); which would be satisfied by providing 'information in the prescribed form': at cl 8(2). Such changes echo these features of the Queensland and NSW legislation discussed above.

[432] That is, the suggested amendments would have meant that an abortion would only be lawful if necessary to save the life of the pregnant woman, or another foetus, or in the case of a significant risk of serious foetal abnormalities that would be incompatible with survival after birth. In other words, establishing a legal regime more oppressive to women than the previous criminal law regime which allowed for abortion when 'the continuance of the pregnancy would involve…greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated': see now repealed *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(i).

The Bill was subjected to extensive debates in the House of Assembly from 16-19 February 2021, with approximately thirty members of the House of Assembly speaking to the Bill.[433] A number of amendments adverse to women's rights were moved by members of both major parties and many such proposed amendments regrettably succeeded. The Bill that eventually passed the House of Assembly on 19 February 2021 was, from a feminist perspective, a vastly more defective Bill than that which earlier passed the Legislative Council. The Bill was returned to the Legislative Council with those amendments and the Legislative Council agreed to the amended Bill without any further amendments on 2 March 2021. The Termination of Pregnancy Bill 2020 (SA) had a title change to the Termination of Pregnancy Bill 2021 (SA) and was assented to on 11 March 2021, but the consequent *Termination of Pregnancy Act 2021* (SA) did not commence until 7 July 2022 as it was not until that date that the regulations commenced.[434]

As indicated immediately above, the *Termination of Pregnancy Act 2021* (SA) was a disappointment from a woman's rights perspective, and, in this author's opinion, constituted an appeasement to members of the South Australian Parliament (from across the political spectrum) possessing a regressive misogynistic ideology, such that the laudable original purpose of the legislation was fundamentally compromised. Presented with an opportunity to embark upon progressive abortion law reform, and become the leading jurisdiction in Australia with respect to recognising women's reproductive rights, the South Australian parliament instead chose to look backwards and the resulting legislation is arguably inferior to the comparable legislation in most other jurisdictions.

The *Termination of Pregnancy Act 2021* (SA) nonetheless has two significant positive aspects. First and foremost, the legislation largely removed abortion from the scope of the criminal law.[435] In

[433] See South Australia, *Parliamentary Debates*, House of Assembly, 16 February 2021, 4225-4233, 4257-4310 (various speakers); South Australia, *Parliamentary Debates*, House of Assembly, 17 February 2021, 4395-4460 (various speakers); South Australia, *Parliamentary Debates*, House of Assembly, 18 February 2021, 4511-4521, 4546-4633 (various speakers).

[434] See *Termination of Pregnancy Regulations 2022* (SA).

[435] See *Termination of Pregnancy Act 2021* (SA) sch 1, pt 2, which repealed sections 81, 82, and 82A of the *Criminal Law Consolidation Act 1935* (SA) and abolished any common law offence of abortion. It is also clear that 'a person who consents to, assists in or performs, or attempts to perform, a termination on themselves does not commit an offence': *Termination of Pregnancy Act 2021* (SA) s 16. However, the *Termination of Pregnancy Act 2021* (SA) did not repeal *Criminal Law Consolidation Act 1935* (SA) s 83, which creates the offence of concealment of birth as follows: 'Any person who, by any secret disposition of the dead body of a child, whether the child died before, at or after its birth, endeavours to conceal the birth of the child shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years': at s 83(1). This offence, as it potentially applies to a 'child' in utero, has possible implications for lawful abortion. The *Termination of Pregnancy Act 2021* (SA) sch 1, pt 3 also expanded the meaning of 'emotional or psychological harm' for the purposes of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) to include 'coercing a person to terminate a pregnancy' and 'coercing a person to not terminate a pregnancy': at ss 8(4)(od)-(oe).

South Australia the practice of abortion is now regulated through the *Termination of Pregnancy Act 2021* (SA), the *Termination of Pregnancy Regulations 2022* (SA), and applicable health law.[436] However, in common with all jurisdictions, it remains an offence for an 'unqualified person' to perform or assist in the performance of an abortion.[437] This offence arguably captures friends, family and/or carers of the pregnant woman as 'assist' in the performance of an abortion includes:

> (a) obtaining on behalf of, or supplying to, another person a drug or other substance for use in a termination; and (b) any other act that directly and materially aids in the performance of a termination.[438]

Thus, purchasing and/or delivering abortifacients on behalf of another, or simply being present (eg. as a disability carer or legal guardian) while an abortion is being performed, might well constitute this offence, and the maximum penalty for such assistance is 5 years imprisonment.[439] However, a prosecution for this offence can only be commenced with the 'Director of Public Prosecution's written consent',[440] which perhaps decreases the likelihood that friends, family and/or carers of the pregnant woman would be so charged as, given the current public attitudes to abortion in South Australia,[441] such a prosecution would be politically injudicious. Nonetheless, as explained previously, such an offence is not only problematic (for reasons already highlighted) but also unnecessary.[442]

Putting this issue aside, the second major positive feature of the legislation is that, provided the pregnant woman 'is not more than 22 weeks and 6 days pregnant' an abortion may be performed

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[436] For example, *Health Care Act 2008* (SA), *Health Practitioner Regulation National Law*, *Consent to Medical Treatment and Palliative Care Act 1995* (SA), and *Controlled Substances Act 1984* (SA), all of which are referenced in the *Termination of Pregnancy Act 2021* (SA).

[437] See *Termination of Pregnancy Act 2021* (SA) s 14. An 'unqualified person' is generally defined as 'a person who is not a registered health practitioner': at s 14(3). Similarly in common with all jurisdictions, the South Australian legislation also provides for the conscientious objection of a registered health practitioner: at s 11. In common with NSW, in South Australia the practitioner that so objects must inform the patient: at s 11(2); then either transfer the patient's care to another health practitioner that s/he reasonably believes has no such objection and can 'provide the service': at(s 11(3)(b)(i); or to a health service provider that s/he reasonably believes has no such objection and 'can provide the service': at s 11(3)(b)(ii); or simply provide the patient with information 'on how to locate or contact a medical practitioner who, in the first practitioner's reasonable belief, does not have a conscientious objection to the performance of the termination': at s 11(3)(a); and that obligation to provide information may be complied with by simply providing the patient with 'information approved by the Minister': at s 11(4). Consistent with other jurisdictions, conscientious objection is not available to a registered health practitioner in cases of 'emergency': at s 11(5).

[438] Ibid s 3.

[439] See ibid s 14(2). The maximum penalty for an unqualified person that performs an abortion is 7 years imprisonment: at s 14(1).

[440] Ibid s 15.

[441] See Cations, Ripper and Dwyer (n 99).

[442] That is, there is no unmet societal need for the offence for reasons already provided.

'by a medical practitioner acting in the ordinary course of the practitioner's profession'.[443] That is, no reasons need to be provided by the pregnant woman in requesting an abortion, and the decision is hers to make, as the medical practitioner does not need to be satisfied that legislatively mandated criteria are met.[444] In addition, the legislation makes it clear that 'any other registered health practitioner acting in the ordinary course of the practitioner's profession' may terminate a pregnancy by administering abortifacients, provided the registered health practitioner is authorised to prescribe such medication.[445]

However, prior to performing an abortion (whether performed by a medical practitioner or other registered health practitioner) 'all necessary information…about access to counselling, including publicly-funded counselling' must be provided to the person seeking an abortion.[446] This provision is similar to the requirement for the provision of information about counselling after 22 weeks gestation that exists in NSW referred to above.[447] As explained with respect to the NSW legislation, to mandate the provision of such information is condescending to the woman concerned, as it presumes that she has not already considered all such matters prior to deciding to terminate her pregnancy.[448] Nonetheless, in common with NSW, the South Australian legislation does not mandate counselling, only the provision of information about accessing counselling, so it remains the woman's prerogative whether to seek counselling, or indeed to even read the information provided.

Post 22 weeks and 6 days gestation an abortion is only available in South Australia if performed by a 'medical practitioner acting in the ordinary course of the practitioner's profession',[449] and that medical practitioner and a second medical practitioner who has been consulted, consider that, 'in all the circumstances':

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[443] *Termination of Pregnancy Act 2021* (SA) s 5(1)(a). It is submitted that 'acting in the ordinary course of the practitioner's profession' is a meaningless condition because it is fulfilled the moment the practitioner performs the termination, which includes '(a) administering or prescribing a drug or other substance; or (b) using a medical instrument or other thing': at s 3.

[444] This is not quite correct, as certain information on counselling must be provided: Ibid s 8; and an abortion must not be performed 'for the purposes of sex selection': at s 12(1). These issues will be discussed further below.

[445] Ibid s 5(1)(b). A 'registered health practitioner' is defined as any person (other than a student) registered under the *Health Practitioner Regulation National Law*: at s 3. It is also the case that, whether the abortion is performed by a medical practitioner or other registered health practitioner, another registered health practitioner (including a medical practitioner) 'acting in the ordinary course of the practitioner's profession' may assist in that termination of pregnancy: at s 10.

[446] *Termination of Pregnancy Act 2021* (SA) s 8(1). Such information need not be provided in cases of emergency: at s 8(2).

[447] See *Abortion Law Reform Act 2019* (NSW) s 7(2).

[448] See, eg, SALRI (n 53) 278-280.

[449] *Termination of Pregnancy Act 2021* (SA) s 5(2)(a).

> (i) the termination is necessary to save the life of the pregnant person or save another foetus; or (ii) the continuance of the pregnancy would involve significant risk of injury to the physical or mental health of the pregnant person; or (iii) there is a case, or significant risk, of serious foetal anomalies associated with the pregnancy.[450]

These conditions echo the repealed criminal law provisions discussed in subsection 6.1 above.[451] However, it should be noted that the above conditions are less severe than those of the repealed criminal law. First, the second medical practitioner referred to above only needs to be 'consulted', whereas the repealed law required both medical practitioners to have 'personally examined the woman' in arriving at their requisite opinions.[452] Second, the repealed law required the continuance of the pregnancy to constitute a 'greater risk' to the pregnant woman's health,[453] whilst the new law only requires that there be a 'significant risk' in that regard.[454] As mentioned previously, abortion is generally always safer than childbirth,[455] so the above conditions would probably be met in almost every case. Nonetheless, the burden of meeting these additional legal criteria after a certain gestation is not medically justified, and dilutes patient autonomy because the abortion decision is thereby no longer the woman's to make and the medical profession become the legal gatekeepers to abortion care.[456]

In addition, an abortion post 22 weeks and 6 days gestation must be 'performed at a prescribed hospital',[457] and the above medical practitioners must also hold the abortion to be 'medically appropriate' considering '(a) all relevant medical circumstances; and (b) the professional standards and guidelines that apply to the medical practitioner in relation to the performance of the termination'.[458] As mentioned above with respect to the equivalent NSW, Queensland, and Northern Territory provisions,[459] mandating the consideration of the above factors is superfluous

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[450] Ibid ss 6(1)(a)-(b). These conditions need not be met in an 'emergency': at s 6(3). This is the case in all jurisdictions: see, eg, *Termination of Pregnancy Law Reform Act 2017* (NT) s 10; *Termination of Pregnancy Act 2018* (Qld) s 6(3); *Abortion Law Reform Act 2019* (NSW) s 6(5).

[451] See now repealed *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a).

[452] Ibid s 82A(1)(a). Such opinions also needed to be certified: at s 82A(4)(a).

[453] See ibid s 82A(1)(a)(i).

[454] See *Termination of Pregnancy Act 2021* (SA) ss 6(1)(a)(ii), 6(1)(b)(ii). There are also slight differences in terms of the foetal abnormality ground: see *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii); *Termination of Pregnancy Act 2021* (SA) ss 6(1)(a)(iii), 6(1)(b)(iii); but such differences are not important as the foetal abnormality ground would be subsumed within the maternal health risk grounds for a lawful abortion.

[455] See above nn 100, 239-240.

[456] This is also arguably contrary to the principle of self-determination, as the medical profession should not be gatekeepers to the rights of women: see Forster and Jivan (n 320) 862-863.

[457] *Termination of Pregnancy Act 2021* (SA) s 6(1)(c). A 'prescribed hospital' is that prescribed by the regulations: see s 3; *Termination of Pregnancy Regulations 2022* (SA) reg 4 and sch 1.

[458] *Termination of Pregnancy Act 2021* (SA) s 6(2).

[459] See *Abortion Law Reform Act 2019* (NSW) s 6(3); *Termination of Pregnancy Act 2018* (Qld) s 6(2); *Termination of Pregnancy Law Reform Act 2017* (NT) s 7.

as applicable health law and standards would require medical practitioners to consider these issues in any case as part of appropriate clinical practice. However, the South Australian legislation goes beyond the above mentioned jurisdictions and imposes further compulsory assessments that medical practitioners must 'have regard to' when performing abortions post 22 weeks and 6 days gestation.[460] These matters that the medical practitioners must consider are excessive, cumbersome, and from a woman's reproductive rights perspective insulting, including (but not limited to): whether the survival of other foetuses would be impacted in cases involving a multiple pregnancy;[461] whether foetal abnormality might have been diagnosed prior to 22 weeks and 6 days gestation;[462] whether the foetus had been exposed to 'infective agents' that may have damaged the foetus;[463] whether specialist services might have been accessed prior to 22 weeks and 6 days gestation;[464] and whether the pregnant woman has a 'medical condition…incompatible with an ongoing pregnancy'.[465] Some of the matters listed above (and others not mentioned above, but listed in the legislation) may be medically relevant in some situations, and in those situations would have to be considered by a health practitioner acting in accordance with generally applicable health law and standards, but to mandate the consideration of all these issues is clinically unjustified and a clear statement by the South Australian Parliament that abortion post 22 weeks and 6 days gestation is unlike any other health care practice. Furthermore, the convoluted and numerous matters that must be considered by medical practitioners might serve to discourage medical practitioners from providing abortion services after 22 weeks and 6 days gestation.[466]

Even if this were the extent of the changes to abortion law resulting from the *Termination of Pregnancy Act 2021* (SA), it is only with some reluctance that one might conclude that the new legislation was an improvement on the previous criminal law. As mentioned above, it is significant that abortions performed prior to 22 weeks and 6 days gestation are now largely treated in a similar manner to other health care,[467] but the onerous conditions placed upon abortions after

[460] *Termination of Pregnancy Act 2021* (SA) s 9.
[461] See ibid s 9(a).
[462] See ibid s 9(b).
[463] Ibid s 9(b).
[464] See ibid s 9(c).
[465] Ibid s 9(g).
[466] It might be argued that this was the purpose of mandating such assessments, but there is no direct evidence of this in the relevant parliamentary debates. It should, however, be noted that there now seems to be no upper gestational limit to lawful abortion provided these conditions are met: see ibid sch 1, pt 2 which repealed *Criminal Law Consolidation Act 1935* (SA) ss 82A(7)-(8).
[467] That is, other than the mandated provision of counselling information referred to above: see *Termination of Pregnancy Act 2021* (SA) s 8(1).

that gestation are difficult to overlook.[468] Although all jurisdictions other than the ACT increase restrictions on abortions after a particular gestation, no other jurisdiction creates such burdensome provisions for medical practitioners to satisfy. However, this is not the breadth of the modifications initiated by the *Termination of Pregnancy Act 2021* (SA). In common with the NSW legislation, the South Australian legislation also specifically addresses 'born' foetuses,[469] and prohibits abortion on the basis of sex selection.[470]

With respect to 'a person being born' as a result of a termination of pregnancy,[471] the legislation stipulates that medical practitioners or other registered health practitioners may exercise 'any duty to provide the person with medical care and treatment',[472] and further that 'the duty owed by a registered health practitioner to provide medical care and treatment to a person born as a result of a termination is no different than the duty owed to provide medical care and treatment to a person born other than as a result of a termination'.[473] This is identical to the NSW legislation,[474] and for reasons already outlined earlier is a farcical and offensive proposition. Put simply, to say that the duty owed to an aborted (but briefly 'born') foetus is identical to the duty owed to a wanted newborn is to not only state the absurd, but it also implicitly defines the pregnant woman as nothing more than an incubator for the foetus.

The other problematic provision adapted from the NSW legislation is that concerning sex selection. In South Australia 'a registered health practitioner must not perform a termination of a pregnancy for the purposes of sex-selection',[475] unless 'the registered health practitioner is satisfied that there is a substantial risk that the person born after the pregnancy (but for the termination) would suffer a sex-linked medical condition that would result in serious disability to that person'.[476] This goes further than the NSW legislation, which 'opposes' rather than prohibits

[468] It should be noted that only approximately 2% of abortions are performed after 20 weeks gestation: see, eg, South Australian Abortion Reporting Committee (n 240) 8. However, this still accounts for approximately 100 abortions annually, and the fact that only a minority of women are affected does not detract from the disdain for women's reproductive rights that these conditions represent.
[469] See *Termination of Pregnancy Act 2021* (SA) s 7; *Abortion Law Reform Act 2019* (NSW) s 11.
[470] See *Termination of Pregnancy Act 2021* (SA) s 12; *Abortion Law Reform Act 2019* (NSW) s 16.
[471] *Termination of Pregnancy Act 2021* (SA) s 7(1).
[472] Ibid s 7(2).
[473] Ibid s 7(3).
[474] See *Abortion Law Reform Act 2019* (NSW) s 11(3).
[475] *Termination of Pregnancy Act 2021* (SA) s 12(1).
[476] Ibid s 12(2).

an abortion on the basis of sex selection.[477] Thus, the arguments made earlier in this section against the NSW sex selection provision apply to the South Australian legislation, if not more so.

There are other provisions in the *Termination of Pregnancy Act 2021* (SA) that further highlight the compromises that were required to pass the legislation, but these were relatively minor, or largely superfluous, so do not require analysis.[478] The above discussion amply highlights the now convoluted nature of providing abortion services in South Australia. As said previously, one is consequently reticent to conclude that the *Termination of Pregnancy Act 2021* (SA) was an improvement on the law that preceded it. Nonetheless, the fact that an abortion performed by a registered health practitioner is no longer within the scope of the criminal law is cause for celebration.[479] As declared over two decades ago, 'while abortion remains a subject for Australian criminal law, it can never be a right possessed by Australian women'.[480]

In addition, provided the woman is not more than 22 weeks and 6 days pregnant, the prescribed counselling information is supplied to her, and she does not proclaim that she wishes an abortion for reasons of sex selection, a registered health practitioner may perform an abortion at the woman's request. This is not quite abortion on demand, or a right to abortion, but it is close. That is, the pregnant woman need not provide any reasons for requesting an abortion, and other than the mandatory provision of counselling information and the prohibition of abortions for sex selection, the registered health practitioner does not need to be satisfied that particular obligatory criteria are met. However, as outlined immediately above, post 22 weeks and 6 days gestation obtaining an abortion becomes an arduous undertaking for all concerned, and medically

[477] *Abortion Law Reform Act 2019* (NSW) s 16(1). Although it should be noted that recent guidelines state that if the request for an abortion is motivated 'for the sole purpose of sex selection..[then]…the practitioner must not perform the termination, unless not performing the termination will cause significant risk to the woman's health or safety': HSP (n 275) 1.

[478] For example, it is expressly stated that registered health practitioners incur no criminal nor civil liability for acting (or omitting to act in the case of conscientious objection) in accordance with the Act: see *Termination of Pregnancy Act 2021* (SA) s 13. This is redundant as it is simply restating the general principle that if one acts according to the law then one is not legally liable for such actions. There are also confidentiality provisions prohibiting the disclosure of personal information that arguably reflect existing confidentiality requirements with respect to any medical service: at ss 18-19. Personally non-identifiable data collection and relevant reports are also mandated: at ss 20-21. See also *Termination of Pregnancy Regulations 2022* (SA) regs 5-6, sch 2. This last mentioned issue on data collection and reporting is not 'minor', as such data and reports are essential for maintaining standards and improving any health service, but it is secondary to the focus of this thesis.

[479] That is, abortion is no longer mentioned in the criminal law, and the *Termination of Pregnancy Act 2021* (SA) not only makes it clear that the pregnant woman commits no offence: at s 16; but also suggests that registered health practitioners that fail to perform, or assist in, an abortion in accordance with the Act (or otherwise contravene the Act) are only subject to standard professional disciplinary proceedings for that failure, rather than criminal charges: at s 17.

[480] Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 252.

unnecessary (and thereby medically unjustified) processes must be satisfied in order to perform a lawful abortion at this stage.[481]

To summarise, regardless of gestation abortion care is not treated in the same manner as other forms of health care in South Australia. From a feminist perspective, this is a lamentable situation as it means that the South Australian Parliament has failed to recognise a woman's right to abortion, and thereby failed (for reasons outlined previously in this contextual statement) to recognise women as full moral persons.

7. Conclusion: Impact and Significance

The articles in this thesis cover a timespan of almost two decades. The articles have sought, over this period, to make a forceful and sustained case for abortion law reform that would create a legal environment in which a woman's right to abortion was indisputable. Collectively, the paramount significant original contribution to knowledge provided by the articles in this thesis is to develop and advance a particular set of criteria for analysis and critique of the law conducive to recognising a woman's right to abortion, and, by establishing specific doctrinal parameters for law reform, expressly convey what further reform is required from that feminist perspective.

The articles in this thesis have been referenced in myriad scholarly publications, law reform commission reports, and parliamentary briefing papers. The articles have also been the basis for factsheets, parliamentary advice and consultations, and other timely contributions at crucial stages of the legislative process as evidenced in this contextual statement.[482] During this period the law has changed in all but one jurisdiction,[483] and the articles have paralleled and shaped this substantive change in the law, indicating both societal and political impact. Regrettably, all such law reform has ultimately fallen short of what the articles in this thesis submit is required.[484]

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[481] For example, the requirement for two medical practitioners to make the requisite labyrinthine assessment: see *Termination of Pregnancy Act 2021* (SA) ss 6, 9; or the insistence that abortions may only be lawfully performed in prescribed hospitals: at s 6(1)(c).

[482] Note: in the interests of avoiding unnecessary repetition, this conclusion will not seek to substantiate determinations that have already been adequately established in this contextual statement or in the articles in this thesis. However, some repetition of points made throughout this contextual statement is unavoidable, and indeed previously conceded in section 1 of this contextual statement.

[483] That is, the law in Western Australia has not significantly changed since 1998, prior to the publication of the first article in this thesis in 2001.

[484] That is, other than the safe access zone legislation in South Australia: see *Health Care (Safe Access) Amendment Act 2020* (SA).

In contemporary Australia the legal recognition of a woman's right to abortion remains elusive. No jurisdiction has yet engaged in the necessary law reform that would effectively secure such recognition. As explained throughout this contextual statement, and in many articles in this thesis, the reform required is that which would enable abortion care to be treated in the same manner as other forms of health care. Namely, the offence of abortion, and all related offences, must be abolished, and any existing abortion specific legislation needs to be repealed.[485] Once this is achieved the general health law framework (including health practitioner standards and guidelines) will be enlivened to regulate abortion care simply as health care.

As determined previously, only the ACT approaches this goal. Although most other jurisdictions have now legislated in a manner conducive to the exercise of women's reproductive rights up to a declared gestation period, such jurisdictions nonetheless abandon this prior respect for women's autonomy once that gestation limit is reached. In other words, as the further conditions placed upon the provision of lawful abortion services after a certain gestation are not justified from a clinical perspective, such jurisdictions implicitly recognise that the foetus has value, to the detriment of women's rights.[486]

Thus, the arguments presented in the articles in this thesis remain relevant. Even in the articles that offered critiques of now repealed legislation, the essential purpose of those articles, in proposing particular, and as yet unrealised, law reform, continue to be pertinent. As mentioned above, this is the primary original contribution to knowledge of the law focused articles in this thesis: to advocate for and clearly articulate parameters for defined abortion law reform, expressed as unambiguous legislative objectives, that would ensure a woman's right to abortion.[487] In addition, each article in this thesis constitutes an original contribution to knowledge

[485] Other than legislation creating safe access zones around premises that provide abortion services.
[486] As discussed in section 1 of this contextual statement. Moving beyond a theory of rights, to a practical response, it is also arguable that these restrictive abortion laws (defined throughout this contextual statement and the articles in this thesis as any laws that prevent women from exercising a right to abortion), which all jurisdictions possess, are inconsistent with Australia's international human rights obligations. As Snelling asserts: '[t]he United Nations construes access to safe and legal abortion as a fundamental human right': Snelling (n 40) 217. For a discussion of the various human rights instruments that should compel full decriminalisation of abortion: see Belton, Gerry and Stulz (n 216) 27-32, 31-34; Rebecca J Cook, 'International Human Rights and Women's Reproductive Health' (1993) 24(2) *Studies in Family Planning* 73; Forster and Jivan (n 320) 854-855; Sifris and Belton (n 217). Sifris and Belton also contend that '[g]iven that abortion is an aspect of health care required only by women…[then the]…differential treatment that the law accords to abortion as against other forms of medical treatment…constitutes a form of discrimination against women': at 212. See also Forster and Jivan (n 320) 855; Belton, Gerry and Stulz (n 216) 42-44.
[487] That is, according to doctrinal law and leaving aside whether consequent provision is adequate.

in and of itself, and the remainder of this section will briefly highlight such contributions in the order that the articles appear in the thesis.[488]

At the time Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229 was published there had been scant recent scholarship on Australian abortion law, especially with respect to a comprehensive analysis of the law in every jurisdiction, so the article filled a considerable deficiency in scholarship in that regard. The significance of this contribution to knowledge is reflected in the numerous citations this work has received.[489] In addition, unlike previous publications on Australian abortion law, that tended to critique the law without a clear reform agenda,[490] this article not only comprehensively canvassed and critiqued the law from a feminist perspective, in terms of whether the law recognised a woman's right to abortion, but also provided a defined law reform proposal; namely, 'the removal of abortion from the realm of criminal law.'[491]

The methodology of examining the law from a feminist perspective, and the expression of the above specific reform agenda continued with the article Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29(2) *Monash University Law Review* 316. This was also the first refereed law journal article to analyse the Tasmanian reforms of 2001 and the ACT reforms of 2002,[492] so self-evidently constitutes an original contribution to knowledge. In concluding that analysis, the article vilified the Tasmanian reforms for failing to decriminalise abortion and for refusing to recognise a woman's right to abortion,[493] and lauded the ACT reforms for almost achieving complete decriminalisation, and thus approaching the recognition of a woman's right to abortion.[494] Maintaining a focus on a

[488] This discussion will be succinct because the points made have previously been canvassed in this contextual statement in the relevant sections addressing each article.
[489] See above section 2.
[490] For example, although Cica, in her impressive and detailed study of Australian abortion law, rightly concluded that the law was 'inconsistent, uncertain and unenforced': Cica (n 51) 66; did not reflect 'current social attitudes': at 67; and should 'be the subject of legislative reform, to reflect and clarify contemporary attitudes towards abortion': at 38; no specific suggestions for that reform were made. It should be noted that Duxbury and Ward advocated for the decriminalisation of abortion one year prior to this author's article, but such reform was suggested more as a means to meet international human rights obligations than to specifically recognise a woman's right to abortion: see Duxbury and Ward (n 51).
[491] Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (n 4) 252.
[492] See *Criminal Code Amendment Act (No 2) 2001* (Tas); *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT).
[493] See Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (n 65) 326.
[494] See ibid 334-335.

specific feminist reform agenda, and consistent with comments made throughout this contextual statement, the article contended that the ACT legislation should be the preferred legislative template for other jurisdictions to follow.[495]

The article Mark J Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (2018) 44(1) *Monash University Law Review* 32 applied the above perspective to solely one jurisdiction. The further original contribution to knowledge of this article was in exploring beyond the conventional approach to a discussion of NSW abortion law at the time, which tended to only focus on the relevant cases,[496] and providing a detailed examination of the archaic legal basis of those cases; namely, the common law doctrine of necessity.[497] As this was the first refereed law journal article to attempt such an analysis of Australian law,[498] the original contribution to knowledge is obvious. In addition, the article made the consistent reform proposal of abolishing the offence of abortion and thereby 'regulate the service in the same manner as any other medical procedure'.[499]

The critique of current law, and the expression of a specific legislative reform recommendation, based upon recognising a woman's right to abortion, was most evident in Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1. This article was the most politically transparent of all the articles in this thesis in this regard. In systematically considering the law in each jurisdiction from the perspective of how far that jurisdiction was from recognising a woman's right to abortion, the article provided a clear legislative reform agenda for each jurisdiction, and thus produced a 'report card' for each jurisdiction on that basis.[500] This feature of the article is not only a novel contribution to knowledge in and of itself, but is a further original contribution to knowledge in the sense that it offers a practical reference tool for those campaigning for abortion law reform in the interests of women's reproductive rights.[501] This was also the first article (chronologically) in this thesis that unambiguously determined that 'the full

[495] See ibid 335.
[496] That is, the cases of *R v Davidson* [1969] VR 667; *R v Wald* (1971) 3 DCR NSW 25; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47. This article did also provide an analysis of some of those cases: see Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 35-40.
[497] See Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 40-66.
[498] Given that the common law principle of necessity is no longer relevant to NSW abortion law, as a result of the *Abortion Law Reform Act 2019* (NSW), it is also likely to be the last such article.
[499] Rankin, 'Abortion Law in New South Wales: The Problem with Necessity' (n 42) 70.
[500] See Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 10-11, 16-18, 21, 25-26, 30-31, 34-35, 38-39, 45-46.
[501] This article was extensively utilised in this regard during the law reform process described in section 6 of this contextual statement.

recognition of a woman's right to abortion necessitates that the practice be regulated in an identical fashion to any other medical procedure.'[502]

The article Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (2007) 10(2) *Flinders Journal of Law Reform* 271 takes a markedly different approach. This article did not discuss law reform per se,[503] but rather addressed the primary counter argument to the law reform advocated in the articles referred to immediately above. The ostensible purpose of the article was to meaningfully engage with the theological conservative view on foetal personhood by accepting the fundamental principles of that view and then assessing whether that perspective was internally consistent. Such an in depth analysis of Catholic theology was a novel approach in the Australian context,[504] and the article thus satisfied an unmet political need; namely, to convince the hypothetical supporter of foetal rights on the basis of such theological considerations that such a position was dubious even according to the basic principles inherent in that position. This was the original contribution to knowledge, and real objective, of this article: to provide such political impact in the Australian abortion law reform environment by refuting foetal personhood, without disputing the religious beliefs that supposedly supported that view.[505]

A similar approach was adopted in the article Mark Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (2013) 31(2) *Monash Bioethics Review* 37. The innovative methodology implemented in this article was to critique a major criticism of the conservative view on foetal personhood,[506] rather than directly confront that conservative position. In this manner, the hope was to engage with holders of that conservative perspective, as the basic precepts of that view were accepted in the article. The article constituted an original contribution to knowledge in terms of being the only Australian publication that provided a detailed analysis of relevant aspects of both biology and moral philosophy with respect to the issue of foetal personhood.[507] In addition, in common with the 2007 article referred to immediately above, the other original contribution of this article was in terms of political impact, as the article concluded

[502] Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (n 2) 48.
[503] Although the law is referenced briefly: see Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3) 271-272.
[504] In other jurisdictions there have been some detailed examinations of the Catholic Church's stance on foetal personhood and abortion: see, eg, Daniel A Dombrowski and Robert Deltete, *A Brief, Liberal, Catholic Defense of Abortion* (University of Illinois Press, 2000).
[505] The article was not disingenuous in this respect as this purpose was clearly stated both at the beginning and end of the article: see Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility' (n 3) 273-274, 285.
[506] That is, the twinning argument against the conservative view on foetal personhood, whether founded upon theological or secular grounds.
[507] That is, the few Australian publications on point tend to provide one or the other, but not both.

that although there was no way to irrefutably disprove the conservative view on foetal personhood,[508] that view was nonetheless shown to be inherently questionable,[509] which has obvious political utility in the abortion debate.

The article Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35(1) *Sydney Law Review* 1 returns to a more conventional legal analysis. Although the issue of child destruction, and its application to the lawfulness of abortion, had been raised in Australia previously, this was the first Australian publication to deal with the issue in detail.[510] The original contribution to knowledge of this article thus consisted of addressing this lacuna in scholarship, in addition to continuing the theme of presenting specific law reform recommendations. In particular, the article concluded that the offence of child destruction might function to place an implicit upper gestational limit on lawful abortion, such that any legislative attempt at complete decriminalisation of abortion would be doomed to fail if any existing offence of child destruction was not simultaneously abolished.[511]

This focus on appropriate legislative reform is most evident in the final and most recent article in this thesis, Mark J Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (2020) 39(2) *University of Tasmania Law Review* 61. The purpose of this article was entirely practical. It was intended to be utilised in campaigning for legislation to establish safe access zones around premises that provided abortion services in both South Australia and Western Australia. The article offered a critique of safe access zone legislation already existing in other Australian jurisdictions,[512] in order to arrive at an ideal legislative template for South Australia and Western Australia to adopt.[513] However, this was not the major original contribution of the article.[514] The primary significance of the article was its research translation impact. As detailed in subsection 6.4 of this contextual statement, the research undertaken in drafting the article, and the knowledge gained as a consequence, was

[508] Indeed, the article concludes that the twinning argument against the conservative position on foetal personhood is not fatal to that position: see Rankin, 'Can One Be Two? A Synopsis of the Twinning and Personhood Debate' (n 2) 57.
[509] See ibid 59.
[510] The offence of child destruction had received some scholarly attention previously in Australian publications: see, eg, Louis Waller, 'Any Reasonable Creature in Being' (1987) 13(1) *Monash University Law Review* 37, 41, 51; Savell (n 168) 647-650; Cica (n 51) 43, 52, 63; but these instances were secondary to a primary focus in those publications. In the UK there had been more extensive scholarship on the issue: see, eg, I J Keown, 'The scope of the offence of child destruction' (1988) 104(1) *Law Quarterly Review* 120.
[511] See, Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (n 1) 23-26.
[512] See Rankin, 'Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia' (n 2) 69-79.
[513] See ibid 79-81.
[514] Indeed, similar examinations had occurred previously: see, eg, Sifris and Penovic (n 398).

instrumental in enacting safe access zone legislation in South Australia that broadly reflected the legislative template recommended in the article.[515] This has always been the underlying purpose of all the articles in this thesis that analyse doctrinal law – namely, to advocate for specific law reform – but it was this 2020 article in which that objective was most clearly realised.

As mentioned throughout this contextual statement, the original contribution to knowledge of the articles in this thesis (other than the two articles on certain facets of theology and moral philosophy), is to make the sustained legal argument (or, in the case of the two non-legalistic articles, contribute to that argument by addressing the major counter argument) that abortion should be completely decriminalised and treated by the law in the same manner as other forms of health care; thereby recognising a woman's right to abortion. As highlighted earlier in this conclusion, this objective is yet to be achieved in any jurisdiction. The articles in this thesis thus continue to have import in providing an explicit law reform agenda for future legislative ventures on abortion law by Australian parliaments.

[515] See *Health Care (Safe Access) Amendment Act 2020* (SA).

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PRIOR PUBLISHED WORK

The following eight publications are sole authored original work of the candidate, and are presented in the order that each is discussed in the Contextual Statement above:

Mark J Rankin, ‘Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman’s Right to Abortion’ (2001) 27(2) *Monash University Law Review* 229

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Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion

MARK J RANKIN*

This article provides an up-to-date statement of the law with regard to abortion in Australia. The law in each jurisdiction is canvassed and discussed, with particular emphasis upon the most recent developments in the law.

In doing so, two aspects of Australian abortion law are highlighted: first, that abortion is a criminal offence; and second, that therefore Australian law denies women a right to abortion. The article dispels the myth that there exists 'abortion-on-demand' in Australia, and argues that any 'rights' that exist with respect to the practice of abortion are possessed and exercised by the medical profession, and not by pregnant women.

INTRODUCTION

Abortion is a subject which elicits diverse responses. The myriad legal, political, social, religious, economic, and moral issues that abortion raises are well known to all those who seriously contemplate the subject. This article will, however, concentrate on the legal regulation of abortion. It aims to provide a comprehensive and up-to-date statement of the law with regard to abortion in every jurisdiction in Australia.

In doing so, the article will highlight two aspects, or consequences, of the law with regard to abortion: first, that abortion is a criminal offence; and second, that therefore Australian law denies women a right to abortion.

The fact that abortions in Australia are widespread and Medicare funded[1] suggests that there exists a substantial gap between abortion practice and the letter of the law.[2] This is clearly an issue of concern, but it will not be dealt with in this work. Except insofar as emphasizing the actual or potential practical effect of certain aspects of the law, this article will not examine abortion practice in detail.[3]

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I would like to thank Associate Professor Margaret Davies and Associate Professor Kathy Mack, both of Flinders School of Law, for their comments on earlier drafts of this article.

1 See National Health and Medical Research Council, *An Information Paper on Termination of Pregnancy in Australia* (1996) 3-5; and Karen Coleman, 'The Politics of Abortion in Australia: Freedom, Church, and State' (1988) 29 *Feminist Review* 75, 87.

2 See Alison Duxbury and Christopher Ward, 'The International Law Implications of Australian Abortion Law', (2000) 23 *University of New South Wales Law Journal* 1, 7; Teresa Libesman and Vani Sripathy (eds), *Your Body Your Baby: Women's Legal Rights from Conception to Birth* (1996) 37; Natasha Cica, 'The Inadequacies of Australian Abortion Law' (1991) 5 *Australian Journal of Family Law* 37, 47-49; and Tony McMichael (ed), *Abortion: The Unenforceable Law-The Reality of Unwanted Pregnancy and Abortion in Australia* (1972).

3 For discussions on the practice of abortion see National Health and Medical Research Council, above n 1, 3-22; Lyndall Ryan, Margie Ripper, and Barbara Buttfield, *We Women Decide: Women's Experience of Seeking Abortion in Queensland, South Australia and Tasmania 1985-1992*, (1994) 15-28; and Kerry Petersen, *Abortion Regimes* (1993).

The focus of this article is upon the law, and the legal framework within which abortions are performed in Australia. The relevant legislation is the obvious point from which to commence this examination of Australian abortion law.

THE LEGISLATION: A BRIEF SYNOPSIS

In Australia the legislation relating to abortion is contained in each jurisdiction's criminal statutes,[4] and such legislation is based (to varying degrees) on sections 58 and 59 of the United Kingdom's *Offences Against the Person Act of 1861*.[5] Section 58 of the 1861 Act reads as follows:

> Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall *unlawfully* administer to herself any Poison or other noxious Thing, or shall *unlawfully* use any Instrument or other Means whatsoever with the like Intent and whosoever, with Intent to procure the Miscarriage of any Woman whether she be or be not with Child, shall *unlawfully* administer to her or cause to be taken by her any Poison or other noxious Thing, or shall *unlawfully* use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony...and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or for any Term not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.[6]

All Australian jurisdictions have statutory provisions on abortion that are modelled on this 140 year old English legislation. In New South Wales, the Australian Capital Territory and Victoria, the relevant legislation is practically identical (there are only differences as to the penalty imposed for the offence) to sections 58 and 59 of the 1861 Act.[7]

Queensland and Tasmania also possess statutory provisions almost identical to sections 58 and 59 of the 1861 Act.[8] However, the legislation in these jurisdictions departs slightly from the original UK Act, by separately providing for a statutory defence in cases of medical emergency.[9] This does not significantly alter the law in these States from that in Victoria and New South Wales, as such provisions have been held to effectively adopt judicial pronouncements made in Victoria and New South Wales as to what constitutes a lawful abortion.[10] It may therefore be said that the criminal law legislation dealing with abortion in the jurisdictions of Queensland, Tasmania,[11] Victoria, New South Wales, and the

4 In WA and the ACT there also exist provisions on abortion outside the criminal statutes, but the fundamental law with regard to abortion is still found in the criminal statutes in both jurisdictions.

5 24 & 25 Vict, c 100, ss 58 & 59.

6 Emphasis added. Note: Section 59 of the Act deals with the supplying of abortifacients.

7 See *Crimes Act 1958* (Vic), ss 65 & 66; *Crimes Act 1900* (NSW), ss 82-84; and *Crimes Act 1900* (ACT), ss 42-44. Note: the ACT enacted legislation in 1998 that, although not directly amending the criminal law legislation, does effect the practice of abortion in that jurisdiction.

8 *See Criminal Code Act 1899* (Qld), ss 224-226; and *Criminal Code Act 1924* (Tas), ss 134-135.

9 *See Criminal Code Act 1899* (Qld) s 282; and *Criminal Code Act 1924* (Tas) ss 51(1) and 165(2).

10 See *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8.

11 It must be noted that the legal situation in Tasmania is still somewhat of a mystery as there have been no decided cases on the relevant legislation. One assumes, given the similarity between the Queensland and Tasmanian legislation, that a Tasmanian court would follow the lead of Queensland courts in this regard, although this is by no means certain.

ACT,[12] is effectively very similar, if not practically identical.

South Australia, the Northern Territory, and Western Australia, also have provisions derived from sections 58 and 59 of the 1861 Act,[13] but have enacted amendments that may be described as major departures from the 1861 source. Legislation in these jurisdictions, which I call for convenience 'reform' jurisdictions, expressly states under what conditions an abortion may be considered lawful.[14] The law in these 'reform' jurisdictions will be discussed separately later in the article.

Women throughout Australia have relatively easy access to legal abortion services.[15] Putting aside for the time being the 'reform' jurisdictions (which have legislated to this effect), this state of affairs may seem somewhat astonishing as the relevant statutory provisions in the other jurisdictions appear extremely restrictive. Indeed, a literal reading of such provisions would lead one to conclude that there exists a total prohibition of abortion in such jurisdictions.[16]

The reason that prohibition does not exist in practice is largely due to judicial initiatives of the 20th century.[17] Specifically, the term 'unlawfully', present in the parent Act of 1861, and transplanted to all Australian statutory provisions on abortion, has been interpreted to imply that the law recognises that there may be lawful abortions. It will, however, be shown that this liberalisation, or de-criminalisation, of the law has not conferred any rights upon women with regard to abortion, but has simply resulted in the medicalisation of abortion.

Since the interpretation of the word 'unlawfully' is the basis of our present situation, the development of the law in this regard is the predominant focus of this part of the article.

THE MEANING OF 'UNLAWFULLY' - THE BASIS OF THE JUDICIAL INITIATIVES OF THE 20TH CENTURY

There were three other legislative attempts at defining the crime of abortion in the UK prior to the Act of 1861 (in 1803,[18] 1828,[19] and 1837[20]). All such legislation contained the word 'unlawfully', either by itself or in conjunction with other similar words. For example, the first attempt at placing abortion on a statutory

12 The ACT, like Tasmania, is also a jurisdiction in which the law with regard to abortion is uncertain. In the ACT this uncertainty is attributable to not only a lack of definitive judgments on the criminal law legislation, but also to the fact that new legislation was enacted in 1998 that, although professing to have no effect on the substantive criminal law, does change the practice of abortion in that jurisdiction. The effect of the 1998 legislation will be discussed at length later in the article.

13 See *Criminal Law Consolidation Act 1935* (SA) ss 81-82; *Criminal Code Act 1983* (NT), ss 172-173; and *Criminal Code Act 1913* (WA) s 199.

14 See *Criminal Law Consolidation Act 1935* (SA) s 82A; *Criminal Code Act 1983* (NT) s 174; and *Criminal Code Act 1913* (WA) s 199, as amended by *Acts Amendment (Abortion) Act 1998* (WA).

15 See, for example, National Health and Medical Research Council, above n 1; and Coleman, above n 1, 76, 80 & 96.

16 See s 58 of the 1861 Act quoted in the text above n 6. As already explained, this UK legislation is representative of the legislation in all non-'reform' jurisdictions in Australia.

17 I say 'largely' because the general political unwillingness to deal with the issue, which finds expression in the current executive policy of non-prosecution, certainly contributes to the accessibility of abortion services. See Coleman, above n 1; and Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 847.

18 See *Lord Ellenborough's Maiming and Wounding Act 1803* (UK) 43 Geo 3, c 58, ss 1&2.

19 See *Lord Lansdowne's Act 1828* (UK) 9 Geo 4, c 31, ss 8 & 13.

20 See the *Offences Against the Person Act 1837* (UK) 7 Wm 4 & 1 Vict, c 85, s 6.

basis, *Lord Ellenborough's Act of 1803*, contained the words 'willfully, maliciously, and unlawfully'. However, in the 19th century no cases were heard as to the meaning of such words, nor did Parliament attempt to explain them further. This inherent uncertainty was commented upon by the Criminal Law Commissioners in their Reports of 1846.[21] The Commissioners suggested that to clarify the law a proviso should be enacted that abortions performed in good faith with the intention of saving the life of the mother should be considered lawful.

This recommendation was ignored by Parliament and the 1861 Act was passed without any such proviso. This omission by the drafters of the 1861 Act was to prove to be highly significant. The inclusion of the word 'unlawfully' without any guidance as to its meaning has allowed the judiciary a free reign in which to interpret this most important aspect of abortion law.

The meaning to be given to the word 'unlawfully' became the crucial issue of abortion law for 20th century courts, as the interpretation of 'unlawfully' is central to the application of abortion law in practice. The decisions of such courts form the basis of contemporary abortion law in most jurisdictions in Australia. There are four major Australian cases in this regard: *R v Davidson*,[22] *R v Wald*,[23] *R v Bayliss and Cullen*,[24] and *CES v Superclinics (Australia) Pty Ltd ('Superclinics')*.[25] As the predominant focus of this article is to provide a statement of current law, the main emphasis will be on more recent cases.[26]

THE MEANING OF 'UNLAWFULLY' IN AUSTRALIA - THE CASES OF DAVIDSON, WALD, BAYLISS & CULLEN, AND SUPERCLINICS

A. R v DAVIDSON

The first major Australian case that dealt with the meaning of 'unlawfully' was the Victorian case of *R v Davidson*.[27] The case concerned a medical practitioner, Charles Kenneth Davidson, who was charged with four counts of unlawfully using an instrument to procure a miscarriage under section 65 of the *Crimes Act 1958* (Vic).[28] The case dealt exclusively with the meaning of 'unlawfully' under section 65,[29] and was heard by Justice Menhennitt of the Victorian Supreme Court.

Justice Menhennitt felt that the use of the word 'unlawfully' in section 65

21 See Law Commissioners, United Kingdom, *British Parliamentary Papers: Law Commissioners Reports* [1846], 24.42, Art 16.

22 [1969] VR 667.

23 [1971] 3 DCR (NSW) 25.

24 (1986) 9 Qld Lawyer Reps 8.

25 (1995) 38 NSWLR 47.

26 It might be argued that this discussion of abortion law should also include an analysis of the UK decision of *R v Bourne* [1939] 1 KB 687. However, the focus of this article is contemporary Australian law, and in the early 21st century it is safe to say that the decision in *R v Davidson* has now surpassed *R v Bourne* as the basis for Australian abortion law.

27 [1969] VR 667.

28 He was also charged with one count of conspiring unlawfully to procure the miscarriage of a woman.

29 This was evident from Justice Menhennitt's opening statement that: 'The particular matter as to which I have heard submissions and on which I make this ruling is as to the element of unlawfulness in the charges', 667.

implied that some abortions may be lawful,[30] and sought to ascertain the circumstances in which that would be the case. He decided that the common law defence of necessity was the appropriate principle to apply in this regard, and relied on Sir James Fitzjames Stephen's definition of the doctrine.[31]

The court declared that the defence of necessity contained the two elements of necessity and proportion, which were to be determined by subjective tests upon reasonable grounds.[32] On this basis, Justice Menhennitt, in his final direction to the jury, provided the following declaration as to what constitutes a lawful abortion:

> For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.[33]

On this direction the defendant was found not guilty on all counts.

R v Davidson had a dramatic impact on the practice of abortion, initially in Victoria and ultimately throughout Australia. The above direction clearly and concisely declared that the law allows an abortion to be performed lawfully not only where there is a danger to the woman's life, but also where there is a danger to the woman's physical or mental health.[34]

However, Justice Menhennitt may be criticised for failing to clarify the meaning of the crucial phrase - 'serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth)'.[35] The use of such general words creates ambiguity and therefore uncertainty. In addition, it is unclear what is meant by the proviso, 'not merely being the normal dangers of pregnancy and childbirth'. There seems to be no legal basis for its existence, and it is probably best left unsaid as it appears largely superfluous.[36] Overall, the judgment is of little help in formulating specific criteria for deciding when it is lawful to terminate a pregnancy.

In coming to his liberal interpretation of the law, Justice Menhennitt was not intending to confer any rights upon women with regard to abortion. Indeed, Justice Menhennitt suggested that the necessity defence was only available to medical practitioners.[37] At no stage was it considered relevant whether the woman

30 [1969] VR 667, 668.

31 [1969] VR 667, 670. Stephen defined the principle of necessity as follows: 'An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. The extent of this principle is unascertained', James Fitzjames Stephen, A *Digest of the Criminal Law*, (1st ed, 1894), ch 3, art 43.

32 [1969] VR 667, 671-672.

33 [1969] VR 667, 672.

34 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 200.

35 [1969] VR 667, 672.

36 *R v Woolnough* [1977] 2 NZLR 508, in which Richmond P stated that such words were 'at best redundant' (519).

37 [1969] VR 667, 672.

herself believed her health to be threatened. The only relevant consideration was whether the medical practitioner reasonably believed that the woman's health was threatened by the continuance of her pregnancy. On the basis of such determinations it may be argued that, had a patient of Davidson's been charged, that woman would have had no defence available to her.

B. R v WALD

This lack of recognition of the woman involved can also be read from the next major Australian abortion case, that of *R v Wald*.[38] In this case the accused operated an abortion clinic in New South Wales and were charged under section 83 of the *Crimes Act 1900* (NSW).[39] The case was presided over by Judge Levine of the New South Wales District Court.

Like Justice Menhennitt before him, Judge Levine felt that the word 'unlawfully' contained in section 83 envisaged that not every abortion constitutes an offence. As to the test to apply in order to determine whether or not a particular abortion was lawful, his Honour followed and adopted the test enunciated in *R v Davidson* two years earlier.[40] If there had been any doubt previously with regard to the medical monopolisation of the necessity defence as it applies to abortion,[41] Judge Levine removed it, stating that the defence was only available to the medical profession.[42]

Judge Levine also made his own contribution to the development of the law by indicating what may constitute a 'serious danger' to the woman's physical or mental health:

> In my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health. It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy, if uninterrupted. In either case such a

38 [1971] 3 DCR (NSW) 25. Note: Prior to this decision *R v Davidson* was followed by Judge Southwell in an unreported case concerning a Dr Heath - see Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, 44.

39 Not only were the surgeons charged, but the orderlies, the owners of the premises on which the abortions were carried out, and even those individuals who referred women to the clinic. Thus, many of the accused could not be charged with the offence of committing abortion so were charged with conspiracy (aiding and abetting) to commit abortion - Judge Levine dealt with the issue of conspiracy at [1971] 3 DCR (NSW) 25, 29-32.

40 [1971] 3 DCR (NSW) 25, 29.

41 I submit that there was no such doubt since the *R v Bourne* decision in 1939, in which Justice Macnaghten made it clear that only medical practitioners could lawfully perform abortions [1939] 1 KB 687, 691-692. This aspect of the *R v Bourne* decision was followed by subsequent courts in the UK and Australia - see, for example, *R v Bergmann & Ferguson* [1948] 1 *British Medical Journal* 1008; *R v Newton & Stungo* [1958] *Criminal Law Review* 469; *R v Trim* [1943] VLR 109, 117; *R v Carlos* [1946] VLR 15, 19; and *R v Salika* [1973] VR 272. Cf the New Zealand decision of *The King v Anderson* [1951] NZLR 439. In this case Justice Adams of the New Zealand Supreme Court held that the requirement of the Crown to prove an abortion to be unlawful was 'universal', and that therefore a non-medical practitioner could, at least theoretically, perform a lawful abortion, 443.

42 [1971] 3 DCR (NSW) 25, 29.

conscientious belief on reasonable grounds would have to be negatived before an offence under s 83 of the Act could be proved.[43]

Judge Levine thus extended the *R v Davidson* test so that a medical practitioner could take into account non-medical considerations in determining whether or not there existed a serious danger to the woman's health. In addition, the time-frame for the requisite 'serious danger' to arise is expanded beyond the present to include the reasonably foreseeable environment of the pregnant woman. In other words, the phrase 'serious danger to health' was considerably broadened.

This interpretation significantly contributed to the current situation of relatively easy access to abortion services,[44] and must be applauded for this consequence. However, it must also be emphasised that this liberalisation of the law did not confer any rights upon women with regard to abortion.

Indeed, Judge Levine was quite clear on this point, as he was expressly asked by counsel to interpret the law in such a way as to create a situation of abortion-on-demand,[45] but declined to accept this submission and categorically stated that a woman's desire to terminate her pregnancy is no justification for doing so.[46]

Until recently a discussion of *R v Davidson* and *R v Wald* would complete a discussion of abortion law for the States of Victoria and New South Wales, as the decisions were followed by higher courts without much comment.[47] However, the situation in New South Wales has undergone recent minor change as a consequence of the *Superclinics* decision handed down by the NSW Court of Appeal in 1995. As the only appellate court judgment with regard to abortion law in Australia it warrants detailed discussion.

Before moving on to this recent judicial development in New South Wales, it is chronologically convenient to first discuss the other major Australian abortion case, that of *R v Bayliss and Cullen*,[48] a District Court of Queensland decision handed down in 1986 by Judge McGuire.

C. R v BAYLISS AND CULLEN

Although abortion law in Queensland had received limited judicial attention in 1955,[49] it was not until the early 1980's that the meaning of 'unlawfully' was discussed by a Queensland court. In the case of *K v T*[50] Justice Williams seemed to suggest that *R v Davidson* represented the law in Queensland,[51] but made no definite determination on this point.[52]

43 [1971] 3 DCR (NSW) 25, 29.

44 Brian Lucas, 'Abortion in New South Wales - Legal or Illegal?' (1978) 52 *Australian Law Journal* 327, 331.

45 As Judge Levine explained: 'In effect...[the defendant's submission]...would have me declare that it is lawful for a qualified medical practitioner to terminate a pregnancy upon the request of a pregnant woman without cause' [1971] 3 DCR (NSW) 25, 28.

46 [1971] 3 DCR (NSW) 25, 28-29.

47 See, for example, the decision of Helsham CJ in *K v Minister for Youth & Community Services* [1982] 1 NSWLR 311. Of course, it should be noted that the decision in *R v Wald* has not been tested in Victorian courts - see Duxbury and Ward, above n 2, 3.

48 (1986) 9 Qld Lawyer Reps 8.

49 See *R v Ross* [1955] St R Qld 48.

50 [1983] Qd R 396.

51 [1983] Qd R 396, 398. Justice Williams' decision was upheld by the Full Court in *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R 404, and by Gibbs CJ of the High Court in *Attorney-General (ex rel Kerr) v T* (1983) 57 ALJR 285.

52 This lack of a definitive statement as to the law contributed to a continuation of prosecutions in Queensland during the 1970's and early 1980's- see P Gerber, 'Criminal Law and Procedure' (1985) 59 *Australian Law Journal* 623.

The law was not ultimately clarified in Queensland until 1986 when the case of *R v Bayliss and Cullen*[53] came before Judge McGuire of the District Court. The case concerned charges made under section 224 of the *Criminal Code Act 1899* (Qld) against medical practitioners operating the Greenslopes Fertility Control Clinic. The accused relied on the defence under section 282 of the *Criminal Code Act 1899* (Qld), which states that a 'surgical operation' (in this case an abortion) performed in 'good faith and with reasonable care and skill' will be lawful if it is performed 'for the preservation of the mother's life' and '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'.

Section 282, as it applies to abortions, effectively repeats the test in *R v Davidson*, except that it is unclear whether or not a threat to the woman's health is covered by the phrase 'for the preservation of the mother's life'. In determining the meaning of this phrase, Judge McGuire ultimately settled on the definition given in *R v Davidson*: that the phrase 'for the preservation of the mother's life' is to be read in such a way that it includes the preservation of her health 'in one form or another'.[54]

Judge McGuire was ambiguous on the appropriateness of considering economic and social factors in determining impact upon health,[55] but ultimately concluded that too much time had passed for him to dismiss *R v Wald* as an incorrect decision.[56] Thus, the most one can say on this point is that *R v Wald* probably represents the law in Queensland. What is certain is that Judge McGuire followed and applied *R v Davidson*.[57]

Although Judge McGuire failed to contribute to the development of the law, his analysis of the relevant authorities was comprehensive, and like Justice Menhennitt and Judge Levine before him, Judge McGuire made it clear that there existed no women's right to abortion, stating that:

> The law in this State has not abdicated its responsibility as guardian of the silent innocence of the unborn. It should rightly use its authority to see that abortion on whim or caprice does not insidiously filter our society. There is no legal justification for abortion on demand.[58]

Judge McGuire was quite correct; the law as it presently stands provides no basis for abortion on demand. Indeed, in coming to his decision, Judge McGuire was at pains to point out that the *R v Davidson* defence could not 'be made the excuse for every inconvenient conception'[59] and that it would only be 'in exceptional cases'[60] that an abortion would be deemed lawful.

Nonetheless, the practical effect of *R v Bayliss and Cullen* is that the interpretation of the law that exists in Victoria and New South Wales also exists

53 (1986) 9 Qld Lawyer Reps 8.

54 (1986) 9 Qld Lawyer Reps 8, 41. Judge McGuire offers a comprehensive discussion of s 282, 33-35, 41-43. Similar provisions can be found in the *Criminal Code Act 1924* (Tas), s 51(1); and the *Criminal Code Act 1913* (WA), s 259.

55 (1986) 9 Qld Lawyer Reps 8, 26.

56 (1986) 9 Qld Lawyer Reps 8, 45.

57 (1986) 9 Qld Lawyer Reps 8, 45. At this point His Honour also made some additional comments concerning the meaning of the word 'serious', but such comments were not particularly helpful in further defining this vague word.

58 (1986) 9 Qld Lawyer Reps 8, 45.

59 (1986) 9 Qld Lawyer Reps 8, 45.

60 (1986) 9 Qld Lawyer Reps 8, 45.

in Queensland.

Unfortunately, this also means that the law in Queensland is as uncertain as the law in Victoria and New South Wales with regard to what constitutes a 'serious danger to health'. It is currently very difficult to say with any confidence whether a particular abortion will be deemed lawful or unlawful.

D. SUPERCLINICS

This uncertainty was vividly borne out in the most recent case to touch on the subject of abortion, that of *Superclinics*.[61] In this case, the decision of the trial court was overturned on appeal, as the appeal court came to a different conclusion with regard to what constituted serious danger to health.[62]

Unlike the other abortion decisions discussed, this case was not a criminal prosecution, but an action for damages. The case was heard at first instance by Justice Newman, sitting in the Common Law Division of the NSW Supreme Court. The plaintiff brought an action for damages against the defendants, alleging that they were in breach of duty to her (either personally or vicariously) by failing to diagnose her pregnancy or failing to communicate the fact that a pregnancy test had proved positive. As a result of these failings, the plaintiff alleged that she was denied the opportunity to have an abortion performed at a time when it was safe to do so, and she thus gave birth to a child which she did not desire to have.

The defendants conceded that they had been negligent in failing to diagnose her pregnancy, but argued that no damages could be awarded because the plaintiff was claiming a loss of an opportunity to perform an illegal act, which is not maintainable at common law. In other words, having accepted that a breach of duty had occurred, the defendants argued that an abortion, at any stage of the plaintiff's pregnancy, would have been unlawful.

The case could have been decided purely by reference to the issue of medical negligence, on the basis that it would be inappropriate for a civil court to attempt to rule on the lawfulness of a hypothetical abortion. Indeed, other courts have consistently found that the lawfulness of an abortion is a matter for a criminal court to adjudicate upon, and outside the scope of a civil court.[63] Furthermore, one could argue that any determination with regard to the lawfulness of a hypothetical abortion is outside the scope of any court, as it would involve a court in making a declaration upon an abstraction.[64] When the matter was heard on appeal the majority of the Court of Appeal (especially Kirby A-CJ) recognised the problems with attempting a determination of the legality of a hypothetical abortion in a civil trial.[65]

However, at trial Justice Newman accepted that the defendant's submission

61 (1995) 38 NSWLR 47.

62 See Lynda Crowley-Smith, 'Therapeutic Abortions and the Emergence of Wrongful Birth Actions in Australia: A Serious Danger to Mental Health?' (1996) 3 *Journal of Law and Medicine* 359, 362-365.

63 See *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276; *Attorney-General (ex rel Kerr) v T* (1983) 57 ALJR 285; *In the Marriage of F* (1989) 13 Fam LR 189; and *Veivers v Connolly* (1995) 2 Qd R 326.

64 A similar point is made by Priestley JA in *Superclinics* (1995) 38 NSWLR 47, 83.

65 Kirby A-CJ made the comment that it was unsatisfactory to examine the hypothetical (il)legality of a hypothetical termination procedure as such hypothetical second-guessing should not be embarked upon by courts of law - see *Superclinics* (1995) 38 NSWLR 47, 58, 62-63 & 69. Also see Priestley JA, who made similar comments - see *Superclinics* (1995) 38 NSWLR 47, 83.

had merit and thus attempted to determine what constituted a lawful abortion, and whether the plaintiff's hypothetical abortion would have satisfied any such legal test.

Justice Newman expressly followed the decisions in both *R v Davidson* and *R v Wald*. His Honour felt that the present case revolved around the question as to whether the element of 'serious danger to health' (as defined by the above authorities) had been satisfied. The court found that, although there was some evidence that the pregnancy represented a danger to the plaintiff's mental health, there was no evidence that the pregnancy, at any relevant time, represented a *serious* danger to the plaintiff's life or physical or mental health. Thus, had the plaintiff's pregnancy been terminated, that termination would have been unlawful, as an offence under either s 82 or s 83 of the *Crimes Act 1900* (NSW). The plaintiff's case failed, as she was therefore asking for damages based on the loss of an opportunity to perform an illegal act, which is not maintainable at common law.[66]

There are a number of problems with Justice Newman's decision, many of which were adequately criticised when the matter was heard on appeal. For present purposes it is sufficient to note that his determination that the abortion would have been unlawful was possible because of the inherently uncertain nature of the phrase 'serious danger to health'.

On appeal, the NSW Court of Appeal[67] ruled that if the plaintiff had undergone the abortion at the time when it was medically safe to do so, it would not necessarily have been unlawful. On this basis, the court ordered a new trial. The majority explained that if an abortion was subsequently held to be lawful under the circumstances that existed at the requisite time, then the appellant was entitled to damages.[68]

Although an appeal to the High Court was undertaken by the defendants,[69] the matter was settled prior to any decision being made. The judgment of the NSW Court of Appeal therefore constitutes the highest authority with regard to abortion law and so requires detailed analysis.

The substantive law applied in the Court of the Appeal was identical to that applied by Justice Newman: that of *R v Davidson* and *R v Wald*. The distinguishing aspect of the two *Superclinics* decisions is that the Court of Appeal came to a different conclusion with regard to whether or not a 'serious danger' to the plaintiff's mental health existed at the requisite time. This highlights the uncertain, and therefore unsatisfactory, state of the law with regard to what

66 It is well recognised that illegality is a defence to an action in negligence, as the common law does not categorise the loss of an opportunity to perform an illegal act as a matter for which damages may be recovered - see, for example, *Gala v Preston* (1991) 172 CLR 243.

67 Consisting of Kirby A-CJ, Priestley JA and Meagher JA (dissenting).

68 The Court made it clear that she would only be entitled to the recovery of costs leading up to the birth, because subsequent costs could have been avoided by recourse to adoption. The absurdity of this determination was adequately expressed by Kirby A-CJ, and will not be further discussed here. See Lisa Teasdale, 'Confronting the Fear of Being "Caught": Discourses on Abortion in Western Australia' (1999) 22 *University of New South Wales Law Journal* 60, 69-70.

69 For an interesting discussion of the arguments, strategies, and personnel involved in seeking leave to appeal to the High Court - see Regina Graycar & Jenny Morgan, 'A Quarter Century of Feminism in Law: Back to the Future' (1999) 24 *Alternative Law Journal* 117; Jo Wainer, 'Abortion before the High Court' (1997) 8 *Australian Feminist Law Journal* 133; and (1998) 20 *Adelaide Law Review* which contains a number of articles on the issue of the many intervening parties in the appeal.

constitutes a 'serious danger' to health.

Acting Chief Justice Kirby made a similar criticism, lamenting that no specific criteria as to what constitutes a serious danger to health is provided in either *R v Davidson* or *R v Wald*, which results in the test being 'open to subjective interpretation'.[70]

Despite reservations about making a determination as to the lawfulness of a hypothetical abortion, the Court of Appeal ultimately decided that it should deal with the matter, and embarked upon a discussion of the criminal law concerning abortion. Acting Chief Justice Kirby's commendable judgment on the issue was the most intelligent and comprehensive that has yet been delivered in Australia.[71] It thus deserves the most attention.

After discussing at length the authorities of both *R v Davidson* and *R v Wald*, Kirby A-CJ clearly preferred a test that considered economic and social grounds in determining what constituted a serious danger to health.[72] Kirby A-CJ, however, extended the period during which a serious danger to health might arise. Whereas Judge Levine in *R v Wald* restricted such period to the pregnancy itself,[73] Kirby A-CJ felt that such a confined period was not justifiable, stating that:

> 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, for example, 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 a mother's psychological health *after* the child was born when those circumstances might be expected to take their toll.[74]

Such comments are supported by the contemporaneous Queensland Supreme Court case of *Veivers v Connolly*.[75] In that case, also a civil case in which the plaintiff alleged that, due to the negligence of her medical practitioner, she had lost the opportunity to lawfully terminate her pregnancy, Justice de Jersey commented that the 'serious risk' to the plaintiff's mental health 'crystallised with the birth' of her child.[76] Both Justice de Jersey and Kirby A-CJ were stating the obvious, for, as Justice de Jersey put it, 'the birth was the natural consequence of the pregnancy',[77] and it may well be the case that any 'serious danger' to a

70 *Superclinics* (1995) 38 NSWLR 47, 63.

71 Kirby A-CJ covered a lot of ground in his decision, much of which must be left for another time, as it deals with evidential issues, and policies for quantifying damages - neither of which are relevant for present purposes.

72 *Superclinics* (1995) 38 NSWLR 47, 59.

73 *R v Wald* [1971] 3 DCR (NSW) 25, 29.

74 *Superclinics* (1995) 38 NSWLR 47, 60. See also 65.

75 (1995) 2 Qd R 326. This case is not discussed separately because, not being a criminal trial, the court did not deal with the criminal law of abortion in any detail, and rightly confined itself to the case at hand, one of medical negligence. Justice de Jersey adopted the common sense approach of only taking into account the fact that the abortion may have been unlawful in his assessment of damages. He found that the risk that the abortion would have been unlawful to be small, so reduced the plaintiff's damages by only 5% (1995) 2 Qd R 326, 335.

76 (1995) 2 Qd R 326, 329.

77 (1995) 2 Qld R 326, 329.

woman's health does 'not fully afflict her in a practical sense until after birth.'[78]

Unfortunately, Kirby A-CJ was alone in his determination that the *R v Wald* test should be extended to include consideration of any health effects after the birth of the child, so the majority decision can only be stated as approving the test laid down in *R v Wald*.[79]

Kirby A-CJ's main contribution to the development of the law can be found in his consideration of the hypothetical lawfulness of the plaintiff's intended termination. Kirby A-CJ made the salient point that it would be extremely difficult to say whether *any* hypothetical abortion would have been unlawful.[80] That is, for an abortion to be considered unlawful, the Crown would have to prove that a medical practitioner did not honestly believe upon reasonable grounds that the termination of the pregnancy was necessary and proportionate to alleviate the pregnant woman from a serious danger to her health. To say that a hypothetical medical practitioner, performing a hypothetical abortion, would not have held such a belief, and further to say that this could be proven beyond reasonable doubt, is absurd. It is hard enough to convict on any crime which incorporates a subjective *mens rea* element, let alone on a crime that has not occurred and is not going to occur. For Justice Newman to effectively hold that a jury would have held beyond reasonable doubt that a medical practitioner would either not have held the requisite belief, or would not have held it on reasonable grounds, is a determination without foundation.[81]

Kirby A-CJ decided that enough evidence existed to conclude that a jury, in a hypothetical criminal trial in contemporary Australian society (where termination procedures are commonly available and accepted as legitimate by the majority of the populace)[82] would hold the abortion to be lawful.[83]

In addition, Kirby A-CJ made the significant finding that even if one could say with certainty that the hypothetical medical practitioner performing the hypothetical abortion would be unable to defend a charge of 'unlawful' abortion, this, in itself, would not preclude the plaintiff from recovery unless it could be shown that she also would have failed to defend such a charge. That is, even if the medical practitioner were acting illegally in providing the termination of pregnancy, the pregnant woman would not be guilty of aiding and abetting the commission of that offence if she nonetheless still honestly and reasonably believed the termination to be lawful.[84] Under such a formulation, a prosecution of a woman for procuring her own abortion would be almost certainly doomed to failure, provided the procedure was performed by a registered medical practitioner. It would be nearly impossible to prove that a woman did not hold the requisite belief, if she had been told by her medical practitioner that the abortion would be lawfully performed (irrespective of whether or not the medical practitioner was honest in that appraisal).[85]

78 (1995) 2 Qld R 326, 329.
79 *Superclinics* (1995) 38 NSWLR 47, 59-60 (Kirby A-CJ); 80 (Priestley JA).
80 *Superclinics* (1995) 38 NSWLR 47, 61 & 66.
81 Such a conclusion is made by Kirby A-CJ, although expressed in less harsh terms *Superclinics* (1995) 38 NSWLR 47, 61.
82 *Superclinics* (1995) 38 NSWLR 47, 69.
83 *Superclinics* (1995) 38 NSWLR 47, 66.
84 *Superclinics* (1995) 38 NSWLR 47, 62.
85 *Superclinics* (1995) 38 NSWLR 47, 67. An identical determination was made by Priestley JA, 83.

This can only be a positive result.[86] Women in New South Wales should no longer fear prosecution for procuring their own abortion. Although it is still a theoretical possibility, the likelihood of the Crown being successful in prosecuting such a charge is so small as to be effectively nil.

Unfortunately, the basis for this aspect of the majority decision is that the medical profession are the appropriate people to make the decision as to whether or not to terminate a pregnancy.[87] The majority is thus effectively legitimising and reinforcing the power role that is reserved for the medical profession under the current law: namely, that it is the medical practitioner who decides whether or not a termination is lawful. The medical profession thus become the 'legal gatekeepers' with regard to abortion law.[88] This is unfortunate for two reasons: (1) the medical profession is not necessarily qualified to play such a quasi-judicial role;[89] and (2) it effectively excludes a woman's right to abortion.[90]

In allowing for the possible recovery of damages in this case, *Superclinics* may have contributed to the development of the law to some extent, but it needs to be emphasised that the decision does not stand for the proposition that most, some, or even any, abortions are *prima facie* lawful. On the contrary, the members of the Court were unanimous in stating quite clearly that abortions remain *prima facie* unlawful in New South Wales.[91] It is clear from the majority decisions of Acting Chief Justice Kirby and Justice Priestley that there is no such thing as abortion-on-demand in New South Wales, but rather abortions are only 'lawfully available in the limited circumstances described in *Wald*'.[92]

The *Superclinics* case stands as a stark reminder of the legal situation of abortion. It not only indicates just how far we are from viewing abortion in terms of women's reproductive freedom, but it also represents ample evidence of the uncertain nature of abortion law in most jurisdictions in Australia. By applying identical precedent (ie. the test in *R v Wald*) the two courts came up with completely different answers to the question: 'would the abortion have been lawful?' The present uncertainty of the law is such that it is virtually impossible

86 The positive result is that a woman is unlikely to be found guilty of the offence of abortion. The fact that only a medical practitioner may lawfully perform an abortion is a negative, as it precludes the possibility of a woman choosing an equally qualified professional (such as a midwife) to perform her abortion.

87 As Kirby A-CJ stated: 'It is not unreasonable to suppose that...[the pregnant woman]...would simply have put herself in the hands of the surgeon. She would have relied upon him or her to tell her whether the termination could take place'. - *Superclinics* (1995) 38 NSWLR 47, 67. Also see similar findings by Priestley JA, 82.

88 Kerry Petersen, 'Abortion: Medicalisation and Legal Gatekeeping' (2000) 7 *Journal of Law and Medicine* 267, 269-271. Also see Regina Graycar and Jenny Morgan, '"Unnatural Rejection of Womanhood and Motherhood": Pregnancy, Damages and the Law: A Note on CES v *Superclinics (Aust) Pty Ltd*' (1996) 18 *Sydney Law Review* 323, 333.

89 John Keown, *Abortion, Doctors, and the Law* (1988).

90 Petersen, above n 88, 271; Lynda Crowley-Cyr, 'A Century of Remodelling: The Law of Abortion in Review', (2000) 7 *Journal of Law and Medicine* 252, 257-258; Susanne Davies, 'Captives of their Bodies: Women, Law and Punishment, 1880's-1980's' in Diane Kirkby (ed), *Sex, Power, and Justice: Historical Perspectives of Law in Australia* (1995) 99, 109; Sheila McLean, 'Women, Rights, and Reproduction', in Sheila McLean (ed), *Legal Issues in Human Reproduction* (1989) 213, 227; and Kathleen McDonnell, *Not an Easy Choice: A Feminist Re-examines Abortion* (1984) 126-130.

91 *Superclinics* (1995) 38 NSWLR 47, 69, (Kirby A-CJ); 82 Priestley JA. Also see the comment made by the dissenting judge, Meagher JA, that '[t]he position is perfectly clear: s 82 and s 83 of the *Crimes Act 1900* make abortion illegal' *Superclinics* (1995) 38 NSWLR 47, 85.

92 *Superclinics* (1995) 38 NSWLR 47, 82 (Priestley JA).

(except in extreme cases) to say with any confidence whether a particular abortion would be lawful. The law generally seeks to claim a degree of objectivity and universality, yet abortion law has developed in such a way that the outcome of each case will depend entirely on a particular court's subjective opinion as to whether the pregnancy in question posed a serious danger to the woman's health. As Justice Priestley rightly stated in *Superclinics*:

> [A]s the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a common law criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.[93]

The *Superclinics* case was the most recent, and to-date the last, Australian abortion decision. At this stage it represents the law not only in New South Wales, but also arguably in Victoria, Queensland, Tasmania, and the Australian Capital Territory.

It is therefore a relatively easy task to concisely summarise the law in those jurisdictions as follows:

1. Abortion is a serious crime, but some abortions are lawful;
2. An abortion is only lawful if performed by a medical practitioner with an honest belief on reasonable grounds that the operation was necessary to preserve the woman concerned from serious danger to her life or health (not being merely the normal dangers of pregnancy and childbirth);
3. Economic and social grounds may be considered by a medical practitioner in coming to his/her honest and reasonable belief that an abortion is necessary in order to prevent serious danger to the woman's health;
4. The requisite serious danger to the woman's health need not be existing at the time of the abortion, provided it could reasonably be expected to arise at some time during the course of the pregnancy;
5. A woman's desire to be relieved of her pregnancy is no justification, in itself, for performing an abortion; and
6. There is no women's right to abortion.

This brings the discussion to an analysis of the law in the 'reform' jurisdictions.

93 *Superclinics* (1995) 38 NSWLR 47, 83.

THE REFORM JURISDICTIONS

The category 'reform' jurisdictions refers to those jurisdictions in which the legislature has taken the initiative in the development of the criminal law with regard to abortion. Such jurisdictions, in the chronological order that the relevant legislative proclamations were made are South Australia, the Northern Territory, and Western Australia.

As stated earlier, abortion law in the ACT is, theoretically, framed by identical criminal law provisions and precedent as New South Wales. However, the ACT Parliament enacted legislation in 1998 that deals with the provision of abortion services. Such legislation, although professing not to affect the substantive criminal law of abortion, does change the legal framework within which abortions are performed in the ACT. The discussion of this legislation will therefore take place in this part of the article, although it must be recognised that the ACT is not technically a 'reform' jurisdiction as the criminal law with regard to abortion in the ACT has not been the subject of legislative amendment.

A. SOUTH AUSTRALIA & THE NORTHERN TERRITORY

The South Australian law on abortion is contained within sections 81, 82 and 82A of the *Criminal Law Consolidation Act 1935* (SA). Sections 81 and 82 are directly derived from sections 58 and 59 of the 1861 Act. The distinguishing factor between the law in South Australia and the eastern States is that, where 'unlawfully' in the relevant sections has been defined judicially in the eastern States, in South Australia it was defined by the legislature in 1969. In that year Parliament enacted section 82A, which sought to qualify sections 81 and 82 and define the circumstances in which an abortion would be lawful.[94]

Section 82A(1)(a) of the South Australian legislation states that an abortion will be lawful if it is performed by a medical practitioner in a prescribed hospital, provided that the medical practitioner and one other medical practitioner are of the opinion, formed in good faith (after both personally examining the woman) that the continuance of the pregnancy would involve greater risk to the life or physical or mental health of the woman than if the pregnancy were terminated.[95]

[94] The law in South Australia is very similar to the current law in the United Kingdom, which is governed by ss 58 and 59 of the 1861 Act and the *Abortion Act 1967* (UK). This is not surprising as the South Australian legislation was modelled on the UK Act.

[95] There is the additional ground that a legal abortion may be performed if there is a substantial risk of foetal abnormality - see *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii), which stipulates that an abortion will be lawful if there is a substantial risk that the child would be born seriously physically or mentally handicapped. Very few abortions are, however, performed on this ground, and no case has been heard on this point in South Australia or the UK. There do exist interesting discussions on this issue, especially from English scholars (the UK equivalent of this section is s 1(1)(b) of the *Abortion Act 1967* (UK)) - see the comprehensive study of the UK section by Derek Morgan, 'Abortion: The Unexamined Ground' [1990] *The Criminal Law Review* 687. Other less significant aspects of s 82A refer to residential requirements (see s 82A(2)), and the allowance for medical staff to have conscientious objections (see s 82A(5)), provided the operation is not necessary to prevent grave injury or to save the life of the woman (see s 82A(6)).

In forming this opinion, the medical practitioners may take account of the woman's 'reasonably foreseeable environment'.[96] It should be noted that the South Australian 'good faith' requirement is less restrictive than its common law equivalent, which demands that the medical practitioner have an honest belief on reasonable grounds, whereas in South Australia the requisite belief need only be honest. It should also be emphasised that the judiciary is reluctant to question this good faith.[97]

Nonetheless, the requirements of hospitalisation and two medical opinions (that must be provided in certificate form)[98] result in the South Australian law being more restrictive in terms of the procedures for determining lawfulness, than the current law in the eastern States. On the other hand, section 82A(1)(b) seems to codify the common law of the eastern States, as it waives the requirements of hospitalisation and two medical opinions when the abortion 'is immediately necessary to save the life, or to prevent grave injury to the physical or mental health of the pregnant woman'. Thus, it is likely that the common law decisions of the eastern States are relevant to South Australia, despite the legislative amendments.[99]

The legal situation in the Northern Territory is, on its face, similar to that in South Australia, as legislative changes there in 1974 brought the Territory's law in line with South Australia's. Abortion law in the Northern Territory is contained within sections 172-174 of the *Criminal Code Act 1983* (NT). Sections 172 and 173 embody the old 1861 legislation, while section 174 defines the circumstances in which an abortion is lawful. However, there exist major differences between the law in the Northern Territory and the law in South Australia, which make the Northern Territory law more restrictive. Such dissimilarities are: (1) that abortions are only lawful in the Northern Territory up to fourteen weeks gestation on the 'balancing of maternal health' or 'foetal abnormality' grounds,[100] whereas in

96 *Criminal Law Consolidation Act, 1935*(SA) s 82A(3).

97 *Paton v British Advisory Service Trustees* [1979] 1 QB 276, 281; Lord Justice Scarman in *Reg v Smith (John)* [1973] 1 WLR 1510, 1512; and K v T [1983] Qd R 396, 398 - comments made in these cases are evidence of the judiciary's extreme reluctance to question the medical practitioner's good faith. Also see Linda Clarke, 'Abortion: A Rights Issue?' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (1989) 155, 165.

98 *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulations 1996* (SA) reg 5.The prescribed certificate is contained in Part A of Schedule 1.

99 It should be noted, however, that s 82A(9) states that all abortions are unlawful unless performed within the guidelines of s 82A, even if the abortion would have been lawful at common law. This attempts to supersede and displace the common law. However, it is not certain whether it has this effect, as the South Australian Supreme Court has implied that the common law still applies in South Australia - see *The Queen v Anderson* [1973] 5 SASR 256. Indeed, Bray CJ made the point that a jury should always be directed that the defence (as enunciated in *R v Davidson*) had to be negatived, whether or not the defence raised it, provided that there was evidential foundation for such a defence - see *The Queen v Anderson* [1973] 5 SASR 256, 270. Cf Bray CJ's comments with those of the court in *R v Smith* [1973] 1 WLR 1510. In this English case, the court held that s 5(2) of the *Abortion Act 1967* (UK) (the equivalent of s 82A(9) of the *Criminal Law Consolidation Act 1935* (SA)) meant that s 1(1) 'supersedes and displaces the common law', [1973] 1 WLR 1510, 1512.

100 See *Criminal Code Act 1983* (NT) s 174(1)(a).

South Australia the upper limit for lawful abortions is set at twenty-eight weeks on both grounds;[101] (2) only a gynaecologist or obstetrician may lawfully perform abortions in the Northern Territory,[102] whereas in South Australia any registered medical practitioner may do so; (3) it is not certain whether a medical practitioner in the Northern Territory may take account of the pregnant woman's *reasonably foreseeable environment* in determining whether the continuance of the pregnancy involves a greater risk to the pregnant woman's life or health than if the pregnancy were terminated (the 'balanced maternal health' ground), whereas in South Australia it is clear that a medical practitioner may do so;[103] and (4) in the Northern Territory a woman cannot be charged for procuring her own abortion, whereas in South Australia this is still possible.[104] With the exception of dissimilarity '(4)', these differences result in the Northern Territory legislation being significantly more restrictive than the South Australian legislation.

Indeed, in terms of the broad test for lawfulness, South Australian abortion law *appears* to also be less restrictive than the law in the eastern States. That is, the requisite risk of injury to the physical or mental health of the woman need not be 'serious' (as in the eastern States), only greater than the risk of continuing the pregnancy, and the degree of risk required is not qualified by the proviso, 'not being merely the normal dangers of pregnancy and childbirth'. However, the additional requirements in South Australia of two medical opinions and hospitalisation results in a far more restrictive process for determining lawfulness. In practice, these requirements complicate, and thus tend to delay, the process of accessing abortion services in South Australia. Such requirements therefore serve to increase the maternal health risks associated with the termination procedure, and for this reason should be removed.

It must also be recognised that, in common with the judicial development of the law in the eastern States, the legislative 'liberalisation' of the law undertaken in South Australia in enacting section 82A was a liberalisation in favour of the medical profession only. The defence of section 82A is *only* available to medical practitioners, and no-one else.[105] The only 'right' granted is to the medical practitioner to form an opinion in good faith, and to perform the abortion on the basis of this opinion.[106] Given the reluctance of the courts to inquire into the 'good faith' of the medical practitioner's decision, and the absence of any real guidance by the law as to the degree of risk of injury to the physical or mental health of the

101 See *Criminal Law Consolidation Act, 1935* (SA) s 82A(8). Note: Abortions may be lawfully performed in the Northern Territory after 14 weeks gestation, but prior to 23 weeks gestation, on the more restrictive ground that the termination is immediately necessary to preserve the woman's life, or to prevent grave injury to her physical or mental health - *Criminal Code Act 1983* (NT) s 174(1)(b) & (c). In South Australia, if such a ground is established, the abortion need not be performed in a hospital or approved facility - *Criminal Law Consolidation Act, 1935* (SA) s 82A(1)(b).

102 *Criminal Code Act 1983* (NT) s 174(1)(a).

103 *Criminal Law Consolidation Act, 1935* (SA) s 82A(3).

104 *Criminal Law Consolidation Act, 1935* (SA) s 81(1).

105 Note: some comments made by Bray CJ in *The Queen v Anderson* [1973] 5 SASR 256, 271 suggest otherwise, but his Honour failed to make a definitive determination on this point. Also see the House of Lords decision in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800.

106 The medical profession has been granted the additional 'right' to object on grounds of conscience to participating in the majority of abortions - see Clarke, above n 97, 163-166.

pregnant woman required, the whole issue is largely left to the medical practitioner. In other words, the law grants medical practitioners the 'right' to perform abortions under certain conditions. In practice, this means that medical practitioners may 'impose on to women their own views of when abortion is permissible.'[107] There exists no women's right to abortion and, legally speaking, women are expressly denied any say at all in the matter.[108]

There is no indication that the legislature was acknowledging the existence of a woman's right to abortion, and indeed by confining the application of section 82A solely to the medical profession, the implication is that this right was expressly denied to women. This point can also be made with regard to the law in Western Australia, although admittedly to a lesser extent.

B. WESTERN AUSTRALIA

In 1998 dramatic modifications were made to Western Australian abortion law. The *Acts Amendment (Abortion) Act 1998* (WA) amended the *Criminal Code 1913* (WA) by repealing sections 199, 200, and 201.[109] The 1998 amendments changed the condition of abortion law in Western Australia from uncertainty to clarity.[110]

The repealed sections were replaced by an amended section 199, which states:

> (1) It is unlawful to perform an abortion unless -
>
> (a) the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and
>
> (b) the performance of the abortion is justified under section 334 of the *Health Act 1911*.

In common with abortion law in every other Australian jurisdiction, in Western Australia, unless exceptional circumstances exist, only medical practitioners may perform lawful abortions.[111] Section 334 of the *Health Act 1911* (WA) outlines in detail what abortions are justified. A number of grounds are immediately recognisable as being modelled on either the South Australian legislation[112] or the

[107] Clarke, above n 97, 166.

[108] The lack of a woman's right to abortion, and the existence of a medical practitioners right to perform one, is clearly evidenced by the English case of *Re T, T v T* [1987] 1 All ER 613, in which the court held that an abortion performed by a registered medical practitioner on a 19 year old severely handicapped woman would not be unlawful, despite the absence of the woman's consent. It could be argued that this case stands for the proposition that if a medical practitioner forms the relevant opinion, a woman has no right *not* to have an abortion - see Clarke, above n 97, 163.

[109] Section 259 of the *Criminal Code 1913* (WA) (which was very similar to s 282 of the *Criminal Code Act 1899* (Qld)) was also amended by the 1998 Act. The amended section is substantially the same as the old s 259, with the only significant difference being that the phrase 'performing...a surgical operation' is replaced with the phrase 'administering...surgical or medical treatment'.

[110] The repealed sections were almost identical to ss 224, 225 and 226 of the *Criminal Code Act 1899* (Qld) and were directly derived from the 1861 UK legislation. However, like Tasmania, in Western Australia no cases were heard on the meaning of such provisions.

[111] *Criminal Code 1913* (WA) s 199(1)(a). Also see s 199(3), *Criminal Code 1913* (WA), which states: 'Subject to section 259, if a person who is not a medical practitioner performs an abortion that person is guilty of a crime and is liable to imprisonment for 5 years'.

[112] For example, provision is made for the conscientious objector, whether it be a person or an institution *Health Act 1911* (WA) s 334(2). The Western Australian legislation, like the South Australian legislation before it, also provides for the furnishing of reports (which must not contain any particulars from which patient identity could be ascertained) *Health Act 1911* (WA) ss 335(5)(d) & (e).

judicial initiatives in the eastern States.

Under section 334, an abortion will be deemed to be justified if one of four grounds are satisfied: (a) the 'informed consent' of the pregnant woman has been obtained;[113] (b) 'the woman concerned will suffer serious personal, family or social consequences if the abortion is not performed';[114] (c) 'serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed';[115] and (d) 'the pregnancy of the woman concerned is causing serious danger to her physical or mental health'.[116]

Ground (d) effectively codifies *R v Davidson*, while grounds (b) and (c) resemble the decisions in *R v Wald* and *Superclinics*. Clearly, the first ground of informed consent is the most significant and unique, and deserves our attention.

Consent operates in two somewhat analogous ways. On its own, it is sufficient legal justification. However, under section 334(4) the pregnant woman must have given her informed consent in order for any of the other grounds to operate.[117] This creates a somewhat strange situation, whereby the first ground must be made out for the other grounds to operate, but if consent is established there is no need to attempt to justify the abortion by reference to any other ground.

Section 334(5) sets out the criteria for informed consent as follows:

> **'Informed consent'** means consent freely given by the woman where -
>
> (a) a medical practitioner has properly, appropriately and adequately provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term;
>
> (b) a medical practitioner has offered her the opportunity of referral to appropriate and adequate counselling about matters relating to termination of pregnancy and carrying a pregnancy to term; and
>
> (c) a medical practitioner has informed her that appropriate and adequate counselling will be available to her should she wish it upon termination of pregnancy or after carrying the pregnancy to term.

There is the additional requirement that the medical practitioner referred to above cannot be involved in the performance of the abortion.[118] This will often have the practical effect of delaying the process, and thereby increasing the risk of the termination procedure. It is thus a requirement that should be abandoned.

It is clear from the above that abortion law in Western Australia is the most liberal in the country.[119] This conclusion is reinforced by the fact that women can no longer be charged with an offence for procuring their own abortion. Nonetheless, there exists no women's right to abortion, and for everyone else abortion remains a crime.

[113] *Health Act 1911* (WA) s 334(3)(a).
[114] *Health Act 1911* (WA) s 334(3)(b).
[115] *Health Act 1911* (WA) s 334(3)(c).
[116] *Health Act 1911* (WA) s 334(3)(d).
[117] Unless, with regard to the ground of serious danger to her health (either presently occurring or impending), it is 'impracticable for her to do so', *Health Act 1911* (WA) s 334(4).
[118] *Health Act 1911* (WA) s 334(6).
[119] Duxbury and Ward, above n 2, 5; Teasdale, above n 68, 71; and Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make* (1998) 98.

This aspect of the law in Western Australia warrants highlighting: abortion remains an offence,[120] and a person found guilty of unlawfully performing an abortion, attempting to perform an abortion, or 'doing any act with intent to procure an abortion'[121] is liable to a fine of $50,000 if that person is a medical practitioner, and up to 5 years imprisonment if that person is not a medical practitioner.[122] The offence operates regardless of whether or not the woman concerned is pregnant.[123]

On the other hand, because an abortion is justified if the woman has given her informed consent and the operation is performed by a medical practitioner (not being the medical practitioner to whom she gave her informed consent), the amended law has the effect that abortions in Western Australia can now be safely performed (by medical practitioners) without fear of successful prosecution.

Of course, the above determination is only true provided the woman concerned is less than 20 weeks pregnant, as after this period of gestation further restrictions apply. In such cases the abortion will only be justified if two medical practitioners who are members of a panel of at least six medical practitioners appointed by the Minister agree 'that the mother, or the unborn child, has a severe medical condition that...justifies the procedure'.[124] Such an abortion must also be performed in a facility approved by the Minister for that purpose.[125]

Additional restrictions also apply for women under 16 years of age, namely: if such a woman is being supported by a custodial parent(s), then that custodial parent(s) must be informed that an abortion is being considered, and must be 'given the opportunity to participate in a counselling process and in consultations between the woman and her medical practitioner as to whether the abortion is to be performed'.[126] A young woman finding herself in this position may apply to the Children's Court for an order that the custodial parent(s) need not be so notified,[127] but reasons must be given to support such an application (for example, that the pregnancy is the result of incest). Western Australia thus follows the Northern Territory in this respect.[128]

The Western Australian abortion provisions will come up for a mandatory Parliamentary review on 26th May 2002.[129] One can be reasonably confident that anti-choice activists will campaign against the maintenance of many of the provisions.

This leads us into a discussion of the Australian Capital Territory legislation, which was a clear victory for the anti-choice movement.

[120] I disagree with comments made by some scholars that, as a consequence of the *Health Act 1911* (WA), abortion is now predominantly a 'health' matter - see, for example, Lynda Crowley-Cyr, above n 90, 254-255.

[121] *Criminal Code 1913* (WA) Section 199(5)(b). A question that might be raised on this point is whether advertising abortion services falls within this definition.

[122] ss 199(2) & (3) of the *Criminal Code 1913* (WA) respectively.

[123] *Criminal Code 1913* (WA) s 199(5).

[124] *Health Act 1911* (WA) s 334(7)(a).

[125] *Health Act 1911* (WA) s 334(7)(b).

[126] *Health Act 1911* (WA) s 334(8)(a).

[127] *Health Act 1911* (WA) s 334(9).

[128] In the Northern Territory the consent of a custodial parent(s) is required in some circumstances when the pregnant woman is under 16 years of age, *Criminal Code Act 1983* (NT) s 174(4)(b).

[129] *Acts Amendment (Abortion) Act 1998* (WA) s 8.

C. THE AUSTRALIAN CAPITAL TERRITORY

In the ACT abortion practice is now governed by two statutes: (1) the *Crimes Act 1900* (ACT); and (2) the *Health Regulation (Maternal Health Information) Act 1998* (ACT). There is no question that abortion remains an offence in the ACT,[130] but until recently one could say with confidence that the New South Wales judicial initiatives of the late 20th century probably applied to abortion practice in the ACT, with the result that abortions could be relatively easily obtained. This is no longer the case as anti-choice activists sitting in the ACT Parliament were able to secure passage of the *Health Regulation (Maternal Health Information) Act 1998* (ACT).[131]

The main body of the 1998 Act deals with the information that must be provided to a woman before an abortion may take place. Section 7 states that certain information must be provided to a woman contemplating an abortion, and that a statement to that effect must be completed, prior to an abortion being performed.[132] A failure to do so makes the person performing the abortion liable to a penalty of 50 penalty units. [133]

This prescription of provision of information is in line with one of the professed objectives of the 1998 Act, which is to 'ensure that a decision by a woman to proceed or not to proceed with an abortion is carefully considered'.[134] One is immediately struck by the audacity of this professed objective, as it suggests that women do not otherwise carefully consider their decision as to whether or not to terminate their pregnancy.

As to the information that must be provided to a woman contemplating an abortion, section 8(1)(a) states that a medical practitioner must 'properly, appropriately and adequately' provide advice about:

(i) the medical risks of termination of pregnancy and of carrying a pregnancy to term;

(ii) any particular medical risks specific to the woman concerned of termination of pregnancy and of carrying a pregnancy to term;

(iii) any particular medical risks associated with the type of abortion procedure proposed to be used; and

(iv) the probable gestational age of the foetus at the time the abortion will be performed;

The medical practitioner must also offer the woman the opportunity of referral to 'appropriate and adequate counselling' concerning her decision to either terminate

[130] See *Crimes Act 1900* (ACT) ss 42, 43 & 44.

[131] This Act will be referred to periodically as 'the 1998 Act'. For a discussion of the initial Bill see Duxbury and Ward, above n 2, 3-4.

[132] Such conditions are not required to be met if the person performing the operation 'honestly believes that a medical emergency exists involving the woman', *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 7(2). The term 'medical emergency' is defined under the Act as a medical condition that 'makes it necessary to perform an abortion to avert substantial impairment of a major bodily function of the woman; and does not allow reasonable time to comply' with the requirements of the Act , s 5.

[133] At the current rate 50 penalty units amounts to $5,000.00 - see *Interpretation Act 1967* (ACT) s 33AA.

[134] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 3(b).

her pregnancy or to carry it to term,[135] and the opportunity of referral to counselling after her termination of pregnancy, or during and after carrying the pregnancy to term.[136] The obligations placed upon the medical practitioner to offer counselling and to advise about the medical risks stated in section 8(1)(a)(i) above, effectively repeat the criteria for 'informed consent' under the Western Australian legislation. The obligation to provide advice concerning the medical risks and gestational age of the foetus outlined in sections 8(1)(a)(ii)-(iv) above go beyond the requirements of the Western Australian legislation.

In addition to the above duties, the medical practitioner must provide the woman concerned with any information that has been approved by an Advisory Panel set up under the legislation.[137] Such information may include 'pictures or drawings and descriptions of the anatomical and physiological characteristics of a foetus at regular intervals'.[138] Fortunately (and surprisingly since the make-up of the sevenperson Panel under the Act guarantees that threemembers will come from Calvary Hospital, a Catholic institution)[139] the information pamphlet thus far approved by the Panel for distribution does not contain any such pictures or drawings,[140] and indeed is a relatively balanced document.

The ACT Right to Life Association have expressed their eagerness to influence the content of any new information pamphlets,[141] and anti-choice activists within the ACT Parliament have attempted to effect changes through administrative processes under the 1998 Act.[142] One may only hope that the current view of the Advisory Panel prevails, and that attempts to affect the document through such means prove unsuccessful.

Once all the information, advice, relevant pamphlets, and offers of referrals have been given, the woman and the medical practitioner concerned must make a joint declaration to that effect, stating the date and time.[143] The woman must then wait not less than 72 hours after signing this declaration before presenting herself at an approved facility,[144] she must then provide her consent (again in writing, stating date and time) to the procedure before it may be performed.[145]

[135] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(b)(i).
[136] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(b)(ii).
[137] *Health Regulation (Maternal Health Information) Act 1998* (ACT) ss 8(1)(c), (d) & (e).
[138] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 14(4).
[139] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 14(1).
[140] See 'Considering an Abortion?', an information pamphlet published by the ACT Department of Health and Community Care, Health Outcomes and Policy and Planning Health Strategies Development, Canberra City, May 1999.
[141] See ACT Right to Life Association, *Newsletter*, (First Quarter 1999).
[142] There is scope in the 1998 Act, under s 16, for the Executive to 'make regulations for the purposes' of the Act. In 1999 the Executive was persuaded to do so, and the *Maternal Health Information Regulations 1999* (ACT) came into force. These regulations provide for a 'current pamphlet' containing pictorial material of foetal development. Fortunately, as such pamphlets have not gained Advisory Panel approval, they are not required to be distributed under s 8 of the 1998 Act.
[143] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 9. Note: a failure to make such a declaration, or the making of a false declaration, may result in a penalty of 50 penalty units - see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 9(2).
[144] For the procedure for gaining approval as an approved facility see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 11.
[145] *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 10. Note: All such documentation is utilised in providing quarterly reports required under the legislation, *Health Regulation (Maternal Health Information) Act 1998* (ACT) ss 13 &15.

The final aspect of the 1998 Act that requires highlighting is the existence of provisions that allow individuals and institutions to not only refuse to participate in the performance of abortions,[146] but also to refuse to provide counselling or advice in relation to an abortion,[147] and to refuse to refer a woman to another person for such purposes.[148] This goes far beyond the conscientious objector provisions in the 'reform' jurisdictions, and appears inconsistent with a medical practitioner's ethical and legal obligations to properly advise his/her patient.

The legal effect of the 1998 Act is difficult to predict as although it professes to have no impact on the lawfulness of an abortion,[149] medical practitioners (and others) may be penalised for non-compliance with the Act. Indeed, section 6 provides that a non-medical practitioner who performs an abortion will be liable to 5 years imprisonment,[150] while a person (presumably a medical practitioner) who fails to perform an abortion in an 'approved facility' shall be liable to 6 months imprisonment or 50 penalty units, or both.[151]

Regardless of the legal effect of the 1998 Act, its practical effect will be to restrict access to abortion services in the ACT because the medical profession, under threat of heavy penalty, will obey the provisions of the 1998 Act. Thus the 1998 Act, in a practical sense, removes the ACT from the umbrella of New South Wales abortion law. The lawfulness of an abortion in the ACT is still defined by the test in *R v Wald*, but the 1998 Act places a number of quite onerous administrative procedures upon the performance of abortions that will make abortion services more difficult to access in the ACT than in New South Wales, despite being, in theory, under the same law.

To summarise and simply state the result of the 1998 Act: (1) it serves to discourage medical practitioners from referring women for abortion; (2) it acts as a disincentive for medical practitioners to perform abortions; (3) it serves to delay the process of obtaining an abortion, thereby increasing the maternal health risks of the procedure; and (4) it seeks to remove any autonomy that the woman concerned may have had under the previous regime.

The 1998 ACT legislation serves to remind those of us who value women's reproductive freedom that development of the law with regard to abortion will not necessarily prove to be progressive. Positive developments have occurred since early last century, and there has been a pattern of continued progression towards more liberal laws during the course of the 20th century, reaching a zenith with the passing of the *Acts Amendment (Abortion) Act 1998* (WA) but, appropriately enough, the same year saw the passing of reactionary legislation in the ACT. Those of us who wish to protect the rights of women with regard to abortion thus need to not only campaign for further reform (specifically, repeal of all criminal law relating to abortion), but also (somewhat paradoxically) to protect reform already achieved.

146 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(a).
147 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(b).
148 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(c).
149 The Act specifically states that 'the lawfulness or unlawfulness of an abortion...is not affected by either the compliance by any person or the failure by any person to comply with a provision of this Act' - see s 4, *Health Regulation (Maternal Health Information) Act 1998* (ACT). Also see paragraph 2 of the preamble to the *Health Regulation (Maternal Health Information) Act 1998* (ACT).
150 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 6(1).
151 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 6(2).

CONCLUSION

The predominant objective of this article has been to provide a statement as to the law in each jurisdiction in Australia, and consequently to demonstrate that there exist restrictive abortion laws that deny women the right to abortion. In all jurisdictions in Australia, abortion is defined as a serious crime, and while abortion remains a subject for Australian criminal law, it can never be a right possessed by Australian women.

The medicalisation of abortion undertaken by the judiciary and the legislatures in the 20th century has not granted any rights to women.[152] Of course, this medicalisation of abortion has meant that it is possible for a medical practitioner to perform an abortion lawfully, thereby providing practical benefits for Australian women seeking abortions. However, this places little decision-making responsibility with the woman concerned; it merely grants medical practitioners a quasi-judicial role that they are not necessarily qualified to possess. It also serves to remove from the woman concerned the power to make the reproductive decision about her own body.[153]

If women are to be accepted by our governments as full moral persons, they must be granted the right to make their own decisions about their own bodies. An essential step towards this goal is the removal of abortion from the realm of criminal law.

Tasmania, the one jurisdiction that, up until December 2001, had failed to provide any judicial or legislative clarification of its abortion law, has now joined the reform jurisdictions.

In December 2001 the Tasmanian Parliament passed the Criminal Code Amendment Act (No. 2) 2001 (Tas), which sought to clarify the circumstances under which an abortion would be deemed to be lawful. This Act came into effect upon receiving the royal assent on 24th December 2001.

[152] Indeed, if any legal 'rights' exist with respect to the practice of abortion, they are possessed and exercised by the medical profession, and not by pregnant women.

[153] See Kerry Petersen, above n 88, 271; Crowley-Cyr, above n 90, 257-258; Libesman and Sripathy, above n 2, 42; Cica, above n 2, 66; Davies, above n 90, 109; McLean, above n 90, 227; and McDonnell, above n 90, 126-130.

RECENT DEVELOPMENTS IN AUSTRALIAN ABORTION LAW: TASMANIA AND THE AUSTRALIAN CAPITAL TERRITORY

MARK J RANKIN*

This article follows on from a previous article, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion', published in (2001) 27(2) Monash University Law Review.

The predominant aim of the 2001 article was to provide an up-to-date statement of the law with regard to abortion in each Australian jurisdiction. However, since that article was published there have been significant legislative developments in Tasmania and the Australian Capital Territory relating to abortion, with the consequence that the 2001 article no longer completely satisfies this goal.

This present article aims to satisfy this goal by providing an up-to-date statement of the law with regard to abortion in the jurisdictions of Tasmania and the Australian Capital Territory. In doing so, comparisons are made with abortion laws in other Australian jurisdictions, and adopting the perspective of the 2001 article, inquiry is also made as to the effect of the recent legislation on the criminality of abortion, and the influence it has upon a woman's right to abortion.

I INTRODUCTION

In the 2001 edition of this Review can be found the article 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion'.[1] The predominant objective of that article was professed to be 'to provide a comprehensive and *up-to-date* statement of the law with regard to abortion in every jurisdiction in Australia.'[2] However, since the article was published, there have been some further legislative developments in Tasmania and the ACT. As a consequence, the 2001 article now appears incomplete.

This present article seeks to rectify this defect, so that read together, this article and the previous article satisfy the goal of providing a comprehensive and up-to-date statement of Australian abortion law. The previous article states the law in the jurisdictions of New South Wales, the Northern Territory, Queensland, South

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1 Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229.

2 Ibid 229 (emphasis added).

Australia, Victoria, and Western Australia, while this article will deal with the recent developments in Tasmania and the ACT.[3]

The new legislation in both jurisdictions will be critically canvassed, and where appropriate, subject to comparative analysis. Adopting the perspective of the previous article, inquiry will also be made as to the effect of the legislation on the criminality of abortion, and the influence it has upon a woman's right to abortion. Clearly, both issues are inextricably linked, as one cannot have a right to a crime.

As will be seen, the legislation in Tasmania and the ACT provide useful points of comparison for these questions. The Tasmanian legislation looks backward, defining abortion as a crime and denying women the right to abortion, while the ACT has embarked upon novel reform, effectively removing abortion from the ambit of the criminal law, and as a consequence moving towards a recognition of a woman's right to abortion. Following this path of progression, this article will first discuss the Tasmanian developments before analysing the ACT regime.[4]

II TASMANIA AND THE 2001 AMENDMENTS

A *Background to the 2001 Amendments*

At the turn of the 21st century, abortion was a criminal offence in every jurisdiction in Australia. The legislation that dealt with abortion was to be found in each jurisdiction's criminal statutes.[5] Such legislation was modelled (to varying degrees) on ss 58 and 59 of the United Kingdom's *Offences Against the Person Act 1861*.[6] This legislation defined the act of 'unlawfully' procuring a 'miscarriage' as a felony punishable with lengthy imprisonment.

Under the 1861 Act, if a miscarriage had been unlawfully procured, or an attempt at such had been made, the woman, any third party who assisted her, and any supplier of abortifacients utilised therein, could all be charged. The maximum penalty for the crime was 'penal servitude for life.'[7] This severe legislation was echoed in the criminal statutes of the Australian jurisdictions. Indeed, in some jurisdictions the statutory provisions on abortion were, and remain, practically identical to this ancient and draconian United Kingdom legislation.[8]

3 In common with the previous article, this article does not seek to examine abortion practice in detail, but rather focuses almost exclusively on the law. For discussions on the practice of abortion see National Health and Medical Research Council, *An Information Paper on Termination of Pregnancy in Australia* (1996) 3-22; Lyndall Ryan, Margie Ripper and Barbara Buttfield, *We Women Decide: Women's Experience of Seeking Abortion in Queensland, South Australia and Tasmania 1985-1992* (1994) 15-28; and Kerry Petersen, *Abortion Regimes* (1993).

4 This article will not study the politics that underlie the legislation, only the enacted law itself. For a discussion of the politics involved in reforming abortion law see Karen Coleman, 'The Politics of Abortion in Australia: Freedom, Church, and State' (1988) 29 *Feminist Review* 75. Also see the description of the role of the Women's Electoral Lobby in the recent legislative reforms: (2003) Women's Electoral Lobby (WEL) Australia Inc <http://www.wel.org.au> at 7 April 2003.

5 In West Australia and the ACT, there also existed provisions on abortion outside the criminal statutes, but the fundamental law with regard to abortion was still found in the criminal statutes in both jurisdictions.

6 24 & 25 Vict, c 100, ss 58-9.

7 *Offences Against the Person Act 1861*(UK) c 100, s 58.

8 See, eg, the relevant NSW and Victorian legislation: *Crimes Act 1900* (NSW) ss 82-4; *Crimes Act 1958* (Vic) ss 65-6.

Fortunately for Australian women seeking abortion services, throughout the later half of the 20th century each Australian jurisdiction, with the exception of Tasmania, embarked upon abortion law reform, either through judicial initiative or through legislative amendment. Although abortion remained a serious crime, these reforms expressly recognised that some abortions could be lawful, and sought to clarify the circumstances under which an abortion would be considered to be lawful.

In Victoria, New South Wales and Queensland, such clarification was provided by the judiciary,[9] whereas in South Australia, the Northern Territory and Western Australia, the legislature took the lead in this respect.[10] In the Australian Capital Territory, a combination of both judicial and legislative actions were brought to bear on that jurisdiction's abortion law.[11]

A discussion of all of these various reforms has been previously dealt with[12] and will not be repeated here unless relevant to the jurisdictions presently under scrutiny. For present purposes, it will suffice to say that by the turn of the 21st century, each Australian jurisdiction had embarked upon a mode of abortion law reform, so that clarification of the law had been achieved to some extent. That is, this had occurred in every jurisdiction except Tasmania. At the turn of the 21st century Tasmania had yet to provide any judicial or legislative clarification of its abortion law.

Tasmanian abortion law was to be found in ss 134 and 135 of the *Criminal Code Act 1924* (Tas); legislation derivative of ss 58 and 59 of the UK 1861 Act. Sections 134 and 135 stated as follows:

> 134. (1) Any woman who, being pregnant, unlawfully administers to herself, with intent to procure her own miscarriage, any poison or other noxious thing or with such intent unlawfully uses any instrument or other means whatsoever, is guilty of a crime.
>
> (2) Any person who, with intent to procure the miscarriage of a woman, whether she be pregnant or not, unlawfully administers to her, or causes her to take, any poison or other noxious thing, or with such intent unlawfully uses any instrument or other means whatsoever, is guilty of a crime.
>
> 135. Any person who unlawfully supplies to or procures for any other person anything whatever, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of a woman, whether she is or is not pregnant, is guilty of a crime.

9 See respectively *R v Davidson* [1969] VR 667; *R v Wald* [1971] 3 DCR (NSW) 25; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8. The legal situation in NSW has changed since *R v Wald* (albeit in a minor way) as a consequence of the Court of Appeal decision of *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 *('Superclinics')*. It would not be unreasonable to assume that *Superclinics* would be followed in both Victoria and Queensland.

10 See respectively *Criminal Law Consolidation Act 1935* (SA) s 82A; *Criminal Code Act 1983* (NT) s 174; and *Criminal Code Act 1913* (WA) s 199, amended by *Acts Amendment (Abortion) Act 1998* (WA).

11 Such developments will be detailed later in the article.

12 For a detailed discussion of these reforms see Rankin, above n 1.

Although there had been no legislative or judicial explanation of these provisions, it had been assumed, given the similarity of the relevant legislation in Tasmania and Queensland, that Tasmanian courts would follow the lead of Queensland courts [13] and allow lawful abortions according to the criteria set out in *R v Davidson*.[14] Accordingly, it was assumed that an abortion would be lawful in Tasmania if performed by a medical practitioner, with an honest belief on reasonable grounds that the operation was necessary to preserve the woman concerned from a 'serious danger to her life or physical or mental health (not being merely the normal dangers of pregnancy and childbirth)'.[15] However, this was by no means certain, and the Tasmanian situation with respect to abortion law was still largely a mystery at the end of the 20th century.

This all changed in December 2001, when the Tasmanian Parliament passed the *Criminal Code Amendment Act (No 2) 2001* (Tas), which sought to clarify the circumstances under which an abortion would be deemed to be lawful. This Act came into effect upon receiving the royal assent on 24 December 2001.

B *A New Regime or the Same Old Story?*

The significant provisions of the 2001 Act are ss 4 and 5. Section 5 seeks to alleviate the concerns of the Tasmanian medical profession. The profession had, by and large, refused to perform abortions by late 2001 because of a perceived uncertainty as to whether or not they would be acting illegally in providing abortion services.[16] This state of affairs was the impetus for the calling of Parliament out of session and the passing of the Act.[17]

The concerns of the medical profession with regard to the possible laying of charges under the old law are effectively removed by s 5, which states:

> No prosecution lies against any person in relation to a termination of pregnancy performed before the commencement of this Act by a registered medical practitioner at a public hospital or private medical establishment.

This retrospective pardon for medical practitioners is accompanied by major amendments to Tasmanian abortion law. Section 4 enacts such amendments, which were incorporated directly into the *Criminal Code Act 1924* (Tas).[18]

[13] Ibid 230, 242.

[14] [1969] VR 667. This Victorian Supreme Court decision was followed in the District Court of Queensland in *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8. See also *K v T* (1983) Qd R 396.

[15] *R v Davidson* [1969] VR 667, 672. This decision has been expanded upon by the subsequent decisions in *R v Wald* [1971] 3 DCR (NSW) 25; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8; *Superclinics* (1995) 38 NSWLR 47, but the basic principle remains the same.

[16] See M Paire, 'Abortion Reform Celebrated', *Mercury News* (Tasmania), 22 December 2001, 4; Editorial, 'Abortion Law Clarified in Tasmania (Round Up: Law and Policy)' (2002) 10 *Reproductive Health Matters* 199; Jenny Ejlak, *Inkwel,* (2003) Women's Electoral Lobby (WEL) Australia Inc <http://www.wel.org.au/ inkwel/ink0204/tasab.htm> at 7 April 2003.

[17] See Ejlak, above n 16. This site also provides an interesting description of the politics involved in WEL's campaign for reform.

[18] See *Criminal Code Amendment Act (No 2) 2001* (Tas) s 4, which states: 'The amendments effected by this section have been incorporated into the authorised version of the *Criminal Code Act 1924*'.

Under the new law abortion remains a serious crime, due to the continued existence of ss 134 and 135 of the *Criminal Code Act 1924* (Tas). The 2001 amendments affected these sections, but only in minor syntactical ways. Specifically, the phrase 'whether she be pregnant or not' was deleted from s 134(2), and the phrase 'whether she is or is not pregnant' was deleted from s 135.

This change achieves very little as the deleted phrases were largely superfluous. That is, the addition of the phrase 'whether she be pregnant or not', after the term 'woman', adds nothing to s 134(2). Put simply, the definition of 'woman' includes a pregnant woman as well as a non-pregnant woman; one does not cease to be a woman merely by becoming pregnant. Thus, deleting the phrase from s 134(2) (and the equivalent phrase from s 135) achieves nothing of significance. Furthermore, the sections essentially create offences of attempts, and an intention to procure a miscarriage is an intention to procure a miscarriage, whether or not the woman is pregnant, so specifying this was redundant in the first place.

The significant amendments to the law are to be found in the newly created s 164 of the *Criminal Code Act 1924* (Tas). This section, titled 'Medical termination of pregnancy', outlines what constitutes a 'legally justified' termination of pregnancy. Section 164(1) makes it clear that a 'legally justified' termination of pregnancy is not a crime.

As to what constitutes 'legally justified', the new section is a curious blend of the South Australian and Western Australian legislation dealing with abortion. Section 164(2) states that an abortion is legally justified if:

> (a) two registered medical practitioners have certified, in writing, that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and
>
> (b) the woman has given informed consent unless it is impracticable for her to do so.

An abortion must therefore satisfy two tests in order to be deemed to be legally justified: (1) a balancing of risks test; and (2) an informed consent test. The risks test is a South Australian innovation, and the informed consent test is adopted from Western Australia. Indeed, s 164(2)(a) effectively duplicates the balancing of risks formula found in s 82A(1)(a)(i) of the South Australian Act,[19] while s 164(2)(b) reproduces the informed consent model created by the recent Western Australian amendments.[20] This failure by the Tasmanian Parliament to adopt a novel approach to abortion law reform is regrettable, as it ultimately results in repeating the mistakes of others, rather than learning from them, and thereby

[19] The 'South Australian Act' referred to is the *Criminal Law Consolidation Act 1935* (SA).

[20] The 'Western Australian amendments' refers to the *Criminal Code Act 1913* (WA) s 199, amended by the *Acts Amendment (Abortion) Act 1998* (WA), which also provides for amendments to the *Health Act 1911* (WA).

constitutes a lost opportunity to embark upon progressive reform. Indeed, the level of borrowing from the legislation in the other 'reform'[21] jurisdictions is so great that it is appropriate to discuss the 2001 Tasmanian amendments by reference to the legislation which it emulates.

III A COMPARATIVE ANALYSIS

A *The South Australian Influence*

Looking first at the South Australian influenced s 164(2)(a), there do exist minor differences between the Tasmanian legislation and the 'parent' South Australian legislation. For instance, s 82A(1)(a)(i) of the South Australian Act also refers to a 'greater risk to the life of the pregnant woman', a phrase omitted from the Tasmanian s 164(2)(a), which only provides for health risks. However, this distinction is not important as the inclusion of a life risk is redundant when health risks are included. That is, a risk to one's life is clearly also a risk to one's health.

The South Australian legislation also differs in that it allows for a lawful termination on the grounds of foetal abnormality,[22] while the Tasmanian legislation is silent on this issue. However, this is not overly significant because the fact of foetal abnormality would certainly constitute a factor that the requisite two medical practitioners may consider in coming to a determination as to the risk to the pregnant woman's mental health.

As to what other factors the two medical practitioners may refer in coming to their conclusion concerning the relevant risk, the Tasmanian legislation follows the South Australian legislation by granting the medical practitioners a wide discretion in this respect. Indeed, the Tasmanian legislation allows the medical practitioners to cast an even wider net than the South Australian legislation,[23] permitting them to 'take account of any matter which they consider to be relevant' in assessing the risk to the pregnant woman's health.[24] Furthermore, unlike the South Australian legislation, there is no express onus upon the Tasmanian medical profession to act in 'good faith' in coming to a decision as to the lawfulness of a particular abortion.

When combined with the absence of any guidance by the law as to the degree of risk of injury required, Tasmanian law thus effectively frees the Tasmanian medical profession from external scrutiny with respect to determining the relevant health risks under s 164(2)(a). This effectively grants the Tasmanian medical profession quasi-judicial status, as the Tasmanian government has

21 I use this term to describe those jurisdictions that have amended the original legislation dealing with abortion.

22 See *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii). For a discussion of the analogous UK provisions see D Morgan, 'Abortion: The Unexamined Ground' [1990] *Criminal Law Review* 687.

23 The South Australian Act allows the medical practitioners to take account of the pregnant woman's 'actual or reasonably foreseeable environment' - see *Criminal Law Consolidation Act 1935* (SA) s 82A(3).

24 *Criminal Code Act 1924* (Tas) s 164(3).

thereby delegated the role of deciding upon the legality of an abortion to the Tasmanian medical profession.

The medical profession thus become the 'legal gatekeepers' with regard to abortion law.[25] This is unfortunate for two reasons: (1) the medical profession is not necessarily qualified to play such a quasi-judicial role;[26] and (2) it effectively excludes a women's right to abortion.[27]

In common with South Australian law, under Tasmanian law the only 'right' granted is to the medical profession to decide whether or not an abortion is lawful, and to perform the abortion under certain conditions.[28] Judging from decisions in other jurisdictions, it is likely that the Tasmanian judiciary will be reluctant to question the medical profession in making any decision as to the lawfulness of an abortion.[29] Unfortunately, this means that the medical profession may 'impose on to women their own views of when abortion is permissible.'[30]

As to the conditions under which lawful abortions may be performed in Tasmania, such conditions are even more relaxed than in South Australia. Specifically, there is no requirement in Tasmania to perform the abortion in a 'prescribed hospital', nor are there any residency or reporting requirements;[31] which are conditions contained in the South Australian legislation.[32]

On the other hand, the Tasmanian legislation is more restrictive than the South Australian legislation in that at least one of the medical practitioners making the relevant determination must specialise in obstetrics or gynaecology.[33] This serves

25 See Kerry Petersen, 'Abortion: Medicalisation and Legal Gatekeeping' (2000) 7 *Journal of Law and Medicine* 267, 269-71. Also see Regina Graycar and Jenny Morgan, '"Unnatural Rejection of Womanhood and Motherhood": Pregnancy, Damages and the Law: A Note on *CES v Superclinics (Aust) Pty Ltd*' (1996) 18 *Sydney Law Review* 323, 333.

26 See John Keown, *Abortion, Doctors, and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803-1982* (1988) 50-80.

27 See Petersen, above n 25, 271; Lynda Crowley-Cyr, 'A Century of Remodelling: The Law of Abortion in Review' (2000) 7 *Journal of Law and Medicine* 252, 257-8; Susanne Davies, 'Captives of their Bodies: Women, Law and Punishment, 1880's-1980's' in Diane Kirby (ed), *Sex, Power, and Justice: Historical Perspectives of Law in Australia* (1995) 99, 109; Sheila McLean, 'Women, Rights, and Reproduction', in Sheila McLean (ed), *Legal Issues in Human Reproduction* (1989) 213, 227; Kathleen McDonnell, *Not an Easy Choice: A Feminist Re-examines Abortion* (1984) 126-30; and Linda Clarke, 'Abortion: A Rights Issue?' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (1989) 155, 163-6.

28 In common with all other Australian jurisdictions, Tasmanian law also grants members of the medical profession the 'right' to refuse to participate in any way in an abortion (see *Criminal Code Act 1924* (Tas) s 164(7)). Fortunately, this allowance for a conscientious objection does not extend to cases where 'treatment ... is necessary to save the life of a pregnant woman or to prevent her immediate serious physical injury' (*Criminal Code Act 1924* (Tas) s 164(8)).

29 See *Paton v British Advisory Service Trustees* [1979] 1 QB 276, 281; *Reg v Smith (John)* [1973] 1 WLR 1510, 1512 (Scarman LJ); *K v T* [1983] Qd R 396, 398 - comments made in these cases are evidence of the judiciary's extreme reluctance to question the medical profession with respect to any such decision.

30 Clarke, above n 27, 166.

31 However, in common with the law in South Australian, in Tasmania the two medical practitioners must certify in writing that they believe the continuance of the pregnancy poses a greater risk of injury to the health of the pregnant woman than if the pregnancy were terminated;see *Criminal Code Act 1924* (Tas) s 164(2)(a)), which may produce an analogous result to the South Australian reporting requirements.

32 See *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a) for the 'prescribed hospital' condition, and *Criminal Law Consolidation Act 1935* (SA) s 82A(2) for the residency requirements.

33 *Criminal Code Act 1924* (Tas) s 164(5).

to delay the process of accessing abortion services in Tasmania. Fortunately for Tasmanian women seeking abortion, the Tasmanian restriction in this respect does not go as far as the Northern Territory legislation, which requires an obstetrician or gynaecologist to perform the abortion.[34] In Tasmania, any registered medical practitioner may lawfully perform an abortion.[35]

At this stage, it must be emphasised that, like all Australian jurisdictions, it is *only* medical practitioners that may lawfully perform abortions in Tasmania. The law in Tasmania expressly and unambiguously provides for a medical monopoly with regard to the practice of abortion.[36] In common with all Australian jurisdictions, Tasmanian abortion law provides for the medicalisation of abortion.

However, despite the apparent intention of the Tasmanian Parliament to create a medical monopoly in this respect, it could nonetheless be argued that s 51(1) of the *Criminal Code Act 1924* (Tas) constitutes a fundamental ability for non-medical practitioners to perform operations, and that this could extend to abortions. This section allows a non-medical practitioner to perform a 'surgical operation' 'in good faith and with reasonable care and skill' when the operation is 'reasonable, having regard to all the circumstances', and provided the operation is performed with the consent and for the 'benefit' of the woman concerned.[37] Similarly, it appears by virtue of s 165(2) of the *Criminal Code Act 1924* (Tas), that if a woman's life is threatened by the continuance of her pregnancy, then anyone acting in good faith for the preservation of her life may terminate her pregnancy by any means available.[38]

Neither s 51(1) nor s 165(2) were affected by the 2001 amendments, which means that these sections, which seem to provide further statutory defences to the crime of abortion, may yet have significant implications for abortion law and practice in Tasmania. Indeed, further reform might be achieved by certain individuals (eg qualified nurses or midwives) performing abortions, thereby encouraging prosecution, and subsequently attempting to avail themselves of these statutory defences.[39] It remains to be seen how Tasmanian courts would react to ss 51(1) and 165(2) being used in this manner, however it should be noted that the first major abortion decision of the 20th century, that of *R v Bourne*[40] (the decision that first made it clear that it was possible to perform a lawful abortion), was the result of just such a test case.

34 *Criminal Code Act 1983* (NT) s 174(1)(a).
35 *Criminal Code Act 1924* (Tas) s 164(6).
36 See *Criminal Code Act 1924* (Tas) s 164(6), which states: 'A legally justified termination can only be performed by a registered medical practitioner'.
37 The full text of *Criminal Code Act 1924* (Tas) s 51(1) is as follows: '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'.
38 The full text of *Criminal Code Act 1924* (Tas) s 165(2) is as follows: 'No one commits a crime who by any means employed in good faith for the preservation of its mother's life causes the death of any such child before or during its birth'.
39 A means of possible reform unavailable in South Australia, which has no similar statutory defences to *Criminal Code Act 1924* (Tas) ss 51(1), 165(2).
40 [1939] 1 KB 687.

B *The Western Australian Influence*

Turning to the informed consent requirement created by s 164(2)(b), in defining the phrase 'informed consent', Tasmania replicates the Western Australian model. The Tasmanian s 164(9) defines informed consent as follows:

> 'informed consent' means consent given by a woman where -
> (a) a registered medical practitioner has provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term; and
> (b) a registered medical practitioner has referred her to counselling about other matters relating to termination of pregnancy and carrying a pregnancy to term;
> 'woman' means any female person of any age.

Sections 164(9)(a) and (b) are almost identical to ss 334(5)(a) and (b) of the *Health Act 1911* (WA). The only significant difference between the Tasmanian and Western Australian 'informed consent' provisions is that the Tasmanian legislation is less restrictive, in that the medical practitioner providing the relevant counselling and referrals may also perform the abortion, whereas in Western Australia s/he may not do so.[41] In addition, in Western Australia the medical practitioner must also inform the woman concerned 'that appropriate and adequate counselling will be available to her should she wish it upon termination of pregnancy or after carrying the pregnancy to term',[42] whereas no such future obligation is placed upon Tasmanian medical practitioners.

The Tasmanian provisions are also less restrictive than the Western Australian parent legislation with respect to the fact that there are no further restrictions in Tasmania concerning performing an abortion upon a woman under 16 years of age, whereas in Western Australia additional restrictions are placed upon this practice.[43] Furthermore, in Western Australia there exist extra restrictions on the practice of abortion that arise when an abortion is to be performed on a woman who is more than 20 weeks pregnant,[44] whereas in Tasmania there exists no stated time limit for lawful abortions; although one may reasonably assume that viability is the cut-off point in this respect.[45]

However, notwithstanding the fact that the Tasmanian 'informed consent' provisions viewed in isolation appear less restrictive than the parent provisions in Western Australia, it must be recognised that the overall result of the 2001 amendments is that the law in Tasmania is far more restrictive than it is in Western Australia. In Western Australia, the test for a lawful abortion is informed

41 See *Health Act 1911* (WA) s 334(6).
42 *Health Act 1911* (WA) s 334(5)(c).
43 See *Health Act 1911* (WA) ss 334(8), (9). Also see *Criminal Code Act 1983* (NT) s 174(4)(b) for similar restrictions with regard to women under the age of 16 in the Northern Territory.
44 See *Health Act 1911* (WA) s 334(7).
45 There is no specific provision expressly stating this, but it may be implied from the law in other jurisdictions, common law decisions (eg *C v S* [1987] 1 All ER 1230; *Rance v Mid-Downs Health Authority* [1991] 1 QB 587), and by virtue of *Criminal Code Act 1924* (Tas) s 166(2). This issue of viability being the cut-off point for lawful abortions will be discussed in further detail below.

consent;[46] there is no additional requirement that two medical practitioners must certify in writing that they have applied the appropriate balancing of risks formula to the situation.

IV A LOST OPPORTUNITY FOR PROGRESSIVE REFORM

The result of incorporating elements of *both* the South Australian and Western Australian legislation is a more restrictive abortion regime than exists in either of these other 'reform' jurisdictions. Tasmanian abortion law is more restrictive than Western Australian abortion law because it requires the certification of two medical practitioners with regard to the balancing of risks involved, and it is more restrictive than South Australian abortion law because it also requires the provision of counselling according to the informed consent criteria.[47]

One may nonetheless conclude that the Tasmanian amendments should be tentatively welcomed, if only because they have resulted in some clarification of the law, and thus provided enough legal certainty to the Tasmanian medical profession so that they may resume providing abortion services. However, the fact that the 2001 amendments create, or rather maintain, a restrictive abortion regime should not be overlooked.[48]

It is also of concern that there remains uncertainty as to how the new law sits with the old statutory defences contained within ss 51(1) and 165(2). In particular, one may reasonably question whether, and if so in what way, the common law decisions of the eastern states remain applicable to Tasmania. That is, the defences offered by ss 51(1) and 165(2) appear to illicit the applicability of these decisions, as occurred with regard to similar provisions in Queensland.[49]

However, the most important point to recognise in coming to a conclusion as to the overall worth of the 2001 amendments, is that the 2001 Tasmanian amendments have not changed the *fundamental* character of abortion law in that

[46] It should be noted that there exist other grounds for performing lawful abortions in West Australia (see *Health Act 1911* (WA) s 334 (b)-(d)). However given that informed consent is a legitimate ground in itself (see *Health Act 1911* (WA) s 334 (a)), the use of these other grounds is minimal.

[47] It should be noted however that medical practitioners throughout Australia are legally required to provide information and advice concerning any proposed medical procedure. Consequently, the provision of advice concerning the medical risks of abortion must be provided irrespective of whether or not the relevant abortion law demands it. For example, the main provider of abortion services in South Australia, the Pregnancy Advisory Centre, has adopted a policy of providing counselling along similar lines to the counselling described under s 164(9) of the Tasmanian Act, despite any legislative demand to do so.

[48] Similar conclusions are made by WEL, which summed up the 2001 amendments as follows: 'there is now greater legal clarity, although no greater access to the service for women', Ejlak, above n 16.

[49] See *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, in which it was held that the equivalent Queensland provision (*Criminal Code Act 1899* (Qld) s 282), provided the means by which the court could follow the decisions of *R v Davidson* [1969] VR 667 and *R v Wald* [1971] 3 DCR (NSW) 25. Of course, it should be noted that the Tasmanian ss 51(1) and 165(2) are far more likely to be read down in relation to abortion, given that Tasmania has adopted specific abortion law. In addition, a court may say that 'reasonable' in s 51(1) has to be read in light of other law, specifically current Tasmanian abortion law.

state. Although medical practitioners may now lawfully perform abortions under the provisions of s 164, abortion remains a crime; a medical monopoly of the practice is preserved; and there continues to be a failure to recognise a woman's right to abortion.

This unfortunate state of affairs is a result of the fact that the 2001 amendments merely rehash previous reforms in South Australia and Western Australia, neither of which frame the abortion decision in terms of a woman's right. Following the lead of these jurisdictions, the 2001 Tasmanian amendments merely provide for the medicalisation of abortion. Consequently, under Tasmanian law the abortion decision is now clearly in medical hands, and the only 'rights' with regard to abortion are possessed and exercised by the medical profession. Moreover, if a woman seeks to terminate her pregnancy outside the controls of the medical profession, she can still be charged with the serious crime of procuring her own abortion.[50] As the Women's Electoral Lobby state: '[t]he key issue is that legally, doctors decide whether a woman can have an abortion - women do not have control over the decision.'[51] In this sense, the benefit to the Tasmanian medical profession has come at the expense of Tasmanian women, as Tasmanian abortion law serves to deny women any rights with regard to abortion.

The failure of the Tasmanian Parliament to provide innovation on the issue is therefore cause for deep regret. The Tasmanian Parliament, sitting at the beginning of the 21st century, had a golden opportunity to embark upon progressive reform that focused on the rights of the pregnant woman concerned. Showing a lack of insight and initiative, the Tasmanian Parliament instead chose to look backward and simply copy the mistakes of others.

The present state of Tasmanian abortion law is therefore no cause for celebration, and indeed before the ink is dry on the 2001 amendments there should be a campaign for further reform of the law. A campaign focused not upon who may lawfully perform abortions, but rather upon addressing the human rights violations that occur as a result of denying women the right to make their own reproductive choices.[52] Such a campaign must necessarily have as its central platform the removal of abortion from Tasmania's Criminal Code, because so long as abortion remains a crime, it can never be a right.

[50] See *Criminal Code Act 1924* (Tas) s 134(1).

[51] Above n 16.

[52] For discussions of the various human rights violations that occur as a result of maintaining restrictive abortion laws see Ellen Willis, 'Abortion: Is a Woman a Person?', in Ann Snitow, Christine Stansell and Sharon Thompson (eds), *Desire: The Politics of Sexuality* (1984) 92, 92-6; C Neff, 'Woman, Womb, and Bodily Integrity' (1991) 3 *Yale Journal of Law and Feminism* 327, 337; Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (1984) 374-5, 378, 387; Katherine Kolbert, 'A Reproductive Rights Agenda for the 1990's' (1989) 1 *Yale Journal of Law and Feminism* 3, 3; Frances Olsen, 'Unravelling Compromise', in Patricia Smith (ed), *Feminist Jurisprudence* (1993) 335, 340.

V THE ACT IN 2002: LIGHTING THE WAY

This last point leads to a discussion of the ACT reforms of 2002. As a consequence of these reforms the ACT has moved towards the recognition of a woman's right to abortion, and as a result now possesses the most liberal abortion law in the country.[53] Ironically, the last time the ACT Parliament decided to legislate on the subject of abortion in 1998, the resulting regime could be described as the most reactionary in Australia.[54] Fortunately, the ACT has now come full circle, and the notable result of the 2002 reforms is that the ACT is the first Australian jurisdiction to approach the holy grail of abortion law reform; the removal of abortion from the realm of the criminal law. The significance of this achievement cannot be overstated, and the consequent new abortion regime in the ACT is cause for celebration. The ACT Parliament is to be commended for lighting the way for all Australian jurisdictions.

To adequately illuminate the achievement of the ACT Parliament in this respect, it is necessary to briefly outline the legal situation that existed in the ACT prior to the 2002 reforms.[55]

Background to 2002

In common with the jurisdictions of New South Wales, Queensland, and Victoria, the abortion provisions in the *Crimes Act 1900* (ACT) prior to 2002 were copied from ss 58 and 59 of the *Offences Against the Person Act 1861* (UK).[56] Under ss 44, 45, and 46 of the *Crimes Act 1900* (ACT) abortion was defined as a serious crime, with severe penalties.[57] However, it was generally believed that the New South Wales decisions[58] were applicable to the ACT,[59] and hence the practice of abortion in the ACT functioned under this belief, resulting in relatively easy access to abortion services.[60]

This situation of relative stability was unbalanced in 1998 by the passing of the *Health Regulation (Maternal Health Information) Act 1998* (ACT).[61] The main purposes of this Act were professed to be 'to ensure that adequate and balanced medical advice and information are given to a woman who is considering an

53 Prior to 2002, one could say that West Australian abortion law could lay claim to this title - see Rankin, above n 1, 247; Alison Duxbury and Christopher Ward, 'The International Law Implications of Australian Abortion Law' (2000) 23 *University of New South Wales Law Journal* 1, 5; Lisa Teasdale, 'Confronting the Fear of Being "Caught": Discourses on Abortion in Western Australia' (1999) 22 *University of New South Wales Law Journal* 60, 71; Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make* (1998) 98.

54 See Rankin, above n 1, 251.

55 A more detailed analysis of the pre-2002 ACT situation can be found in Rankin, above n 1, 249-51.

56 To be more precise, they were copied from the NSW provisions, which in turn were copied from the 1861 UK Act.

57 Note: prior to 2002 the relevant sections were ss 42-4. From January 2002 they became ss 44-46 (but remained otherwise unchanged). On 9 September 2002, the new s 44 was substituted for the old ss 44-6, and on 9 December 2002, s 44 expired altogether.

58 See *R v Wald* [1971] 3 DCR (NSW) 25; *Superclinics* (1995) 38 NSWLR 47.

59 See Rankin, above n 1, 249.

60 See National Health and Medical Research Council, above n 3, 5-6.

61 For a discussion of the initial Bill see Duxbury and Ward, above n 53, 3-4.

abortion',[62] and 'to ensure that a decision by a woman to proceed or not to proceed with an abortion is carefully considered.'[63] The legislation demanded that a medical practitioner 'properly, appropriately and adequately' provide a woman contemplating an abortion with advice concerning medical risks[64] and foetal development.[65] The medical practitioner was also obliged to offer the woman referral to counselling.[66] A statement certifying that the requisite information and advice had been provided would then have to be completed prior to an abortion being performed.[67]

Much of the information and advice to be provided was similar to that demanded by the informed consent provisions in Western Australia, and since 2001, in Tasmania. However, the issue of addressing foetal development was a controversial innovation, as the legislation made it mandatory for medical practitioners to provide women seeking an abortion with a pamphlet containing information concerning this,[68] which might include pictures of foetuses at different stages of gestation.[69] The original pamphlet did not contain such pictures, but an attempt was made to create such a pamphlet by the use of the regulatory power conferred by the Act,[70] resulting in the *Maternal Health Information Regulations 1999* (ACT), which was cause for concern for some time.[71]

Other aspects of the 1998 Act that were alarming were the conscientious objector clauses, which allowed individuals to not only refuse to participate in abortions,[72] but also to refuse to provide advice and/or counselling concerning abortion,[73] and most worrying, to refuse to refer a patient to someone who would provide the advice, counselling, and/or service desired.[74] Given the religious and moral connotations abortion has for some people in our society, it would seem reasonable to permit such individuals to decline to participate in abortions.[75] However, to allow such individuals to refuse to refer their patients to people who could actually treat them is clearly 'inconsistent with a medical practitioner's ethical and legal obligations to properly advise his/her patient.'[76]

62 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 3(a).
63 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 3(b).
64 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(a)(i)-(iii).
65 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(a)(iv).
66 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(b)(i) and (ii).
67 See *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 7. Such conditions were not required to be met if the person performing the operation 'honestly believes that a medical emergency exists involving the woman' - *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 7(2). The term 'medical emergency' was defined under the Act as a medical condition that 'makes it necessary to perform an abortion to avert substantial impairment of a major bodily function of the woman and does not allow reasonable time to comply' with the requirements of the Act - *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 5.
68 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(c), (d), (e).
69 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 14(4).
70 See *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 16.
71 See Rankin, above n 1, 250.
72 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(a).
73 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(b).
74 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(c).
75 Of course, that is unless the woman's life is under threat, in which case such a refusal would be unreasonable and unethical.
76 Rankin, above n 1, 251.

Curiously, the 1998 Act purported to have no effect on the lawfulness of abortions in the ACT,[77] but this is nonsense, as not only did it have a clear effect on practice,[78] but it also prescribed criminal sanctions for contravention of certain provisions.[79] Regardless of legal effect, the 1998 Act restricted access to abortion services and served to delay the process of obtaining an abortion,[80] with consequent health risks to the woman concerned.[81] To repeat my previous conclusion concerning the overall result of the 1998 Act:

> (1) it serve[d] to discourage medical practitioners from referring women for abortion; (2) it act[ed] as a disincentive for medical practitioners to perform abortions; (3) it serve[d] to delay the process of obtaining an abortion, thereby increasing the maternal health risks of the procedure; and (4) it [sought] to remove any autonomy that the woman concerned may have had under the previous regime.[82]

In other words, the 1998 Act was 'a clear victory for the anti-choice movement'.[83] Fortunately, this state of affairs did not last long, and the winds of change soon began to blow through the ACT Parliament.

VI A CHANGE IN THE AIR?

The repeal process began in late 2001, with the Executive issuing the *Maternal Health Information Regulations Repeal 2001* (ACT), which repealed the 1999 Regulations that had attempted to incorporate foetal pictures into the requisite pamphlet. Although a commendable step in itself, the truly significant reform was to occur in 2002, with the passing of the *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT).

77 The Act specifically states that 'the lawfulness or unlawfulness of an abortion ... is not affected by either the compliance by any person or the failure by any person to comply with a provision of this Act' - see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 4. See also paragraph two of the preamble to the *Health Regulation (Maternal Health Information) Act 1998* (ACT).

78 Rankin, above n 1, 251.

79 See, eg, *Health Regulation (Maternal Health Information) Act 1998* (ACT) ss 6(1), 6(2), which prescribe imprisonment as the penalty for failure to obey that section.

80 This delay factor was exacerbated by the fact that once all the information, advice, relevant pamphlets, and offers of referrals have been given, the woman and the medical practitioner concerned must make a joint declaration to that effect, stating the date and time (see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 9). The woman must then wait not less than 72 hours after signing this declaration before presenting herself at an approved facility and she must then provide her consent (again in writing, stating date and time) to the procedure before it may be performed (see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 10).

81 Ie, the later an abortion is performed, the more dangerous it is. See Stanley Henshaw and Jennifer Van Vort, 'Abortion Services in the United States, 1991 and 1992' (1994) 26 *Family Planning Perspectives* 100-6; Christopher Tietze and Stanley Henshaw, *Induced Abortion: A World Review* (1986) 97; *Report of the Working Party to Examine the Adequacy of Existing Services for the Termination of Pregnancy in South Australia*, South Australian Health Commission, Adelaide, May 1986, 75-6; J Miller, 'Medical Abortion in South Australia: A Critical Assessment of Early Complications' (1973) 1 *Medical Journal of Australia* 825-30; John Lynxwiler and Michele Wilson, 'A Case Study of Race Differences Among Late Abortion Patients' (1994) 21 *Women and Health* 43, 44.

82 Rankin, above n 1, 251.

83 Ibid 248.

This Act substituted the old abortion ss 44-46 with a new s 44, titled 'Abortion - abolition of common law offence', which stated as follows:

> 44. (1) Any rule of common law that creates an offence in relation to procuring a woman's miscarriage is abrogated.
>
> (2) This section expires 3 months after it commences.
>
> (3) This section is a law to which the *Legislation Act 2001*, section 88 applies.

The substitution of the above s 44 effectively repeals the ancient abortion provisions to be found in ss 44, 45 and 46, while s 44(1) abolishes any common law offence of abortion that might otherwise apply in the ACT. The combined effect of ss 44(2) and 44(3) is that since 9 December 2002, the above s 44 no longer sits in the *Crimes Act 1900* (ACT),[84] but continues to have effect by virtue of ss 88(1) and 88(2) of the *Legislation Act 2001* (ACT). As it presently stands, the *Crimes Act 1900* (ACT) makes no mention of ss 44 to 46, and jumps from s 43 to s 47.

The removal of abortion from the realm of the criminal law has always been the predominant objective of the pro-choice movement. After so much campaigning and toil towards that goal, it seems somewhat strange that it could be achieved so easily.[85] Nonetheless, there it is: in one step the provisions of the *Crimes Act 1900* (ACT) maintaining abortion as an offence are swept aside, and a further guarantee is enacted under s 44(1) so that over-zealous prosecutors can have no recourse to the common law. Simple, but very effective. As mentioned earlier, from a pro-choice or women-centred perspective, this achievement is grand in scale, which perhaps explains why it seems slightly hollow that victory may be secured so simply: in essence the 2002 Act provides that all offences with respect to abortion are expunged from the *Crimes Act 1900* (ACT) and the traditional criminal law.

However, in the legal sphere rarely is anything quite that simple. Although abortion is no longer expressly mentioned in the *Crimes Act 1900* (ACT) as a result of (the now expired) s 44, there remain offences within the *Crimes Act 1900* (ACT) that may affect the legality of some abortions. In particular, s 42 (and to a lesser extent s 43) appears to retain an influence on the upper time limit for legal abortions. Section 42 creates the offence of 'child destruction',[86] which operates 'in relation to a childbirth before the child is born alive'.[87] Although at first glance the use of the phrase 'in relation to a childbirth before the child is born alive' suggests that the section operates outside the parameters of abortion, closer scrutiny reveals that some methods of extremely late abortions might be construed as involving 'childbirth'. Such abortions may therefore be unlawful

[84] Ie, the new s 44 was inserted into the *Crimes Act 1900* (ACT) on the notification date of 9 September 2002, and so expired three months hence, as provided for by s 44(2).

[85] By this I mean 'easy' from a legal, rather than a political, perspective.

[86] *Crimes Act 1900* (ACT) s 43 deals with the offence of inflicting grievous bodily harm upon a child.

[87] A similar phrase can be found in *Crimes Act 1900* (ACT) s 43.

under s 42. As a result, s 42 may operate to define an upper time limit for lawful abortions.

As to the exact cut-off point for lawful abortions I would suggest that s 42 implies that the upper time limit for lawful abortions in the ACT is viability. That is, the use of the phrase 'in relation to a childbirth before the child is born alive' implies that s 42 only operates with respect to an unborn child that is capable of being born alive. This conclusion is reinforced by the fact that it accords with the law in other jurisdictions that continue to maintain an offence of child destruction.[88] The phrase 'child capable of being born alive' has been held to have substantially the same meaning as 'viable.'[89] Thus, it is reasonable to infer that s 42 only operates with respect to a viable child. Consequently, one may draw the conclusion that viability appears to be the upper time limit for lawful abortions in the ACT.

Of course, deciding that viability is the cut-off point for lawful abortions is not particularly precise as 'viability' is a shifting standard, which changes with advances in medical technology and practice.[90] In 1969, the South Australian Parliament considered that viability occurred at 28 weeks,[91] whereas in recent decisions various courts have held that a child at 26 weeks is viable.[92] At the other end of the spectrum, a Queensland court has held that a child at 21 weeks is not viable.[93] Thus, it may be said that viability is currently reached sometime between 22 and 26 weeks,[94] and certainly no later than 28 weeks gestation.[95] This accords with current practice, as most abortion service providers in Australia do not provide abortions if the woman is over 22 weeks pregnant.[96] This is the case even in jurisdictions that expressly provide for a 28 week limit.[97] The practical rationale for such decisions is the fact that abortions performed after the second trimester are far more dangerous.[98]

88 For example, see *Crimes Act 1958* (Vic) s 10, which limits the offence of child destruction to 'a child capable of being born alive'. Also see *Criminal Law Consolidation Act 1935* (SA) s 82A(7).

89 See *C v S* [1987] 1 All ER 1230, 1240-3; and *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 621-2.

90 Courts have recognised this fact, deciding that although a child may not have been viable until 28 weeks gestation in 1929 (the year in which the relevant UK legislation was enacted), it was highly likely that viability would be reached much sooner in the late 20th century - see *C v S* [1987] 1 All ER 1230, 1240.

91 See *Criminal Law Consolidation Act 1935* (SA) s 82A(8).

92 See, eg, *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 616-17.

93 See *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, 40.

94 This legal conclusion is backed up by medical evidence. For example, Mason makes the point that 22 weeks is the earliest point at which viability could be said to be reached as it is the earliest point at which a child could breathe. See J K Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (1990) 104.

95 Indeed, no Australian jurisdiction allows lawful abortions beyond 28 weeks, unless it is a case of medical emergency whereby the mother's life is in danger or her health is seriously threatened by the continuance of the pregnancy.

96 See Pregnancy Advisory Centre, Mark J Rankin, and Natasha Cica, 'Law and Practice of Abortion in Australia', in Pregnancy Advisory Centre (ed), *Information Pack for Students and Health Workers Interested in Abortion* (1999) 3, 3-7.

97 For example, the Pregnancy Advisory Centre, which performs most abortions in South Australia, has a policy of only performing abortions up until 20 weeks, despite the fact that the South Australian legislation allows lawful abortions up until 28 weeks of pregnancy.

98 See National Health and Medical Research Council, above n 3, 13.

However, a desire to be rid of an unwanted pregnancy is hardly satisfied by reference to such concerns. Indeed, given the torture of an unwanted pregnancy, there exists a strong argument in favour of allowing abortions at any stage of pregnancy.[99] It would, I imagine, seem quite absurd to a woman seeking an abortion to be told that she cannot legally obtain one as she is 22 weeks pregnant, but if she had approached the abortion service provider when she was only 21 weeks pregnant, she would no longer be pregnant. Such advice would be devastating.

Unfortunately for women who find themselves in this position, to suggest that the law should be further reformed, so as to allow abortions on demand at any stage of pregnancy, would be political suicide, as many members of our society would have a strong stance against such action (whether logically justified or not), and the anti-choice movement would probably take the opportunity to erode reforms already achieved. Thus, although abortions in the ACT are (probably) only lawful until viability, and therefore the purist may say that the ultimate goal of total legalisation is yet to be achieved, it is a flaw within the system that those of us who advocate choice will just have to live with for the time being. Furthermore, it should not, in any meaningful way, take away from the achievement of the ACT Parliament in passing the 2002 legislation which (with the viability exception discussed immediately above), removes abortion from the realm of the criminal law.

The 2002 Act that provided for the abolition of the offence of abortion was followed with the repeal of the 1998 Act regulating the medical profession.[100] This was achieved by the passing of the *Health Regulation (Maternal Health Information) Repeal Act 2002* (ACT). Indeed, as the 1998 Act (although professing otherwise) clearly raised criminal issues with respect to abortion, it was necessary to repeal this Act in order to complete the legalisation process.

Of course, in repealing the 1998 Act, the ACT Parliament created a legal void with respect to abortion. This void was filled by further legislative reform, namely making amendments to the *Medical Practitioners Act 1930* (ACT), by passing the *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT), which inserted a new 'Part 4B' into the *Medical Practitioners Act 1930* (ACT).

VII THE NEW REGIME

Part 4B of the *Medical Practitioners Act 1930* (ACT), consists of ss 55A, 55B, 55C, 55D, and 55E, and provides for the medical regulation of abortion in the ACT. In common with the other legislative reforms of 2002, this medicalisation of abortion was achieved efficiently. The effect of pt 4B of the *Medical*

[99] See Laurie Nsiah-Jefferson, 'Reproductive Laws, Women of Color, and Low-Income Women' (1989) 11 *Women's Rights Law Reporter* 15, 15-30, in which she convincingly proves her point that law restricting late abortions will continue to have a particular impact on poor women and women of colour.

[100] Note that all of the major reform Acts were passed simultaneously, with the same notification date of 9 September 2002 (ie, Acts 24, 25 and 26 of 2002).

Practitioners Act 1930 (ACT) is that abortions in the ACT must be performed in an approved facility[101] by a registered medical practitioner.[102]

Unfortunately, this medicalisation of abortion is achieved at the cost of re-criminalising certain abortions. That is, under pt 4B a failure to perform an abortion in an approved medical facility carries a possible penalty of imprisonment for six months,[103] while a person who performs an abortion who is not a registered medical practitioner is liable to be imprisoned for five years.[104] Clearly, penalties of imprisonment carry definite connotations of criminality. This is both unfortunate and unnecessary.

Sections 55B and 55C of the *Medical Practitioners Act 1930* (ACT) effectively create new offences, namely: (1) performing abortions in non-approved facilities; and (2) the performance of an abortion by anyone other than a registered medial practitioner. This re-criminalisation of certain abortions is cause for concern, however like the case of viability referred to above, it is difficult to express this state of affairs as a major problem in the current political and social climate. That is, the medical profession possess a tax-payer funded monopoly with respect to the provision of a number of health services; abortion is simply no exception. It is also standard practice to label as criminal any health professionals acting outside the medical professions' monopoly; again, abortion is no exception. Put simply, the medical profession in Australia is a very successful 'profession'.[105] Consequently, the profession's monopoly with respect to certain services, including abortion, is likely to continue into the foreseeable future. There seems to be neither the political will, nor the social offensive, to change this state of affairs, and provided there are sufficient members of the medical profession prepared to perform abortions, the maintenance of the medical monopoly is not cause for great alarm.

The more immediate concern may be the creation of an offence with respect to abortions not performed in an approved medical facility, as approval under s 55D is granted by the Minister. Fortunately s 55D(3) makes it clear that the 'Minister must not unreasonably refuse or delay a request for approval of a medical facility', and it would appear that the only test the Minister should direct his/her mind to in reaching a decision in this respect is whether or not a medical facility is 'suitable on medical grounds for carrying out abortions'.[106] Auspiciously, this

[101] See *Medical Practitioners Act 1930* (ACT) s 55C.
[102] See *Medical Practitioners Act 1930* (ACT) s 55B.
[103] See *Medical Practitioners Act 1930* (ACT) s 55C.
[104] See *Medical Practitioners Act 1930* (ACT) s 55B. Note: under the terms of a new Bill currently before the ACT Parliament this penalty for non-medical practitioners is extended to life imprisonment. See the proposed *Crimes Amendment Bill 2002* (ACT) s 42A(2).
[105] Without going into unnecessary detail, I take the goal of 'professions' to be the monopoly of specific markets, and I believe that the medical profession are especially successful in this respect. For support of this view see Eliot Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (1970); Eliot Freidson, *Professional Dominance: The Social Structure of Health Care* (1970); Eliot Freidson and Judith Lorber, *Medical Men and their Work* (1972); Euan Willis, *Medical Dominance: The Division of Labour in Australian Health Care* (1989); Noel Parry and Joseph Parry, *The Rise of the Medical Profession* (1976).
[106] See *Medical Practitioners Act 1930* (ACT) s 55D(1).

approval process seems to be operating well, with five approvals thus far granted.[107]

The final provision of note is s 55E, which contains the standard conscientious objector clauses, allowing people 'to refuse to assist in carrying out an abortion',[108] and making it clear that 'no-one is under a duty (by contract or by statutory or other legal requirement) to carry out or assist in carrying out an abortion.'[109] Such clauses can be criticised as inconsistent with the medical professions' oath of assistance in all cases, but as many individuals have a resistance to abortion based on religious or moral grounds there also exist strong arguments in favour of the inclusion of such clauses. This is especially the case given that such clauses do not alleviate a medical practitioner from his/her duty to provide advice, or to refer a patient to another practitioner, but are simply confined to the operation itself. Furthermore, according to the medical profession's ethical code, if the woman's life was threatened assistance would have to be provided irrespective of any such objections. Thus, all in all, the effect of these clauses is not profound, and may merely be viewed as a recognition and acceptance of the diverse views held on the subject of abortion.

In summary, it is clear from the above that the ACT is the only jurisdiction in Australia that in any meaningful way satisfies the commendable policy goals of the Women's Electoral Lobby: (1) the removal of abortion from the criminal codes; and (2) the regulation of the practice under health law.[110] Although the process is not complete, the ACT Parliament have moved towards accepting women as full moral persons, as it has come some way to recognising (albeit incompletely) that women have 'the right to make their own decisions about their own bodies.'[111]

Despite the fact that abortion is not entirely removed from the realm of the criminal law (which is essential if women are to possess a right to abortion), in that post-viability abortions; abortions not performed by a registered medical practitioner; and abortions not performed in an approved medical facility remain unlawful, it is possible to say that the ACT Parliament have achieved the most that can be realistically hoped for in contemporary Australia. With the exceptions mentioned immediately above, the ACT Parliament has removed abortion from the criminal code and from the common law, and has provided for the medical regulation of the practice. On the condition that abortions are performed pre-viability, and by registered medical practitioners in approved facilities, there now exists effective abortion-on-demand in the ACT.

Of course, this legalisation and simultaneous medicalisation of abortion does not grant any rights to women. However, in addition to providing obvious practical

[107] The requisite approval must be in writing and such approval is a notifiable instrument (*Medical Practitioners Act 1930* (ACT) s 55D(2)), thus one can keep track of the number of approvals.
[108] *Medical Practitioners Act 1930* (ACT) s 55E(2).
[109] *Medical Practitioners Act 1930* (ACT) s 55E(1).
[110] See Editorial, (2003) Women's Electoral Lobby (WEL) Australia Inc <http://www.wel.org.au/policy/00pol3.htm#Abortion> at 7 April 2003.
[111] Rankin, above n 1, 252.

benefits, the 2002 reforms leave space for women to make their own decisions (within certain parameters) with respect to abortion, as they do not have to surmount the hurdle of the legal tests that exist in other jurisdictions. Although women in the ACT are not completely granted the power to make their own decisions about their bodies, by removing abortion from the criminal law, an essential step has been taken towards this goal.[112] As previously stated, 'while abortion remains a subject for Australian criminal law, it can never be a right possessed by Australian women.'[113]

The ACT has made headway in this respect, and the current ACT regime is the most we can presently hope for in the short-term. The 2002 reforms therefore deserve our praise, and indeed our protection. This last point requires emphasis as anti-choice advocates are unlikely to rest until the law reverts back to its draconian origins. We must therefore protect the ACT achievement and campaign for other jurisdictions to follow. The ACT Parliament has lighted the way towards abortion being a right, and has therefore taken a crucial and essential step towards the recognition of reproductive freedom; the feminist utopia. Of course, reproductive freedom remains a distant dream for Australian women, but the ACT Parliament, by virtue of the 2002 reforms, has brought that dream into sharper focus.

[112] See Petersen, above n 25, 271; Crowley-Cyr, above n 27, 257-8; Teresa Libesman and Vani Sripathy (eds), *Your Body Your Baby: Women's Legal Rights from Conception to Birth* (1996) 42; Natasha Cica, 'The Inadequacies of Australian Abortion Law' (1991) 5 *Australian Journal of Family Law* 37, 66; Davies, above n 27, 109; McLean, above n 27, 227; McDonnell, above n 27, 126-30.

[113] Rankin, above n 1, 252.

ABORTION LAW IN NEW SOUTH WALES: THE PROBLEM WITH NECESSITY

MARK J RANKIN*

I INTRODUCTION

In 1861 the United Kingdom Parliament enacted the *Offences against the Person Act*,[1] which, pursuant to ss 58–9, made abortion a criminal offence.[2] At the turn of the 20th century, New South Wales, along with all other Australian jurisdictions, enacted statutory provisions on abortion modelled on this 19th century English legislation. The NSW provisions, contained within ss 82–4 of the *Crimes Act 1900* (NSW), are practically identical to the *1861 UK Act*.[3] Section 83 of the *Crimes Act 1900* (NSW) states as follows:

> Whosoever: unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years.[4]

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1 *Offences against the Person Act 1861*, 24 & 25 Vict, c 100 ('*1861 UK Act*').

2 It has been suggested that s 58 merely codified an already existing common law offence — see Macnaghten J's comments in *R v Bourne* [1939] 1 KB 687, 689–90 ('*Bourne*') — but the preponderance of authorities indicates that it is extremely doubtful whether abortion (before or after quickening) was ever firmly established as a common law crime: see, eg, Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (W Clarke & Sons, first published 1644, 1817 ed) 47–50; William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (Clarendon Press, 1769) 198; D Seaborne Davies, 'The Law of Abortion and Necessity' [1938] *Modern Law Review* 126, 131–4; *R v Bayliss* (1986) 9 Qld Lawyer 8, 11; *R v Woolnough* [1977] 2 NZLR 508, 512–13. It is also of interest to note that, prior to the *1861 UK Act*, there were three previous instances of the UK legislature defining the crime of abortion: see *Malicious Shooting or Stabbing Act 1803*, 43 Geo 3, c 58, ss 1–2 ('*Lord Ellenborough's Maiming and Wounding Act*'); *Offences against the Person Act 1828*, 9 Geo 4, c 31, ss 8, 13 ('*Lord Lansdowne's Act*'); *Offences against the Person Act 1837*, 7 Wm 4 & 1 Vict, c 85, s 6.

3 As the Victorian decision in *R v Davidson* [1969] VR 667 ('*Davidson*') constitutes a significant part of the discussion of NSW abortion law in this article, it should be noted that the Victorian provisions originally contained within ss 65–6 of the *Crimes Act 1958* (Vic) were also practically identical to the *1861 UK Act* (and thus to ss 82–4 of the *Crimes Act 1900* (NSW)).

4 Note: s 82 creates the same offence with respect to the woman concerned if she attempts to perform her own abortion (although for the woman herself to be charged she must be pregnant), and s 84 creates an offence for the supply of 'any drug or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman' (and consistent with s 83, it does not matter whether or not the woman concerned was pregnant).

The UK judiciary began to moderate the otherwise draconian provisions of the *1861 UK Act* from the late 1930s onwards,[5] but it was not until the late 1960s that Australian jurisdictions moved on the matter. South Australia was first,[6] passing legislation in 1969 that provided for lawful abortions in certain circumstances,[7] followed by the Victorian and then NSW judiciaries. In Victoria the 1969 decision in *Davidson* interpreted the legislation in such a way as to permit lawful abortions provided the elements of the necessity defence were met.[8] This defence will receive detailed analysis in this article, but for present contextual purposes a simple definition may be offered: '[b]y necessity is meant the assertion that conduct promotes some value higher than the value of literal compliance with the law';[9] the necessity defence thus allows one to 'break the letter of the law if breaking the law will avoid a greater harm than obeying it'.[10] The defence is utilitarian in nature,[11] as it serves to 'promote the greater social good',[12] especially in its simplistic 'lesser evils' formulation:[13] one may lawfully commit what is otherwise an offence (an 'evil'), if the commission of that offence is necessary to avert a greater 'evil'.[14] The defence of necessity therefore involves a comparative assessment of 'evils', and thus 'a choice of values'.[15] These issues will be discussed at greater length below.

5 See *Bourne* [1939] 1 KB 687 — in which Macnaghten J established the principle that abortions could be performed lawfully under certain conditions. It is of interest to note that in 1906, Lord Alverstone CJ entertained the notion that an abortion could be performed for a lawful purpose, but declined to discuss the matter in any detail: see *R v Bond* [1906] 2 KB 389, 393–7. Post-*Bourne*, a number of cases followed Macnaghten J's reasoning but expanded the scope of the available defence: see, eg, *R v Bergmann* (Unreported, Central Criminal Court, Morris J, 14 May 1948) (a condensed version of the case can be found in Note, 'Alleged Conspiracy to Procure Miscarriages: Two Doctors Acquitted' [1948] 1 *British Medical Journal* 1008. It is also referred to by Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber & Faber, 1958) 154, 165; and by Bernard M Dickens, *Abortion and the Law* (MacGibbon & Kee, 1966) 50); C B Orr, '*R v Newton and Stungo*' [1958] *Criminal Law Review* 469. In the late 1960s the legislature took over from the judiciary in this regard: see *Abortion Act 1967* (UK) c 87.

6 SA is described as 'first' because although the SA legislation was not enacted until after the *Davidson* [1969] VR 667 decision was handed down, the Bill was before the SA Parliament as early as 1968; thus, SA was the 'first' jurisdiction to seriously engage with the issue.

7 See *Criminal Law Consolidation Act 1935* (SA) s 82A.

8 [1969] VR 667.

9 Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 722.

10 D O'Connor and P A Fairall, *Criminal Defences* (Butterworths, 3rd ed, 1996) 103. See also Susan B Apel, 'Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction' (1991) 48 *Washington and Lee Law Review* 41, 42; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 74 (Lord Goff).

11 See Alan Brudner, 'A Theory of Necessity' (1987) 7 *Oxford Journal of Legal Studies* 339, 341; Barney Sneiderman and Marja Verhoef, 'Patient Autonomy and the Defence of Medical Necessity: Five Dutch Euthanasia Cases' (1996) 34 *Alberta Law Review* 374, 380; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 226–7, 239–40 (Brooke LJ).

12 Apel, above n 10, 42. A similar statement is provided by Tremblay: 'necessity condones the pursuit of the greater good rather than conformity with the letter of the law' — Hugo Tremblay, 'Eco-Terrorists Facing Armageddon: The Defence of Necessity and Legal Normativity in the Context of Environmental Crisis' (2012) 58 *McGill Law Journal* 321, 333.

13 See Sabine Michalowski, 'Relying on Common Law Defences to Legalise Assisted Dying: Problems and Possibilities' (2013) 21 *Medical Law Review* 337, 340.

14 See *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 236 (Brooke LJ).

15 Edward B Arnolds and Norman F Garland, 'The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil' (1974) 65 *Journal of Criminal Law and Criminology* 289, 295.

Davidson was followed and expanded upon in NSW by the 1971 decision in *R v Wald*.[16] As a result of Judge Levine's interpretation of the necessity defence in *Wald*, NSW at the time of that decision had arguably the most liberal abortion regime in Australia. Since *Wald* was decided there have been some extensive judicial discussions of abortion law, but NSW courts have always ultimately settled on *Wald* as representing an accurate expression of the law.[17] Thus, in NSW, the lawfulness or unlawfulness of an abortion rests upon a particular interpretation and (assumed) application of the common law defence of necessity.[18]

NSW is now the only Australian jurisdiction not to have legislated on the issue of abortion in over a century, and, along with SA,[19] has seen no significant change in the law (legislative or judicial) for almost 50 years. Of course, this fact, in and of itself, is not necessarily cause for concern. It might well be argued that no change has been necessary because the *Wald* decision created a situation approaching abortion-on-demand, so was, and is, better left alone.[20] Putting aside the fact that while abortion remains a crime it can never be a woman's right,[21] one might agree that a liberal interpretation of *Wald* would probably lead to an approach to providing abortion services that might allow an abortion for almost any reason. However, as the *R v Sood* prosecution highlighted, the law demands that there be adequate reason for the abortion.[22] In 1938, in the landmark UK decision in *Bourne*,[23] Macnaghten J stated that 'the desire of a woman to be relieved of her pregnancy is no justification at all for performing the operation',[24] and this remains the law in NSW.[25] Yet, if abortion were a right, or if abortion-on-demand actually existed, the decision would be entirely in the woman's hands, and no 'reason'

16 (1971) 3 DCR NSW 25 ('*Wald*').

17 See, eg, two decisions of the NSW Supreme Court: *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311, 318; *R v Sood* [2006] NSWSC 1141 (31 October 2006) [16]. In 1995, the NSW Court of Appeal, in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 ('*Superclinics*'), did discuss the law of abortion at considerable length, but in the end result the majority chose to merely apply the reasoning in *Wald* (1971) 3 DCR NSW 25, rather than embark upon any novel approach. A similar decision was taken after some consideration by Simpson J of the NSW Supreme Court in *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006).

18 See, eg, *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006) [37], in which Simpson J made it clear that the lawfulness or unlawfulness of an abortion in NSW 'depends upon the law of necessity', citing *Davidson* [1969] VR 667.

19 Although it should be noted that in *R v Anderson* [1973] 5 SASR 256, 271 it was suggested that the necessity defence was still applicable in SA despite the legislature specifically addressing lawful abortion.

20 Kate Gleeson makes the point that the common law regime is actually less restrictive in practice than some of the jurisdictions that have specifically legislated for lawful abortion: see Kate Gleeson, 'The Other Abortion Myth — The Failure of the Common Law' (2009) 6 *Journal of Bioethical Inquiry* 69, 77–80. See also Heather Douglas, Kirsten Black and Caroline de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560, 570.

21 See Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229, 229, 252.

22 *R v Sood* [2006] NSWSC 1141 (31 October 2006) [18]–[23].

23 [1939] 1 KB 687.

24 Ibid 693.

25 See, eg, *Wald* (1971) 3 DCR NSW 25, 28–9; *Superclinics* (1995) 38 NSWLR 47, 82 (Priestley JA). In Queensland the point has also been made by Judge McGuire that '[t]here is no legal justification for abortion on demand': *R v Bayliss* (1986) 9 Qld Lawyer 8, 45.

would be required other than a woman's desire to no longer be pregnant; there would be no need to persuade a medical practitioner of sufficient grounds for the abortion.[26] But, again, legal pragmatists might argue that the present regime is as close to abortion-on-demand as we may realistically aspire to in the current political climate, and therefore reform is not necessary.[27] Or, to put it colloquially: 'If it ain't broke, don't fix it.'

The purpose of this article is to point out that the law on abortion in NSW is, in fact, theoretically 'broke'. This article aims to highlight that the current NSW law on abortion rests on a lower court decision that interprets and applies an archaic common law defence in a manner that sits uneasily with the present authoritative interpretation of that necessity principle. Put simply, it is the contention here that *Wald* is bad, or at least suspect, law, and bad or suspect law is, by definition, susceptible to being corrected, and how that 'correction' might look is worrying for those that argue that a right to abortion should be part of a woman's right to reproductive freedom, bodily integrity and/or equality.[28] This article will canvass the law of abortion in NSW, studying in detail how it has been interpreted in both *Davidson* and *Wald* (as *Wald* follows the reasoning in *Davidson*). The article will then trace the history of the common law defence of necessity in both the UK and Australia to illustrate the complexity and instability of this defence, and to, ultimately, argue that *Wald* constitutes an incorrect or dubious application and interpretation of that principle; if not at the time it was decided, then certainly now. In this manner, this article advocates for abortion law reform in NSW — specifically, the repeal of the offence of abortion — on the basis that the necessity defence is not theoretically coherent as it applies to the offence of abortion.

II ABORTION LAW IN NSW

A R v Davidson

As mentioned above, all Australian jurisdictions initially adopted the relevant abortion provisions of the *1861 UK Act*, and it was not until 1969 (when the SA parliament enacted s 82A of the *Criminal Law Consolidation Act 1935* (SA))[29] that an Australian jurisdiction legislated on the issue in order to allow for lawful

26 It is of interest to highlight a recent study that has found that many medical practitioners in NSW and Queensland fabricate 'reasons' for the abortion in order to satisfy the law in this respect: see Douglas, Black and de Costa, 'Manufacturing Mental Illness (and Lawful Abortion)', above n 20, 567–76. For more on that survey see Caroline de Costa, Heather Douglas and Kirsten Black, 'Making It Legal: Abortion Providers' Knowledge and Use of Abortion Law in New South Wales and Queensland' (2013) 53 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 184.

27 Contrary to such a view, it should be noted that a woman has recently been found guilty of the offence under s 82 of the *Crimes Act 1900* (NSW): that of self-administering a drug with the intent to procure her own miscarriage — see *DPP (NSW) v Lasuladu* [2017] NSWLC 11 (5 July 2017).

28 The obvious question that is generated from this conclusion that *Wald* is bad or suspect law — namely, why has *Wald* not already been overturned or distinguished? — is a question beyond the scope of the present article.

29 This provision was based largely on the *Abortion Act 1967* (UK) c 87.

abortions in specified circumstances. In that same year the decision in *Davidson*[30] brought about a similar practical effect in Victoria (ie that some abortions might be considered lawful under particular circumstances) by virtue of the application of the necessity defence to the crime of abortion.[31]

The case concerned a medical practitioner, Charles Kenneth Davidson, who was charged with four counts of unlawfully using an instrument to procure a miscarriage under s 65 of the *Crimes Act 1958* (Vic).[32] Section 65 was practically identical to s 83 of the *Crimes Act 1900* (NSW) provided earlier in this article,[33] which is not surprising as both were 'in substance in the same form' as s 58 of the *1861 UK Act*.[34] The case dealt almost exclusively with the meaning of 'unlawfully' under s 65,[35] and was heard by Menhennitt J of the Victorian Supreme Court. His Honour held that the use of the word 'unlawfully' in s 65 implied that some abortions may be lawful,[36] and, after studying a number of referred authorities, Menhennitt J concluded that the common law defence of necessity was the appropriate principle to apply in that respect.[37]

His Honour relied on Sir James Fitzjames Stephen's definition of the doctrine as representing a correct formulation of the principle.[38] Stephen defined the principle of necessity as follows:

> An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.[39]

30 [1969] VR 667.

31 It should be noted that *Davidson* [1969] VR 667 was not the first Victorian case in which the possibility of a defence to the crime of abortion was discussed: see, eg, *R v Trim* [1943] VLR 109, 113–17; *R v Carlos* [1946] VLR 15, 19.

32 He was also charged with one count of conspiring unlawfully to procure the miscarriage of a woman.

33 There were slight differences as to order of wording, and the maximum penalty in Victoria was 15 years imprisonment, rather than the 10 year maximum applicable in NSW.

34 See *Davidson* [1969] VR 667, 668.

35 This was evident from Menhennitt J's opening statement that '[t]he particular matter as to which I have heard submissions and on which I make this ruling is as to the element of unlawfulness in the charges': ibid 667.

36 Ibid 668.

37 Ibid 670–1.

38 Ibid 670. It is also of interest to note that Stephen suggests that sacrificing a child during birth to save the life of the mother would be justified under the necessity defence — see Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 2, 110; Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan, 2nd ed, 1890) 77.

39 Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan, 4th ed, 1887) 24. Note: Menhennitt J refers to the first edition — Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan, 1877) 19 — in his judgment: *Davidson* [1969] VR 667, 670. However, the relevant wording is almost identical to the fourth edition that will be utilised in this article.

The above quotation was provided in full in Menhennitt J's judgment, and his Honour determined this definition of the concept contained the two elements of necessity and proportion, and, having discussed the necessity defence in some detail, his Honour found that the two elements of proportion and necessity were to be determined by 'subjective tests, subject to the beliefs being held on reasonable grounds'.[40]

On this basis, Menhennitt J gave the following final direction to the jury:

> For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not merely being the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted. … [which means] the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.[41]

In other words, Menhennitt J held that serious danger to the woman's health amounts to the 'inevitable and irreparable evil' referred to by Stephen[42] (and thus required to satisfy the necessity element of Menhennitt J's interpretation of the defence), and avoiding this serious danger to the woman's health outweighs breaking the law by performing an abortion — thus meeting Menhennitt J's interpretation of the proportion element of the defence. On this direction the defendant was found not guilty on all counts.

Davidson had a dramatic impact on the practice of abortion in Victoria as Menhennitt J declared that the necessity defence was not limited to life-threatening situations, and an abortion could be lawfully performed not only where there is a serious danger to the woman's life, but also where there is a serious danger to the woman's physical or mental health.[43] However, Menhennitt J's interpretation of the necessity defence that allowed such a finding is open to criticism. This critique of the decision will occur later in the article, after providing context for that analysis via canvassing the development of the necessity defence in both UK and Australian law. It is now more appropriate to turn to the decision in *Wald*.[44]

40 *Davidson* [1969] VR 667, 672.

41 Ibid.

42 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

43 [1969] VR 667, 671.

44 (1971) 3 DCR NSW 25. Note: prior to this decision, *Davidson* [1969] VR 667 was followed by Judge Southwell in an unreported Victorian case mentioned by Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, 44.

B R v Wald

In *Wald* the accused operated an abortion clinic in New South Wales and were charged under s 83 of the *Crimes Act 1900* (NSW).[45] Not only were the surgeons charged, but also the orderlies, the owners of the premises on which the abortions were carried out, and even those individuals who referred women to the clinic. Thus, many of the accused were charged with conspiracy (aiding and abetting) to commit abortion.[46] The case was presided over by Judge Levine of the New South Wales Court of Quarter Sessions.[47]

The main defendants, Wall, Wald, Morris (all medical practitioners), and the Colbournes (the owners of the premises on which the abortions were performed) had separate counsel, and these counsel made very different submissions to the court. Wall and Wald relied on the defence in *Davidson*, while Morris and the Colbournes decided to pursue a novel approach that submitted that at common law the termination of pregnancy with the consent of the woman, after quickening, did not itself constitute an offence, unless harm resulted to the woman.[48] Judge Levine ultimately declined to accept the submission of Morris and the Colbournes,[49] and devoted the majority of his judgment to a consideration of *Davidson*. Judge Levine concluded that:

> In my view the general principle laid down in *Davidson's* case, *supra*, does provide adequate criteria where the operation to terminate the pregnancy is skilfully performed, with the woman's consent, by duly qualified medical practitioners. … Accordingly for the operation to have been lawful in this case the accused must have had an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life, or physical or mental health, which the continuance of the pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted.[50]

However, in following *Davidson*, Judge Levine chose to expand upon Menhennitt J's ruling by indicating what may be considered relevant facts in determining a 'serious danger' to the woman's physical or mental health, and by extending the time period during which that assessment might occur:

> In my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view

45 (1971) 3 DCR NSW 25.

46 Judge Levine dealt with the issue of conspiracy separately: see ibid 29–33.

47 'Courts of General and Quarter Sessions (generally referred to as Quarter Sessions) were [established] in New South Wales in 1824 … [and] were given power to deal with all crimes and misdemeanours not punishable with death … The court ceased on 1 July 1973 when the Quarter Sessions were abolished and the district courts took on the criminal as well as the civil jurisdiction': NSW State Archives and Records, *Quarter Sessions Guide* <https://www.records.nsw.gov.au/archives/collections-and-research/guides-and-indexes/quarter-sessions-guide>.

48 *Wald* (1971) 3 DCR NSW 25, 27–8.

49 Ibid 28.

50 Ibid 29.

> could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health. It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy, if uninterrupted. In either case such a conscientious belief on reasonable grounds would have to be negatived before an offence under s 83 of the Act could be proved.[51]

Upon this direction the jury acquitted all of the accused. In summary, by holding that medical practitioners could take into account economic and social grounds in assessing the danger to a woman's health, and by finding that this danger to health need not be present at the exact time that the abortion took place, if it could reasonably be expected to arise sometime during the course of the pregnancy, the *Wald* decision significantly expanded upon the Menhennitt J ruling and thereby laid the foundation for the current situation of relatively easy access to abortion services in NSW.[52] The *Wald* decision remained largely accepted and unconsidered in NSW until 1995 when the Court of Appeal dealt with NSW abortion law in detail in *Superclinics*.[53] However, although Kirby ACJ in that case advocated an expansion of the Levine ruling in *Wald*,[54] ultimately the majority chose to simply follow and approve the test laid down in *Wald*.[55] Thus,

51 Ibid.

52 However, it should be noted that this does not mean that an abortion service provider may now act with impunity. If a medical practitioner performs an abortion without first satisfying the *Wald* requirements, they may be convicted: see *R v Sood* [2006] NSWSC 1141 (31 October 2006), in which a medical practitioner was convicted of unlawful abortion because she did not make the required assessment of 'the relative dangers of termination against the dangers of non-termination' (at [21]), and therefore could not have possessed the required belief in the necessity of the procedure (at [23]). See also *DPP (NSW) v Lasuladu* [2017] NSWLC 11 (5 July 2017), in which a woman who attempted to procure her own abortion through self-administering misoprostol was found guilty of an offence under s 82 of the *Crimes Act 1900* (NSW) — however, it should be noted that in this case the foetus was viable, being '28 weeks of age': at [24].

53 (1995) 38 NSWLR 47. For a more detailed discussion of *Superclinics* see Rankin, 'Contemporary Australian Abortion Law', above n 21, 237–42. *Davidson* and *Wald* were also followed in Queensland: *R v Bayliss* (1986) 9 Qld Lawyer 8, 41–5. For a discussion of this Queensland case see Rankin, 'Contemporary Australian Abortion Law', above n 21, 235–7.

54 Kirby ACJ saw no reason to limit the assessment of 'serious danger' to the woman's health to events occurring during the pregnancy. As his Honour explains:

> 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, for example, 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 a mother's psychological health *after* the child was born when those circumstances might be expected to take their toll.

Superclinics (1995) 38 NSWLR 47, 60 (emphasis in original). Such reasoning is echoed by de Jersey J in the contemporaneous Queensland Supreme Court case of *Veivers v Connolly* [1995] 2 Qd R 326, 329.

55 See *Superclinics* (1995) 38 NSWLR 47, 59–60 (Kirby ACJ), 80–2 (Priestley JA). *Wald* was also followed by Simpson J in *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006) [30].

Wald remains the authoritative statement of abortion law in NSW. However, in common with *Davidson*, the interpretation and development of the elements of the necessity defence by Judge Levine in *Wald* is problematic. Prior to discussing such issues, it now seems apposite to study that necessity principle in detail.

III THE NECESSITY DEFENCE

At the outset it should be said that this article does not attempt any detailed philosophical examination of the necessity principle,[56] and confines the analysis to the legal issues raised by the defence.[57] There will also be little discussion of the necessity defence outside the UK and Australia;[58] this limitation is justified by reference to the fact that this article is predominantly concerned with the law in NSW (and other Australian jurisdictions where relevant), and that the law on necessity was, at least initially, adopted from the UK. A study of UK law, especially with respect to investigating the historical origins of the defence, also serves a useful contextual purpose for present discussions on the matter.

A *Necessity in the UK*

Necessity is a defence with a long history and the birth of necessity is difficult to date with any precision, with some courts appearing to apply the principle as early as the 14th century,[59] but it was certainly generally accepted as a legitimate common law defence by the early 17th century, and has been raised in a small

56 As will become apparent, the necessity defence has potentially significant moral, economic and political ramifications that might prove quite revolutionary to contemporary society — see, eg, Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2nd ed, 2001) 159, who refers to the 'Pandora's Box' that necessity potentially opens in allowing one to raise all kinds of social, political and economic arguments to commit what is otherwise a crime. For example, the defence might be utilised to justify homicide in euthanasia cases: see Michalowski, above n 13. Indeed, this has already occurred in the Netherlands: see Sneiderman and Verhoef, above n 11, 385–407. It might also be applied to justify or excuse the use of torture in interrogating suspected terrorists: see Paul Ames Fairall, 'Reflections on Necessity as a Justification for Torture' (2004) 11 *James Cook University Law Review* 21, 28–32; Paola Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?' (2004) 2 *Journal of International Criminal Justice* 785. The necessity defence may also come to the aid of those advocating civil disobedience to further political causes (such as environmental protection): see Tremblay, above n 12. The necessity defence has also been raised by anti-abortionists seeking to justify illegal behaviour, such as trespass to property: see Apel, above n 10; Patrick G Senftle, 'The Necessity Defense in Abortion Clinic Trespass Cases' (1987) 32 *Saint Louis University Law Journal* 523; Arlene D Boxerman, 'The Use of the Necessity Defense by Abortion Clinic Protestors' (1990) 81 *Journal of Criminal Law and Criminology* 677.

57 Of course, it should be noted that the fact that the necessity defence raises such moral and political issues serves to further complicate an already confusing and ambiguous legal doctrine.

58 It should, however, be noted that necessity is an established defence in Canada — see *Perka v The Queen* [1984] 2 SCR 232, 241–5; *Latimer v The Queen* [2001] 1 SCR 3. It has also been accepted and applied in the US for some time now: see Arnolds and Garland, above n 15, 291–2.

59 See the 1321 case recorded in the King's Bench rolls and discussed by Sir Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown* (E and R Nutt and R Gosling, 1736) vol 1, 56–8.

number of cases ever since. The principle has, from its very beginning, exhibited high degrees of unpredictability, uncertainty, and inconsistency. Indeed, questions remain largely unresolved in the UK with regard to the defence's appropriate formulation and application. In particular, the current utilitarian 'lesser evils' approach to the defence was not always apparent.

Early decisions arguably referring to the principle tended not to develop the defence in terms of elements or criteria, but rather offered simple instances of when it may come into play.[60] The first clear judicial pronouncement on necessity was that provided by Serjeant Pollard in the mid-16th century case of *Reniger v Fogossa*:[61]

> in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law … where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion …[62]

Although scant on details the above statement does arguably represent a nascent 'lesser evils' approach to the issue. In the early 17th century there was a run of cases that appeared to apply the necessity principle so enunciated,[63] but there was no further development of the principle from Serjeant Pollard's foundational statement. It is at this juncture that one may therefore look to the early common law scholars for more detailed expositions of the necessity principle.[64] Turning first to Lord Bacon, who is arguably the earliest scholarly exponent and advocate of the necessity defence,[65] he provides a number of examples when the necessity defence might be applicable that are suggestive of a 'lesser evils' approach.[66] Perhaps Bacon's most pertinent and revolutionary example in this respect is that:

60 For example, in 1469 Justice Littleton concluded that one may legitimately pull down a house in order to prevent fire from spreading: (1469) YB Mich 9 Edw 4, fo 35a–b, pl 10. In 1499, Justice Rede held that jurors may leave the premises without the court's permission if a fight breaks out and they are escaping to avoid injury: (1499) YB Trin 14 Hen 7, fo 29b–30a, pl 4.

61 (1551) 1 Plow 1; 75 ER 1.

62 Ibid 18; 29–30. It is of interest to note that Serjeant Pollard appeared to base his statement on *Matthew* 12:3–4, which suggests that one may take (steal) bread if one is hungry.

63 See, eg, *The Case of the King's Prerogative in Saltpetre* (1606) 12 Co Rep 12, 12; 77 ER 1294, 1294; *Mouse's Case* (1608) 12 Co Rep 63, 63; 77 ER 1341, 1342; *Moore v Hussey* (1609) Hob 93, 96; 80 ER 243, 246; *Colt v Bishop of Coventry and Lichfield* (1612) Hob 140, 159; 80 ER 290, 307. For a later example see *Manby v Scott* (1659) 1 Lev 4, 4–5; 83 ER 268, 268.

64 It should be noted in this respect that the most eminent of such scholars remain persuasive authorities unless the law has expressly altered since their time: see *R v Casement* [1917] 1 KB 98, 141, quoting *Butt v Conant* (1820) 1 Brod & Bing 548, 570; 129 ER 834, 843 (Dallas CJ).

65 That is, although Bracton refers to a situation that suggests 'necessity', Bracton was really referring to self-defence rather than a general defence of necessity: see O'Connor and Fairall, above n 10, 106.

66 For example, Bacon states that 'if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth; this is no escape, nor breaking of prison': Francis Bacon, 'Maxims of the Law' in James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon* (Longmans, first published 1857, 1872 ed) vol 7, 344; and further allows that one might throw goods overboard to halt a sinking ship; or pull down another house in order to stop the spread of fire: at 344–5. Bacon also holds that self-defence is a form of necessity: at 346.

'[i]f a man steal viands to satisfy his present hunger, this is no felony nor larceny'.[67] Nonetheless, as if to evidence the inconsistent nature of the necessity defence, Bacon's most famous illustration of necessity is one that cannot be described as a 'lesser evils' situation:

> So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.[68]

The above 'plank' example is clearly not a 'lesser evils' approach because, assuming all life to be of equal worth, it is not the lesser evil to kill an innocent to save yourself.[69] Put simply, a 'lesser evils' defence would demand that, in killing one (or indeed many), there must be a net saving of lives for that killing to be justified.[70] Of course, it is not quite that simple as perhaps necessity is more than a purely utilitarian equation, and the fact that homicide is involved further muddies the waters as courts have always struggled dealing with necessity as a defence to murder,[71] but these issues will be discussed later in the article. For now, we may simply highlight that Bacon viewed necessity as a general defence,[72] but was inconsistent in his approach to its formulation and application.[73]

Although Bacon's approach received approval from his contemporary, William Noy (even to the point of supporting his radical principle that hunger justifies theft

67 Ibid 343. It is 'revolutionary' because deciding the conflict between life and property in favour of life clearly has revolutionary potential in a capitalist society that otherwise appears to decide this conflict in favour of private property. Of course, the nature of necessity is that it will often manifest as a conflict between life and property: see Glanville Williams, *Criminal Law: The General Part*, above n 9, 734.

68 Bacon, above n 66, 344. It is of interest to note that this plank example was approved by Stephen: see Stephen, *History of the Criminal Law*, above n 38, 108.

69 As Glanville Williams points out, as 'the two lives must be accounted equal in the eye of the law and there is nothing to choose between them', a 'lesser evils' approach cannot justify the killing: Glanville Williams, *Criminal Law: The General Part*, above n 9, 740. See also *R v Howe* [1987] 1 AC 417, 430–3 (Lord Hailsham LC).

70 As Glanville Williams explains — '[i]f his act was intended to result in a net saving of lives, it would surely be justified by necessity. Even the law of murder must yield to the compulsion of events': Glanville Williams, *Criminal Law: The General Part*, above n 9, 739.

71 This 'struggle' is amply demonstrated in *R v Dudley* (1884) 14 QBD 273.

72 Bacon's only limitations on the defence were that necessity could not be a defence to treason, and that the person raising the defence cannot have caused the circumstances giving rise to the situation of necessity: see Bacon, above n 66, 345–6.

73 Indeed, Bacon often mentioned necessity, not as a 'lesser evils' principle, but rather as a recognition that certain dire circumstances will compel action such that the actor cannot be held to be morally or legally accountable for such actions (see, eg, Bacon, above n 66, 343) — an approach more in line with the moral involuntariness perspective adopted by the Canadian courts: see, eg, *Perka v The Queen* [1984] 2 SCR 232, 250, 259. See also Glenys Williams, 'Necessity: Duress of Circumstances or Moral Involuntariness?' (2014) 43 *Common Law World Review* 1, 7–13.

to satiate that hunger),[74] other legal scholars were not so supportive. In particular, Sir Matthew Hale, whom Windeyer has described as the 'greatest lawyer of the Restoration period',[75] was adamant that no general defence of necessity was known to the common law,[76] and, in any case, could certainly neither justify homicide,[77] nor excuse a starving person from stealing food as '[m]en's properties would be under a strange insecurity, being laid open to other men's necessities, whereof no man can possibly judge, but the party himself'.[78]

Blackstone repeated this view,[79] holding that the defence could neither justify nor excuse murder,[80] nor theft out of hunger or impoverishment.[81] Nonetheless, the more authoritative Blackstone[82] differs from Hale in that he holds that the necessity defence does exist in English common law, and provides a succinct statement of the 'lesser evils' approach:

> There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. *And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two.* Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in choosing the less.[83]

74 See William Noy, *The Principal Grounds and Maxims, with an Analysis; and a Dialogue and Treatise of the Laws of England* (S Sweet, 9th ed, 1821) 32–3. It is of interest to note that Bacon's main authoritative rival of the time, Sir Edward Coke, had little to say on necessity, apart from discussing cases he decided on the issue (for example, *The Case of the King's Prerogative in Saltpetre* (1606) 12 Co Rep 12; 77 ER 1294 — Coke discusses this case in Coke, above n 2, 83–4) whereas another 17th century writer, Hobbes, believed that to kill for self-preservation, or to steal out of hunger, was neither unlawful nor immoral: see Thomas Hobbes, *Leviathan* (Clarendon Press, first published 1651, 1909 ed) 232.

75 W J V Windeyer, *Lectures on Legal History* (Lawbook, 2nd revised ed, 1957) 217.

76 Hale, above n 59, 51–5.

77 That is, Hale states that the mariner in Bacon's plank example 'ought rather to die himself, than kill an innocent': ibid 51.

78 Ibid 54. See also P R Glazebrook, 'The Necessity Plea in English Criminal Law' (1972) 30 *Cambridge Law Journal* 87, 116.

79 Blackstone, above n 2, 32.

80 Blackstone states in support of this conclusion — 'for he ought rather to die himself, than escape by the murder of an innocent': ibid 30. However, he nonetheless seems to favour Bacon's plank example, justifying it by reference to 'unavoidable necessity', but he also suggests that this might be a case of self-defence, rather than necessity: at 186.

81 Ibid 31–2. For a critique of Hale's and Blackstone's view that economic necessity is no defence see Glanville Williams, *Criminal Law: The General Part*, above n 9, 734–5. See also East, who disagrees with both Hale and Blackstone, and directly challenges the view that necessity may not excuse murder: Edward Hyde East, *A Treatise of the Pleas of the Crown* (J Butterworth, 1803) vol 1, 294. There is also support from Russell for a 'lesser evils' defence: see Sir William Russell, *A Treatise on Crimes and Misdemeanours* (Garland Publishing, first published 1819, 1979 ed) vol 1, 664–5.

82 Blackstone is indisputably an authority in his own right, but such prestige is enhanced by the fact that his *Commentaries on the Laws of England* was the basis of Stephen's *Commentaries* in the late 19th century: see Windeyer, above n 75, 243–5.

83 Blackstone, above n 2, 30–1 (emphasis added).

Blackstone's views in this respect were the basis of the position taken by Sir James Fitzjames Stephen in the most cited early exposition of necessity.[84] Stephen was the first scholar to clearly provide the elements of the defence as follows:

(1) the conduct of the defendant was necessary to avoid 'inevitable and irreparable evil';

(2) no more was done than was 'reasonably necessary' to avoid that evil;

(3) the evil threatened 'could not otherwise be avoided' than by the action taken; and

(4) the evil done to avoid that evil (ie the commission of the offence in question) was 'not disproportionate to the evil avoided'.[85]

This formulation of the necessity defence has received consistent judicial support, and has arguably been the basis of most judicial pronouncements on the defence ever since.[86] However, Stephen himself, in a number of his publications, has emphasised the inherently uncertain nature of the defence of necessity. Stephen highlights the fact that the 'extent of this principle is unascertained',[87] and further noted:

> Compulsion by necessity is one of the curiosities of law, and so far as I am aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient.[88]

Stephen explains this issue further:

> In short, it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards … I see no good in trying to make the law more definite than this, and there would I think be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances.[89]

The last sentence above perhaps echoes the fear expressed by both Hale and Blackstone, and further highlights the revolutionary potential of necessity to undermine both the stability and authority of the legal system (ie what does it say

84 The relevant paragraph will not be quoted here as it is provided in full above during the discussion on *Davidson* [1969] VR 667: see above n 39 and accompanying text. The famous quote is found in Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24 and is repeated in full by Menhennitt J in *Davidson* [1969] VR 667, 670.

85 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

86 See, eg, *Davidson* [1969] VR 667, 670–2; *R v Loughnan* [1981] VR 443, 448 (Young CJ and King J) ('*Loughnan*'); *R v Rogers* (1996) 86 A Crim R 542, 547 (Gleeson CJ) ('*Rogers*'); *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 240 (Brooke LJ). See also Yeo, who states that both UK and Australian courts have tended to place 'heavy reliance' upon Stephen's view in this respect: Stanley Yeo, 'Revisiting Necessity' (2010) 56 *Criminal Law Quarterly* 13, 36.

87 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

88 Stephen, *History of the Criminal Law of England*, above n 38, 108.

89 Ibid 109–10.

about such a system when one concludes that breaking the law is the 'lesser evil'?), and the ideological foundations of our society (eg what sort of capitalism allows the starving to steal with impunity?). This fear of the potential ramifications of the necessity defence has been regularly repeated by the judiciary,[90] and is perhaps most forcibly espoused by Lord Coleridge CJ in *R v Dudley*:[91] 'it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime'.[92]

There were arguably cases touching on necessity from the late 18th century through to the early 20th century,[93] but for present purposes the major UK case on the necessity principle was not heard until 1938 in *Bourne*.[94] This was a somewhat strange decision by Macnaghten J, as his Honour did not expressly state that the necessity defence was being applied to the matter before the court[95] (although there was reference to 'what has always been the common law of England'),[96] yet comments made by the court lead inescapably to that conclusion. It is now generally accepted that the basis of his Honour's decision was the common law principle of necessity.[97]

In this case the defendant was charged with performing an unlawful abortion under s 58 of the *1861 UK Act*. Ultimately, Macnaghten J decided that the abortion was lawful provided 'the termination of pregnancy [was] for the purpose

90 For a recent example, see *R v Quayle* [2006] 1 All ER 988, 1020–6 (Mance LJ) ('*Quayle*').

91 (1884) 14 QBD 273.

92 Ibid 288. Although the Court arguably recognised necessity as a common law defence (see Glazebrook, above n 78, 113–14), this case will not be further discussed as it 'descended to mere rhetoric' (Glanville Williams, *Criminal Law: The General Part*, above n 9, 742) and is thus 'an entertaining story which is authority for nothing': Peter Alldridge, 'Duress, Duress of Circumstances and Necessity' (1989) 139 *New Law Journal* 911, 911. See also Sneiderman and Verhoef, above n 11, 378; Rupert Cross, 'Necessity Knows No Law' (1968) 3 *University of Tasmania Law Review* 1, 2–4; Bernadette McSherry, 'The Doctrine of Necessity and Medical Treatment' (2002) 10 *Journal of Law and Medicine* 10, 16.

93 See, eg, *The Governor and Company of the British Cast Plate Manufacturers v Meredith* (1792) 4 Term R 794; 100 ER 1306; *R v Vantandillo* (1815) 4 M & S 73, 76; 105 ER 762, 763; *Humphries v Connor* (1864) 17 ICLR 1, 7 (O'Brien J); *R v Hicklin* (1868) LR 3 QB 360, 376–7 (Blackburn J), 378 (Lush J); *Burns v Nowell* (1880) 5 QBD 444; *R v Tolson* (1889) 23 QBD 168; *Cope v Sharpe [No 2]* [1912] 1 KB 496, 506–10 (Kennedy LJ).

94 [1939] 1 KB 687.

95 Indeed, on the face of it Macnaghten J was applying a defence under s 1(1) of the *Infant Life (Preservation) Act 1929*, 19 & 20 Geo 5, c 34 to the offence before the Court (Bourne was charged with using an instrument with intent to procure a miscarriage, contrary to the provisions of s 58 of the *1861 UK Act*): see *Bourne* [1939] 1 KB 687, 690–1. However, it is not altogether clear why his Honour felt that an exception in one statute was, in itself, grounds for reading a similar exception into the other, and, in any case, his Honour still had to define 'unlawfully' and did so by applying considerations that clearly stemmed from the necessity defence. The only plausible legal basis for Macnaghten J's decision is the necessity principle: see Glanville Williams, *The Sanctity of Life and the Criminal Law*, above n 5, 152.

96 *Bourne* [1939] 1 KB 687, 691.

97 See Seaborne Davies, above n 2, 130; Ministry of Health Home Office, *Report of the Inter-Departmental Committee on Abortion* (Her Majesty's Stationery Office, 1939) 31 [76], 70 [195]; Glanville Williams, *The Sanctity of Life and the Criminal Law*, above n 5, 152; Arnolds and Garland, above n 15, 291–2; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 231–2 (Brooke LJ); *Loughnan* [1981] VR 443, 451–5 (Crockett J).

of preserving the life of the mother'.[98] It was evident that the Court was applying a classic 'lesser evils' interpretation of the necessity defence as his Honour explained further that '[t]he 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';[99] in other words, one may perform an abortion lawfully only if the abortion was necessary to avert a greater evil, namely, the death of the mother. His Honour also took a broad view of 'life' in this respect, finding that if a medical practitioner forms the view, on reasonable grounds, 'that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck',[100] then an abortion performed on that basis will constitute 'operating for the purpose of preserving the life of the mother'.[101] As stated, this represents the classic utilitarian 'lesser evils' approach to the necessity defence.

Bourne was the last significant case in which necessity was successfully applied, or even discussed, for some time in the UK. It was not until the early 1970s that higher courts in the UK dealt with the issue. In *Southwark London Borough Council v Williams*[102] the necessity defence was raised, and although the Court appeared to accept the existence of the defence it refused to apply it, ostensibly due to the Court's fear of the adverse implications of allowing a broader defence of necessity. Lord Denning MR exemplified this trepidation:

> Else necessity would open the door to many an excuse. … [I]t would open a way through which all kinds of disorder and lawlessness would pass. … Necessity would open a door which no man could shut.[103]

The necessity defence was also the subject of rudimentary discussion in *Buckoke v Greater London Council*,[104] but the Court similarly refused to apply it to the case at hand, extraordinarily deciding that the defence would not be available to the driver of a fire engine that ran a red light in order to save a life.[105] This decision is difficult to reconcile with a 'lesser evils' approach to necessity; indeed, if necessity cannot be applied in the above scenario, one struggles to envision cases where it might be applicable, and it comes as no surprise that the defence of necessity was rarely mentioned for some time after this decision.[106]

98 *Bourne* [1939] 1 KB 687, 693.

99 *R v Bourne* [1938] 3 All ER 615, 620. Note: this quote does not appear in the Law Reports version of the case.

100 *Bourne* [1939] 1 KB 687, 694.

101 Ibid.

102 [1971] Ch 734 ('*Southwark*').

103 Ibid 743–4. The other judge in *Southwark*, Edmund Davies LJ, expressed similar sentiments — 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear — necessity can very easily become simply a mask for anarchy': at 745–6.

104 [1971] Ch 655.

105 Ibid 668–9.

106 In *Johnson v Phillips* [1975] 3 All ER 682 it could be argued that necessity was inferred when Wien J stated that 'a constable would be entitled … to [direct motorists to disobey traffic regulations] if it were reasonably necessary for the protection of life or property', but the necessity defence was not expressly mentioned by the court: at 686.

It is at this point that UK law on necessity ceases to be particularly authoritative or persuasive for present purposes because by the early 1980s Australian law had developed its own interpretations and formulations of the necessity defence through the decisions in *Davidson*,[107] *Wald*,[108] and especially *Loughnan*,[109] which remains the landmark Australian decision on necessity (and will be discussed at length below).

Nonetheless, as an illustration of necessity's inconsistent and uncertain nature, it is interesting to point out that the UK courts in the late 1980s arguably implicitly extinguished the necessity defence (at least in its 'lesser evils' formulation) by creating a new defence of duress of circumstances,[110] only to then revive the 'lesser evils' interpretation of the defence in the 1990s,[111] even applying the defence to murder at the turn of the 21st century.[112] So where does necessity currently sit in UK law? It is difficult to say.[113] The most that can be said is that necessity (probably) remains a defence under UK common law. However, whether it is a defence of general application, or confined to specific offences, remains open to debate. Similar uncertainty is evident with regard to the elements of the defence, or even whether the defence is appropriately labelled 'necessity', 'duress of circumstances', or 'necessity by circumstances'. Put simply, 'the authorities are not consistent'.[114] It has recently been said that the necessity defence holds a 'somewhat ambivalent and nebulous position' in the UK common law.[115] Well over half a century ago Glanville Williams explained that '[t]he peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision',[116] and it would appear that little has changed

107 [1969] VR 667.

108 (1971) 3 DCR NSW 25.

109 [1981] VR 443.

110 The defence of duress of circumstances was established in the Court of Appeal cases of *R v Willer* (1986) 83 Cr App R 225, 227 (Watkins LJ); *R v Denton* (1987) 85 Cr App R 246, 248 (Caulfield J); *R v Conway* [1989] QB 290, 296–7 (Woolf LJ); *R v Martin* [1989] 1 All ER 652, 653–4 (Simon Brown J). After this flurry of activity the defence was rarely mentioned again; although in *Quayle* reference was made to a defence of 'necessity by circumstances', it was clear that this was a reference to the necessity defence and not duress of circumstances: [2006] 1 All ER 988, 1019–20 (Mance LJ). For a discussion of the defence of duress of circumstances see D W Elliott, 'Necessity, Duress and Self-Defence' [1989] *Criminal Law Review* 611; Birju Kotecha, 'Necessity as a Defence to Murder: An Anglo-Canadian Perspective' (2014) 78 *Journal of Criminal Law* 341, 350–9; Michael Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes — Taking Human Life and the Defence of Necessity' (2006) 70 *Journal of Criminal Law* 147, 150–1; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 232–6 (Brooke LJ), 252–4 (Robert Walker LJ).

111 See, eg, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 174 (Lord Fraser); *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 74 (Lord Goff).

112 See *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 219–40 (Brooke LJ). For a concise philosophical analysis of this case, especially with respect to the rights-based v consequence (deontological v teleological) arguments, see Kotecha, above n 110, 343–8.

113 Arnolds and Garland note that judges often failed to discuss the legal principles of the defence, and '[a]s a consequence, it is impossible to demonstrate with any degree of satisfaction an historical development of the law of necessity': Arnolds and Garland, above n 15, 291.

114 Ian Howard Dennis, 'On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse' (2009) 3 *Criminal Law and Philosophy* 29, 31.

115 Glenys Williams, above n 73, 1. See also Michalowski, above n 13, 369; Kotecha, above n 110, 361.

116 Glanville Williams, *Criminal Law: The General Part*, above n 9, 728.

in the UK common law since then. This level of uncertainty with regard to the necessity defence is less apparent in Australian common law.

B *Necessity in Australia:* R v Loughnan

The law on necessity in Australia is less confusing and ambiguous than it currently stands in the UK for predominantly one reason: in Australian common law there exists a decision on the necessity defence that has been followed and applied ever since it was handed down by the Victorian Supreme Court: *Loughnan*.[117]

In *Loughnan*[118] the court discussed the concept of necessity at length and delivered a comprehensive judgment on the principle. The case may be considered the landmark or definitive Australian decision on the necessity defence.[119] In this case the defendant was charged with escaping prison and raised the necessity defence by arguing that he only did so as he feared for his life due to threats emanating from other prisoners.[120] The Court held that the common law defence of necessity remained good law,[121] that it was a defence of general application,[122] and importantly the court provided detailed exposition of the elements of the defence (but found that the defence was not made out in the case at hand).[123] In determining the elements of the necessity defence, the majority (consisting of Young CJ and King J) placed great emphasis upon Stephen's definition of the concept[124] (as cited by Menhennitt J in *Davidson*,[125] and quoted in full earlier in this article), and concluded that there were three elements to necessity: irreparable evil, immediate peril, and proportion.[126] The majority explained those elements as follows:

> [1] [T]he criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect …
>
> [2] The element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril …

117 [1981] VR 443.

118 Ibid.

119 See, eg, Yeo, who refers to the case as '[t]he leading pronouncement on necessity under Australian common law': Yeo, 'Revisiting Necessity', above n 86, 35.

120 It is of interest to note that there were actually two such prison escape cases argued before the Full Court of the Victorian Supreme Court in the late 1970s: *R v Dawson* [1978] VR 536 and *Loughnan* [1981] VR 443. Both cases involved the same escape from Pentridge prison, and both defendants essentially argued that they escaped prison as they feared for their lives due to threats emanating from other prisoners. In *R v Dawson* the necessity principle received scant judicial comment, but in *Loughnan* it formed the basis of the judgment.

121 See *Loughnan* [1981] VR 443, 447 (Young CJ and King J), 456–7 (Crockett J).

122 That is, the defence might apply to both common law and statutory crimes: ibid 450 (Young CJ and King J), 458 (Crockett J).

123 Ibid 447 (Young CJ and King J), 463–4 (Crockett J).

124 Ibid 448.

125 [1969] VR 667, 670.

126 *Loughnan* [1981] VR 443, 448.

> [3] The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?[127]

As to what might constitute 'irreparable evil', the majority felt that the 'limits of this element are at present ill defined and where those limits should lie is a matter of debate'.[128] As the case before the court involved a threat of death (which amply satisfies the element of 'irreparable evil'),[129] the majority chose not to provide those limits, other than stating that a consequence less than death 'might be sufficient to justify the defence'.[130] As to the meaning of 'imminent peril', the majority similarly declined to concisely define the phrase,[131] preferring to allow it to vary on a case by case basis.[132] However, the point was made that it should be 'an urgent situation of imminent peril … [and] if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed'.[133] As to the element of proportion, again the majority failed to provide any detailed exposition, but they did seem to imply that even murder might be a proportionate response in certain circumstances.[134]

To summarise the majority view:[135] for the defence of necessity to be applied there must exist 'an urgent situation of imminent peril'.[136] Such 'peril' must be 'certain',[137] and it must be shown that the 'peril', if it had been permitted to eventuate, would have 'inflicted irreparable evil'[138] upon the defendant, or upon others that he or she was bound to protect.[139] Finally, it must be shown that the steps taken by the defendant to avoid the 'peril' were not disproportionate to the 'peril', and this proportion element may be judged according to an assessment

127 Ibid.

128 Ibid.

129 Ibid.

130 Ibid.

131 Other than to effectively repeat previous definitions, for example — 'an urgent situation of imminent peril must exist in which the accused must honestly believe on reasonable grounds that it is necessary for him to do the acts which are alleged to constitute the offence in order to avoid the threatened danger': ibid 449.

132 Ibid 448.

133 Ibid.

134 This implication is read from the majority's view that *R v Dudley* (1884) 14 QBD 273 should be distinguished, and a failure to state categorically that the defence could not be applied to homicide: ibid 449–50. *Contra* 456–7 (Crockett J).

135 The other judge in the case, Crockett J, also recognised the necessity defence but chose to formulate the defence in a more classical 'lesser evils' manner (indeed, Crockett J adopts a test that might be described more aptly as a 'comparable evil' test): *Loughnan* [1981] VR 443, 459–60. His Honour also held that the defence would only be raised in 'an urgent situation of imminent peril', and that there should be no alternative for the defendant to act as they did to avoid the threatened 'evil', but his Honour felt that the proportion element would be satisfied if there was merely 'the preservation of at least an equal value', and his Honour does not refer to the need for there to be a 'certain' infliction of 'irreparable evil' as a condition of necessity: at 460.

136 Ibid 449.

137 Ibid 448.

138 Ibid.

139 Ibid.

of reasonably available alternatives to the action taken.[140] The defendant 'must honestly believe on reasonable grounds' that the urgent situation of imminent peril existed;[141] whereas the tests for whether such peril would have constituted an 'irreparable evil' if allowed to occur, and whether the response to the peril was proportionate, appear to be purely objective. The reasoning of the majority in *Loughnan* has prevailed, with that decision being followed and applied ever since.[142] As the Victorian Court of Criminal Appeal stated in *R v Dixon-Jenkins*, as a result of *Loughnan* the principles of necessity were 'no longer in doubt'.[143] However, one final decision requires brief discussion — *Rogers*[144] — as not only is this a NSW appellate court judgment, but it has been argued by some other courts that *Rogers* slightly altered the effect of *Loughnan*, and this issue requires examination.

A similar fact situation to *Loughnan* presented itself in *Rogers*:[145] the defendant was charged with attempting to escape from prison and argued that he only did so as he feared for his life due to threats from other prisoners. The NSW Court of Appeal judgment was delivered by Gleeson CJ. His Honour reaffirmed the majority decision in *Loughnan* as being a correct statement of the law and agreed with the majority's basic formulation of the elements of the defence of necessity.[146] However, Gleeson CJ, in reference to the *Loughnan* factors of 'urgency and immediacy'[147] held:

> it is now more appropriate to treat those 'requirements', not as technical legal conditions for the existence of necessity, but as factual considerations relevant, and often critically relevant, to the issues of an accused person's belief as

140 Ibid.

141 Ibid.

142 Australian cases touching on necessity since *Loughnan* have always followed, applied, approved of, or been consistent with the majority decision in *Loughnan* — see, eg, *Rogers* (1996) 86 A Crim R 542; *R v Japaljarri* (2002) 134 A Crim R 261; *Dunjey v Cross* (2002) 36 MVR 170; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Taiapa v The Queen* (2009) 240 CLR 95; *Mattar v The Queen* [2012] NSWCCA 98 (17 May 2012); *Leichhardt Council v Geitonia Pty Ltd [No 6]* (2015) 209 LGERA 120; *Police (SA) v Ludwig* (2015) 73 MVR 379. However, it is of interest to note that *Loughnan* no longer effectively applies in Victoria, as that jurisdiction has now legislated for a defence of 'sudden and extraordinary emergency' and expressly abolished the common law defence of necessity: see *Crimes Act 1958* (Vic) s 322R which creates the statutory defence and s 322S which abolished the common law defence. Versions of this defence of 'sudden and extraordinary emergency' can be found in most jurisdictions: *Criminal Code Act 1995* (Cth) s 10.3; *Criminal Code 2002* (ACT) s 41; *Criminal Code Act 1983* (NT) ss 33, 43BC; *Criminal Code Act 1899* (Qld) s 25; *Criminal Code Act Compilation Act 1913* (WA) s 25 — but, notably, not in NSW.

143 (1985) 14 A Crim R 372, 378.

144 (1996) 86 A Crim R 542. Note that, prior to *Rogers*, necessity came before the NSW courts in *R v White* (1987) 9 NSWLR 427. In that case, the court followed *Loughnan* and stated that, although courts should be reluctant to extend the necessity defence to novel situations, the defence was available for strict liability offences, and that the defence is more readily available the more minor the offence committed: *R v White* (1987) 9 NSWLR 427, 431–2, which is perhaps a pithy example of the proportion element in action.

145 (1996) 86 A Crim R 542.

146 Ibid 543–5.

147 Ibid 546.

> to the position in which he or she is placed, and as to the reasonableness and proportionality of the response.[148]

It has been argued that the effect of the above paragraph converts the elements of the necessity defence established in *Loughnan* to mere factual considerations.[149] With respect, such a view is tenuous and downplays the fact that Gleeson CJ did not discuss *Loughnan* in any way suggestive of not accepting *Loughnan* as being good law for NSW; indeed, his Honour expressly followed and applied *Loughnan*.[150] Furthermore, the passage in question was clearly stated with respect to the issues of 'urgency and immediacy', and not all the elements of the necessity defence espoused in *Loughnan*, and the considerations of 'urgency' and 'immediacy' were not elements of the defence in *Loughnan*, but rather issues relevant to the element of 'imminent peril'.[151] Thus, in this author's opinion, in NSW the elements of necessity are those laid down by the majority in *Loughnan*. In common with other cases on necessity since *Loughnan*, Gleeson CJ in *Rogers* provided guidance on how one is to assess those elements,[152] but the elements remain the same.[153] Consequently, if *Rogers* alters *Loughnan* at all, it is that, in assessing whether the 'imminent peril' element of the necessity defence is evident on the case before it, a court need not make a finding that the threat complained of was either 'urgent' or 'immediate'; however, such issues remain relevant to the assessment of whether there existed a situation of imminent peril in the circumstances.

C *A Summation of Necessity*

As has been evident from the preceding discussion, the development of the necessity defence has been somewhat haphazard. Nonetheless, a number of conclusions may be made with confidence. First and foremost, it is indisputable that necessity is a defence recognised by Australian common law,[154] and continues

148 Ibid.

149 For example, Doyle CJ (with whom Anderson and Kelly JJ agreed) in *R v B, JA* (2007) 99 SASR 317 felt that although *Loughnan* accurately expressed the law, that decision must now be viewed through the lens of *Rogers*, and the effect of *Rogers* was such that the elements of the necessity defence espoused in *Loughnan* should not be viewed as legal conditions or requirements, but factual considerations relevant (and often critically relevant) to the defendant's belief of the existence of the requisite peril and the reasonableness and proportionality of the response: *R v B, JA* (2007) 99 SASR 317, 322–323 [24]–[26]. See also *Bayley v Police* (2007) 99 SASR 413, 421–3 [34]–[37] (Gray J, with whom Sulan and White JJ agreed); *R v Patel [No 7]* [2013] QSC 65 (7 March 2013) [11].

150 See *Rogers* (1996) 86 A Crim R 542, 543–5.

151 [1981] VR 443, 448–9.

152 (1996) 86 A Crim R 542, 546–8.

153 See, eg, *Ahmadi v The Queen* (2011) 254 FLR 174, 179–80 [35]–[41] (Buss JA); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 496 (Gleeson CJ); *Leichhardt Council v Geitonia Pty Ltd [No 6]* 209 LGERA 120, 152–3 [142]–[146].

154 The necessity defence has been described 'as a rubric of the common law': *Loughnan* [1981] VR 443, 457 (Crockett J). See also Kenneth J Arenson, 'Expanding the Defences to Murder: A More Fair and Logical Approach' (2001) 5 *Flinders Journal of Law Reform* 129, 136–7; Stanley M H Yeo, *Compulsion in Criminal Law* (Lawbook, 1990) 53. Cf *R v Dawson* [1978] VR 536, 539 (Anderson J), 543 (Harris J).

to be so recognised by NSW appellate courts.[155] Although courts are eager to keep the applicability of the defence 'within carefully confined limits',[156] it is nonetheless probably a defence of general application available to both common law and statutory offences[157] (and not limited to particular offences),[158] although doubt remains as to whether it might apply to murder.[159] Of course, whether the necessity defence can apply to a charge of murder is a moot point with respect to the crime of abortion, as the foetus (not being a legal person) cannot be the victim of homicide.[160] However, a related issue is worth discussing — whether necessity is a justification or merely an excuse.[161]

Judgments are inconsistent on this issue.[162] Both *Davidson*[163] and *Wald*[164] are suggestive of necessity as a justification, as is the more recent decision in *Bayley v Police*.[165] However, in *Rogers* it was held to be an excuse,[166] whereas in *Loughnan* Crockett J held it to be a justification,[167] while the majority did not decide on the

155 See, eg, *NSW v McMaster* (2015) 91 NSWLR 666, 706–9 [214]–[226] (Beazley P); *Simon v Condran* (2013) 85 NSWLR 768, 775–6 [33] (Leeming JA); *Mattar v The Queen* [2012] NSWCCA 98 (17 May 2012) [7] (Harrison J).

156 *R v B, JA* (2007) 99 SASR 317, 323 [25]. See also *Bayley v Police* (2007) 99 SASR 413, 426 [48], quoting *R v Latimer* [2001] 1 SCR 3, 19 [27].

157 See, eg, *Loughnan* [1981] VR 443, 458 (Crockett J); *Bayley v Police* (2007) 99 SASR 413, 420–1 [32]; *Leichhardt Council v Geitonia Pty Ltd [No 6]* (2015) 209 LGERA 120, 150–1 [137], [139]. It may even be applied to an offence of absolute liability: *R v Martin* [1989] 1 All ER 652; Tamara Walsh, 'Defending Begging Offenders' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 58, 63–5. Cf *Quayle* [2006] 1 All ER 988, 1011, 1014.

158 See Yeo, *Compulsion in Criminal Law*, above n 154, 253–4. Cf *R v Pommell* [1995] 2 Cr App R 607, 613–4 (Kennedy LJ).

159 It has been suggested by a number of scholars that necessity may apply to murder: see, eg, Nathan Tamblyn, 'Necessity and Murder' (2015) 79 *Journal of Criminal Law* 46, 47–8; Bohlander, above n 110, 157. *Contra* Michael D Bayles, 'Reconceptualizing Necessity and Duress' (1987) 33 *Wayne Law Review* 1191, 1205; Michalowski, above n 13, 344–6. However, the judiciary tend to be less enthusiastic in this respect: see, eg, *R v Howe* [1987] AC 417, 453 (Lord Mackay); *R v Brown* [1968] SASR 467, 490.

160 See *R v Hutty* [1953] VLR 338, 339; *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, 279; *C v S* [1988] QB 135, 140; *In the Marriage of F* (1989) 13 Fam LR 189, 194, 197.

161 It is related to the issue of the applicability of necessity to murder because a justificatory view of necessity would likely hold that the defence is applicable to murder in circumstances where there is a net saving of lives: see Glanville Williams, *Criminal Law: The General Part*, above n 9, 739; Yeo, *Compulsion in Criminal Law*, above n 154, 152–3; Glazebrook, above n 78, 114; Jeremy Finn, 'Emergency Situations and the Defence of Necessity' (2016) 34(2) *Law in Context* 100, 109. Of course, whether necessity might justify murder also clearly involves a tension between philosophies — teleological (save more lives) and deontological (never take a life). For further discussion see Kotecha, above n 110, 348–53.

162 See, eg, *Moore v Hussey* (1609) Hob 93, 96; 80 ER 243, 246, in which necessity is defined as an excuse, whereas in *Davidson* [1969] VR 667 Menhennitt J applied the defence as a justification, as did Brooke LJ in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 236. As further evidence of this inconsistency, the founder of modern necessity, Stephen, initially suggested that the defence was a justification (see Stephen, *History of the Criminal Law of England*, above n 38, 109–10), but later indicated that it was an excuse (see Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24).

163 See [1969] VR 667, 672.

164 See (1971) 3 DCR NSW 25, 29.

165 See (2007) 99 SASR 413, 427–8 [53].

166 (1996) 86 A Crim R 542, 547.

167 [1981] VR 443, 455–6, 458.

matter,[168] which is not unusual because when necessity is before a court the issue is often not discussed at all, or held to be of little import.[169] In a practical sense the distinction is probably of no consequence;[170] in particular, it does not impact upon the defendant that is acquitted in either case. However, there are significant political and symbolic ramifications of defining a defence as either a justification or an excuse.[171]

Put simply, a justification defines the conduct in question as 'right' conduct 'deserving of praise',[172] whereas an excuse holds the conduct to be 'wrong' but the actor not to be morally blameworthy.[173] That is, the basis of justifications and excuses is to pronounce and reflect community values and expectations, and if an act is said to be justified, the court (as the theoretical guardian of society's values) is saying that the conduct was right, and indeed, *should* have been done. On the other hand, a person who claims an excuse concedes that harm was done by the act and that the act was wrong, but that he or she should nonetheless be excused (eg on the basis of human frailty) in the circumstances.[174] With respect to the politically charged offence of abortion, it matters (politically, philosophically and symbolically) whether we define the action as 'right' or 'wrong'; or rather whether we merely excuse the actor or applaud the act.[175]

It is this author's opinion that the current Australian formulation of the necessity defence denotes a justification rather than an excuse.[176] That is, justifications are

168 Ibid 450.

169 See, eg, *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 237 (Brooke LJ), 253 (Robert Walker LJ). See also Miriam Gur-Arye, 'Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?' (1986) 102 *Law Quarterly Review* 71, 89.

170 See Gur-Arye, above n 169, 88.

171 See Finn, above n 161, 102.

172 Yeo, *Compulsion in Criminal Law*, above n 154, 14–15. Yeo further explains that a justification indicates conduct that is 'recognised by society as right conduct': at 160. See also Finn, above n 161, 103.

173 See Kotecha, above n 110, 350; Jaime Lindsey, 'A New Defence of Necessity in the Criminal Law' (2011) 17 *UCL Jurisprudence Review* 122, 129–33.

174 As Yeo explains, an excuse constitutes an opportunity for the law to provide 'censure but compassion within limits': Yeo, *Compulsion in Criminal Law*, above n 154, 24. See also Finn, who states that '[i]n excusatory necessity the conduct is unlawful but the actor is excused because the actor could not be expected to withstand the peril and adhere to the law': Finn, above n 161, 104.

175 Another point to recognise is that, if necessity is a justification, and abortion in those circumstances is therefore 'right', then it becomes unlawful for others to impede or resist the performance of that justified conduct: see Glanville Williams, *Criminal Law: The General Part*, above n 9, 745. For a detailed discussion of whether necessity is a justification or excuse, and the implications thereof: see Finn, above n 161, 101–8.

176 Much like self-defence, which may be viewed as simply a specific application of the necessity principle: see Victorian Law Reform Commission, *Defences to Homicide*, Report No 8 (2004) 110–11. However, it should be noted that some have argued that necessity is neither a justification nor an excuse, but a third (ill-defined) category of defence because the conduct is neither entirely 'right' nor 'wrong': see, eg, Kotecha, above n 110, 342. Kotecha goes on to conclude that necessity is better expressed as simply 'an emergency … where there is a sudden, urgent and often unexpected occurrence, occasion or circumstance that requires action': at 353. See also Michelle Conde, 'Necessity Defined: A New Role in the Criminal Defence System' (1981) 29 *UCLA Law Review* 409, 439–42; Yeo, *Compulsion in Criminal Law*, above n 154, 28. Yeo also argues that there may exist both justificatory necessity and excusatory necessity: at 46.

consequentialist in nature,[177] tending to 'favour net utility rather than respect for individuals and their rights',[178] and the proportionality element (or 'lesser evils' basis, whereby one commits 'evil' only in order to avoid a greater 'evil') of the necessity defence is clearly framed in utilitarian terms:[179] hence, necessity is a justificatory defence.[180] Put another way, it must be a desirable social value that a member of society chooses the lesser evil, or avoids the greater evil. Since one is acting as society would desire one to act, society must therefore regard such conduct as 'right'; the necessity defence must therefore be a justification.

This point about choosing the 'lesser evil' raises another issue with necessity that has probably been the primary basis for the judicial reluctance to apply the defence more liberally: the application of the necessity defence effectively compels a court to usurp the role of the legislature.[181] That is, besides the obvious practical difficulty of weighing up and ordering competing, and often incommensurable,[182] harms, values and/or interests,[183] in deciding which 'acts are of more value to society or create more harm',[184] a court is engaging in a utilitarian balancing of values in direct conflict with legislative policy;[185] essentially, holding that there are more important values than obeying the law.[186] In a purported liberal democratic society, such as Australia, the determination or prioritising of such competing interests or values is, in theory, the prerogative of the legislature.[187] In this sense, the necessity defence may serve to undermine parliamentary sovereignty.[188] This is the 'democracy problem' of necessity highlighted by Gardner.[189]

177 As Glenys Williams explains — 'justification is, in essence, consequentialist in nature because it favours a consequence that leads to the least harm or evil': Glenys Williams, above n 73, 3.

178 Lindsey, above n 173, 132–3. See also Tamblyn, above n 159, 52. For a detailed discussion of the utilitarian and deontological underpinnings of justification and excuse see Dennis, above n 114, 33–40.

179 See Brudner, above n 11, 341–2; Michalowski, above n 13, 340; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 238 (Brooke LJ); Tamblyn, above n 159, 50; Laura Offer, 'A Court of Law or a Court of Conscience: A Critique of the Decision in *Re A (Children)*' (2012) 4 *Plymouth Law and Criminal Justice Review* 132, 141. Conde even goes so far as to suggest that necessity reflects the idiom that the end justifies the means: Conde, above n 176, 432. Cf Lindsey who argues that '[t]he proportionality test is not simply about the net costs or benefits of committing the crime, it requires an analysis of all the different avenues available and the relationship between the crime committed and the anger averted': Lindsey, above n 173, 142.

180 See Edward M Morgan, 'The Defence of Necessity: Justification or Excuse?' (1984) 42(2) *University of Toronto Faculty of Law Review* 165, 183; Kotecha, above n 110, 349; Finn, above n 161, 102; Stanley Meng Heong Yeo, 'Proportionality in Criminal Defences' (1988) 12 *Criminal Law Journal* 211, 221; Yeo, *Compulsion in Criminal Law*, above n 154, 103; *Loughnan* [1981] VR 443, 459 (Crockett J).

181 See Dennis, above n 114, 30, 46; Lindsey, above n 173, 122, 128. For an example of a court struggling with this dilemma see *Quayle* [2006] 1 All ER 988, 1020–6.

182 See Dennis, above n 114, 30.

183 See Tamblyn, above n 159, 54; Dennis, above n 114, 45–7.

184 Lindsey, above n 173, 133.

185 See Dennis, above n 114, 30, citing *Quayle* [2006] 1 All ER 988, 1020; *Perka v The Queen* [1984] 2 SCR 232, 248–52 (Dickson J).

186 See Lindsey, above n 173, 127–8. In essence, the court's decision 'will inevitably manifest a political choice': Tremblay, above n 12, 364.

187 See Lindsey, above n 173, 139.

188 Ibid 128. The necessity defence also threatens 'the law's role as a framework of normative rules': Tremblay, above n 12, 331.

189 Simon Gardner, 'Necessity's Newest Inventions' (1991) 11 *Oxford Journal of Legal Studies* 125, 132.

On the other hand, the necessity defence may serve an indispensable purpose for the legal system itself: allowing for flexibility and adapting to (and accommodating where necessary) 'evolving social realities'[190] when the law is not otherwise reflective of society's current values.[191] In this sense, 'recognition of the defense of necessity ultimately works to increase the legitimacy of the law and improves the judicial process'.[192] These issues highlight the complicated nature of the necessity defence, indicating its complex political and moral implications, and suggesting interesting areas for further analysis. However, for the purposes of this article, the focus needs to return to a purely legal examination; in particular, what are the exact elements of the defence, and does *Wald* express those elements correctly?

IV THE ELEMENTS OF NECESSITY: PROBLEMS WITH *WALD*

Ascertaining the precise nature of the elements of the necessity defence is a difficult task,[193] and the defence is probably 'still in a process of development';[194] even issues that appear, at first glance, to be straightforward, upon closer examination remain puzzling and contentious.[195] Nonetheless, an attempt at that formulation must be made.

As indicated earlier in the article, the first relatively concise, and authoritative, formulation of the elements of the defence was by Stephen, who concluded that necessity had four elements as follows: (1) the conduct of the defendant was necessary to avoid an 'inevitable and irreparable evil'; (2) no more was done than was 'reasonably necessary' to avoid that evil; (3) the action taken was the only means by which to avoid the evil threatened; and (4) the evil done (ie the commission of the offence in question) to avoid the evil threatened was 'not disproportionate to the evil avoided'.[196] Stephen did not suggest whether such elements were to be assessed upon subjective or objective grounds, but he makes no reference to subjective concepts, such as 'belief' or 'intention', so it is

190 Tremblay, above n 12, 330.

191 Ibid 344; Stanley Yeo, 'Private Defence, Duress and Necessity' (1991) 15 *Criminal Law Journal* 139, 150.

192 Benjamin Reeve, 'Necessity: The Right to Present a Recognized Defense' (1986) 21 *New England Law Review* 779, 810. Cf Tremblay, who argues that when raising the defence of necessity for acts of civil disobedience one is inherently questioning the rule of law and legal certainty: see Tremblay, above n 12, 321.

193 It has been said that 'the precise ambit of the defence remains unclear': O'Connor and Fairall, above n 10, 105. See also Fairall, above n 56, 22.

194 McSherry, above n 92, 10. See also Colleen Davis, 'Criminal Law Implications for Doctors who Perform Sacrificial Separation Surgery on Conjoined Twins in England and Australia' (2014) 4 *Victoria University Law and Justice Journal* 61, 72.

195 See Finn, above n 161, 114–16.

196 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24. Interestingly, in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, in which Brooke LJ claimed to be adopting Stephen's definition of the defence verbatim, his Lordship found that there were only three elements; in effect, his Lordship dropped the element labelled (3) above from the necessity equation: at 240.

reasonable to assume that Stephen felt that the elements should be determined upon objective grounds.[197]

The next significant formulation of the defence for present purposes is that of Menhennitt J in *Davidson*. Menhennitt J stated that he was following Stephen's definition, but held that there were only two elements to the defence: (1) necessity; and (2) proportion.[198] Under the Menhennitt ruling the act must have been necessary to avoid an 'evil', which was defined in the circumstances of that case as a 'serious danger' to a woman's life or health (but 'not merely being the normal dangers of pregnancy and childbirth'), and the act must not have been 'out of proportion' to that 'serious danger'.[199] Menhennitt J thereby effectively dropped Stephen's elements labelled (2) and (3) above. Menhennitt J held that the two elements of necessity and proportion were to be determined by reference to an honest belief on reasonable grounds.[200]

In *Wald* Judge Levine followed the Menhennitt ruling in *Davidson*, but arguably changed the test for proportionality from an assessment of the defendant's honest belief on reasonable grounds to a purely objective assessment of proportionality.[201] His Honour also extended the meaning of 'serious danger' to enable an assessment of how economic and social factors might impact upon a woman's health, and further that the assessment of whether there existed a serious danger to the woman's health could be extended to considerations throughout the pregnancy.[202] It has been suggested by Simpson J in *R v Sood [No 3]* that Judge Levine's test for whether there existed the requisite serious danger was purely subjective,[203] but, with respect, that is a dubious argument as Judge Levine clearly explains that there needs to exist '*reasonable grounds* upon which an accused could *honestly and reasonably* believe there would result a serious danger to [a woman's] physical or mental health'.[204] In any case, even if the assessment of whether there existed a serious danger is subjective, it is clear that the test for whether the abortion was necessary to avoid that serious danger remains a test of honest belief on reasonable grounds.[205]

The majority in *Loughnan* followed Stephen more closely, holding that necessity had three elements as follows: (1) the conduct in question was done to avoid 'irreparable evil'; (2) there was an urgent situation of imminent peril; and (3) the conduct committed was not out of proportion to that imminent peril, and this

197 Although, Stephen does utilise the phrase 'if the accused can show', which perhaps suggests that an honest belief on reasonable grounds is required: Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

198 See *Davidson* [1969] VR 667, 671–2.

199 Ibid 672.

200 Ibid.

201 See *Wald* (1971) 3 DCR NSW 25, 29.

202 Ibid.

203 See *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006) [32]–[34].

204 *Wald* (1971) 3 DCR NSW 25, 29 (emphasis added).

205 Ibid.

requirement is satisfied only when there was no alternative course of action to avoid that peril.[206]

The majority held that these elements were to be assessed on purely objective grounds, except for whether there existed a situation of imminent peril, which was to be assessed from the perspective of the defendant's honest belief on reasonable grounds.[207] It is thus clear that *Loughnan* is a return to many aspects of Stephen's formulation of the necessity defence. There are slight differences, in that: (a) Stephen provided the additional requirement that the 'irreparable' evil must also be 'inevitable',[208] whereas *Loughnan* used the term 'certain';[209] and (b) *Loughnan* requires the existence of a situation of imminent peril.[210] *Rogers* followed *Loughnan*, but arguably changes the requirements of 'urgency and immediacy' to factual considerations relevant to the 'reasonableness and proportionality of the response'.[211] In any case, the following arguments highlighting issues with *Wald* apply regardless of one's interpretation of *Rogers*; that is, irrespective of whether the three factors isolated by the majority in *Loughnan* should be viewed as elements or legal conditions or factual considerations, they would nonetheless need to be considered and addressed by any court before it came to a conclusion as to whether the necessity defence justified the offence before the court. So, although the effect of *Rogers* on *Loughnan* may be open to debate, that uncertainty does not significantly affect the following discussion. *Loughnan* is the definitive authority on the necessity defence as it has never been distinguished or questioned, but rather considered, followed and applied. Thus, given the purpose of this article, a comparison of the decision in *Wald* with *Loughnan* is crucial. Although it is acknowledged that the *Loughnan* elements are interconnected and, at times, interdependent, in the interests of clarity it is nonetheless appropriate to conduct that investigation with respect to each element in isolation.

A *Proportionality*

Of the *Loughnan* elements (or factual considerations) proportionality appears relatively straightforward:[212] the act committed cannot be out of proportion to the threat avoided, and that must be objectively assessed,[213] as it cannot be left

206 [1981] VR 443, 448.

207 Ibid.

208 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

209 Ibid. In *Limbo v Little* (1989) 98 FLR 421 the NT Court of Appeal felt that the 'certain' requirement in *Loughnan* meant that the threat or peril complained of must be 'inevitable': at 449.

210 [1981] VR 443, 448. It is of interest to note that this criterion of imminent peril has support in a decision made shortly after the publication of Stephen's formulation — see, eg, *Cope v Sharp [No 2]* [1912] 1 KB 496, 510.

211 *Rogers* (1996) 86 A Crim R 542, 546.

212 Finn makes the point that although the proportionality criterion is clear in principle (ie 'that the harm caused was proportionate to the benefits intended to be gained'), it is often difficult to apply in practice: Finn, above n 161, 108.

213 See *Bayley v Police* (2007) 99 SASR 413, 427–8 [53].

to the defendant to make such 'value-judgments'.[214] Proportionality must contain an objective test because it must be the court (and not the defendant) that decides whether the value assisted was greater than the value defeated;[215] otherwise one cannot say that society would approve of the choice of values.[216] As Crockett J explains:

> the defence must be objective in the determination of equality or supremacy between competing values so that it is for the judge to decide … whether the value assisted was greater than the value defeated.[217]

In addition, if the test of proportionality is not objective, then the element of proportionality ceases to effectively exist. As Simpson J explains:

> The first limb of the test concerns the (reasonably based) belief in the accused that it is necessary to do what is done for the relevant purposes. The second concerns the proportionality of what is done to the danger involved. But, if the issue in the second concerns the belief of the accused rather than the objective reality of the proportionality, nothing is added to the first test. That is, if an accused person honestly believes on reasonable grounds that it is necessary to do what is done, that necessarily incorporates a belief in the proportionality of that conduct. The second is entirely subsumed in the first. That is not so if an objective test is applied to the second limb. Accordingly, both because of authority, and because of the logic inherent in the Crown's position, I concluded that the test of proportionality is an objective one.[218]

However, as Yeo points out:

> This still leaves unresolved the extreme difficulty of comparing the harms that could be quite different in nature. For example, is bodily harm always graver than damage to property? Can bodily harm be compared with deprivation of one's liberty? And even if the same type of harms were involved, there is no guarantee of a ready answer. Is a severed limb comparable to a fractured skull? Should numbers count, so that it is justifiable for one human life to be lost in order for two to be saved? There can never be clear-cut answers to questions of this nature,

214 *Rogers* (1996) 86 A Crim R 542, 547. This view was also reflected in the Canadian Supreme Court in *Morgentaler v The Queen* [1976] 1 SCR 616, 678 (Dickson J): 'No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.'

215 As Gleeson CJ stated — 'the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law': *Rogers* (1996) 86 A Crim R 542, 546. Whether the test is purely objective or both objective and subjective (ie an honest belief on reasonable grounds) is not significant for this purpose as the difference in this respect is negligible as a test of honest belief on reasonable grounds still necessitates an objective test as part of that analysis.

216 As indicated earlier, it is the proportionality element of necessity that denotes the defence as a justification, and a justification means that society approves of the conduct in question, and one may only hold that society so approves if the action taken is the lesser of two evils from an objective perspective. It should, however, be noted, as discussed earlier, that perhaps it should be the legislature, rather than the judiciary, that determines such ordering of values.

217 *Loughnan* [1981] VR 443, 461. See also *Quayle* [2006] 1 All ER 988, 1014–15; *R v Rodger* [1998] 1 Cr App R 143, 145.

218 *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006) [40]–[42].

> as much depends on the social policy considerations, moral values and societal expectations attending the particular circumstances of the case at hand.[219]

Loughnan provides some further guidance with respect to proportionality, holding that this element is assessed by reference to whether a reasonable person would conclude that the defendant had no 'alternative to doing what he did to avoid the peril'.[220] Another way to put this criterion is that the 'the harm sought to be avoided "could not otherwise be avoided"'.[221] Thus, if alternatives are 'reasonably available',[222] or even merely 'possible',[223] then the response will not be proportional and the defence fails.[224] Gleeson CJ explained the rationale for this criterion of necessity:

> The relevant concept is of necessity, not expediency, or strong preference. If the prisoner, or the jury, were free to consider and reject possible alternatives on the basis of value judgments different from those made by the law itself, then the rationale of the defence, and the condition of its acceptability as part of a coherent legal system, would be undermined.[225]

Of course, in relation to abortion such issues are not particularly relevant because abortion is the only means by which to avert the 'greater evil' (ie the continuance of the pregnancy); alternatives do not exist. Thus, the primary question with respect to proportionality is whether a 'serious danger' to a woman's health constitutes the 'greater evil' compared to the destruction of the foetus. Both *Davidson* and *Wald* have held that it does. Initially in the abortion example the balancing of relevant harms or value judgments was between the woman's life and the foetus' life; in which case, as Macnaghten J concluded in *Bourne*, there is no question that the woman's life was to be preferred.[226] The saving of the woman's life was then extended by the judiciary to saving her life or avoiding a serious danger to her health,[227] which is an obvious and compelling extension as there is a hazy line between danger to life and danger to health. In this author's opinion it is

219 Yeo, 'Revisiting Necessity', above n 86, 26–7.

220 [1981] VR 443, 448. See also *Bayley v Police* (2007) 99 SASR 413, in which the court held that 'objectively viewed, there must have been no reasonable alternative course of action open to the accused': at 427 [53]. In this way, the 'considerations of reasonableness and proportionality go hand in hand': *Rogers* (1996) 86 A Crim R 542, 548. Note: neither *Davidson* [1969] VR 667 nor *Wald* (1971) 3 DCR NSW 25 make reference to this issue.

221 *Rogers* (1996) 86 A Crim R 542, 547, quoting Stephen, *A Digest of the Criminal Law* (1st ed), above n 39, 19.

222 *Bayley v Police* (2007) 99 SASR 413, 428 [53]. For example, in order to get someone to hospital in an emergency, one might call an ambulance rather than drive illegally: see O'Connor and Fairall, above n 10, 112, citing *Osborne v Dent; Ex parte Dent* (Unreported, Supreme Court of Queensland, Macrossan J, 29 July 1982).

223 *Rogers* (1996) 86 A Crim R 542, 548.

224 See *R v B, JA* (2007) 99 SASR 317, 325 [44]; *Rogers* (1996) 86 A Crim R 542, 551. In *Bayley v Police* (2007) 99 SASR 413, the court made the point that such alternatives might constitute a lesser breach of the law: at 428 [53]. Cf Yeo, who claims that 'there is no strict requirement preventing the defence from operating in the event of there being … an alternative [non-legal] course of action': Yeo, *Compulsion in Criminal Law*, above n 154, 89. East also argues that it is only when a legal alternative is available that the defence becomes unavailable: see East, above n 81, 294.

225 *Rogers* (1996) 86 A Crim R 542, 547.

226 [1939] 1 KB 687, 693–4.

227 See *Davidson* [1969] VR 667, 671.

indisputable that terminating a pregnancy to avoid a serious danger to a woman's health is a proportionate, 'lesser of two evils', response.

However, although the foetus is not a legal person,[228] it does have value;[229] indeed, it is of interest to note that it has been consistently held that the protection of foetal life was the predominant purpose of creating the offence of abortion.[230] It should also be noted that there have been recent legislative attempts to grant the foetus further legal status.[231] If the foetus acquires more legal status Judge Levine's broadening of the assessment of the woman's health to include a consideration of economic and social factors becomes more problematic; that is, it is arguable that including such considerations implies that the foetus is of little, or no, value.[232] On the other hand, one might reasonably argue that it is the 'serious danger' to a woman's health that meets the proportionality requirement, and the means by which this 'serious danger' is to be assessed is not relevant for that determination. However, it may be that, sometime in the future, the foetus has such value recognised by law that even an abortion performed in order to avoid a serious danger to a woman's health may be held to not constitute a proportional response. This is clearly not presently the case, and there is currently no doubt that performing an abortion in order to avoid a serious danger to a woman's health meets the proportionality element from *Loughnan*, but the point is made

228 See *R v Hutty* [1953] VLR 338, 339; *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 279; *C v S* [1988] QB 135, 140; *In the Marriage of F* (1989) 13 Fam LR 189, 194, 197.

229 Obviously, different views are held on this issue. It is this author's opinion that the foetus has value, but only that attributed to the foetus by the pregnant women herself: see Kristin Savell, 'Is the "Born Alive" Rule Outdated and Indefensible?' (2006) 28 *Sydney Law Review* 625, 660; Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35 *Sydney Law Review* 1, 26.

230 See, eg, *R v Bourne* [1938] 3 All ER 615, 620; *Wald* (1971) 3 DCR NSW 25, 28–9. In *Wald* Judge Levine made the comment that '[s]ociety has an interest in the preservation of the human species': at 28. In 1939 the Birkett Committee held that the prohibition of abortion had the three goals of: (1) to protect foetal life; (2) to increase population; and (3) to prevent a decline in moral standards, in particular sexual morality. It is noteworthy that the Committee did not consider the protection of women as even an ancillary objective of the legislation: see Ministry of Health Home Office, above n 97, 85 [231]–[235]. Other courts have suggested that the legislation had the dual-purpose of protecting both foetal and female life: see, eg, *R v Trim* [1943] VLR 109, 115; *R v Woolnough* [1977] 2 NZLR 508, 517; *R v Bayliss* (1986) 9 Qld Lawyer 8, 9. Alternatively, Keown argues that the prohibition of abortion was not about the protection of women nor foetuses, but rather primarily about medical domination — see John Keown, *Abortion, Doctors, and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge University Press, 1988) 49–80.

231 For example, proposed changes to culpable driving offences have suggested that 'reference to causing the death of another person, or harm to another person, includes causing the death or causing harm to an unborn child': Criminal Law Consolidation (Offences against Unborn Child) Amendment Bill 2013 (SA) cl 3. A similar Bill is currently before the NSW Parliament — see Crimes Amendment (Zoe's Law) Bill 2017 (NSW).

232 Judge Levine also implied that the foetus is of *no* value in his additional determination that the proportion element is confined to one relationship only — that of the danger of the operation v the danger to be averted: see *Wald* (1971) 3 DCR NSW 25, 29. See Brian Lucas, 'Abortion in New South Wales — Legal or Illegal?' (1978) 52 *Australian Law Journal* 327, 330–1, who makes the argument that Judge Levine thus failed to apply the proportion element of necessity consistently. See also Wild CJ of the New Zealand Court of Appeal, who felt that even *Davidson* [1969] VR 667 amounted to an act of 'judicial legislation' in this regard — see *R v Woolnough* [1977] 2 NZLR 508, 524. Judge McGuire also initially questioned the appropriateness of Judge Levine's introduction of economic and social factors for the same reason: see *R v Bayliss* (1986) 9 Qld Lawyer 8, 26.

to illustrate the precarious nature of allowing the provision of abortion services purely on the basis of the defence of necessity.

There are two further elements stated by the majority in *Loughnan* — succinctly labelled as 'imminent peril' and 'irreparable evil' — but prior to this discussion another facet of *Wald* (inherited from *Davidson*) requires analysis with respect to the element of proportionality: the 'serious danger' to the woman's health that necessitates the abortion cannot merely be 'the normal dangers of pregnancy and childbirth'.[233]

1 *Normal Dangers*

It is entirely unclear what either Menhennitt J or Judge Levine had in mind in adopting the above proviso. There seems to be no legal basis for its existence, and indeed it creates unnecessary uncertainty because the term 'serious danger' is ambiguous enough without compelling a court, or a medical practitioner, to also make a value judgment as to what constitutes a 'normal danger' of pregnancy or childbirth. What constitutes 'normal'? Is the test confined to the woman concerned, or does it require an assessment of 'normal' for the 'average' pregnant woman? If a pregnancy is unwanted, does this make the situation self-evidently 'abnormal'? If so, the proviso is superfluous.[234]

Of course, as abortion (especially early abortion) is always relatively safer than childbirth,[235] without this proviso all abortions would be prima facie lawful because they are less of a threat to the woman's life or health than childbirth, and are therefore always the 'lesser evil' in that regard; in other words, to not include this proviso potentially makes the prohibition of abortion redundant (ie unless the foetus is granted value). One might also postulate that the reason for the inclusion of this proviso was as an implied recognition of the interests of the foetus; that is, recognition that the 'evil' of abortion was not simply breaking the law but also the destruction of the foetus.

Alternatively, it might be argued that the reason for the inclusion of the proviso was as an implied rejection of a woman's right to abortion;[236] that is, without this proviso the law may approach something close to abortion-on-demand because an unwanted pregnancy, by definition, threatens a woman's mental health and

233 *Wald* (1971) 3 DCR NSW 25, 29; *Davidson* [1969] VR 667, 672.

234 See *R v Woolnough* [1977] 2 NZLR 508, 519 (Richmond P).

235 For example, in South Australia, in the most recent five-year recorded period (2011–15), the maternal mortality rate was 8.9 per 100 000 women, yet from 1980 to 2015 there was only one recorded maternal death associated with induced abortion: see SA Health Pregnancy Outcome Unit, *Maternal and Perinatal Mortality in South Australia 2015* (September 2017) SA Health, 13–14 <http://www.sahealth.sa.gov.au/wps/wcm/connect/634bc993-4048-4f64-aee0-54a7fa044333/Maternal+and+Perinatal+Mortality+in+SA+2015.PDF?>.

236 Judge Levine was quite clear that his Honour rejected any such right: see *Wald* (1971) 3 DCR NSW 25, 28.

is thus self-evidently a serious danger to her health.[237] If so, this is hardly a commendable legal basis for the proviso, but it is difficult to imagine a defensible legal reason for its existence. Whatever the reason for its inclusion, the phrase is cause for concern as it allows a court to hold that, because certain threats to the woman's health constitute 'normal dangers' of pregnancy and childbirth, such threats cannot be used to raise the necessity defence. Thus, this proviso makes the law potentially far more restrictive.

Although clearly problematic, the proviso may be largely ignored because it has no legal basis in terms of a correct interpretation of the necessity defence; that is, the majority in *Loughnan* do not mandate any such limitation or proviso on the assessment of any of the elements of the necessity defence. Despite the many issues highlighted above, one may thus conclude that, in holding that averting a serious danger to a woman's health justifies an abortion, Judge Levine was meeting the element of proportion: terminating the pregnancy in such circumstances is the only means by which to avoid that serious danger to the woman's health and (at least presently) would clearly constitute the 'lesser evil'. The issue that now requires discussion is whether this 'serious danger' to the woman's health adequately meets the *Loughnan* element of 'irreparable evil'.

B *Irreparable Evil: What Harm Threatened Is Sufficient?*

The majority in *Loughnan* were clear that the threat complained of, if allowed to eventuate, would have 'inflicted … irreparable evil' upon the defendant, or upon others that he or she was bound to protect.[238] Yeo makes the point that 'irreparable evil' is a 'non-specification'.[239] That may be so, but, as explained in *Quayle*, 'the law has to draw a line at some point in the criteria which it accepts as sufficient' to constitute an irreparable evil.[240] In *Quayle* it was held that the avoidance of 'pain' was insufficient in that respect.[241] In recent years the Supreme Court of South Australia has suggested that only threats of death or serious injury will be sufficient to meet the irreparable evil requirement.[242] Conversely, it has also been held that the 'irreparable evil' required to raise the defence need not be threats to life or limb, or indeed threats to person at all, but danger to property might suffice

237 This was the position taken by Kirby ACJ: see *Superclinics* (1995) 38 NSWLR 47, 64–6. In the same case Priestley JA made the point that if an unwanted pregnancy itself constituted a serious danger to the woman's health, then this would create a situation of abortion on demand, which is not the *Wald* doctrine and consequently not the law as abortions are only 'lawfully available in the limited circumstances described in *Wald*': at 82.

238 [1981] VR 443, 448, quoting *Davidson* [1969] VR 667, 670.

239 Yeo, 'Revisiting Necessity', above n 86, 39.

240 [2006] 1 All ER 988, 1026 [77].

241 Ibid. Cf Glanville Williams who argues that 'great pain or distress' would be sufficient: Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 2nd ed, 1983) 604.

242 See *R v B, JA* (2007) 99 SASR 317, 323 [30]; *Bayley v Police* (2007) 99 SASR 413, 427–8 [53]. See also *Southwark* [1971] Ch 734, 743–4 (Lord Denning MR). It is arguable that the majority in *Loughnan* also came to this conclusion: see *Loughnan* [1981] VR 443, 448.

in some circumstances.[243] Under Crockett J's view of necessity in *Loughnan*, any 'peril' or 'evil' will be sufficient to raise the defence provided the response taken was intended not to result in greater harm.[244]

Although a serious danger to a woman's health meets even the more conservative view (ie that the threat must be that of death or serious injury), Judge Levine's broadening of the ambit of that assessment to include economic and social factors may be problematic. Of course, as mentioned above, it may be argued that it is the 'serious danger' that satisfies the element of 'irreparable evil', and how that 'serious danger' is assessed (in terms of the factors to be considered in arriving at a determination of 'serious danger') is not the issue. This is probably correct, but a related issue is that raised by Kirby ACJ in *Superclinics*: what level of risk is to constitute a 'serious danger' to the pregnant woman's health?[245] This is perhaps more of a practical than legal concern, but it is noteworthy that neither *Davidson* nor *Wald* provides any real assistance in answering this question.[246] Of course, as highlighted by Kirby ACJ, the law thus invites a case by case analysis,[247] but this is unavoidable as '[t]he inquiry cannot satisfactorily be further limited. … [G]iven the wide variety of particularities which will arise for consideration in each case'.[248]

C *Imminent Peril*

The final *Loughnan* element that requires analysis is that of imminent peril: that in order to raise the necessity defence there must exist 'an urgent situation of imminent peril'.[249] This element has arguably been an aspect of necessity since its inception,[250] and in common with many aspects of the necessity defence, the meaning of the term 'imminent peril' is ambiguous;[251] in particular, it remains unclear whether the threat needs to be immediate. On this point, the majority in *Loughnan* indicated that immediacy would usually be required to successfully

243 See, eg, *Dunjey v Cross* (2002) 36 MVR 170, 182 (Miller J). It should be noted that this case dealt with the sudden or extraordinary emergency defence under s 25 of the *Criminal Code Act Compilation Act 1913* (WA), but the court also held that this statutory defence was a codification of the necessity defence: *Dunjey v Cross* (2002) 36 MVR 170, 179. Of course, the proportion element of the defence would still need to be satisfied in such cases, so the possible actions one might take as a consequence of a threat to property will be far more limited than if one were taking necessary action as a consequence of a threat to a person. See also Glanville Williams, *Criminal Law: The General Part*, above n 9, 729; Yeo, *Compulsion in Criminal Law*, above n 154, 73. *Contra* the Supreme Court of Canada in *Morgentaler v The Queen* [1976] 1 SCR 616, in which the Court was quite adamant that economic considerations will very rarely raise the necessity defence: at 654.

244 [1981] VR 443, 459–60.

245 See (1995) 38 NSWLR 47, 63.

246 Judge Levine did briefly discuss the meaning of 'serious danger to … mental health', but did not address the level of risk required in that regard: *Wald* (1971) 3 DCR NSW 25, 30.

247 *Superclinics* (1995) 38 NSWLR 47, 63.

248 Ibid 66.

249 [1981] VR 443, 449 (Young CJ and King J), 457 (Crockett J).

250 See, eg, *Southwark* [1971] Ch 734, 743 (Lord Denning MR), 746 (Edmund Davies LJ); *Morgentaler v The Queen* [1976] 1 SCR 616, 678; *Perka v The Queen* [1984] 2 SCR 232, 244.

251 See Yeo, 'Revisiting Necessity', above n 86, 22–4.

raise the necessity defence.[252] Other courts have come to similar conclusions, holding that 'imminence' equates to 'immediacy, in the sense that the compulsion is present and continuous',[253] or that the threat must be 'imminent and operative'.[254] In one of the recent *Patel* decisions the Supreme Court of Queensland held that the element of imminence is essentially a requirement of 'immediacy'[255] or 'immediate risk'.[256]

However, *Rogers*, if it changes *Loughnan* at all, arguably affects this element of 'imminent peril' by explaining that this element does not require that the peril be either urgent or immediate; although such issues are often critically relevant factual considerations.[257] Yeo has suggested that perhaps the requirement of imminence 'emphasises the feature of emergency or urgency contained in [most] situations of necessity',[258] but the defence does not necessarily require immediacy;[259] thus, brief intervals of time between the threat and its realisation are not fatal to raising the defence.[260] Similarly, Lord Goff in *Re F (Mental Patient: Sterilisation)* held that an emergency situation is not a 'criterion or even a prerequisite; it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency'.[261] Indeed, it may be that 'imminent' simply means 'certain' or 'inevitable'.[262]

On the other hand, if there is no situation of immediacy or urgency it may prove difficult to show that the action was reasonably necessary to avoid the peril,[263] or that decisive action was even required;[264] that is, the luxury of time will usually

252 [1981] VR 443, 448. See also *Leichhardt Council v Geitonia [No 6]* (2015) 209 LGERA 120, in which the court indicated that an interval of time was fatal to the defence: at 157–8 [166]–[167].

253 *R v Dawson* [1978] VR 536, 539 (Anderson J). See also *Quayle* [2006] 1 All ER 988, 1027. See also Gardner, who states that necessity may only be successfully raised in 'pathological situations of great immediacy and pressure': Gardner, above n 189, 127.

254 *Bayley v Police* (2007) 99 SASR 413, 428 [53].

255 *R v Patel [No 7]* [2013] QSC 65 (7 March 2013) [14].

256 Ibid [15].

257 *Rogers* (1996) 86 A Crim R 542, 546.

258 Yeo, *Compulsion in Criminal Law*, above n 154, 253.

259 Ibid 88. Yeo later explained that perhaps we should focus instead on 'the "urgency" (in the sense of a pressing or compelling need) for the defendant to have done what he or she did': Yeo, 'Revisiting Necessity', above n 86, 23.

260 See Yeo, *Compulsion in Criminal Law*, above n 154, 253–4.

261 [1990] 2 AC 1, 75.

262 See *Limbo v Little* (1989) 98 FLR 421, 448–9; Kotecha, above n 110, 355. Such a view of 'imminent' has been utilised to preclude the application of the necessity defence to anti-nuclear and environmental protests because the view was taken that the threat of nuclear holocaust or environmental catastrophe is not sufficiently inevitable or certain: see, eg, *Limbo v Little* (1989) 98 FLR 421, 448–9. In another anti-nuclear 'protest' case, that of *R v Dixon-Jenkins* (1985) 14 A Crim R 372, the court appeared to add a new element to the defence; namely, that the defendant's actions need to impact on the removal of the peril/threat complained of. However, no definitive decision was made in that respect: at 378. See also Tremblay, who states that a 'peril is considered imminent enough if it is remote in time but its realization is inevitable': Tremblay, above n 12, 335.

263 See Yeo, *Compulsion in Criminal Law*, above n 154, 89.

264 As was explained in *Perka v The Queen* [1984] 2 SCR 232, there must be 'clear and imminent peril', quoting *Morgentaler v The Queen* [1976] 1 SCR 616, 678, such that 'normal human instincts cry out for action and make a counsel of patience unreasonable': *Perka v The Queen* [1984] 2 SCR 232, 251. See also Kotecha, above n 110, 354.

create alternatives for action. In addition, even if immediacy is not required and a time interval is permitted, that interval will be minutes, and perhaps hours, not months or years.[265] Thus, whether or not 'imminent' means 'immediate', the requirement of an 'imminent peril' must be, in some way, time sensitive.[266]

This element of imminent peril is nowhere to be found in either *Davidson* or *Wald*. Most notably for present purposes, Judge Levine's determination in *Wald* that a medical practitioner may look to a woman's reasonably foreseeable environment and speculate as to what will occur (ie with respect to factors creating a 'serious danger' to the woman's health) during the entire pregnancy seems completely at odds with this element of the necessity defence and arguably falls far short of this criterion of imminence. The relevant statement by Judge Levine is as follows:

> It may be that an honest belief be held that the woman's health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, *although not then in serious danger*, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy …[267]

This finding that the danger to health need not be present at the exact time that the requisite assessment is made, or even when the abortion takes place, if it could reasonably be expected to arise sometime during the course of the pregnancy, is extremely problematic because if the woman concerned is not in actual and present serious danger when the requisite assessment is made and/or the abortion is performed, it is arguable that no imminent peril existed; thus, the necessity defence is not available in such situations. It is reasonable to hold that, in some such cases, where the 'evil' or 'peril' to be averted is yet to materialise, the abortion will occur prior to any imminent danger,[268] and consequently that abortion will be unlawful as it fails to meet this element of the necessity defence.

Of course, one might argue that it is the *continuance* of the pregnancy that poses the requisite threat to the woman's life or health; thus, the threat is not only clearly imminent, but already existing.[269] Or perhaps an unwanted pregnancy is, by definition, an emergency situation? In any case, the Levine ruling in this regard is concerning, and indeed may be described as bad or suspect law in this respect, because his Honour effectively states that even when there is clearly *no* urgent situation of imminent peril, the necessity defence may apply, and this is plainly incorrect. Before leaving this discussion of the element of 'imminent peril' one final issue should be briefly mentioned: that of prior fault.

265 See Yeo, 'Revisiting Necessity', above n 86, 22.

266 See Kotecha, above n 110, 360–1.

267 *Wald* (1971) 3 DCR NSW 25, 29 (emphasis added).

268 See Bohlander, above n 110, 151.

269 However, it is difficult to argue that the further extension of time advocated by Kirby ACJ in *Superclinics* (that allows for the consideration of economic, medical and social factors that may arise after the birth of the child in arriving at an assessment of whether the woman's health is in serious danger due to the continuance of her pregnancy) might satisfy any reasonable interpretation of 'imminent peril': see *Superclinics* (1995) 38 NSWLR 47, 60. It is of interest to note that this aspect of Kirby ACJ's decision was seemingly followed by Simpson J in *R v Sood* [2006] NSWSC 1141 (31 October 2006) [22].

It has been suggested that if the defendant brought about or caused the situation that compelled the acts sought to be justified by necessity, then that prior fault precludes the application of the defence.[270] This is arguably a logical proviso because if the defence does not have this limitation then one could, conceivably, 'set up' a scenario in order to commit an illegal act that was intended all along, and then claim that the act was done only out of necessity. Such a proviso would clearly have dreadful potential consequences for applying the necessity defence to abortion. For instance, if a woman has engaged in unprotected sexual intercourse of her own free will and with full knowledge that pregnancy was a possible result of that conduct, could it be said that she has created (equally with her sexual partner) the peril that she now wishes to avoid? Fortunately, this prior fault proviso is not mentioned in *Davidson*, *Wald*, *Loughnan* or *Rogers*, so is probably not correct law in Australia.[271]

V CONCLUSION

Much of the above discussion sounds like speculation; and, unfortunately, it is. The nature of the necessity defence is such that these issues and questions have few definitive answers,[272] as the applicable legal tests are so 'open to subjective interpretation'.[273] Nonetheless, assuming *Loughnan* to be the leading authority (which has been argued in this article), it is clear that *Wald* possesses serious shortcomings and may be described as bad, or at least suspect, law. In particular, the *Wald* decision appears inconsistent with the *Loughnan* element of imminent peril. At best, *Wald* rests on shaky ground,[274] and this alone is sufficient reason to legislate so as to ensure legal certainty. Indeed, the current practice is itself inherently unstable, as it relies on the NSW medical profession continuing to provide abortion services on a liberal interpretation of the common law, which, in turn, relies upon the NSW government retaining the present policy of not generally prosecuting those members of the medical profession that provide abortions.[275] If

270 See Bacon, above n 66, 345–6; *Perka v The Queen* [1984] 2 SCR 232, 255; Yeo, *Compulsion in Criminal Law*, above n 154, 252; *Leichhardt Council v Geitonia [No 6]* (2015) 209 LGERA 120, 158–9 [170]; *Nguyen v The Queen* [2005] WASCA 22 (25 February 2005) [30] (McLure J). Cf Glazebrook, above n 78, 115.

271 Furthermore, as the law currently operates in practice, it is only medical practitioners that would potentially need to raise the necessity defence, so provided the medical practitioner who performs the abortion did not impregnate the woman concerned, this prior fault limitation would have little impact.

272 See, eg, Yeo, who concludes that there are 'many controversies plaguing any discourse on the subject': Yeo, 'Revisiting Necessity', above n 86, 50. Members of the judiciary have described the defence as 'vague and elusive' (*R v Dawson* [1978] VR 536, 543 (Harris J)), and 'obscure' (*Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 219 (Brooke LJ)).

273 *Superclinics* (1995) 38 NSWLR 47, 63 (Kirby ACJ).

274 The point was made by Fryberg J in *R v Patel [No 7]* [2013] QSC 65 (7 March 2013) that '[i]t seems to me that the formulation of Justice Menhennitt cannot survive the formulation … [in *Loughnan*] … [and] … while it did not overrule [*Davidson*] … it reformulated the common law position in relation to the defence of necessity': at [10].

275 That is, although prosecutions do occur — see, eg, *R v Sood* [2006] NSWSC 1141 (31 October 2006) — they are extremely rare.

that prosecution policy were to change, many members of the medical profession may find themselves convicted of the crime of unlawful abortion as the application of the necessity defence to abortion is, as evident from this article, potentially quite rigorous. Furthermore, an important point made by both Kirby ACJ and Priestley JA in *Superclinics* was that as the law stands it is extremely difficult to say whether *any* proposed abortion would be lawful.[276] That is, in NSW abortion remains, prima facie, a crime and abortions are only 'lawfully available in the limited circumstances described in *Wald*',[277] and whether that test for necessity would be made out is unknown until a court of law seeks to apply it. As Priestley JA explained:

> as the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a common law criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.[278]

Certainly, those at the coalface remain puzzled by the current law in NSW, and there is evidence that some members of the medical profession tend to either ignore the law,[279] or 'manufacture mental illness'[280] with respect to the woman concerned on the assumption that this satisfies the test in *Wald*. It is submitted that a significant number of abortions may be performed on grounds that a court might hold to be insufficient grounds to make the abortion lawful. As Douglas, Black and de Costa concluded consequent to their comprehensive survey of medical practitioners in Queensland and NSW:

> According to the present research, doctors providing abortions in New South Wales and Queensland routinely feel compelled to behave, at best, misleadingly but often dishonestly and unethically in order to behave 'legally'. In the context of this study, doctors necessarily focused on the woman's mental health concerns, rather than physical health, to justify the abortion. Commonly doctors expressed frustration at having to invent diagnoses of mental health issues for women requesting a termination in order to bring the abortion within the law. Often this required doctors to ignore or reframe the woman's view of her circumstances.[281]

To this situation, one must add the legal problems with *Wald* highlighted in this article; that is, that *Wald*, which forms the legal basis of abortion practice in NSW, is probably an incorrect interpretation and application of the necessity defence. Given the importance of lawful abortion services to women's reproductive

276 See *Superclinics* (1995) 38 NSWLR 47, 61, 66 (Kirby ACJ), 83 (Priestley JA).

277 Ibid 82 (Priestley JA).

278 Ibid 83 (emphasis in original).

279 See Douglas, Black and de Costa, 'Manufacturing Mental Illness (and Lawful Abortion)', above n 20, 572.

280 Ibid 568, 576.

281 Ibid 574.

freedom, there is a need to rest the provision of that service upon a more solid legal foundation.

There are two viable options in this respect: (1) codify the necessity defence;[282] or (2) abolish the offence of abortion. As to the first option, this has already effectively occurred in most Australian jurisdictions (other than NSW, Tasmania and SA) with the enactment of 'sudden and extraordinary emergency' provisions.[283] As an example, the *Criminal Code 2002* (ACT), s 41 provides as follows:

> (1) A person is not criminally responsible for an offence if the person carries out the conduct required for the offence in response to circumstances of sudden or extraordinary emergency.
>
> (2) This section applies only if the person reasonably believes that — (a) circumstances of sudden or extraordinary emergency exist; and (b) committing the offence is the only reasonable way to deal with the emergency; and (c) the conduct is a reasonable response to the emergency.

However, whether the performance of an abortion on grounds similar to current practice in NSW (ie a practice that is predicated upon a liberal interpretation of the grounds outlined in *Wald*) would satisfy such criteria depends upon the circumstances of a particular abortion, and many abortions may be held to not constitute 'circumstances of sudden or extraordinary emergency'.[284] This is especially the case with respect to medical practitioners looking to a woman's reasonably foreseeable environment in making the assessment of 'serious danger' to her health (ie the above discussion concerning 'imminent peril' seems even more pertinent under such a provision).

Thus, it would appear that the most effective means by which to resolve the mess of abortion law in NSW is to simply abolish the offence of abortion. Such reform would also result in NSW no longer being the outlier within Australia with respect to abortion law, both in regard to its continued reliance on the common law defence of necessity, and its continued criminalisation of abortion. With the

282 As Bohlander explains — 'it is always preferable to have a clear and considered piece of legislation than to rely on judicial inventions that can by the very nature of the judicial process only occur on a case-by-case basis': Bohlander, above n 110, 150. See also Finn, above n 161, 116.

283 See *Criminal Code Act 1995* (Cth) ss 10.1–10.3; *Criminal Code 2002* (ACT) s 41; *Criminal Code Act 1983* (NT) ss 33, 43BC; *Criminal Code Act 1899* (Qld) s 25; *Crimes Act 1958* (Vic) ss 322I, 322R; *Criminal Code Act Compilation Act 1913* (WA) s 25. In Qld and WA there is also a specific medical treatment defence in certain circumstances — see *Criminal Code Act 1899* (Qld) s 282; *Criminal Code Act Compilation Act 1913* (WA) s 259. Although not completely synonymous with the common law defence of necessity such provisions are clearly similar to that defence: see Meredith Blake, 'Doctors Liability for Homicide under the WA Criminal Code: Defining the Role of Defences' (2011) 35 *University of Western Australia Law Review* 287, 308; see also *Dunjey v Cross* (2002) 36 MVR 170, 179 (Miller J). In fact, such statutory defences appear to be based on a 'lesser of two evils' principle: see Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 97 (2007) 184–5.

284 In addition, one may reasonably assume that courts would be as reluctant to apply the statutory defence as they have been to apply the common law necessity defence for those reasons highlighted by Gleeson CJ — '[n]or can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed': *Rogers* (1996) 86 A Crim R 542, 546.

exception of Queensland[285] (and perhaps South Australia),[286] all other jurisdictions have effectively decriminalised abortion (to varying degrees). Western Australia was the first to do so in 1998,[287] followed by the ACT in 2002,[288] and then Victoria in 2008.[289] Tasmania and the NT have embarked upon a number of legislative reforms over the years,[290] finally achieving the decriminalisation of medical abortion in 2013 and 2017 respectively.[291]

The fact that most Australian jurisdictions have now legislated to decriminalise abortion, and regulate the service solely through health law, demonstrates the relative legislative (though not necessarily political) ease by which this can be achieved. The preceding discussion has highlighted the current complexities plaguing abortion law in NSW, but it does not follow that removing such complexities is a difficult task. Put simply, if the NT, Tasmania, Western Australia, the ACT and Victoria can so legislate, then surely NSW can do so. Any

285 In Queensland abortion remains a serious crime (see *Criminal Code Act 1899* (Qld) ss 224–6), and lawful access to abortion services is solely based on an interpretation of the statutory defence under *Criminal Code Act 1899* (Qld) s 282: see *R v Bayliss* (1986) 9 Qld Lawyer 8. Although there was some legislative activity in 2009 (see *Criminal Code (Medical Treatment) Amendment Act 2009* (Qld)), only minor amendments were made to the s 282 defence, such that abortions realised through abortifacients were also potentially covered by the defence (ie prior to the 2009 amendments it was arguable that only 'surgical' abortions would be lawful). For a more detailed discussion of abortion law in Queensland see Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1, 23–6.

286 That is, although *Criminal Law Consolidation Act 1935* (SA) s 82A allowed for lawful abortions in specified circumstances, abortion remains, prima facie, a serious crime — see ss 81–2.

287 See *Acts Amendment (Abortion) Act 1998* (WA), which decriminalised medical abortions, now governed by *Health (Miscellaneous Provisions) Act 1911* (WA) s 334. For further discussion see Rankin, 'The Disappearing Crime of Abortion', above n 285, 26–31.

288 See *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT), which completely removed abortion from the criminal law. In the ACT abortion is now lawful if performed by a medical practitioner in an approved facility pursuant to *Health Act 1993* (ACT) ss 80–4. For a discussion of the ACT law see Mark Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316, 329–35.

289 See *Abortion Law Reform Act 2008* (Vic).

290 For a discussion of such past reforms see Rankin, 'The Disappearing Crime of Abortion', above n 285, 31–5 (for Tasmania) and 18–21 (for the NT).

291 See *Reproductive Health (Access to Terminations) Act 2013* (Tas) and *Termination of Pregnancy Law Reform Act 2017* (NT). The term 'medical abortion' refers to the termination of pregnancy by a qualified health practitioner, and the definition of a qualified health practitioner is contained within the relevant legislation. It should also be noted that both Tasmania and the NT maintain quite rigorous tests for lawful abortions over a specified gestation period: in Tasmania the 'pregnancy of a woman who is not more than 16 weeks pregnant may be terminated by a medical practitioner with the woman's consent' (*Reproductive Health (Access to Terminations) Act 2013* (Tas) s 4), but after 16 weeks a termination is only lawful under similar conditions as exist in SA (see *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 5); and in the NT termination of pregnancy by a suitably qualified medical practitioner (or another authorised health practitioner or authorised pharmacist, at the direction of the suitably qualified medical practitioner) at not more than 14 weeks is now relatively straightforward, in that the relevant medical practitioner has to consider the termination to be 'appropriate in all the circumstances, having regard to: (a) all relevant medical circumstances; and (b) the woman's current and future physical, psychological and social circumstances; and (c) professional standards and guidelines' (*Termination of Pregnancy Law Reform Act 2017* (NT) s 7). However, the process becomes more difficult after 14 weeks, as two suitably qualified medical practitioners must consider the abortion appropriate in all the circumstances, and abortion is generally not permitted after 23 weeks (see *Termination of Pregnancy Law Reform Act 2017* (NT) s 9).

of the above mentioned jurisdictions provide useful templates for NSW abortion law reform, but this author advocates for the Victorian model as it (arguably) goes further than the other legislative models in enhancing women's reproductive rights by removing most barriers to accessing abortion services.[292] It should also be noted that, prior to the *Abortion Law Reform Act 2008* (Vic), the law on abortion in Victoria was practically identical to NSW. The way forward for NSW is clear: unambiguously abolish the offence of abortion,[293] and then regulate the service in the same manner as any other medical procedure.[294]

This would achieve the objective of resolving the issues with NSW abortion law highlighted in this article clearly and efficiently; if there is no crime, then there is no need for a defence of necessity, or any other defence. As a pro-choice advocate, one is hesitant in drawing attention to the flaws in the law outlined in this article (as the current interpretation and prosecution of that law serves to allow relatively easy access to abortion services in NSW), but as abortion law reform in NSW has been stagnant for almost 50 years, one must operate on the assumption that all fuel for the fire of repeal is worthwhile. It is hoped that this article may be viewed as further argument in favour of the repeal of the offence of abortion.

292 For a more detailed discussion of Victorian abortion law see Rankin, 'The Disappearing Crime of Abortion', above n 285, 39–46.

293 A good template in this respect is *Abortion Law Reform Act 2008* (Vic) ss 10–11.

294 Unfortunately, the most recent attempt to decriminalise abortion and regulate the service through health law in NSW failed: see Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW).

THE DISAPPEARING CRIME OF ABORTION AND THE RECOGNITION OF A WOMAN'S RIGHT TO ABORTION: DISCERNING A TREND IN AUSTRALIAN ABORTION LAW?

MARK RANKIN[†]

I INTRODUCTION

A *The Description of a Crime*

Late last century abortion was a serious crime in every jurisdiction in Australia. This stemmed from the fact that all Australian jurisdictions, in drafting and enacting their various penal codes early last century, tended to simply absorb aspects of the UK criminal law. Abortion was no different. Each jurisdiction consequently enacted legislation similar, if not practically identical, to sections 58 and 59 of the *Offences Against the Person Act 1861* (UK). As a result, attempting to perform an abortion,[1] and/or supplying abortifacients with like intent, was a serious crime. Penalties for performing or attempting an unlawful abortion ranged from 10 years imprisonment in New South Wales,[2] to life imprisonment in South Australia.[3] Less severe penalties usually applied for unlawfully supplying abortifacients,[4] but imprisonment was nonetheless prescribed.

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1 In other words it was not a necessary element of the offence that an actual termination of pregnancy resulted from the actions complained of.

2 *Crimes Act 1900* (NSW) s 82.

3 *Criminal Law Consolidation Act 1935* (SA) s 81.

4 See, eg, in New South Wales the penalty is 10 years imprisonment for performing the abortion (*Crimes Act 1900* (NSW) ss 82-83), and only 5 years for supplying the requisite drug or instrument (*Crimes Act 1900* (NSW) s 84). All other jurisdictions have similar discounts, with South Australia having the

In each jurisdiction the woman herself could be charged with the offence of attempting to procure her own abortion.[5] In essence, she was potentially liable to be imprisoned for an extended period of time for the crime of utilising her own body as if it were her own body. It might be suggested that this statement is somewhat audacious and overly simplistic, as it ignores the fact that a foetus is involved. In answer, one need only highlight that this crime was one of attempt: there was no need to show that a foetus had been harmed in any way whatsoever. Indeed, in Queensland and Western Australia, in order for a woman to be found guilty of the crime of attempting to procure her own abortion, it mattered not whether she was, in fact, pregnant at the relevant time.[6] In other words, she faced imprisonment for attempting the impossible. Although in all other jurisdictions a woman must have been pregnant if she was to be charged with attempting to procure her own abortion, it was still the case that there was no need to show that an actual termination of pregnancy had occurred.

This focus on the attempt of terminating the pregnancy, rather than any actual termination, was also a fundamental aspect of the crime as it applied to third parties. In all jurisdictions any person (other than the woman concerned) could be charged with the offence irrespective of whether the woman concerned was pregnant.[7] With respect to the crime of supplying the requisite drug or instrument, knowing that it was intended to be used to procure an abortion, it mattered not whether the woman was pregnant, or even whether the

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extreme difference between life imprisonment for performing the abortion (*Criminal Law Consolidation Act 1935* (SA) s 81), and 3 years for providing the requisite drug or instrument (*Criminal Law Consolidation Act 1935* (SA) s 82). The exception to this rule is the NT, where no distinction, in terms of penalty, is made between performing an abortion and supplying abortifacients (*Criminal Code Act 1983* (NT) ss 172-173).

5 See, eg, *Crimes Act 1900* (ACT) s 42; *Crimes Act 1900* (NSW) s 82; *Criminal Law Consolidation Act 1935* (SA) s 81(1); *Criminal Code Act 1924* (Tas) s 134(1); *Crimes Act 1958* (Vic) s 65.

6 *Criminal Code Act 1899* (Qld) s 225; *Criminal Code Act 1913* (WA) s 200.

7 See, eg, *Crimes Act 1900* (ACT) s 43; *Crimes Act 1900* (NSW) s 83; *Criminal Code Act 1983* (NT) s 172; *Criminal Code Act 1899* (Qld) s 224; *Criminal Law Consolidation Act 1935* (SA) s 81(2); *Criminal Code Act 1924* (Tas) s 134(2); *Crimes Act 1958* (Vic) s 65; *Criminal Code Act 1913* (WA) s 199.

drug or instrument was actually utilised with the requisite intent.[8] So, with respect to any person other than the woman concerned (although in Queensland and Western Australia the same applied to the woman concerned), early last century in all Australian jurisdictions, it was the case that individuals could be convicted, and imprisoned at length, for what amounted to attempting the factually or physically impossible.[9]

The law remained in this state until 1969, when the law in South Australia and Victoria was modified through legislative and judicial action respectively. The New South Wales judiciary followed Victoria in 1971, and the NT legislature imitated South Australia in 1974. Queensland had to wait until 1986, when it too followed the Victorian decision. In Western Australia, the ACT, and Tasmania the law remained unchanged until 1998 with respect to Western Australia and the ACT, and 2001 in Tasmania. The ACT again went through a substantial alteration of its law in 2002, as did Victoria in 2008. Minor legislative amendments occurred in the NT in 2006, and in Queensland in 2009.

Given the abovementioned legislative and judicial activity, it would be reasonable to assume that the first sentence of this article - '[l]ate last century abortion was a serious crime in every jurisdiction in Australia' - was a typographical error. There is no such mistake. The abortion law reform that occurred in a number of jurisdictions during the later part of the 20th century only provided for defences,

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8 See, eg, *Crimes Act 1900* (ACT) s 44; *Crimes Act 1900* (NSW) s 84; *Criminal Code Act 1983* (NT) s 173; *Criminal Code Act 1899* (Qld) s 226; *Criminal Law Consolidation Act 1935* (SA) s 82; *Criminal Code Act 1924* (Tas) s 135; *Crimes Act 1958* (Vic) s 66; *Criminal Code Act 1913* (WA) s 201.

9 Although this article will not discuss the issue of physical impossibility as a means of exculpating criminal responsibility, it should be noted that '[t]he application of impossibility to inchoate liability is an area of extreme and subtle difficulty': Desmond O'Connor and Paul Fairall, *Criminal Defences* (Butterworths, 3rd ed, 1996) 126. Suffice to say that the issue continues to be debated within the courts, with some jurisdictions following *Haughton v Smith* [1975] AC 476: see, eg, *Gulyas* (1985) 2 NSWLR 260; *Kristos* (1989) 39 A Crim R 86; while others have moved away from that reasoning: see, eg, *Britten v Alpogut* [1987] VR 929; *R v Lee* (1990) 1 WAR 411.

for both the woman concerned, and third parties performing the abortion or supplying the abortifacients, to the crime of attempting to procure an unlawful abortion. Such reforms, by establishing defences to the crime, meant it was possible to have lawful abortions in certain circumstances, but simultaneously failed to change the fundamental criminal status of abortion.[10]

Fortunately for Australian women seeking lawful abortion services, from 1998 onwards further reforms have been embarked upon by a number of jurisdictions, with much of this legislative activity aimed at decriminalising the procedure to various degrees. This recent liberalisation of abortion law in some jurisdictions has largely been achieved through medicalisation of the issue, whereby the practice is regulated by health or medical services law, rather than criminal law *per se*. In the ACT and Victoria the medicalisation process has now occurred to such an extent that an abortion performed by a qualified person is no longer defined as a crime in most circumstances. The ramifications of this will be dealt with later in the article.

B *The Proposed Interrogation*

The purpose of this article is to canvass and critique the various reforms that have occurred in abortion law since 1969. The current criteria for lawful abortion in each Australian jurisdiction will be discussed, and, based on an assessment of such criteria, a determination will be made as to how far each jurisdiction is from recognising a woman's right to abortion. It is beyond the scope of this article to attempt to prove this moral position; rather, the author

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[10] I acknowledge the point made by Gleeson that it may be unhelpful from a practical access to abortion services perspective to state that abortion is 'unlawful' or 'illegal': see Kate Gleeson, 'The Other Abortion Myth – the failure of the common law' (2009) 6 *Journal of Bioethical Inquiry* 69, especially given that prosecutions for the crime are rare (72-74, 79). But the facts remain: it is defined as a crime in a significant number of jurisdictions, and although rare, both prosecutions and convictions continue to occur: see, eg, *R v Sood* [2006] NSWSC 1141; *R v Brennan and Leach* (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010).

presumes that this moral right exists as a component of the (further presumed) right to reproductive freedom.[11] The article examines the legal reality of abortion law, and not the morality of abortion, but it must be noted that such legal analysis occurs within the context of the author's above stated moral position.

Given this emphasis, the following questions will be asked with respect to the law in each jurisdiction:

1. Is abortion, *prima facie*, a crime, and, if so, can a woman be charged for procuring, or attempting to procure, her own abortion?;

2. Do reasons/defences for abortion need to be provided or satisfied in order to constitute lawful abortion, and, if so, does the law require one or more medical practitioners to sign off with respect to such reasons/defences to constitute lawful abortion?;

3. Does the law require the abortion to be performed in a prescribed facility, or by a particular specialist medical practitioner for it to be lawful?;

4. Are there gestational time limits for lawful abortion?; and

5. Can medical practitioners remove themselves from the process via conscientious objection to the procedure?

These questions are all relevant to establishing whether or not a particular jurisdiction has recognised a woman's right to abortion for the following (non-exclusive) reasons:

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[11] The existence of this moral right is contentious. For a classic argument in support of this moral position see Rosalind P Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (Longman, 1984), especially at 373-378 and 384-387. Petchesky links reproductive freedom, and a right to abortion, to the universally recognised human rights of bodily integrity, self-determination and equality. For a classic argument against this moral position see J T Noonan Jr, 'An Absolute Value in History' in J T Noonan Jr (ed), *The Morality of Abortion: Legal and Historical Perspectives* (Harvard University Press, 1970) 1, 51-59. Noonan argues that no such right to abortion can exist because the foetus' right to life should take precedence.

Question 1 speaks for itself, as one cannot possess a right to commit a crime;[12]

Question 2 is relevant on a similar basis, as the necessity of providing reasons in order to exercise a right, and allowing the medical profession to decide whether those reasons are sufficient, is inconsistent with the full recognition of such a right;[13]

Question 3 deals with logistical issues that hinder the exercise of a woman's right to abortion, especially for women living in remote communities where particular specialists and facilities may not be available;

Question 4 is concerned with the imposition of time limits that serve to constrain the full exercise of a woman's right to abortion. That is, given that the 'foetus has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother',[14] the exercise of a woman's right to abortion should not be conditional upon the gestational age of the foetus; and

Question 5 raises the issue of whether medical practitioners' rights are placed before women's rights; that is, the exercise of the right to abortion should not be conditional upon a medical practitioner's exercise of his/her conscience.

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12 See Mark Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229, 229, 252.

13 It also grants medical practitioners a quasi-judicial role they are not qualified to exercise. This legal gate-keeping role of the medical profession raises other issues – see, eg, Belinda Bennett, 'Abortion' in Ben White, Fiona McDonald, and Lindy Willmott (eds), *Health Law in Australia* (LawBook Co/Thomson Reuters, 2010) 371, 377; Heather Douglas, 'Abortion reform: A state crime or a woman's right to choose?' (2009) 33 *Criminal Law Journal* 74, 84-86; Victorian Law Reform Commission, *Law of Abortion*, Final Report No 15 (2008) 80. Many of these problems are exacerbated when two medical practitioners are required to make the necessary decision, or if a specialist must certify or perform the procedure.

14 *In the Marriage of F* (1989) 13 Fam LR 189, 194 (Lindenmayer J). See also *Attorney General for the State of Queensland & Anor v T* (1983) 57 ALJR 285, 286 (Gibbs CJ); *R v Hutty* [1953] VLR 338, 339 (Barry J); *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 278; *Medhurst v Medhurst* (1984) 46 OR (2d) 263, 267; *C v S* [1987] All ER 1230, 1234, 1240-1243. Code States have adopted an analogous position, see *Criminal Code Act Compilation Act 1913* (WA), s269; *Criminal Code 1922* (Qld), s292; *Criminal Code 1924* (Tas), s 153(4).

Obviously, a number of the above assertions could be subject to further critical inquiry, but that is not the purpose of this article. This article only aims to answer the stated questions for each jurisdiction, and makes the assumption that if a negative answer can be provided for each of the above questions, then it would be reasonable to assert that a woman's right to abortion has been accepted in that jurisdiction. Each jurisdiction will be canvassed in order of the last *significant* legislative or judicial action on the subject. Thus, South Australia is the first jurisdiction to be exposed to the above interrogation, while Victoria will be last in line.[15]

II SOUTH AUSTRALIA: THE FIRST LEGISLATIVE REFORM

Prior to 1969 the law with respect to abortion was to be found in sections 81 and 82 of the *Criminal Law Consolidation Act 1935-1975* (SA). These sections were virtually identical to sections 58 and 59 of the *Offences Against the Person Act 1861* (UK). As a result, abortion was a serious crime and carried a potential sentence of life imprisonment. In 1969 a new section 82A was enacted, which defined the circumstances in which an abortion would be considered lawful; in essence, the new section described the elements of the defences available for the crime of abortion.

It must be noted that the 1969 amendment did not in any way alter the status of abortion as a serious crime. Sections 81 and 82 were not repealed, and are still applicable if a defence is not made out pursuant to section 82A. Thus, in South Australia abortion remains, *prima facie*, a felony, and if convicted a person is liable to be imprisoned for life. This penalty applies to either the woman concerned, or a third party performing the procedure or administering the medication.

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[15] Although Victoria last amended its law in 2008, and Queensland altered its applicable legislation in 2009, Queensland will be discussed prior to Victoria, as the 2009 Queensland amendments cannot be described as 'significant' legislative action.

In South Australia abortion is an inchoate offence: if one administers medical treatment (either through medication or surgery) 'with intent' to procure a miscarriage,[16] then the crime may be committed irrespective of whether or not actual termination of the pregnancy occurred,[17] and in the case of a third party (ie. not the woman concerned), irrespective of whether or not the woman was pregnant at the relevant time.[18] Thus, the woman concerned could be convicted of attempting to terminate her (actual) pregnancy, while the third party could be convicted of attempting a factual impossibility, and both would be liable to life imprisonment for those attempts.[19]

The legislative amendment of 1969 provided for valid defences to these crimes. The primary defence is that an abortion is lawful if performed by a legally qualified medical practitioner, after that person and another legally qualified medical practitioner have formed an opinion, in good faith, and after both personally examining the woman concerned, that 'the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated'.[20] In assessing this risk the medical practitioners may take account of the pregnant woman's 'actual or reasonably foreseeable environment'.[21] There is no need, unlike some other jurisdictions (discussed later in the article), to show further criteria, such as a serious danger, or proportionality requirements. As a result, the question each medical practitioner must answer is straightforward: what is more dangerous to maternal health, the abortion, or the continuation of the pregnancy?

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16 See *Criminal Law Consolidation Act 1935* (SA) s 81.

17 Ibid s 81(1).

18 Ibid s 81(2).

19 Similarly, section 82 states that a person supplying medication or instrument 'knowing that it is intended' to be unlawfully used 'with intent to procure the miscarriage of any woman' may be convicted of an offence, and it is no defence at all that the woman concerned was not pregnant, or that the supplied abortifacients were not so employed: *Criminal Law Consolidation Act 1935* (SA) s 82.

20 Ibid s 82A(1)(a)(i).

21 Ibid s 82A(3).

An abortion is also lawful if performed by a legally qualified medical practitioner after that person and another legally qualified medical practitioner have formed an opinion, in good faith, and after both personally examining the woman concerned, that 'there is a substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped'.[22] It is arguable that this second defence is superfluous, as in such a situation it would be reasonable to hold that the pregnant woman's mental health is thereby threatened in a way that would give rise to the primary defence.[23]

Provided any of the above situations exist, and the requisite opinions have been appropriately certified,[24] and provided the abortion is performed in a prescribed hospital,[25] the woman concerned has been residing in South Australia for at least two months prior to the procedure,[26] and the woman has been pregnant for less than 28 weeks,[27] then the abortion will be lawful in South Australia.[28] The legislation also allows medical practitioners (or

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22 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii).

23 There is the additional issue that framing a specific abortion defence in this way may be offensive, in that it might be construed as 'devaluing the existence of people who live with disabilities': VLRC, above n 13, 45. See also, Helen Pringle, 'Abortion and Disability: Reforming the Law in South Australia' (2006) 29 *University of New South Wales Law Journal* 207.

24 See *Criminal Law Consolidation Act 1935* (SA) s 82A(4)(a), that gives power to the Governor to make such regulations in relation to certification. See also, *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulations 1996* (SA) reg 5, that demands the certification of the relevant two opinions, the prescribed certificate is contained in Schedule 1 of the Regulations.

25 *Criminal Law Consolidation Act 1935* (SA) s 82A(1).

26 Ibid s 82A(2). Note that this residency requirement is only imposed with respect to the primary 'lesser evil' defence – if the abortion is performed on the grounds of foetal abnormality pursuant to section 82A(1)(a)(ii), then no such residency condition is imposed.

27 *Criminal Law Consolidation Act 1935* (SA) ss 82A(7)-(8).

28 Ibid s 82A(9). It is also the case, in common with all jurisdictions, that an abortion will be lawful if performed by a legally qualified medical practitioner in a case where s/he is of 'the opinion, formed in good faith, that the

indeed 'any person') to refuse to participate in the process, including merely providing information or referrals, if they have a 'conscientious objection'.[29]

In summary, and in answer to the questions presented earlier:

1. Abortion is a serious crime in South Australia, and carries a potential sentence of life imprisonment, for either the woman concerned or any other person;

2. Not only must reasons be provided in order to satisfy the requirements for a lawful abortion, but the law requires two medical practitioners to certify the existence of the requisite reasons for a lawful abortion. Given the comparative shortage of medical practitioners in rural and remote areas,[30] this requirement of a second opinion may prove to be extremely difficult for women in rural and remote areas to meet;

3. Although any medical practitioner may lawfully perform an abortion, it must be one of the medical practitioners providing the requisite opinion concerning sufficient reasons for abortion. The abortion itself must be carried out in a prescribed hospital;

4. An abortion performed at over 28 weeks gestation is clearly illegal, but an abortion post-viability, but less than 28 weeks gestation, may also be illegal. That is, section 82A(7) states that the defences under section 82A do not apply if the child is 'capable of being born alive', and although section 82A(8) defines any foetus of over 28 weeks gestation as a child

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termination is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman'. In such circumstances neither a second opinion, nor any other requirement (eg. hospitalisation or residency) is necessary: *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(b). It is arguable that this effectively codifies the common law defence to abortion: see *Queen v Anderson* [1973] 5 SASR 256, 270; Rankin, above n 12, 244; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 553.

29 *Criminal Law Consolidation Act 1935* (SA) s 82A(5). Note: if the abortion is necessary to save the pregnant woman's life or prevent 'grave injury' to her physical or mental health, then this conscientious objection clause does not apply (see section 82A(6)).

30 See Australian Institute of Health and Welfare, *Rural, regional and remote health: indicators of health system performance* (AIHW, 2008), 20-24.

capable of being born alive for the purposes of s 82A(7), this is not an exclusive determination concerning viability, which leaves open the possibility that a foetus at less than 28 weeks gestation may nonetheless be deemed a child 'capable of being born alive';[31] and

5. Any person, including medical practitioners that may otherwise be under a duty to provide medical treatment or advice, may refuse to participate in the process of performing a lawful abortion.

Although the basic defence to the crime of abortion is relatively straightforward, accessing lawful abortion services is a complex bureaucratic process in South Australia, involving at least two medical practitioners, and the certification of a number of administrative conditions. South Australia is thus in the ironic position, given that it was the first jurisdiction to tackle the issue legislatively in a manner that led to greater access to abortion services, of now having some of the more potentially restrictive abortion law in Australia. Certainly, in being unable to answer any of the above questions in the negative, South Australia fails in its obligation to recognise a woman's right to abortion.

[31] This was held to be the case with respect to similar legislation on this point in *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 621 (Brook J). The problem with the 'child capable of being born alive' phrase is that it is inherently uncertain. Even if we hold the phrase to have the same meaning as viability, viability itself is a shifting standard, and courts have acknowledged this inherent ambiguity of viability - see *R v Iby* (2005) 63 NSWLR 278, 284-288; *R v Hutty* [1953] VLR 338; *C v S* [1988] 1 QB 135. A decision about whether a foetus is viable involves assessing not just the level of medical service, technology, and science available at that particular time, but also that particular individual's peculiar distinctions, such as weight, development, and general genetic constitution: see Bennett, above n 13, 385-387; VLRC, above n 13, 101-102.

III NEW SOUTH WALES: THE LAW OF THE COLONY

The law in New South Wales has not been altered legislatively for over a century. The relevant sections in the *Crimes Act 1900* (NSW) remain as they stood when the Act was enacted. In New South Wales one may be charged with providing medical treatment (either through medication or surgery) upon a woman 'with intent...to procure her miscarriage',[32] and it matters not whether she was actually pregnant at the relevant time.[33] The offence carries a potential penalty of ten years imprisonment. A person may also be charged with supplying abortifacients (either medication or instruments), 'knowing that the same is intended to be unlawfully used with intent to procure the miscarriage',[34] and if convicted may be imprisoned for no more than five years. With respect to this supplying charge, it matters not whether the woman was pregnant, or whether the supplied materials were actually utilised for the prohibited purpose. In common with South Australia, the woman herself may be charged with attempting to procure her own abortion,[35] and the abortion need not have been successful, but she must have been pregnant at the relevant time to be convicted. If convicted she faces ten years imprisonment.

As previously stated, the legislature has made no move to change this situation. Fortunately for New South Wales women, in 1971 a New South Wales court decided to follow an earlier 1969 Victorian decision that had created a defence to the charge of abortion, and thereby allowed for there to be lawful abortions. In 1969 the Victorian case of *R v Davidson*[36] had decided that the use of the word 'unlawfully' in the sections dealing with abortion in the *Crimes Act 1958* (Vic), namely sections 65 and 66, implied that certain abortions could be lawful.[37] These sections were framed in

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32 *Crimes Act 1900* (NSW) s 83.
33 Ibid.
34 Ibid s 84.
35 Ibid s 82.
36 [1969] VR 667.
37 Ibid 668.

almost identical terms to the New South Wales sections on abortion, as both were copied almost verbatim from sections 58 and 59 of the *Offences Against the Person Act 1861* (UK). In determining what abortions might be considered lawful, Justice Menhennitt of the Victorian Supreme Court applied the common law defence of necessity to the crime of abortion.[38] The *Davidson* decision meant that abortions would be considered lawful in Victoria provided the medical practitioner performing the abortion 'honestly believed on reasonable grounds'[39] that it was 'necessary to preserve the woman from a serious danger to her life or her physical or mental health[...]which the continuance of the pregnancy would entail'.[40] However, this 'serious danger' could not be the 'normal dangers of pregnancy and childbirth',[41] and the act must be, in all the circumstances, 'not out of proportion to the danger to be averted.'[42] If not performed, or attempted, according to the elements of the necessity defence so enunciated, the abortion would be unlawful.

The *Davidson* decision will not be further discussed here, as it has been adequately dealt with elsewhere,[43] and Victoria has now repealed all criminal law provisions dealing with medical abortion, such that the decision no longer has any real effect on Victorian abortion law. However, the decision was followed in New South Wales in 1971 by Judge Levine in *R v Wald*,[44] so remains historically relevant to that jurisdiction. Judge Levine further clarified the application of the necessity defence to the crime of abortion in two significant ways. First, although Justice Menhennitt had implied that the necessity defence was only available to medical practitioners in the case of abortion,[45] Judge Levine specifically stated that the defence, as it applied to the crime of abortion, was only available to

38 *R v Davidson* [1969] VR 667, 670-672.
39 Ibid 672.
40 Ibid.
41 Ibid.
42 Ibid.
43 See Rankin, above n 12, 232-234.
44 [1971] 3 DCR (NSW) 25. Judge Levine made it clear that he was following Justice Menhennitt in reaching his decision (at 29).
45 See *R v Davidson* [1969] VR 667, 672.

the medical profession.[46] This is a potentially troublesome aspect of the decision, as although it was perhaps made on the basis of preventing 'backyard' abortionists from availing themselves of the defence, a literal reading of the decision would also preclude the woman herself from utilising the defence. Thus, in New South Wales, a woman charged with attempting to procure her own abortion may have no positive defence to that charge.

Second, with respect to medical practitioners, Judge Levine broadened the scope of the defence by holding that, in assessing 'serious danger' to a woman's physical or mental health, a medical practitioner was not confined to purely medical considerations, and could consider 'any economic, social or medical ground or reason'.[47] Further, Judge Levine felt that this assessment need not be confined to an immediate assessment, but could include an assessment as to the woman's future health during the currency of the pregnancy, if the pregnancy were not terminated.[48]

There was a missed opportunity to further extend the assessment of 'serious danger' in the *Superclinics*[49] decision in 1995. The New South Wales Court of Appeal followed both *Davidson* and *Wald* in suggesting the test for a lawful abortion, and felt that, in line with *Wald*, economic and social factors should be considered when assessing a serious danger to the woman's health,[50] but Acting Chief Justice Kirby felt that the danger to the woman's health should not be confined to the currency of the pregnancy, but might also include an assessment of her health after the birth of the child.[51] As Kirby states:

> 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

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46 *R v Wald* [1971] 3 DCR (NSW) 25, 29.
47 Ibid.
48 Ibid.
49 *CES v Superclinics (Australia) Pty Ltd* ('*Superclinics*') (1995) 38 NSWLR 47.
50 Ibid 59.
51 Ibid 60, 65. See also, *Veivers v Connolly* (1995) 2 Qd R 326, 329.

> 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, for example, due to the very economic and social circumstances in which she will then find herself.[52]

This would have been an important interpretation of the law from a women's rights perspective, as it is reasonable to hold that, given an unwanted pregnancy, the (hypothetical) psychological state of the mother after (involuntary) childbirth is likely to provide grounds for a finding of serious danger to her mental health. Unfortunately, Kirby was alone in his determination that the *Wald* test should be so extended, so the majority decision can only be stated as approving the test laid down in *Wald*.[53]

In summary, in New South Wales the situation remains in practice less restrictive than a literal reading of the legislation suggests, as medical practitioners may make quite varied, yet potentially legally appropriate, determinations of 'serious danger' and proportionality. However, the point to remember is that abortion remains, *prima facie*, a crime in New South Wales, and no one knows what assessment a court might make of a particular medical practitioner's decision. As Justice Priestley stated in *Superclinics*:

> [A]s the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.[54]

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52 *Superclinics* (1995) 38 NSWLR 47, 60.

53 Ibid 59-60 (Kirby A-CJ), 80 (Priestley JA).

54 *Superclinics* (1995) 38 NSWLR 47, 83. Kirby A-CJ makes a similar point that the legal tests were 'open to subjective interpretation' (at 63).

This is hardly an ideal state of affairs, yet with respect to the relevant questions, New South Wales performs better than South Australia:

1. Abortion is a serious crime, and not only may the woman herself be charged with the offence, but she also may have no defence to that charge if the necessity defence is held to be only applicable to medical practitioners;

2. Reasons do have to be provided to raise the applicable defence to the crime, but only one medical practitioner needs to reach the required assessment;

3. The abortion need not be performed in any prescribed facility, and may be performed by any qualified medical practitioner;

4. No specific time limits are mentioned in the relevant common law decisions, and New South Wales has no child destruction provisions in the *Crimes Act 1900*,[55] so there would appear to be no upper limit on lawful abortions; and

5. It is uncertain whether medical practitioners may escape their duty, through conscientious objection, to properly advice their patients concerning abortion. There is no mention of a conscientious objection in either case law or legislation,[56] so one may assume that the right is not currently formally recognised. On the other hand, there is also no formal prohibition nor limitation of conscientious objection concerning abortion, so one may also assume that medical practitioners may do so if that is their inclination.

Thus, despite abortion being a crime, the application of the common law defence of necessity has resulted in a situation whereby there is

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[55] Section 4(1) of the *Crimes Act 1900* (NSW) does refer to 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman' in a definition of grievous bodily harm to the pregnant woman, but otherwise does not mention the foetus.

[56] However, conscientious objection provisions may be found elsewhere: see Department of Health (NSW), 'Pregnancy – Framework for Terminations in New South Wales Public Health Organisations' (Policy Directive, 2005) 5. These policy directives provide an obligation, limited to public health environments, to transfer care of the patient to another health professional in the case of a conscientious objection from the health professional initially approached by the woman.

relatively easy access to abortion services in New South Wales.[57] However, the current practice is inherently unstable, as it relies on the New South Wales medical profession continuing to provide abortion services on a liberal interpretation of the common law, which, in turn, relies upon the New South Wales government remaining with the present policy of not prosecuting those members of the medical profession that provide abortions.[58] If that prosecution policy were to change many members of the medical profession may find themselves convicted of the crime of unlawful abortion, as the application of the necessity defence to abortion is quite rigorous.

Not only are there two tests to satisfy – 1) that the abortion was necessary to avert a serious danger to the woman's physical or mental health, 'which the continuance of the pregnancy would entail'[59]; and 2) that the abortion was 'not out of proportion to the danger to be averted'[60] – but those two tests are hardly straightforward. For instance, the serious danger to the woman's health that necessitated the abortion cannot merely be 'the normal dangers of pregnancy and childbirth'.[61] Just what this means is unclear, as the first part of the test refers to dangers to the woman's health that the continuance of the pregnancy would cause, yet the later part of this test seems to suggest that such dangers, if they be 'normal', will be insufficient grounds for satisfying this test. What constitutes 'normal' dangers of pregnancy and childbirth? Does the fact that the pregnancy is unwanted deem the relevant dangers to be 'abnormal'? It is also unclear what precisely is involved with the second test of proportionality. The question remains unanswered as to just how serious must the danger to the woman's health be in order for the abortion to be a proportionate response? Does the law invite a moral determination on the worth of the foetus in this

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57 Gleeson makes the point that the common law regime is less restrictive in practice than most of the jurisdictions that have specifically legislated for lawful abortion: see Gleeson, above n 10, 77-82.

58 Although prosecutions still occur (see, eg, *R v Sood* [2006] NSWSC 1141), it remains exceedingly rare (see Gleeson, above n 10, 72-74, 79), which implies the existence of such a policy.

59 *Davidson* [1969] VR 667, 672.

60 Ibid.

61 Ibid.

respect? Case law is of no assistance in answering any of these questions. As if this were not enough legal uncertainty and complexity, both arms of the test must be satisfied at both an objective and subjective level, in that the relevant medical practitioner must not only honestly believe that both tests have been made out, but that belief must also be reasonable.[62]

Of course, in practice such legal complexity is probably lost on a particular medical practitioner, who may simply decide that the abortion is necessary to prevent harm (broadly defined to include physical, mental and socio-economic factors) to the woman concerned. Unfortunately, as Justice Priestley explained in *Superclinics*,[63] there is no way to predict whether a court would hold a particular medical practitioner's decision to be an appropriate application of the necessity defence, and thereby lawful. This level of legal uncertainty and instability invites prosecution, if a government were so inclined. In any case, with abortion remaining a serious crime, New South Wales fails in its obligation to recognise a woman's right to abortion.

IV THE NORTHERN TERRITORY: TWO FAILED ATTEMPTS AT REFORM

The NT legislature has embarked upon two instances of reform of abortion law: the first in 1974, and the second more recently in 2006. Like all Australian jurisdictions, the NT originally possessed the standard criminal law provisions making abortion an offence.[64] In 1974 the NT passed legislation modelled on the South Australian amendments, by enacting section 174 of the *Criminal Code Act* (NT).

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62 For a discussion of the elements of the necessity defence generally see Bronitt and McSherry, above n 28, 370-375.

63 See *Superclinics* (1995) 38 NSWLR 47, 83. See also, Douglas, above n 13, 86.

64 See *Criminal Code Act* (NT) ss 172-173 [prior to 2006 amendments].

This section created the defence to abortion in similar terms to the South Australian model, but had the further restriction that only gynaecologists or obstetricians could perform a lawful abortion.[65] The good faith opinion of that gynaecologist or obstetrician, along with that of another medical practitioner, after both examining the woman concerned, was necessary for an abortion to be lawful on either the greater risk to maternal health ground,[66] or the foetal abnormality ground,[67] with both of these grounds drafted in identical terms to the South Australian legislation. The NT legislation differed from the South Australian model in terms of gestational period limits, and age restrictions, both of which will be discussed with respect to the 2006 amendments.

In 2006 the NT legislature made further reforms to abortion law, redrafting section 174, and relocating it into section 11 of the *Medical Services Act* (NT). The only positive change made to the previous abortion provision was to remove the requirement of a gynaecologist or obstetrician. Thus, it is now the case that any medical practitioner may lawfully perform an abortion, if that person and another medical practitioner are satisfied of the requisite grounds.[68] However, although a gynaecologist or obstetrician need not perform the procedure, one of the medical practitioners required to form the requisite opinion must be either a gynaecologist or obstetrician, unless this is not 'reasonably practicable in the circumstances'.[69] The abortion must be performed in a hospital,[70] the woman concerned must not be more than 14 weeks pregnant,[71] and if the woman is less than 16 years of age those having authority in law must consent to the procedure.[72] No person is under any duty to assist in terminating a pregnancy if that person 'has a conscientious objection to doing so.'[73]

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65 *Criminal Code Act* (NT) s 174(1)(a).
66 Ibid s 174(1)(a)(i).
67 Ibid s 174(1)(a)(ii).
68 See *Medical Services Act* (NT) s 11(1).
69 Ibid s 11(2).
70 Ibid s 11(1)(c).
71 *Medical Services Act* (NT) s 11(1)(d)
72 Ibid s 11(5).
73 Ibid s 11(6).

A pregnancy of post 14 weeks gestation, but no more than 23 weeks gestation, is also lawful if it is performed by a medical practitioner who forms the opinion in good faith, after a medical examination of the woman, that the abortion is immediately necessary to prevent serious harm to the woman's physical or mental health.[74] It is also lawful for a medical practitioner to perform an abortion at any stage for the 'sole purpose of preserving' the woman's life.[75] In both of these situations the requirement for a second opinion and hospitalisation is waived, as is the requirement for a specialist opinion.

Section 11 of the *Medical Services Act* (NT) makes it clear that all abortions that fail to meet the conditions of that section remain unlawful. The original sections in the *Criminal Code Act* (NT) that made the attempted performance of an abortion (and/or the supply of abortifacients) a crime still exist in slightly modified form.[76] Thus, in answer to the requisite questions, the NT performs worse than either South Australia or New South Wales:

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74 *Medical Services Act* (NT) s 11(3).

75 Ibid s 11(4)(a).

76 Under section 208B(1) of the *Criminal Code Act* (NT) it is an offence to administer medication or use an instrument with the intent to procure a miscarriage. It also remains an offence to supply or obtain 'a drug, instrument or other thing' knowing that such is 'intended to be used with the intention of procuring the woman's miscarriage', and it is irrelevant whether the materials were actually utilised for that prohibited purpose (section 208C(1)). For both offences it remains immaterial whether the woman was pregnant in order to achieve a conviction (sections 208B(2) and 208C(2)), and the potential penalty remains at 7 years imprisonment (the NT stands alone in that the penalty for both performing the abortion and supplying the materials is identical. In other jurisdictions the penalty for supplying materials is less than the penalty for performing the abortion (whether through administering medication or providing surgery), and often much less).

1. Abortion remains a serious offence;[77]

2. Reasons need to be provided to satisfy the elements for a valid defence to the crime, and two medical practitioners have to provide the requisite opinions thereof;

3. The abortion must be performed in a hospital, and although it may be performed by any medical practitioner, one of the practitioners signing off on the required reasons for the abortion should be a gynaecologist or obstetrician;

4. Abortion is only lawful on the more liberal grounds until 14 weeks gestation. Between 14 and 23 weeks the abortion may be lawful on the harsher test that it is immediately necessary to prevent serious harm to the woman concerned. After 23 weeks gestation it would appear that no abortion is lawful, unless it is for the sole purpose of preserving the woman's life; and

5. The law allows for and supports full conscientious objection.

Although based on the South Australian model, the NT situation is more problematic from a rights perspective, as the defences copied from South Australia are only available up to 14 weeks gestation. The 2006 amendments achieved little of substance, as the old abortion provisions of the *Criminal Code* were not significantly revised (other than with respect to the specialist issue), so abortion remains a serious crime. In other words, the situation remains predominantly as it was in 1974. However, the fact that part of the law regulating abortion in the NT now resides in health law, rather than criminal law, is deserving of comment. This move is symbolically important, as it perhaps carries the political and social message that abortion is fundamentally a medical procedure. Such a perception may prove politically useful in any future legislative attempts at decriminalisation of abortion.

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[77] However, the manner in which sections 208B and 208C of the *Criminal Code* are drafted arguably implies that a woman can no longer be charged with procuring, or attempting to procure, her own abortion, as there is no mention of a woman doing acts upon herself, for the purpose of causing the termination of her pregnancy; rather, the legislation talks of 'a person' administering drugs 'to a woman', or using an instrument 'on a woman', or supplying abortifacients 'for a woman'. There are no clear decisions on this issue, so the matter remains uncertain.

V QUEENSLAND: THE STATE OF CONFUSION

The *Criminal Code Act 1899* (Qld) contains the standard offences in relation to abortion. In Queensland, it is unlawful to administer medication, or use 'any force of any kind, or...any other means whatever' with the intention of procuring a miscarriage of a woman.[78] The potential penalty for doing so is 14 years imprisonment. It is also unlawful to supply 'anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.'[79] The potential penalty for such supply is 3 years imprisonment. Similar to all other standard provisions on abortion, it matters not whether the woman concerned was pregnant at the relevant time.[80] As has been discussed, this was all standard throughout most of Australia.

Queensland sets itself apart by carrying this crime of attempting the impossible to the woman concerned. In Queensland, a woman may be charged with unlawfully administering medication to herself, or using 'force' or 'any other means whatever' upon herself, or permitting any such actions (whether medication or surgery) upon herself, 'with intent to procure her own miscarriage'.[81] If convicted she faces 7 years imprisonment, and it matters not whether she was actually pregnant at the material time.[82] To reiterate: she may be deprived of her liberty for 7 years for attempting the impossible, and doing so on her own body. It is hard to believe that this situation exists in contemporary Australia,[83] rather than a fundamentalist theocracy. It is her body, and if she was not pregnant, then she has

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78 *Criminal Code Act 1899* (Qld) s 224.

79 Ibid s 226.

80 Ibid ss 224, 226. In the case of supplying with knowledge, it also matters not whether the supplied materials are actually utilised for the prohibited purpose.

81 Ibid s 225.

82 Ibid.

83 A woman was recently charged with this offence: see *R v Brennan and Leach* (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010). For a detailed discussion of this case see Kerry Petersen, 'Abortion laws and medical developments: A medico-legal anomaly in Queensland' (2011) 18 *Journal of Law and Medicine* 594, 597-599.

simply made use of her own body, harming no-one else (either a real or potential person). One may ask: What exactly is the societal evil that this criminal law seeks to address? Fortunately, there exist possible defences to this crime in Queensland. Unfortunately, the status and application of those defences remains uncertain.

In Queensland, there exists a possible statutory defence to the charge of unlawful abortion contained in section 282 of the *Criminal Code Act 1899* (Qld). This section was the subject of recent legislative amendment via the *Criminal Code (Medical Treatment) Amendment Act 2009* (Qld). The changes made were as follows: the previously worded section 282 stated that a person would not be acting unlawfully if they performed 'in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the 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.'[84] There was a perceived problem with that old section, in that it was uncertain whether the administering of medication would qualify as a 'surgical operation'.[85] Consequently, the 2009 amendment made to the section was that the phrase 'or medical treatment' was inserted immediately after the phrase 'surgical operation'.[86] Nonetheless, the section 282 defence appears a very strict test: the defence is made out *only* if both the woman's life is in danger, and it is reasonable to so act. One would assume that if the woman's life was in danger, then such action would always be 'reasonable having regard to the patient's state at the time and all the circumstances of the case', but it is clear that both steps

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84 *Criminal Code Act 1899* (Qld) s 282 [prior to 2009 amendments].

85 In *Queensland v B* [2008] QSC 231, [21]-[23] it was suggested that the section 282 defence would not cover the administration of drugs. See also Douglas, above n 13, 79-82; Petersen, above n 83, 597.

86. See *Criminal Code Act 1899* (Qld) s 282(1). Further subsections were also added, such that if the administration by a 'health professional' of a particular substance would be lawful under section 282, then it would also be lawful for that health professional to 'direct or advise another person, whether the patient or another person, to administer the substance' (s 282(2)). Provided the direction or advice was lawful, or the person so directed or advised reasonably believed that the direction or advice was lawful, then that person is also protected by the new legislation (s 282(3)).

of the test need to be satisfied to make the abortion lawful. A literal reading of the defence suggests that it would not be enough to show that merely the woman's health was threatened, even if seriously threatened, by the pregnancy.[87]

Fortunately for Queensland women seeking abortion the legislation is not the end of the matter, and case law exists that provides a broader test for a lawful abortion. In essence, the Queensland courts have applied a wide meaning to the phrase 'preservation of the mother's life'. In *R v Bayliss and Cullen*,[88] Judge McGuire of the District Court held that section 282 should be interpreted such that the phrase 'preservation of the mother's life' should include the preservation of her health 'in one form or another'.[89] Although this allows for more lawful abortions than a literal reading of the section would suggest, it is also the case, as Judge McGuire was quick to point out, that it would only be 'in exceptional cases'[90] that an abortion would be deemed lawful under section 282. The 2009 amendments to that section do not change this fact.

There is, however, a fundamental legal issue with Judge McGuire's decision, as it applied the cases of *Davidson* and *Wald* in arriving at an interpretation of section 282.[91] The problem with

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87 The amended section makes it clear that this remains the case, and that there is no less stringent test, because although section 282(1)(a) is framed such that it is lawful to perform a surgical operation or medical treatment upon 'a person or an unborn child for the patient's benefit', section 282(4) makes it clear that such operation or treatment would not include anything 'intended to adversely affect an unborn child'. It is arguable that one might still raise the defence under section 282 if the intent was to preserve the woman's health, and the foreseen, but not sought after, by-product of that treatment was the death of the foetus, but this would be a tenuous line of argument given the wording of the section.

88 (1986) 9 Qld Lawyer Reps 8.

89 Ibid 41. Judge McGuire offers a comprehensive discussion of s 282 at 33-35, 41-43.

90 Ibid 45.

91 In *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, 45, Judge McGuire expressly states that he is following *Davidson*, but was less enthusiastic about

utilising *Davidson* and *Wald* in determining the meaning of section 282 is that neither *Davidson* nor *Wald* were dealing with similar legislative defences, but rather were describing the application of the common law defence of necessity to the crime of abortion, and it is arguable that such common law defences should not apply in Code States.[92] Notwithstanding these issues, Judge McGuire's reasoning in this respect received approval in the Queensland Supreme Court decision of *Veivers v Connolly*.[93]

Leaving aside this issue for the time being, in answer to the questions posed in this article, Queensland looks similar to New South Wales:

1. Abortion is a serious crime, and the woman concerned may not only be charged, but it also does not matter whether she was, in fact, pregnant;

2. Reasons need to be provided for a lawful abortion, but only one medical practitioner is required to sign off on those reasons;

3. There is no need for a prescribed facility, nor a specialist medical practitioner;

4. There is no upper time limit for lawful abortion, other than, by virtue of the relevant child destruction provisions, at the time that 'a female is about to be delivered of a child'.[94] This may have implications for very late abortions, but section 282 is arguably applicable as a defence to a charge of child destruction in any case; and

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applying *Wald*, especially the extension of the test to include social and economic factors in determining impact upon health (at 26). However, ultimately his Honour conceded that *Wald* was probably also applicable (at 45). In *K v T* [1983] 1 Qd R 396 the Court similarly made it clear that *Davidson* applies in Queensland.

92 See Ben White and Lindy Willmott, 'Termination of a minor's pregnancy: Critical issues for consent and the criminal law' (2009) 17 *Journal of Law and Medicine* 249, 258 (the authors refer to *Queensland v Nolan* [2002] 1 QdR 454 as authority for this proposition); Bennett, above n 13, 376.

93 (1995) 2 Qd R 326, 329 (de Jersey J). See also *R v Brennan and Leach* (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010).

94 *Criminal Code 1899* (Qld) s 313(1).

5. There is no specific provision for medical practitioners to remove themselves from the process via conscientious objection, but there is also no express limitation upon their right to do so.

As said, the presiding interpretation of the law in Queensland is similar to the law in New South Wales. Thus, like New South Wales, the stability of the current legal situation is hardly ideal. The situation is even less certain in Queensland because the present legal environment was judicially achieved through what may be described as questionable judicial reasoning. It may well be decided that neither *Davidson* nor *Wald* are applicable in Queensland, with the result being that section 282 is interpreted more literally. If this occurred, abortion would only be lawful if the pregnancy was threatening the woman's life in some way. Queensland thus possesses, at least potentially, the most restrictive abortion law in Australia. It is to be lamented that, given the opportunity presented to significantly amend and clarify the law in 2009, the Queensland Parliament failed to do so.

VI WESTERN AUSTRALIA: THE MOVE TO HEALTH LAW

The process of moving the regulation of abortion from criminal law into health services law, and thus decriminalising the procedure, was instigated by the Western Australian Parliament in 1998. This was not entirely successful in Western Australia because, like the NT, abortion remains a crime within the *Criminal Code Act Compilation Act 1913* (WA). However, if performed by a medical practitioner, it is very unlikely that an abortion will be unlawful in Western Australia as a consequence of the 1998 amendments.

In 1998 the Western Australian Parliament passed the *Acts Amendment (Abortion) Act 1998* (WA). This Act repealed sections 199, 200 and 201 of the *Criminal Code*,[95] which were the standard provisions on abortion. A new section 199 was inserted into the *Criminal Code*, making all abortions, attempted abortions, and 'any act with intent to procure an abortion',[96] unlawful, unless done by a medical practitioner in good faith and with reasonable care and skill, and justified pursuant to section 334 of the *Health Act 1911* (WA).[97]

Under section 334(3) of the *Health Act 1911* (WA) an abortion is only justified if:

> (a) the woman concerned has given her informed consent; or
> (b) the woman concerned will suffer serious personal, family or social consequences if the abortion is not performed; or
> (c) serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed; or
> (d) the pregnancy of the woman concerned is causing serious danger to her physical or mental health.

The legislation then goes on to explain that the woman must give her informed consent (unless it is impracticable for her to do so), in order for the other reasons to be sufficient grounds for a lawful abortion.[98] This condition effectively renders grounds (b), (c), and (d) superfluous. If informed consent is provided, then the abortion is justified under the legislation. Section 334(5) sets out the criteria for informed consent as follows:

> **'Informed consent'** means consent freely given by the woman where -
> (a) a medical practitioner has properly, appropriately and adequately provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term;

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95 *Acts Amendment (Abortion) Act 1998* (WA) s 4.
96 *Criminal Code Act Compilation Act 1913* (WA) s 199(5).
97 *Acts Amendment (Abortion) Act 1998* (WA) s 7, inserts this new section 334 into the *Health Act 1911* (WA).
98 *Health Act 1911* (WA) s 334(4).

(b) a medical practitioner has offered her the opportunity of referral to appropriate and adequate counselling about matters relating to termination of pregnancy and carrying a pregnancy to term; and
(c) a medical practitioner has informed her that appropriate and adequate counselling will be available to her should she wish it upon termination of pregnancy or after carrying the pregnancy to term.

This imposition of mandatory counselling and referral is insulting to the woman concerned, as it presupposes that her consent would otherwise be ill informed, when, in fact, women seeking abortions are 'already well informed.'[99] There is also a logistical issue with this counselling requirement, as the medical practitioner providing the above counselling or referrals cannot perform or assist in the performance of the abortion.[100] This may hinder the exercise of a woman's right to abortion, especially in remote areas where multiple medical practitioners are not available. There is the further practical obstruction that no person or institution (including hospitals) is under any duty to participate in the performance of an abortion.[101] There exist further restrictions in the case of a woman who is a 'dependant minor',[102] which is defined as being less than 16 years of age, and being supported by a custodial parent(s)[103] or legal guardian(s).[104] In such cases, informed consent will not be regarded as being given unless the parent or guardian has been 'informed that the performance of an abortion is being considered and has been given the opportunity to participate in a counselling process and in consultations between the woman and her medical practitioner'.[105]

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99 Douglas, above n 13, 86. See also VLRC, above n 13, 120.
100 *Health Act 1911* (WA) s 334(6).
101 Ibid s 334(2).
102 Ibid s 334(8)(a).
103 Ibid s 334(8)(b).
104 Ibid s 334(8)(c).
105 Ibid s 334(8)(a). The woman seeking an abortion may apply to the Children's Court for an order that the parent or guardian should not be so notified and informed (s 334(9)), and if the Court grants the order, then informed consent may be given without such parental notification (s 334(11)), and the parent or guardian cannot appeal that order (s 334(10)).

Provided the grounds under section 334 have been met, the abortion may be performed by any medical practitioner (except the practitioner providing the requisite counselling or referral), and at any venue.[106] This is the case only if the woman has been pregnant for less than 20 weeks. If the unwanted pregnancy in issue is at least 20 weeks gestation, then the above provisions do not apply,[107] and an abortion will only be justified if two medical practitioners, who are members of a panel of at least six medical practitioners (nominated by the Minister), agree that the 'mother, or the unborn child, has a severe medical condition that justifies the procedure',[108] and the procedure is performed in an approved facility.[109]

The 1998 amendments make it clear that abortions not performed (or not attempted) according to those amendments remain unlawful,[110] and it is immaterial to such a charge whether the woman concerned was pregnant.[111] However, if a registered medical practitioner performs an unlawful abortion,[112] then that person may only be subject to a pecuniary penalty.[113] The removal of imprisonment as a potential penalty for medical practitioners that fail to meet the conditions for a lawful abortion suggests that in Western Australia abortion is now viewed as, *prima facie*, a medical procedure, and therefore lawful, provided it is performed by a member of the medical profession.[114]

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106 The abortion must still be performed in good faith and with reasonable care and skill (pursuant to *Criminal Code Act Compilation Act 1913* (WA) s 199(1)(a)), and the medical practitioner would be required to report the abortion on the prescribed form: see *Health Act 1911* (WA) s 335(5)(d).

107 *Health Act 1911* (WA) s 334(7).

108 Ibid s 334(7)(a).

109 Ibid s 334(7)(b).

110 *Criminal Code Act Compilation Act 1913* (WA) s 199(2).

111 Ibid s 199(5).

112 Or attempts to perform an unlawful abortion, or does 'any act with intent to procure an [unlawful] abortion': *Criminal Code Act Compilation Act 1913* (WA) s 199(5).

113 Ibid s 199(2). Presently a fine of up to $50,000 may be imposed upon conviction.

114 If a person who is not a medical practitioner performs or attempts an abortion, then that person may be subject to 5 years imprisonment if convicted: *Criminal Code Act Compilation Act 1913* (WA) s 199(3). There is, however, a surgical and medical treatment defence under section 259 of the *Criminal*

In terms of the relevant questions, Western Australia thus performs satisfactorily:

1. Although abortion remains a crime, for medical practitioners the penalty is purely monetary, and it is highly unlikely that a woman obtaining an abortion could be charged with any offence;[115]

2. Provided informed consent is given, then no reasons need to be provided in order to justify an abortion prior to 20 weeks gestation, but informed consent necessitates mandatory counselling by a medical practitioner. After 20 weeks gestation the abortion may still be lawful, but only if two medical practitioners from a panel of six decide that the woman or the foetus has a severe medical condition justifying the procedure;

3. Prior to 20 weeks gestation the abortion may be performed anywhere, and by any medical practitioner, except the practitioner providing the requisite counselling and referrals necessary to enable informed consent. After 20 weeks of pregnancy the abortion must be performed in an approved facility;

4. Under the informed consent ground, an abortion will only be lawful up to 20 weeks of pregnancy. After 20 weeks gestation the abortion may still be lawful, but on stricter grounds. There is an upper time limit to lawful abortion presented by the offence of child destruction, but this only comes into play 'when a woman is about to be delivered of a child';[116] and

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Code, which is specifically recognised as applying to the crime of abortion (s 199(3)). Section 259 functions such that it is lawful to administer in good faith and with reasonable care and skill, surgical or medical treatment 'to an unborn child for the preservation of the mother's life[...]if the administration of that treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case' (s 259(1)). As this defence is framed almost identically to the old section 282 of the *Criminal Code Act 1899* (Qld), it creates the possibility that the section might be interpreted to allow the common law decisions of *Davidson*, *Wald*, and *Bayliss and Cullen* to operate in Western Australia. However, with Western Australia being a Code state, this would seem unlikely, although it did happen in Queensland, which is also a Code state.

115 It is unlikely because neither section 199 of the *Criminal Code*, nor section 334 of the *Health Act*, refer to acts committed by the woman concerned.

116 *Criminal Code Act Compilation Act 1913*(WA) s 290.

5. A person may remove themselves from the entire process via conscientious objection.

The main positive aspect of the Western Australian situation from a women's rights perspective is that although two medical practitioners are necessary (one to provide counselling and referrals, and one to perform the operation), no reasons are required to justify the procedure, provided the pregnancy is less than 20 weeks. The fact that no reasons need be provided prior to 20 weeks gestation serves to highlight that the procedure is now perceived as a medical issue, and not a criminal issue. As Bennett comments, the Western Australian legislation was 'an important shift for regulation of abortion from the criminal law to health law'.[117] It is unfortunate that this liberal environment only exists until 20 weeks gestation, but given that late abortions are rare,[118] the practical consequences are probably negligible. The labelling of abortion as predominantly a woman's health concern is the first step towards removing abortion completely from the ambit of the criminal law, and subsequently recognising a woman's right to abortion. In Western Australia this is yet to be fully realised, but of the jurisdictions discussed so far, Western Australia comes the closest to fulfilling its obligation to recognise the right to abortion.

VII TASMANIA: A MISSED OPPORTUNITY

In common with all Australian jurisdictions, Tasmania possessed the standard provisions defining the crime of abortion.[119] Such legislation was not subject to legislative or judicial review until 2001, when the *Criminal Code Amendment Act (No 2) 2001* (Tas) was passed. This legislation expressly accepted that some abortions

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[117] Bennett, above n 13, 379.

[118] Current figures suggest that less than 1% of all abortions performed in Australia are performed after 20 weeks gestation: see Parliamentary Library Research Service, 'Abortion Law Reform Bill 2008' (Current Issues Brief No 4, Department of Parliamentary Services, Victoria, 2008) 34; VLRC, above n 13, 36.

[119] See *Criminal Code Act 1924* (Tas) ss 134-135.

could be lawful, and detailed when this might occur, but otherwise retained the standard provisions outlawing the procedure. Thus, it remains the case in Tasmania that the woman concerned, and any other person, may be charged with unlawfully attempting to procure an abortion, through either administering 'poison or other noxious thing' or using 'any instrument or other means', but it is now an element of the charge that the woman be pregnant at the relevant time.[120]

In 2001 defences to these offences were enacted, so that presently, under section 164 of the *Criminal Code Act 1924* (Tas), it is now possible to perform a 'legally justified' abortion in Tasmania, provided it is performed pursuant to that section;[121] if not, then the old standard provisions apply, and the abortion would, *prima facie*, be criminal.[122] Under section 164(2) the termination of a pregnancy is legally justified if:

> (a) two registered medical practitioners have certified, in writing, that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and
> (b) the woman has given informed consent unless it is impracticable for her to do so.

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[120] Ibid s 134. The unlawful supply of abortifacients (either medication or instruments) knowing that they were to be unlawfully used with the intention to procure a miscarriage of a woman is also a crime, and it matters not whether they were subsequently so utilised: *Criminal Code Act 1924* (Tas) s 135.

[121] Ibid s 164(1). The legal situation in Tasmania is further complicated by the existence within the *Criminal Code* of a surgical operation defence. Under section 51(1) 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'. This section appears to allow for lawful abortion in conjunction with the criteria under section 164. Section 164 makes no reference to section 51(1), and by not mentioning section 51(1), it is arguable that it therefore applies to the performance of an abortion, in which case the regime in Tasmania is arguably far less restrictive than it would appear. On the other hand, it is likely that a court would hold that the legislature intended to override section 51(1) in the case of termination of pregnancy.

[122] *Criminal Code Act 1924* (Tas) s 164(1).

In effect, the Tasmanian legislation is a blend of the both the South Australian and Western Australian legislation on abortion. Section 164(2)(a) is based upon the South Australian model, while section 164(2)(b) incorporates the predominant feature of the Western Australian legislation.

In assessing the requisite risk under section 164(2)(a), the two medical practitioners need not act in good faith (as is required under the South Australian legislation), and may 'take account of any matter which they consider to be relevant'.[123] In addition, although it is clear that only a registered medical practitioner may lawfully terminate a pregnancy,[124] unlike the case in South Australia, the legislation does not necessarily indicate that it must be one of the two providing the certification. Nor does the provision stipulate the necessity of performing the termination in a prescribed facility. However, one of the two medical practitioners providing the requisite certification must specialise in obstetrics or gynaecology.[125]

As to 'informed consent', section 164(9) states that this means:

> [C]onsent given by a woman where –
> (a) a registered medical practitioner has provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term; and
> (b) a registered medical practitioner has referred her to counselling about other matters relating to termination of pregnancy and carrying a pregnancy to term.

Such consent must be obtained unless it is 'impracticable' to do so,[126] but if it is impracticable for the woman to give such informed consent, the two medical practitioners providing the requisite certification must also provide a declaration in writing detailing the

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123 Ibid s 164(3).
124 Ibid s 164(6).
125 Ibid s 164(5).
126 *Criminal Code Act 1924* (Tas) s 164(2)(b).

reasons why it was impracticable for the woman to give her informed consent.[127] Unlike the case in Western Australia,[128] it would appear that the medical practitioner providing the counselling may also perform the abortion. In common with all other jurisdictions canvassed thus far, no person is under a duty to participate in any way with a termination of pregnancy, including merely providing advice or counselling, if they have a conscientious objection.[129]

In answer to the relevant questions, Tasmania performs on a par with South Australia:

1. Abortion remains a serious crime, and the pregnant woman concerned may be charged with the crime;

2. Not only do reasons need to be provided, but two medical practitioners must sign off on those reasons. In addition, the woman concerned must provide 'informed consent', which necessitates mandatory counselling;

3. The abortion need not be performed in any particular facility, and any medical practitioner may perform the abortion, but at least one of the practitioners providing the requisite certification must specialise in either obstetrics or gynaecology;

4. There is no upper time limit for lawful abortion mentioned under section 164, and although there exists a child destruction offence in Tasmania under section 165(1) of the *Criminal Code Act 1924* (Tas), section 165 is expressly made subject to section 164.[130] One may therefore assume that, provided the criteria for lawful abortion stipulated in section 164 are satisfied, then the abortion is legal regardless of period of gestation; and

5. Medical practitioners may remove themselves entirely from the process via conscientious objection.

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127 *Criminal Code Act 1924* (Tas) s 164(4).
128 See *Health Act 1911* (WA) s 334(6).
129 *Criminal Code Act 1924* (Tas) s 164(7).
130 *Criminal Code Act 1924* (Tas) s 164(1).

One suspects that the 2001 legislation represented a genuine effort by the Tasmanian Parliament to reform abortion law by further medicalising, and thereby decriminalising, the procedure to some extent. However, not only does abortion remain a crime, but all provisions dealing with abortion reside in the *Criminal Code*. This precludes any recognition of a right to abortion. Although there is recognition of the possibility of the procedure being lawful in some circumstances, the woman concerned must convince two medical practitioners that she has sufficient reasons for a lawful abortion, and then undergo mandatory counselling. This state of affairs leads to the conclusion that the legislative effort in 2001 constitutes a missed opportunity for significant reform.

VIII THE AUSTRALIAN CAPITAL TERRITORY: ESTABLISHING A BLUEPRINT FOR REFORM

The legislative initiatives of Western Australia in 1998 indicated the possibilities for reforming abortion law, and it was not long before another jurisdiction followed. The ACT enacted legislation in 2002 that went even further than the Western Australian amendments, and took the commendable step of removing medical abortion (ie. an abortion performed by a medical practitioner) from the criminal law; either in statute or common law.[131] In the ACT medical abortion is now solely regulated by health services law.[132] The ACT experience makes one optimistic for further change in other jurisdictions because in 1998 the ACT actually enacted quite restrictive abortion laws,[133] prior to repealing them only four years later,[134] and

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131 See *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT). For a discussion of this Act see Mark Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316, 329-332.

132 See *Health Act 1993* (ACT) ss 80-84.

133 See *Health Regulation (Maternal Health Information) Act 1998* (ACT). For a discussion of this Act and the law prior to 2002 see Rankin, above n 12, 249-251; Rankin, above n 131, 327-329.

134 See *Health Regulation (Maternal Health Information) Repeal Act 2002* (ACT).

replacing them by enacting the *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT). This Act inserted sections 55A-55E into the *Medical Practitioners Act 1930* (ACT), which were moved without amendment into the *Health Professionals Act 2004* (ACT), and finally came to currently reside (again without amendment from the initial 2002 legislation) in the *Health Act 1993* (ACT), as sections 80 to 84. In effect, the legislation defines a lawful abortion as one performed by a medical practitioner in an approved facility. There are no further requirements, nor mandatory counselling, and a woman need offer no reason whatsoever for requesting an abortion. Clearly, the ACT situation must be very close to abortion on demand.

Of course, in order to adequately regulate a process, the regulatory body (in this case the ACT Government, through the relevant Minister) needs to possess the power to reprimand or discipline those that refuse to be so regulated. As a consequence, although abortion was expressly removed from the ambit of the criminal law in the 2002 legislation, the 2002 provisions created two new offences within the *Health Act 1993* (ACT): namely, performing an abortion when not a qualified medical practitioner;[135] and performing an abortion in a non-approved medical facility.[136] If not a medical practitioner, a person is liable to 5 years imprisonment for performing an abortion,[137] while performing an abortion in a facility that has not been approved for the procedure carries a potential pecuniary penalty, or 6 months imprisonment, or both.[138] Unlike the previous offences in the *Crimes Act*, these new offences are not inchoate offences: the legislation is quite clear that, in order to be convicted of the above offences, the requisite administering of medication, use of instrument, or 'any other means',[139] must have actually caused a woman's miscarriage.[140]

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135 *Health Act 1993* (ACT) s 81.
136 Ibid s 82.
137 Ibid s 81.
138 *Health Act 1993* (ACT) s 82.
139 Ibid s 80(c).
140 Ibid s 80.

However, it is difficult to see any need for the creation of these new offences. That is, in constructing the legal situation whereby a woman could approach any medical practitioner and request an abortion, without fear of any criminal sanction, and most significantly in terms of reproductive freedom, without providing any reasons whatsoever, it would appear unnecessary to create any offences with respect to the abortion procedure.

Similarly, although the condition of an approved facility seems reasonable, there is no justification for imprisonment when this condition is not met. Surely, the imposition of a hefty fine would sufficiently dissuade medical practitioners from performing the procedure outside of approved facilities. Furthermore, in approving facilities for the procedure, the Minister need only be satisfied that it is 'suitable on medical grounds',[141] and cannot 'unreasonably refuse or delay a request for approval of a medical facility',[142] so there should be no shortage of such approved medical facilities. Consequently, there is negligible, if any, motive for performance of the procedure in a non-approved facility. Certainly, there is no indication of a disturbing medical trend that requires an offence of possible imprisonment to abate it.

Notwithstanding the creation of these new offences within the *Health Act*, it may be argued that ACT law now views the practice of abortion much like any other procedure over which the medical profession has a state sanctioned monopoly. The only significant distinction between abortion and any other medical procedure is that, with the case of abortion, no person is under any duty 'to carry out or assist in carrying out an abortion',[143] and may refuse to do so if that is requested of them.[144] Whether this extends to providing mere advice or referrals is not clear, but one would assume that the use of the word 'assist' indicates an intention to allow people to refuse to provide even such basic assistance. The addition of this

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141 Ibid s 83(1).
142 Ibid s 83(3).
143 Ibid s 84(1).
144 Ibid s 84(2).

conscientious objector clause into the regulation of abortion in the ACT sits awkwardly with the achievements and purported purpose of the 2002 legislation. It is also the only obstacle that prevents the ACT from being described as an abortion on demand jurisdiction, as allowing full and unconditional conscientious objection is particularly negative from a women's access to abortion services perspective,[145] and certainly condescending to women.[146] The ACT is hardly alone in supporting the conscientious objector, but given the other aspects of the 2002 legislation that embrace recognition of a woman's right to abortion, it is disappointing that the ACT chose this path.

Nonetheless, with respect to the relevant questions, the ACT provides predominantly negative responses:

1. Abortion is not mentioned in the criminal law as such. All previous crimes in relation to abortion contained in either the common law or the *Crimes Act 1900* (ACT) have been abolished. Abortion is lawful when it is performed by a medical practitioner in an approved facility;

2. No reasons need to be provided by the woman suffering from the unwanted pregnancy, and she does not have to sit through mandatory counselling sessions;

3. Although the abortion must be performed in an approved facility, any medical practitioner may perform the procedure;

4. No upper time limit for lawful abortion is mentioned in the applicable legislation, but the ACT retains the crime of child destruction, which means that an extremely late abortion conducted 'in relation to a childbirth' may constitute a crime;[147] and

5. The law allows for medical practitioners to have a conscientious objection to the process, and thereby remove themselves from any involvement in the procedure.

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145 See Gleeson, above n 10, 81-82.

146 Ibid.

147 *Crimes Act 1900* (ACT) s 42.

As mentioned, the current legal situation in the ACT is very close to abortion on demand, and only fails to be so classified because a medical practitioner may still refuse to provide referrals for the service. Despite this flaw, the ACT in 2002 came closer than any previous jurisdiction to recognising a woman's right to abortion. As a consequence, it was stated soon after the ACT legislation was passed that 'the current ACT regime is the most we can presently hope for in the short term'.[148] In 2008 the Victorian Parliament proved this assessment premature.

IX VICTORIA: THE RECOGNITION OF A WOMAN'S RIGHT TO ABORTION?

Prior to 2008 Victorian abortion law functioned according to the standard abortion provisions inherited from sections 58 and 59 of the *Offences Against the Person Act 1861* (UK),[149] as interpreted by Justice Menhennitt in *R v Davidson*.[150] In other words, a draconian legislative system that nonetheless operated in practice, due to the application of the common law defence of necessity,[151] at a far more liberal level. This changed dramatically with the enactment of the *Abortion Law Reform Act 2008* (Vic).

This Act abolished any common law offence of abortion,[152] and amended the abortion provisions within the *Crimes Act 1958* (Vic),[153] such that the current section 65 of that Act now only makes

148 Rankin, above n 131, 335.

149 See *Crimes Act 1958* (Vic), ss 65-66 [prior to 2008 amendments].

150 [1969] VR 667.

151 Ibid 670-672.

152 See *Abortion Law Reform Act 2008* (Vic) s 11, which amended *Crimes Act 1958* (Vic) s 66.

153 See *Abortion Law Reform Act 2008* (Vic) s 11. Note: the Act also repealed the pervious provisions concerning the crime of child destruction: see *Abortion Law Reform Act 2008* (Vic) s 9.

it a crime for a non-qualified person to perform an abortion.[154] There is now no possible criminal charge against either the woman concerned,[155] or a qualified person.[156] A person is deemed to be 'qualified' if they are a 'registered medical practitioner',[157] with 'registered' meaning registered under the *Health Professions Registration Act 2005* (Vic),[158] or, if the abortion is performed by the administration or supplying of drugs, then a 'qualified' person may also be a registered pharmacist or registered nurse.[159] These achievements were all stated as purposes of the 2008 Act.[160]

In terms of the regulation of the procedure,[161] it is now the case that a registered medical practitioner may perform an abortion on any woman (ie. there are no age constraints),[162] provided she is not more than 24 weeks pregnant.[163] There are no other criteria. To repeat this achievement: The abortion may be performed anywhere, and for any reason, or rather, if a woman requests an abortion, and she is not more than 24 weeks pregnant, then that request is sufficient reason, and any registered medical practitioner may

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154 See *Crimes Act 1958* (Vic) s 65(1). In common with the ACT, abortion is no longer an inchoate offence: the defendant must have caused an actual termination of pregnancy in order for a conviction. The defendant must also have intended causing the termination of the pregnancy to be convicted under this section: *Abortion Law Reform Act 2008* (Vic) s 3. Somewhat inconsistently, 'perform an abortion' pursuant to the section also includes the supply of any 'substance knowing that it is intended to be used to cause an abortion', and it would appear that the supply of abortifacients may still be an inchoate offence, as it is not clear whether an actual abortion must take place utilising such substances, or whether the woman concerned needs to be pregnant at the relevant time: *Crimes Act 1958* (Vic) s 65(4).

155 *Crimes Act 1958* (Vic) s 65(2).

156 Ibid s 65. The 2008 Act made certain of this by also amending the various definition provisions in the *Crimes Act 1958* (Vic): see *Abortion Law Reform Act 2008* (Vic) s 10, that amends *Crimes Act 1958* (Vic) s 15.

157 *Crimes Act 1958* (Vic) s 65(3)(a).

158 *Abortion Law Reform Act 2008* (Vic) s 3(a).

159 *Crimes Act 1958* (Vic) s 65(3)(b).

160 *Abortion Law Reform Act 2008* (Vic) s 1.

161 The regulation of the performance of abortions by health practitioners was also an aim of the 2008 Act: *Abortion Law Reform Act 2008* (Vic) s 1(b)).

162 *Abortion Law Reform Act 2008* (Vic) s 3.

163 Ibid s 4.

terminate her pregnancy without inquiring further, and without providing certain 'counselling' or mandatory referrals. This is similar to the ACT, but without the ACT requirement of an approved facility. The Victorian Act went even further, allowing both registered pharmacists and registered nurses to supply or administer 'drugs to cause an abortion',[164] provided the woman is not more than 24 weeks pregnant.[165] Thus, as effective abortifacients become legally available, a woman in Victoria may simply walk into a pharmacy and purchase from a registered pharmacist, without providing any reason whatsoever for that purchase, such abortifacients as she desires, and self-administer them. This would be all perfectly legal, and especially advantageous to women living in remote communities, where access to a medical practitioner may be more difficult.[166] The Victorian legislation is, when compared with the law that preceded it, quite revolutionary.

The regulation of abortions after 24 weeks gestation is more onerous, but nowhere near as burdensome as other jurisdictions (with the exception of the ACT). A registered medical practitioner may perform an abortion after 24 weeks only if that medical practitioner 'reasonably believes that the abortion is appropriate in all the circumstances',[167] and that medical practitioner has consulted with 'at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.'[168] In determining whether an abortion is 'appropriate in all the circumstances', the legislation states that the registered medical practitioners must have regard to 'all relevant medical circumstances',[169] and 'the woman's current and future physical, psychological and social circumstances.'[170] These are very broad tests that allow the medical practitioners full scope to make

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164 *Abortion Law Reform Act 2008* (Vic) s 6. The definition of registered pharmacists and registered nurses is those authorised under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

165 *Abortion Law Reform Act 2008* (Vic) s 6.

166 See Douglas, above n 13, 85.

167 *Abortion Law Reform Act 2008* (Vic) s 5(1)(a).

168 Ibid s 5(1)(b).

169 Ibid s 5(2)(a).

170 Ibid s 5(2)(b).

any decision that they feel is appropriate. In addition, there is no requirement that the abortion be performed in a prescribed facility. As stated earlier, with the exception of the ACT, the tests in Victoria for lawful abortions after 24 weeks are actually *less* stringent than the tests for lawful pre-viability abortions in other jurisdictions.

With respect to the supply or administration of abortifacients when the woman is more than 24 weeks pregnant, the legislation only allows a registered pharmacist or registered nurse 'employed or engaged by a hospital' to do so, and only at the 'written direction' of a registered medical practitioner.[171] A registered medical practitioner may only so direct when the registered medical practitioner writing the direction, and at least one other registered medical practitioner, reasonably believe that the abortion is appropriate in all the circumstances,[172] and in assessing whether it is appropriate they should have regard to all relevant medical circumstances, and the woman's current and future physical, psychological and social circumstances.[173] As there is no longer the offence of child destruction in Victoria,[174] there appears to be no upper time limit for lawful abortion. This is to be applauded, as the cut-off point for lawful abortions still operating in many other jurisdictions is difficult to justify. That the Victorian legislation takes this step is not surprising, as it is truly innovative legislation.

The innovative, even radical, nature of the 2008 Act is further evidenced by the fact that it does not provide a full escape clause for the conscientious objector. In Victoria, 'if a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman',[175] then that practitioner must do so unless they have a conscientious objection. However, if a 'registered health practitioner'[176] has a conscientious objection to abortion, then that

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171 *Abortion Law Reform Act 2008* (Vic) ss 7(3)-7(4).
172 Ibid s 7(1).
173 Ibid s 7(2).
174 Ibid s 9.
175 Ibid s 8(1).
176 Defined pursuant to the *Health Professions Registration Act 2005* (Vic).

practitioner must inform the woman of their conscientious objection to abortion,[177] and 'refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.'[178] Thus, the woman concerned is not significantly disadvantaged by a practitioner having such an objection. The 2008 legislation also restates the conventional position that any conscientious objection (either by a registered medical practitioner or a registered nurse) is irrelevant in an emergency, when the performance of an abortion is necessary to 'preserve the life of the pregnant woman'.[179] In such cases, the legislation expressly states that the health practitioner is under a duty to assist or perform an abortion.[180]

In the ACT the conscientious objection provisions constitute an absolute right, whereas in Victoria, although conscientious objection remains a right, it is conditional, as there is a duty to nonetheless refer the patient to a practitioner that has no such objection. Oreb comments that this 'compulsory obligation to refer'[181] is necessary to ensure the exercise of a right to abortion, and this abortion right necessarily limits the medical practitioner's right to conscience.[182]

However, there may be validity issues in this respect, especially in terms of possible ramifications due to the *Charter of Human Rights and Responsibilities Act 2006* (Vic), as section 14(1) of the Charter guarantees a 'right to freedom of thought, conscience, religion and belief', and section 14(2) demands that a 'person must not be coerced or restrained in a way that limits his or her freedom to

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177 *Abortion Law Reform Act 2008* (Vic) s 8(1)(a).

178 Ibid s 8(1)(b).

179 Ibid ss 8(3)-8(4). Other jurisdictions have similar provisions: see, eg, *Criminal Law Consolidation Act 1935* (SA) s 82A(6); *Criminal Code Act 1924* (Tas), s 164(8).

180 See *Abortion Law Reform Act 2008* (Vic) s 8(3) for the duty of registered medical practitioners and s 8(4) for the duty of registered nurses.

181 Naomi Oreb, 'Worth the wait? A critique of the Abortion Act 2008 (Vic)' (2009) 17 *Journal of Law and Medicine* 261, 262.

182 Ibid 268.

have or adopt a religion or belief in worship, observance, practice or teaching.' At first glance, it would appear that the limitation placed upon a medical practitioner's conscientious objection (ie. to make that objection known, and refer the patient to another practitioner without such an objection to abortion) interferes with this right to conscience. Further, section 15(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) guarantees that everyone may hold an opinion without interference, and it is arguable that this right is also violated by the failure to endorse and fully support conscientious objections.[183]

Of course, the Charter recognises that rights may be limited in some circumstances,[184] but the extent of this is uncertain. Furthermore, section 48 of the Charter specifically states that 'nothing in this Charter affects any law applicable to abortion or child destruction'. However, whether section 48 could be applied in this fashion is debateable, as the purpose of the section seems to have been to ensure that the Charter could not be utilised to decriminalise abortion.[185] Consequently, there may be future challenges to the validity of the conscientious objector aspect of the 2008 Act.

Presently, in answer to the questions posed in this article, Victoria is the only jurisdiction to provide negative answers to all the relevant questions (provided the woman concerned is not more than 24 weeks pregnant):

1. Abortion is not a crime if performed by a registered health practitioner, and the woman herself cannot be charged with any crime. The fact that it remains a crime for a non qualified person is no cause for alarm, as this is consistent with the law

[183] See Bennett, above n 13, 382.

[184] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

[185] That is, a purposive interpretation of the Charter may preclude section 48 being utilised to allow the limitations on conscientious objection under the *Abortion Law Reform Act 2008* (Vic): see Oreb, above n 181, 267. Cf VLRC, above n 13, 162, the VLRC did not seem to think that the conscientious objection clauses where inconsistent with the Charter, and that section 48 consequently applied.

with respect to all other medical procedures that involve surgery;[186]

2. No reasons need to be provided if the woman concerned is not more than 24 weeks pregnant, and no counselling is mandatory;

3. The termination of pregnancy may be performed anywhere, and by any registered medical practitioner. The lack of any facility conditions is reinforced by the fact that abortifacients may be supplied by any registered pharmacist or registered nurse;

4. Abortion is lawful under the above circumstances up to 24 weeks gestation, after which more onerous standards apply, but provided such conditions are met there is no upper time limit for lawful abortion; and

5. Although the law recognises the existence of a conscientious objection, a health professional cannot completely remove themselves from the process on that basis, and must refer the woman to another health professional that has no such objection.

On the basis of such findings, is it reasonable to conclude that Victoria now recognises a right to abortion? The movement from unlawful to lawful in Victoria has been described as a movement from 'merciful allowance...[to]...actionable right'.[187] Well, if not quite a right, it must be close. In defining abortion as essentially an elective medical procedure, the Victorian legislation is certainly 'an exciting model'.[188] In Victoria a woman who is less than 24 weeks pregnant may effectively demand an abortion, provide no reasons whatsoever for that abortion, nor have to receive any form of counselling, and the medical profession must accede to that demand

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[186] Surgery necessarily involves wounding or serious bodily harm, and thus may be described in the criminal law context as an aggravated assault, and the law is clear that one cannot consent to such an assault unless the assailant is a qualified person: see *Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218, 232; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719.

[187] Oreb, above n 181, 262. Oreb later expresses this as a 'qualified' actionable right (at 266).

[188] Douglas, above n 13, 86.

unless a particular member has a conscientious objection, in which case they need to refer the woman to another member who will satisfy her request for an abortion. This sounds like abortion on demand, and full recognition of a woman's right to abortion.

However, the above determination is based on the applicable law when a woman is not more than 24 weeks pregnant. After 24 weeks of pregnancy, if any right exists, it shifts to the medical profession,[189] who may 'impose on to women their own views of when abortion is permissible.'[190] That is, if a woman is more than 24 weeks pregnant, a registered medical practitioner may only perform an abortion if that medical practitioner, and one other medical practitioner, 'reasonably believes that the abortion is appropriate in all the circumstances'.[191] Although such medical practitioners must have regard to 'the woman's current and future physical, psychological and social circumstances'[192] in arriving at any decision as to the appropriateness of the abortion, the fact remains that it is their decision to make, and not the woman's decision. This transfer of the decision making power, from the woman concerned to the medical profession, once the woman reaches 24 weeks of pregnancy, precludes a finding that Victoria now recognises a woman's right to abortion.

X CONCLUSION

The title of this article suggested that the long standing legal categorisation of abortion as a serious crime was being eroded in contemporary Australia. Further, that this decriminalisation of the practice was accompanied, or compelled, by a recognition of a

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189 See Linda Clarke, 'Abortion: A Rights Issue?' in R Lee and D Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (1989) 155, 163-166; Rankin, above n 12, 245-246.

190 Clarke, above n 189, 166.

191 *Abortion Law Reform Act 2008* (Vic) ss 5(1)(a), s 5(1)(b).

192 Ibid s 5(2)(b).

woman's right to abortion. Unfortunately, the foregoing discussion has demonstrated that a woman's right to abortion remains unrecognised in all Australian jurisdictions. Indeed, abortion remains a serious crime in the majority of jurisdictions.[193] Most alarmingly from a reproductive rights perspective, in the majority of jurisdictions a woman may be convicted of attempting to procure her own abortion, face lengthy imprisonment, yet remain pregnant.

However, progress has clearly been made since late last century, such that medical abortion may no longer be defined as a crime in the ACT or Victoria, and is a crime that carries only a monetary penalty in Western Australia. Further, none of the above three jurisdictions require the woman concerned to provide any reasons for the abortion, at least at first instance.[194] In all other jurisdictions the woman must satisfy a medical practitioner that she has sufficient justification for the termination of her pregnancy, and in the NT, South Australia, and Tasmania she has to so convince two medical practitioners.

Upper time limits for lawful abortion also exist in all jurisdictions except New South Wales, Tasmania, and Victoria (and probably Queensland).[195] In the ACT and Western Australia an upper time limit is implicit by virtue of these jurisdictions retaining the offence of child destruction. Although this crime only operates when the child is actually being born,[196] it may impact upon the legality of very late abortions. In South Australia the upper limit for

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193 In New South Wales, Queensland, South Australia and Tasmania any person (including the woman concerned, and a medical practitioner) may be charged with the offence of attempting an unlawful abortion. In the NT unlawful abortion is also a crime, but it is questionable whether the woman can be charged with an offence.

194 In Western Australia and Vitoria reasons do need to be satisfied for a lawful abortion after 20 weeks and 24 weeks gestation respectively.

195 That is, although Queensland retains the offence of child destruction (see *Criminal Code 1899* (Qld) s 313(1)), as *Criminal Code 1899* (Qld) s 282 (the statutory defence applicable to abortion) also arguably applies to the offence of child destruction, the result may be that there is no upper time limit for lawful abortion.

196 Bronitt and McSherry, above n 28, 556.

lawful abortion is currently designated at 28 weeks gestation, but may prove to be as low as 22 weeks, depending upon a court's finding of viability. In the NT lawful abortion may only be performed until 23 weeks gestation. With the exceptions of the ACT and Victoria (and to a lesser extent Western Australia), there exists quite an array of other conditions placed upon a woman seeking a lawful abortion in Australia. There is, accordingly, a deplorable failure by the majority of Australian jurisdictions to satisfy their obligation to fully recognise a woman's right to abortion.

Conversely, since the turn of the 21st century, there has been a 'clear movement from abortion being dealt with under criminal law to it becoming part of health law.'[197] This is essential from a woman's reproductive rights perspective, as the full recognition of a woman's right to abortion necessitates that the practice be regulated in an identical fashion to any other medical procedure. If a woman's right to abortion is fully recognised, then her consent to the procedure (which would be performed, prescribed, or supervised by a qualified person) renders that procedure lawful.[198] This is arguably what has occurred in Victoria (provided the woman is not more than 24 weeks pregnant), and to a slightly lesser extent in the ACT. Are we therefore witnessing the genesis of the demise of the crime of abortion, and the recognition of a woman's right to abortion throughout Australia? Victoria and the ACT have indicated the way down this path, but the question remains: will the other jurisdictions follow their lead?

[197] Bennett, above n 13, 373.
[198] See VLRC, above n 13, 90.

THE ROMAN CATHOLIC CHURCH AND THE FOETUS: A TALE OF FRAGILITY

MARK RANKIN†

I INTRODUCTION

Prior to the late 20th Century, Australian abortion law was relatively homogeneous. In every jurisdiction the legislation dealing with abortion was contained within the various criminal statutes, and such legislation was derived (in some cases almost verbatim)[1] from ss 58 and 59 of the United Kingdom's *Offences Against the Person Act 1861*.[2] Under this legal regime abortion was a felony, punishable by imprisonment. This rather draconian state of affairs was only challenged in 1969. In that year, the South Australian Parliament enacted provisions that expressly allowed for lawful abortions in specific circumstances,[3] and Justice Menhennitt, of the Victorian Supreme Court, handed down a decision in *R v Davidson*[4] that brought about a similar practical effect in Victoria.

Over the course of the next 30 years or so, reform occurred in all other Australian jurisdictions, such that it is now the case that all jurisdictions recognise that it is possible to obtain and perform a lawful abortion in some circumstances. In South Australia, the Northern Territory, Western Australia, Tasmania and the Australian Capital Territory (ACT), the legislature has taken the lead in this respect,[5] whereas in the eastern states of Victoria, New South Wales and Queensland, the judiciary has been left to effect a change in the law.[6] Nonetheless,

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1 See *Crimes Act 1900* (NSW) ss 82–84; *Crimes Act 1958* (Vic) ss 65–66.

2 24, 25 Vict, c 100, ss 58, 59.

3 See *Criminal Law Consolidation Act 1935–75* (SA) s 82A. For a discussion of these provisions see Mark Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229, 243-46.

4 [1969] VR 667.

5 See *Criminal Law Consolidation Act 1935–75* (SA) s 82A; *Criminal Code Act 1983* (NT) s 174; *Criminal Code Act 1913* (WA) s 199; *Criminal Code Act 1924* (Tas) s 164. For a discussion of the SA, NT, and WA legislation see Rankin, above n 3, 243–51, and for a discussion of the ACT and Tasmanian legislation see Mark Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316.

6 See *R v Davidson* [1969] VR 667; *R v Wald* [1971] 3 DCR (NSW) 25; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47. For a discussion of this case law see Rankin, above n 3, 232–42.

with the notable exception of the ACT,[7] abortion remains a serious crime in Australia. Clearly, if one views abortion as a woman's 'moral' right, then further change is required.

Regardless of the vehicle for abortion law reform, the reform process has always been, and will most likely continue to be, accompanied by vigorous debate on the morality of abortion. One of the key positions taken in this debate is what may be labelled as the 'conservative' position. This view maintains that abortion is immoral at any stage of gestation because the foetus is a person from conception,[8] and it is morally wrong to violate this unborn person's right to life.[9]

One of the more significant defenders of this conservative position is the Roman Catholic Church.[10] The Church has campaigned strongly on the abortion issue,[11] and has utilised the vast resources at its disposal to consistently oppose, through a variety of means,[12] any proposed liberalisation of Australian abortion

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7 In 2002 the ACT Parliament went further than any other jurisdiction and effectively removed abortion from the ambit of the criminal law, provided the abortion is performed in an approved facility by a registered medical practitioner — see *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT); *Medical Practitioners Act 1930* (ACT),ss 55A, 55B, 55C, 55D, 55E.

8 Generally, I will refer to the product of human procreation as the 'foetus'. I recognise that, strictly speaking, the term 'foetus' indicates a later stage of development, succeeding, in turn, the zygote, the pre-implantation embryo, and the embryo.

9 Some supporters of the conservative position do not hold it to be absolute, and concede that if the mother's life is in danger, then abortion may become morally permissible notwithstanding that the foetus' right to life is thereby violated — for example, see Bernard Haring, *Medical Ethics* (1973) 108–09; Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (1970) 332–46.

10 In this article reference to 'the Church' is a reference to the official Roman Catholic Church hierarchy. I recognise that the official view of the Catholic Church does not represent the view of all Catholics, and I acknowledge the existence of divergent opinions within the Catholic community on the issue of abortion. For further discussion of these diverse views see Hans Lotstra, *Abortion: The Catholic Debate in America* (1985) 275–76. Also see the 2003 Australian study that suggests that 72 per cent of Catholics are pro-choice — see Katherine Betts, 'Attitudes to Abortion in Australia: 1972 to 2003' (2004) 12 *People and Place* 22, 24.

11 See Karen Coleman, 'The Politics of Abortion in Australia: Freedom, Church, and State' (1988) 29 *Feminist Review* 75, 84–86. Also see M D R Evans and Jonathan Kelly, 'Abortion and Moral Reasoning: Sources of Attitudes Towards Abortion' (2003) 6 *Australian Social Monitor* 74, who make the point that the promulgation of the Church's view on this issue has involved 'the most vigorous religious campaign of recent times' (at 84).

12 The Church's campaign has consisted of, among other things, lobbying politicians and, through use of the media, engaging the public. See Coleman, above n 11; L Skene and M Parker, 'The Role of the Church in Developing the Law' (2002) 28 *Journal of Medical Ethics* 215, 215–16; David Shoemaker, 'Embryos, Souls, and the Fourth Dimension' (2005) 31 *Social Theory and Practice* 51, 53; Joseph Boyle, 'Radical Moral Disagreement in Contemporary Health Care: A Roman Catholic Perspective' (1994) 19 *Journal of Medicine and Philosophy* 183, 190–200. The Church has even sought to influence relevant judicial determinations through the manipulation of the common law mechanism of *amicus curiae* — eg, in *CES v Superclinics* (1995) 38 NSWLR 4 the Church sought (through the Australian Catholic Health Care Association and the Australian Episcopal Conference of the Roman Catholic Church), and was granted, the status of *amicus curiae* in the appeal to the High Court — see *Superclinics Australia Pty Ltd v CES & Ors* S88/1996 (High Court of Australia, 11 September 1996). Also see Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 162–64. The *Superclinics* case was discontinued before the appeal could be heard by the High Court. As to the likely legal argument the Church was going to present to the Court — see L Gormally, 'Commentary on Skene and Parker: The Role of the Church in Developing the Law' (2002) 28 *Journal of Medical*

law. Although some may wish it otherwise,[13] the political reality is that the Church's view on this issue is highly influential.[14] Consequently, if one wishes to advance an alternative perspective, then the Church's position must be addressed in some way.

Over the years very few pro-choice advocates or scholars have attempted any such dialogue, most preferring to simply ignore, dismiss or downplay the Church's position by reference to the irrational nature of their religious argument.[15] I must confess to having adopted a similar stance in the past. However, I have come to the conclusion that such an outlook is not only unproductive, as it allows the Church's argument to go unanswered, but it also constitutes flawed criticism for the following reasons: First, the rejection of religious positions, especially on this issue, assumes a level of societal secularisation that is unfounded;[16] second, it is debatable whether or not faith based views may accurately be described as 'irrational';[17] and finally, it is hypocritical to condemn an idea merely on the basis that it stems from a belief system, when rationalism is itself a belief system.[18]

So, to repeat, from a pro-choice perspective there remains a need to confront the Church's view. This article aims to partly satisfy this need by offering a

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Ethics 224, 225; Neville Warwick, 'Abortion Before the High Court — What Next? Caveat Intervenus: A Note on *Superclinics Australia Pty Ltd v CES*' (1998) 20 *Adelaide Law Review* 183, 185–89. For a discussion of the appropriateness of the Church using the principle of *amici curiae* in this manner see Skene and Parker (216–18).

13 See Shoemaker, above n 12, 58, who stresses that religious perspectives should not account for much in deciding public policy in a purportedly secular society. Also see Paul Simmons, 'Religious Liberty and Abortion Policy: *Casey* as "Catch-22"' (2000) 42 *Journal of Church and State* 69, 71–74, who makes the point that imposing religious views on personhood and the abortion decision violates, somewhat paradoxically, the religious liberty of others.

14 See Coleman, above n 11; Skene and Parker, above n 12. Furthermore, in a society claiming the title 'democracy', there is a compelling argument that the Church's view *should* count to some degree, as it represents the views of some members of that democracy.

15 See, eg, L W Sumner, 'Toward a Credible View of Abortion' (1974) 4 *Canadian Journal of Philosophy* 163, 168; Peter Singer, 'Animals and the Value of Life' in T Regan (ed) *Matter of Life and Death* (1986) 347; Paul Bassen, 'Present Sakes and Future Prospects: The Status of Early Abortion' (1982) 11 *Philosophy and Public Affairs* 314, 326–27. Wertheimer gives a good account of why many non-Catholics view Catholic dogma on this issue as irrational — see Roger Wertheimer, 'Understanding the Abortion Argument' (1971) 1 *Philosophy and Public Affairs* 67, 74–76.

16 Dworkin made the point some time ago that convictions about abortion are, or are largely determined by, '*essentially* religious beliefs' (Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (1993) 155), and recently Engelhardt has confirmed this view, describing abortion as a 'fundamentally religious conflict' (H Tristram Engelhardt, Jr, 'Moral Knowledge: Some Reflections on Moral Controversies, Incompatible Moral Epistemologies, and the Culture Wars' (2004) 10 *Christian Bioethics* 79, 80). This relationship between abortion and religion has been vividly borne out in a recent study of attitudes towards abortion in Australia — see Evans and Kelly, above n 11, 74–88.

17 Everett has suggested that religious beliefs are more aptly described as 'subjectively rational', whereas science embodies objective rationality — see Theodore Everett, 'The Rationality of Science and the Rationality of Faith' (2001) 98 *Journal of Philosophy* 19, 20–36.

18 That is, as there is no way to prove that rational argument is superior to other modes of reasoning without recourse to the precepts of rational argument, the view that rationality is superior to other ways of thinking may therefore be described, like religious belief, as a leap of faith – see, for example, Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed, 2002) 301–306.

critique of the Church's position on foetal personhood. Conscious of the futility of preaching to the converted, I embark upon this project with the arduous goal of engaging those that assume the Church's position to be relatively convincing. With this in mind, I offer a critique of the Church's position *solely* by reference to the Church's basis for that position.

Of course, as a legal academic and lawyer, the critique that I offer will naturally be embedded with standard legal reasoning, namely; a focus on holding propositions to proof; and a demand for internal consistency of argument. However, as I aim to critique the Church's position purely on its own terms, in providing my analysis I will not seek to question the fundamental beliefs of Catholicism. Accordingly, I accept uncritically the following five basic presuppositions:

1 that the Judeo–Christian God exists (hereafter 'God');

2 that souls exist;[19]

3 that persons are those beings endowed with souls;[20]

4 that souls are infused by God;[21] and

5 that the process of ensoulment functions according to the hylomorphic tradition, which results in souls only being infused by God when the organic body is sufficiently developed to receive that soul.[22]

To my mind, an analysis conducted under such conditions may be described as 'fair', and therefore any judgment reached will possess 'normative force'.[23] The specific judgment sought is an answer to the following straightforward question: *Taken on its own terms*,[24] is the Church's position internally consistent, persuasively argued, and thereby relatively credible?

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19 The nature of souls will not be analysed in this article. For an interesting discussion on this point see Shoemaker, above n 12, 56–61.

20 An interesting point is made by Pasnau that a belief in the existence of a soul being necessary to establish personhood need not be viewed as exclusively religious if we define the soul as 'that which is responsible for all the capacities that distinguish us as human beings' — Robert Pasnau, 'Souls and the Beginning of Life (A Reply to Haldane and Lee)' (2003) 78 *Philosophy* 521, 523-24. Also see Thomas Shannon and Allan Wolter, 'Reflections on the Moral Status of the Pre-Embryo' (1990) 51 *Theological Studies* 603, 615.

21 This is creationist theory, which the Church adopted in the 12th Century, thereby rejecting traducianist theory (traducianism assumed that the soul was passed down, along with everything else, from the parents). For discussion of this issue see Thomas Aquinas, *Summa Theologiae* (1981) Pt 1, Q 118, A 1; Carol A Tauer, 'The Tradition of Probabilism and the Moral Status of the Early Embryo' in Patricia Beattie Jung and Thomas Shannon (eds), *Abortion and Catholicism: The American Debate* (1988) 54, 58; Daniel Dombrowski and Robert Deltete, *A Brief, Liberal, Catholic Defense of Abortion* (2000) 51.

22 This is a simplistic definition of hylomorphism that will suffice at this stage. Hylomorphism will be discussed at greater length in due course.

23 John Cantwell, 'On the Foundations of Pragmatic Arguments' (2003) 100 *Journal of Philosophy* 383, 383. Also see Phillip Montague, 'Religious Reasons and Political Debate' (2004) 30 *Social Theory and Practice* 327, 343–46.

24 In line with my emphasis upon a 'fair' analysis, and viewing the Church's position on its own terms, I have endeavoured to utilise predominantly Catholic sources throughout this article — that is, Catholic scholars speaking within the discourse of Catholicism. I even extend this to a

II THE CURRENT POSITION: A STUDY OF INDETERMINACY

The Church maintains that abortion is immoral at any stage of gestation because the foetus is a person from conception. Given that it is generally agreed that all persons have a right to life,[25] the Church's conclusion (that abortion is immoral) seems reasonable given its premise (that the foetus is a person).[26] But what of this premise? On what foundation is it raised? The Church answers that the foetus is a person from conception on the basis that the foetus is endowed with a soul from conception, and any being with a soul is a person. In other words, the Church's present position on foetal personhood derives from a belief in immediate animation.[27] The Church's proclaimed position thus appears quite straightforward and, given the presuppositions outlined earlier, relatively convincing. However, as will subsequently be shown, the Church's promotion of its view as uncomplicated, absolute, and immutable is disingenuous, as the Church's real position is far more complex, uncertain, and, ultimately, fragile.

The Church's current official view, at its earliest, only dates from 1869.[28] In that year Pope Pius IX implied that the Church believed in immediate ensoulment, when he removed the distinction in penalties for abortion as between the animated and unanimated foetus, making all abortions punishable by automatic excommunication.[29] However, Pius IX made no direct and conclusive statement concerning foetal personhood or the ensoulment process.

The issue was not the subject of further papal comment until 1930, when Pope Pius XI issued his encyclical *Casti Connubii*.[30] It was within this document that the Church's position was undoubtedly stated, as Pius XI expressly defined

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reading of biological 'facts', as I have sourced my understanding of biology from Catholic authors.

25 The idea of 'person' is not critiqued in this article, nor is there any discussion of the issue of 'potential personhood'; both of which are clearly areas for further study. For present purposes, 'person' denotes a being with moral rights, most significantly the right to life. Such a definition of 'person' has been described as a 'moral' view of personhood — see S F Sapontzis, 'A Critique of Personhood' (1981) 91 *Ethics* 607, 609–10.

26 Of course, the Church's conclusion is not the only reasonable determination given this premise, as there do exist strong arguments for upholding both the personhood of the foetus and the morality of abortion — see, for example, the classic article J J Thomson, 'A Defence of Abortion' (1971) 1 *Philosophy and Public Affairs* 47.

27 For the purposes of this article the terms 'animation', 'animated', 'ensouled', 'formed' and 'hominization' are all assumed to have identical meaning: that is, all these terms signify that rational ensoulment has occurred.

28 Fisher makes the point that the Church seems to have been moving to this view for some time — see Anthony Fisher, 'A Guided Tour of Evangelium Vitae' (1995) 72 *Australasian Catholic Record* 445, 454–55. This is probably the case, but it should also be noted that there was no consensus within the Church prior to the late 19th Century, and further debate on the issue within the Church continued well into the 20th Century — see John Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977) 214–92; Dombrowski and Deltete, above n 21, 37–38.

29 See Pope Pius IX, '*Codex Iuris Canonici*' (1869) 5 *Acta Sanctae Sedis* 298.

30 See Pope Pius XI, '*Casti Connubii*' (1930) 22 *Acta Apostolicae Sedis* 539.

abortion, at any stage of gestation, as the murder of an 'innocent person'.[31] Pius XI's position in this respect was reiterated in official statements by his immediate successors Pope Pius XII and Pope John XXIII.[32]

In the mid-1960s, the Second Vatican Council provided further confirmation, labeling abortion as an 'unspeakable crime',[33] comparable to murder, infanticide and genocide,[34] or indeed any other act that 'violates the integrity of the human person'.[35] Similarly, in 1968, Pope Paul VI, in his encyclical *Humanae Vitae*,[36] justified his condemnation of abortion primarily by reference to his desire to protect the life of the foetus,[37] and explained that the foetus warranted such protection because it was a person from conception, by virtue of it possessing a soul from conception.[38]

During Paul VI's papacy the Sacred Congregation for the Doctrine of the Faith reiterated this view when it issued the *Declaration on Procured Abortion*, which was ratified by Paul VI on 28th June 1974.[39] This document indicates that the foetus is a person from conception,[40] and defines 'person' as a human being endowed with a soul.[41] Thus, by the mid-1970s, the Church's position had been clearly expressed. Or had it? Despite describing the foetus as a person from conception, the Sacred Congregation for the Doctrine of the Faith indicated that the Church was nonetheless *undecided* as to when the foetus became ensouled. This uncertainty is expressed as follows:

> This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are yet in disagreement ... it suffices that this presence of the soul [from conception] be probable.[42]

This development is extraordinary given what preceded it. It has always been, and continues to be, Church teaching that the *only* criterion (both necessary and sufficient) for personhood is the possession of a soul, and since 1930 (and perhaps as early as 1869) the Church has labelled the foetus a person from conception. To

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31 Ibid 559–65.

32 See, eg, Pope Pius XII, '*Humani Generis*' (1950) 42 *Acta Apostolicae Sedis* 568, 575; Pope Pius XII, 'Address to the Italian Catholic Association of Midwives' (1951) 43 *Acta Apostolicae Sedis* 835, 842–43; Pope Pius XII, 'Address to the Congress of the Family Front and of the Association of Large Families' (1951) 43 *Acta Apostolicae Sedis* 855, 857–59; Pope John XXIII, '*Pacem in Terris*' (1963) 55 *Acta Apostolicae Sedis* 257, 259–60.

33 Second Vatican Council, '*Gaudium et Spes*: Pastoral Constitution on the Church in the Modern World' (1966) 58 *Acta Apostolicae Sedis* 1067, para 51.

34 Ibid para 27, 51.

35 Ibid para 27.

36 Pope Paul VI, 'Humanae Vitae' (1968) 60 *Acta Apostolicae Sedis* 481.

37 Ibid paras 13, 14. He expressed other grounds for his view in paras 17, 22.

38 Ibid paras 13, 25. Also see, for a similar determination, Pope Paul VI, 'Respect for Life in the Womb' (1977) 22 *The Pope Speaks* 281, 282.

39 Sacred Congregation for the Doctrine of the Faith, 'Declaration on Procured Abortion' (1974) 66 *Acta Apostolicae Sedis* 730.

40 Ibid paras 7–13.

41 Ibid para 8.

42 Ibid para 13, n 19.

then refuse to accept that the foetus is necessarily ensouled from conception results in an obvious contradiction. This puzzling element of official Church doctrine will be discussed later. For present purposes it is enough to highlight the inconsistency, and point out that it is repeated in nearly all subsequent Church documents dealing with the issue of foetal personhood.[43]

The papacy of John Paul II saw the enthusiastic adoption of the foetal personhood principles of Paul VI's papacy.[44] In his encyclical *Evangelium Vitae*,[45] issued in 1995, Pope John Paul II provided his own lengthy interpretation and proclamation of those principles. *Evangelium Vitae* is the most detailed papal discussion of the issues surrounding abortion, and the letter remains the most authoritative statement of the Church's present position on foetal personhood.[46]

The encyclical's main purpose is pronounced to be the 'precise and vigorous reaffirmation of the value of human life and its inviolability.'[47] The main practical focus of the letter is with respect to the issues surrounding abortion and euthanasia. John Paul II condemns abortion in emotional language, describing it as 'gravely immoral' and 'morally evil'.[48] It is said to be an 'unspeakable crime', and indeed that '[a]mong all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable.'[49]

For present purposes the more interesting aspect of *Evangelium Vitae* is that the letter clearly identifies the foetus as a person from conception. John Paul II is unequivocal on this issue, expressly stating that the foetus is a person 'from the *moment* of conception',[50] and therefore possesses the same rights as all other persons,[51] including a right to life.[52] On this foundation abortion is defined as an 'act against the person'[53] in direct violation of the divine commandment 'you shall not kill'.[54] For John Paul II abortion is murder at any stage of gestation.[55]

On the basis of such unambiguous statements one might be excused for thinking that the Church's position was now clear. However, this was not the case, as John Paul II, in the same breath that he declared with absolute certainty that the

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43 See, eg, Congregation for the Doctrine of the Faith, '*Donum Vitae*: Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Reply to Certain Questions of the Day' (1988) 80 *Acta Apostolicae Sedis* 70, 79.

44 See, eg, Pope John Paul II, 'Marriage and the Family' (1983) 28 *The Pope Speaks* 360, 365; Pope John Paul II, '*Centesimus Annus*' (1991) 83 *Acta Apostolicae Sedis* 793, para 47; Pope John Paul II, 'Veritatis Splendor' (1993) 85 *Acta Apostolicae Sedis* 1133, para 80.

45 Pope John Paul II, 'The Gospel of Life: *Evangelium Vitae*' (1995) 87 *Acta Apostolicae Sedis* 401.

46 The letter addresses abortion, foetal personhood, and related issues at length. For example, reference to these issues may be found in ibid paras 2–5, 11–14, 16–20, 26-27, 40–63, 68, 73, 74, 81, 99.

47 Ibid para 5. Also see para 2 for similar comments.

48 Ibid para 57.

49 Ibid para 58.

50 Ibid para 45 (emphasis added).

51 Ibid para 18.

52 Ibid paras 5, 20.

53 Ibid para 4.

54 Ibid paras 13, 14, 52–58.

55 Ibid paras 3, 4, 11, 13, 14, 43–45, 53, 57–60.

foetus is a person from conception, expressed doubt as to the exact moment of ensoulment. Echoing the words of the 1974 *Declaration on Procured Abortion*, John Paul II states that it is only a 'probability' that the foetus possesses a soul from conception.[56]

The logic of this reasoning is flawed. John Paul II states that the foetus is an *actual* human person from conception throughout his encyclical,[57] and Church teaching is unambiguous: *actual* human persons are only those who *actually* possess a soul. Yet, John Paul II refuses to acknowledge that the foetus is endowed with a soul from conception; the most he can say is that immediate animation is probable. As a probable premise cannot logically lead to a certain conclusion, if a being only *probably* has a soul, then the most one can say is that that being is *probably* a person.

Thus, the Church is making two mutually inconsistent assertions:

1 that the foetus is a person from conception; and

2 that the foetus is probably a person from conception.

This, of course, results in logical absurdity as you are either a person or you are not a person — you cannot be both. Put another way, if 'Xs' are those beings with souls, 'Ys' are persons, and 'Zs' are foetuses at any stage of gestation, then the Church position is as follows:

1 all and only Xs are Ys;

2 all Zs are probably Xs; but

3 all Zs are Ys.

For the Church's position to be internally consistent, proposition '2' would have to read that 'all Zs are Xs', yet the Church refuses to make this commitment.

It is interesting to note that although the Church refuses to commit to the only premise that would ensure internal consistency in its argument, it is not circumspective with regard to the conclusions it reaches on abortion. Indeed, the Church maintains its prohibition on abortion even if the life of the mother is threatened by the pregnancy.[58] This hardline stance further erodes the coherency of the Church's position, as the lack of conviction on the part of the Church with respect to immediate ensoulment makes the Church's refusal to allow for exceptions when the life of the mother is threatened difficult (if not impossible) to justify.[59] According to a literal interpretation of current Church teaching on

56 Ibid para 60.

57 Ibid paras 2, 4, 5, 11, 13, 18, 20, 45, 48, 53, 57, 58, 60, 62, 63, 76, 77.

58 See, eg, Paul VI, above n 36, paras 14, 17, 62; Pius XII, above n 31, 857–59; Pius XI, above n 29, 562–64.

59 Note: The Catholic doctrine of 'double effect' does not serve to alter this criticism because although the doctrine allows abortions in cases when the destruction of the foetus is an undesired, but inevitable, consequence of removing a threat to the mother's life (eg the removal of a cancerous uterus), it does not apply when the threat to the mother's life comes from the pregnancy itself. For a detailed discussion of the doctrine see Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect' (1967) 5 *Oxford Review* 5; Joseph Boyle, 'Toward Understanding the Principle of Double Effect' (1980) 90 *Ethics* 527; A B Shaw, 'Two Challenges

ensoulment, in such cases there is a choice between a probable person and an actual person, and Church doctrine advocates choosing the probable person: an absurdity that cannot be justified.[60]

Clearly, the Church's refusal to advocate immediate animation with certainty creates a fundamental internal inconsistency in their argument, and therefore exposes their stated position on abortion to significant ridicule. This raises the obvious question as to why the modern Church feels inclined to place doubt on the only premise that could possibly adequately justify its position on abortion. One may reasonably surmise that the Church does not actually believe in immediate animation.

Of interest in this respect is the fact that the Church has not always taught immediate animation (or the probability thereof). Prior to the late 19th Century the Church taught delayed hominization, and appears to have done so since its inception. The doctrine of delayed animation was seen in the writings of the earliest Doctors and Fathers of the Church, [61] codified by Gratian in the 12th Century,[62] justified by Aquinas in the 13th Century,[63] and adopted by the Church at the Council of Vienne (largely on the basis of Aquinas' arguments) as official Church teaching in 1312.[64] By the 15th Century delayed animation was entrenched; accepted by scholars and taught by the Church. [65] By the late 16th Century there existed such widespread recognition of delayed ensoulment that in 1588, when Pope Sixtus V dropped the canon law distinction between aborting an animated and unanimated foetus, there was both surprise and concern. [66] So much so that immediately upon becoming pope in 1590 Pope Gregory XIV

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to the Double Effect Doctrine: Euthanasia and Abortion' (2002) 28 *Journal of Medical Ethics* 102, 104.

60 Or, arguably, the Church condemns both to die, which means that the Church's ban on abortion without exception leads to the absurdity that the doctrine demands harm to X (pregnant woman) without resulting in any advantage to Y (foetus) — see Haring, above n 9, 108–09; Grisez, above n 9, 332–46; Leslie Griffin, 'Evangelium Vitae: Abortion' in Kevin Wildes and Alan Mitchell (eds), *Choosing Life: A Dialogue on Evangelium Vitae* (1997) 159, 165–66.

61 For example, St Jerome, St Augustine and St Cyril, as well as Lactantius and Theodoret, all advocated a theory of delayed ensoulment — see Connery, above n 28, 50–63; Dombrowski and Deltete, above n 21, 17–25; Tauer, above n 21, 57–58.

62 See Connery, above n 28, 86–90; Tauer, above n 21, 58.

63 See Aquinas, above n 21, Pt I, questions 75, 76, 118, and Pt II–II, question 64. Recently scholars have argued that Aquinas would change his view on the basis of current knowledge of human embryology. However, as to the appropriate point of ensoulment, such scholars range from saying that Aquinas would now choose conception (see John Haldane and Patrick Lee, 'Aquinas on Human Ensoulment, Abortion and the Value of Life' (2003) 78 *Philosophy* 255), or implantation (see Jason Eberl, 'The Beginning of Personhood: A Thomistic Biological Analysis' (2000) 14 *Bioethics* 134), or around 12–16 weeks (see Pasnau, above n 20), or between 24–32 weeks (see Dombrowski and Deltete, above n 21, 26–31).

64 See Norman Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science* (1988) 47–59; Dombrowski and Deltete, above n 21, 27. The Council of Trent reaffirmed this dogma in the 16th Century — see Shannon and Wolter, above n 20, 604.

65 See Connery, above n 28, 114–24.

66 See Dombrowski and Deltete, above n 21, 92.

reinstated the lesser penalty for abortion of the unanimated foetus.[67] This distinction was then retained until dropped again by Pope Pius IX in 1869.

The weight of history poses the obvious question: After almost two millennia of advocating delayed ensoulment (notably with no reservations), why did the Church change its mind on the issue? It has been suggested by a growing number of Catholic scholars that the mid-17th Century 'discovery' of homunculi convinced the Church to reject the idea of delayed ensoulment in favour of immediate ensoulment.[68] 'Homunculi' was the name given to the miniscule, fully-formed people that some 17th Century scientists claimed they observed in fertilized eggs.[69] A belief in the existence of homunculi produced the idea of preformation: that the human embryo was conceived fully developed and all that occurred during pregnancy was a gradual increase in size. Applying the Church's hylomorphic conception of ensoulment (ie that souls are only infused by God when the foetus exhibits 'human form') to this 'scientific fact' of preformation then led inevitably to suggestions of immediate animation.[70]

Such a hypothesis leads to the conclusion that the Church's current view on foetal personhood is based on erroneous 17th Century science concerning the process of human reproduction.[71] However, as the Church has never publicly acknowledged the influence of this erroneous science, it would be unfair in the circumstances to impute that such mistakes form the foundation of the Church's current position on foetal personhood. Nonetheless, it is not unreasonable to suggest that the fact that the Church prior to the late 19th Century advocated delayed ensoulment, may partly account for the Church's current reluctance to proclaim immediate ensoulment with certainty, and raises doubts concerning the existence of a genuine belief in immediate animation.

Of course, the fact that the Church has been historically inconsistent on the issue of hominization, although noteworthy, is not in itself a fatal blow to the credibility of the Church's present position.[72] As many scholars have noted, the Church has altered its views on a number of issues as a result of the influence of

67 That is, it did not warrant excommunication as did the abortion of an animated foetus — see ibid 92; Connery, above n 28, 148.

68 See Dombrowski and Deltete, above n 21, 33–54; Connery, above n 28, 168–87; Ford, above n 64, 47–58; Joseph Donceel, 'A Liberal Catholic's View' in Patricia Beattie Jung and Thomas Shannon (eds), *Abortion and Catholicism: The American Debate* (1988) 48, 49–52.

69 See, eg, Dombrowski and Deltete, above n 21, 35–37.

70 See Donceel, above n 68, 49; Connery, above n 28, 168–72; Shannon and Wolter, above n 20, 615–16; Dombrowski and Deltete, above n 21, 38–40.

71 Dombrowski and Deltete, above n 21, 36, 42, 52, 54; Ford, above n 64, 58; Donceel, above n 68, 49.

72 Haldane and Lee make the point that this lack of historical consistency is common knowledge and not seriously doubted by either advocates of delayed or immediate animation — see Haldane and Lee, above n 63, 260–64. Also see Joseph Boyle, 'Abortion and Christian Bioethics: The Continuing Ethical Importance of Abortion' (2004) 10 *Christian Bioethics* 1, 3; Griffin, above n 60, 160, 166; Tauer, above n 21, 54; Connery, above n 28, 168; H Tristram Engelhardt Jr, 'The Ontology of Abortion' (1974) 84 *Ethics* 217, 226–27; Shoemaker, above n 12, 57.

recent advancements in scientific knowledge,[73] and it is arguable that this is what has occurred in the present case, and accounts for the change in position. Certainly, pronouncements of the Church since the mid-20th Century on the issues of personhood and ensoulment tend to place considerable emphasis upon recent advancements in human embryology and genetics.[74] However, current knowledge of the process of human reproduction does not necessarily point in the direction that the Church has moved. This becomes apparent when one considers the theory of ensoulment that the Church applies to these biological facts.

III HYLOMORPHISM: AN AMBIGUOUS DOCTRINE FOR AN UNCERTAIN DETERMINATION

Hylomorphism is a basic dogma of the Church[75] that provides an explanation of the process of ensoulment. The Church's teaching of this doctrine owes much to Thomas Aquinas' interpretation of Aristotle. [76] Put simply, Thomistic hylomorphism rejects the dualist view,[77] and maintains that the body and soul are one.[78] As Donceel explains:

> Hylomorphism holds that the human soul is to the body somewhat as the shape of a statue is to the actual statue ... The shape of the statue cannot exist before the statue exists ... in the same way, the human soul can exist only in a real human body.[79]

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73 See Haldane and Lee, above n 63, 261; Shannon and Wolter, above n 20, 603–04; Dombrowski and Deltete, above n 21, 1–37.

74 See, eg, Sacred Congregation for the Doctrine of the Faith, above n 39, para 13. Also see Pius XII, above n 32, 574–75; John Paul II, above n 45, para 43.

75 Hylomorphism was adopted as Church teaching in 1312, re-affirmed at the Council of Trent in 1566, and forms part of current Church orthodoxy — see Dombrowski and Deltete, above n 21, 35, 49; Shoemaker, above n 12, 66; Tauer, above n 21, 77.

76 For a discussion of Aristotle's influence on Aquinas in this respect, see Eberl, above n 63, 137-40; Ford, above n 64, 19–43; Engelhardt, above n 72, 225–27.

77 See John Coughlin, 'Canon Law and the Human Person' (2003–04) 19 *Journal of Law and Religion* 1, 12.

78 Other terms that have been used in this respect are 'complementary' (see Joseph Donceel, 'A Liberal Catholic's View' in Joel Feinberg (ed), *The Problem of Abortion* (2nd ed, 1984) 15, 16), 'inseparably linked' (see Eberl, above n 63, 137), and 'irreducible unity' (see Coughlin, above n 77, 4).

79 Donceel, above n 78, 16. For other definitions of hylomorphism see Dombrowski and Deltete, above n 21, 27–33; James Keenan, 'Christian Perspectives on the Human Body' (1994) 55 *Theological Studies* 330, 330; J P Moreland and Stan Wallace, 'Aquinas versus Locke and Descartes on the Human Person and End-of-Life Ethics' (1995) 35 *International Philosophical Quarterly* 319, 319–23; A A Howsepian, 'Toward a General Theory of Persons' (2000) 6 *Christian Bioethics* 15, 19; Eberl, above n 63, 138; Pasnau, above n 20, 524–25; Haldane and Lee, above n 63, 266–68; Shoemaker, above n 12, 65–66.

The soul is thus viewed as the 'substantial form' of the body, essentially shaping the body.[80] It is at the moment that this substantial form unites with the body (thereby causing unity of form and matter) that we see the creation of 'one substance — the individual human person'.[81] Hylomorphism declares that only a body with human shape or form possesses a soul, as it is only the presence of the soul that would produce a human shape or form. As a result, unless a being shows human shape or form, then there exists no soul in that being.[82]

Adherence to hylomorphism is virtually unanimous within Catholicism.[83] However, the conclusions reached by various Catholic commentators (on the basis of this principle) concerning the exact moment of ensoulment show no such unanimity.[84] Differences arise because the hylomorphic principle is inherently ambiguous, as it begs the question as to what constitutes a real human form, shape, or outline.

The Church suggests that the acquisition of the human genetic blueprint at conception constitutes the acquisition of hylomorphic human shape or form, as

> [i]t would never be made human if it were not human already ... modern genetic science brings valuable confirmation ... that, from the first instant, the programme is fixed as to what this living being will be.[85]

One might reasonably expect the Church to provide more detail on this issue, especially with respect to why the genetic blueprint necessarily constitutes the attainment of hylomorphic human form; however this is yet to occur.[86] The Church has been content to continue to repeat the above simplistic genetic determination.[87]

So, what to make of this basic position? It is unpersuasive for three major reasons. First, the 'instant' or 'moment' that the Church refers to does not exist in the way these phrases appear to be intended. There is no instant or moment of conception: fertilization is a process, and takes approximately one day to complete.[88] The Church seems oblivious to this fact, consistently referring to a 'moment' that does not exist.

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80 See, eg, Aquinas, above n 21, Pt I, question 75, answers 1, 4, 5, questions 76, answers 3, 4, and question 118, answers 2, 3, and Pt Ia question 90, answer 4, ad 1.

81 Moreland and Wallace, above n 79, 320.

82 As mentioned earlier, the application of this doctrine to a belief in preformation would inevitably result in a conclusion of immediate ensoulment.

83 See Pasnau, above n 20, 524–25; Coughlin, above n 77, 4–12.

84 See, eg, Dombrowski and Deltete, above n 21; Ford, above n 64; Donceel, above n 68.

85 Sacred Congregation for the Doctrine of the Faith, above n 39, para 13. Also see Pius XII, above n 32, 574–75.

86 See Griffin, above n 60, 165.

87 See, eg, John Paul II, above n 45, para 43.

88 See James Diamond, 'Abortion, Animation, and Biological Hominization' (1975) 36 *Theological Studies* 305, 309. Shannon and Wolter indicate that the process of fertilization usually takes between 12 and 48 hours to complete (see Shannon and Wolter, above n 20, 607–10). Shoemaker argues that it is only when the blastocyst is formed (about five days after fertilization) that a significant biological event occurs in this respect — see Shoemaker, above n 12, 54, 61. Also see Dombrowski and Deltete, above n 21, 43.

Second, the Church's view sits uncomfortably with the hylomorphic principle as it is difficult to grasp how a microscopic speck of single-celled matter may constitute hylomorphic human form.[89] The Church might answer that it is not so much the single cell that constitutes the human shape, but rather the human DNA residing within that cell. However, such a focus prompts the rebuttal that all human cells have this DNA, yet clearly every human cell cannot constitute a hylomorphic human body. Furthermore, it is now possible to isolate DNA from a cell, and it would seem bizarre to suggest that in such a form it satisfies the hylomorphic conception of a human person.

Third, and most fatal to the coherency of the Church's position, fertilization is not the point at which all necessary genetic information is received. Without delving into excessive (and unnecessary) biological detail (as this has been more than adequately canvassed elsewhere),[90] it is clear that the reception of the essential genetic data (which appears to be the Church's focus) is a relatively lengthy process. The zygote's genetic information obtained during the process of conception (and contained in chromosomes) is complemented with further genetic information (that the zygote requires in order to continue its development) from both maternal mitochondria and messenger RNA, and this usually occurs sometime between three and five days after conception.[91]

Some authors even go so far as to suggest that it is not until approximately two weeks after conception, at implantation, that it is possible to declare that the genetic blueprint has been wholly received, in the sense that it is only after this point that one may say with certainty that the embryo will undergo no further genetic modification.[92] Whether one agrees with this later hypothesis or not, what is clear is that biology does not support immediate hominization in the way the Church asserts that it does.[93] If the Church, in determining the moment of ensoulment, wishes to rely on the reception of the genetic information necessary for the subsequent development of the human individual, then conception/fertilization is an inappropriate (in the sense of being biologically inaccurate) moment to choose.[94] There is therefore no obvious biological support

89 See Tauer, above 20, 76–79.

90 See Diamond, above n 88, 308–16; Shannon and Wolter, above n 20, 606–14; Mark Johnson, 'Delayed Hominization: Reflections on Some Recent Catholic Claims for Delayed Hominization' (1995) 56 *Theological Studies* 743, 744–63; Shoemaker, above n 12, 53–74; Paul Copland and Grant Gillett, 'The Bioethical Structure of a Human Being' (2003) 20 *Journal of Applied Philosophy* 123, 125–28.

91 See Carlos Bedate and Robert Cefalo, 'The Zygote: To Be or Not to Be a Person' (1989) 14 *Journal of Medicine and Philosophy* 641, 644–45 (1989); Dombrowski and Deltete, above n 21, 43; Diamond, above n 88, 310; Shannon and Wolter, above n 20, 608; Lisa Sowle Cahill, 'The Embryo and the Fetus: New Moral Contexts' (1993) 54 *Theological Studies* 124, 127–28.

92 See Ford, above n 64, 181; Diamond, above n 88, 312–16.

93 See Diamond, above n 88, 307, 316, 319; Engelhardt, above n 72, 228; Dombrowski and Deltete, above n 21, 78; Tauer, above n 21, 76–77; Shannon and Wolter, above n 20, 625–26.

94 As mentioned, in terms of receiving all the genetic information, implantation is the more appropriate point to choose. This determination has led some commentators to suggest that when the Church says 'conception', what it actually means is 'implantation' — see Diamond, above n 88, 320–21; Shannon and Wolter, above n 20, 611.

for the proposition that a hylomorphic human body (as defined by the Church) is created at fertilization.[95]

The Church furnishes no additional argument as to why hylomorphic theory necessarily (or even probably) leads to a finding of immediate animation. On this basis one may conclude that the Church's position is inadequately argued and, as a result, unconvincing. This conclusion is reinforced when one recognises that the strength (or weakness) of a theory is dependent not only on the merits of the theory itself, but also on the theory's ability to withstand critical attack. It is of interest to note in this respect that the Church is silent when it comes to rebutting alternative conclusions reached by Catholic scholars applying the identical metaphysical theory of hylomorphism.[96] Such scholars have canvassed various time periods as to when the foetus acquires a soul, and thereby attains its personhood, with many focusing on a point after implantation (which occurs between 14 and 16 days after conception).[97] Dombrowski and Deltete even go so far as to suggest that a hylomorphic human body is not apparent (and therefore ensoulment has not occurred) until sometime between 24 and 32 weeks gestation.[98]

This divergence of opinion within Catholicism is hardly surprising as the concept of hylomorphic 'human form' is susceptible to myriad interpretations.[99] Nonetheless, one might well have expected the Church to answer such Catholic 'radicals', and support its preferred position of immediate hominization, but this is yet to occur.[100]

IV A SUMMARY OF FRAGILITY

On the basis of the preceding discussion the Church's position on foetal personhood may be described as both inconsistent and unpersuasive. There is no doubt that the Church's failure to unconditionally adopt the teaching of immediate

95 Some authors might be interpreted as suggesting that biology does support the Church view. For example, Johnson makes a case that, biologically speaking, the zygote is both unified and genetically self-directing from conception — see Mark Johnson, '*Quaestio Disputata*: Delayed Hominization (A Rejoinder to Thomas Shannon)' (1997) 58 *Theological Studies* 708, 708–14. Also see Patrick Lee, 'A Christian Philosopher's Views of Recent Directions in the Abortion Debate' (2004) 10 *Christian Bioethics* 7, 9–12; Grisez, above n 9, 274; Francis Beckwith, 'The Explanatory Power of the Substance View of Persons' (2004) 10 *Christian Bioethics* 33, 50-52. However, the focus of such scholars is directed to the issue of proving that the zygote is individuated from conception, not that it has all the necessary genetic information from conception.

96 See, eg, Joseph Donceel, 'Immediate Animation and Delayed Hominization' (1970) 31 *Theological Studies* 76; Ford, above n 64; Dombrowski and Deltete, above n 21.

97 See eg, Ford, above n 64, 170–81; Donceel, above n 78, 15–20.

98 Different date ranges are suggested throughout their book but the above range fits within all those mentioned — see Dombrowski and Deltete, above n 21, 53, 56–59, 121–28.

99 Hershenov has made the point that the concept of the 'human body' is a 'conceptual mess' and inherently vague — see David Hershenov, 'Do Dead Bodies Pose a Problem for Biological Approaches to Personal Identity' (2005) 114 *Mind* 31, 59.

100 See Griffin, above n 60, 165.

ensoulment produces internal inconsistency in its stated position on foetal personhood, and the Church provides insufficient reasons in favour of even the probability of immediate animation. Indeed, this study has revealed that the Church actually has very little to say with regard to why the foetus should possess a soul from conception.[101] Consequently, it is highly likely that opposition to the Church's current position will continue to grow within the Catholic community.[102]

The analytic impotence of the Church's argument raises the implication that the official position is not actually believed by the Church, but rather determined by desired objectives. For instance, perhaps conception is chosen by the Church as the point of ensoulment due to a desire for practical certainty.[103] Such a hypothesis is compatible with the Church's refusal to adopt immediate animation as fact, while still defining the foetus as a person from conception. Or perhaps the Church labels the foetus as a person from conception only because it results in a strong moral condemnation of abortion, which the Church opposes for reasons other than foetal personhood; reasons that might not generate the level of support that a 'right to life' position tends to produce. Of course, the Church has never suggested such contrived motivations, and it is beyond the purpose of this article to investigate such assertions.

The aim of the article was to provide a 'fair' critique of the Catholic Church's position on foetal personhood. The question asked was a simple one: accepting the declared theological foundations of the Church's position, is that position internally consistent, persuasively argued, and thereby relatively credible? The analysis offered suggests that the Church's position is not credible, even according to its own precepts, as it is both internally inconsistent and unpersuasive. I contend that this finding may prove to be of some utility to those frustrated by the Church's continued opposition to abortion law reform.

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101 In fairness, John Paul II did attempt a brief defence of the Church's position by reference to scripture — see John Paul II, above n 45, paras 41, 45. However, just as was the case with biology, all the available evidence points to a different conclusion. For instance, it is arguable that the passages in Exodus 21: 22–25 (that prescribe the penalties to be imposed for assaulting a pregnant woman) imply that the foetus is not to be considered a person, as the penalty for causing the death of the woman is 'life for life', whereas causing the death of the foetus only carries a pecuniary punishment. Surely, if the foetus is a person, then the penalty would be 'life for life'? Of course, the Bible, like any text, is open to interpretation, and one might find other instances that could be said to support the opposing view. However, any conclusions reached would necessarily be by implication, as it is quite clear that the Bible makes no direct statement concerning the beginning of a person (a fact that John Paul II concedes — see John Paul II, above n 45, para 44, at which he states that there is no 'direct and explicit' reference to foetal personhood or the ensoulment process in the Bible. Also see para 61). Thus, the Bible cannot be utilised to support the Church's (or any) position on ensoulment — see Ford, above n 64, 52–57; Connery, above n 28, 7–34; Donald McCarthy, 'Moral Responsibility for Abortion, Euthanasia, and Suicide' in Edward Gratsch (ed), *Principles of Catholic Theology: A Synthesis of Dogma and Morals* (1981) 329, 330.

102 See Patricia Beattie Jung and Thomas Shannon, 'Introduction' in Patricia Beattie Jung and Thomas Shannon (eds), *Abortion and Catholicism: The American Debate* (1988) 1, 3–6; Griffin, above n 60, 160.

103 See Tauer, above n 21, 54–55; Donceel, above n 78, 17. Engelhardt suggests the novel motivation that immediate animation was 'developed under the pressure of the Catholic dogma of the Immaculate Conception' — Engelhardt, above n 72, 226.

Can One Be Two?

A Synopsis of the Twinning and Personhood Debate

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It has been argued that the possibility of monozygotic twinning disproves the conservative position on foetal personhood that defines the foetus as a person from conception. This article will canvass arguments for and against this proposition, in order to arrive at a conclusion as to the relative strength of this finding.

Introduction

It has been suggested that the biological phenomenon of monozygotic twinning is fatal to the conservative position on foetal personhood.[1] The purpose of this paper is to examine the merits of this proposition. Two introductory questions present themselves:

1. what is twinning?; and
2. what is the conservative position?

The following is a brief, non-technical, explanation of the biological processes under discussion. At conception a single celled organism is created: the zygote.

1 Joseph F. Donceel, 'Immediate Animation and Delayed Hominization,' *Theological Studies* 31, 1970, 76–105; James Diamond, 'Abortion, Animation and Biological Hominization,' *Theological Studies* 36, 1975, 305–24; Thomas A. Shannon & A. B. Wolter, 'Reflections on the Moral Status of the Pre-embryo,' *Theological Studies* 51, 1990, 603–626; Jason T. Eberl, 'The Beginning of Personhood: A "Thomistic Biological Analysis"' *Bioethics* 14, 2000, 134–157; Barry Smith and Berit Brogaard, 'Sixteen Days,' *Journal of Medicine and Philosophy* 28, 2003, 45–78; David W. Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' *Social Theory and Practice* 31, 2005, 51–75.

This organism then begins to grow, cell by cell, through the process of cellular mitosis or cell fission. This is, essentially, a process of genetic replication, whereby one cell divides into two genetically identical cells. At this early stage all such cells are totipotent, which means that each cell has the inherent capacity to break away and form another separate organism (a twin). All of this occurs within the same membrane,[2] and while the cells remain totipotent, any such twins may recombine to (again) form one organism (a process called recombination), or continue to develop as separate organisms.[3] These events (if they are occurring) transpire as the pre-implantation embryo (or 'pre-implantation embryos,' if twinning has occurred) moves down the fallopian tube and into the womb.[4] At about the time of implantation into the uterine wall (which occurs between 13 and 16 days after conception)[5] a significant change occurs, and what has been

2 This is a simplistic use of the term 'membrane,' and is purely designed to succinctly illustrate the point that the twins at this stage exist within the same limited physical parameters. One might more accurately label this membrane the zona pellucida, but as the pre-implantation embryo(s) 'hatches' from the zona pellucida at some point prior to implantation (whereby the zona pellucida degenerates), and a new type of membrane forms the outer layer of the pre-implantation embryo, it is in the interests of overall clarity to simply make the point that the biological processes under discussion occur within the same 'membrane' (broadly defined).

3 The zygote may also develop into nothing more than a hydatidiform mole or teratoma. However, the implications of this phenomenon will not be pursued here. Furthermore, there is a strong argument that such organisms are not the result of 'normal, biologically complete, conceptions' but are in fact 'flawed or deficient fertilizations' (Francis Beckwith, 'The Explanatory Power of the Substance View of Persons,' *Christian Bioethics* 10, 2004, 51). Thus, such organisms cannot really be said to originate in zygotes, and therefore they are not appropriate targets for the individuation argument canvassed in this paper – see Stephen Heaney, 'The Human Soul in the Early Embryo,' *The Thomist* 56, 1991, 46; and Lisa Sowle Cahill, 'The Embryo and the Fetus: New Moral Contexts,' *Theological Studies* 54, 1993, 136.

4 It should be noted that, as the number of cells constituting the pre-implantation human organism increases, biology provides different labels. For instance, the original single celled fertilized egg is the 'zygote'; the approximately 16 celled organism is a 'morula'; and the approximately 32+ celled organism is a 'blastocyst.' It is only upon implantation that the term 'embryo' is generally utilised. However, for present purposes (and in the interests of overall clarity) this article will refer to the 'pre-implantation embryo' for all stages of the human organism from immediately post-zygote stage (i.e., immediately post a single celled organism) to implantation stage.

5 See Anne McLaren, 'Where to Draw the Line?' *Proceedings of the Royal Institution* 56, 1984, 101–121; Louis M. Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' *Philosophy* 81, 2006, 463; Smith & Brogaard, 'Sixteen Days,' 54–58.

called the 'primitive streak' appears.[6] This primitive streak indicates that the embryo's cells have become differentiated or restricted.[7] In other words, the embryo's cells lose their totipotency at this point; thereby precluding any further twinning (and/or subsequent recombination). Thus, whatever has occurred up to this stage with respect to twinning (whether it be twinning, recombination, or further twinning after recombination) is now fixed, and no further changes of this nature are possible.[8] Although the processes involved are far more complex than this summary suggests, it will suffice for the purposes of this article.[9]

The conservative position on foetal personhood defines the foetus as a person from the time of conception.[10] Advocates of this position tend to be loosely placed into two camps: the theological and the secular. In the theological camp the sole criterion for personhood is the possession of a rational soul, and it is argued (on various grounds) that the foetus has such a soul from the time of conception. This position is often referred to as a belief in immediate animation or ensoulment.[11]

The parameters of the secular camp are less easily defined, with varied criteria suggested to establish foetal personhood at conception: myriad theories too numerous to mention in this paper.[12] However, there does appear to be a

6 Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 613.

7 See John Mahoney, *Bioethics and Belief*, London: Sheed and Ward, 1984, 66–67; Thomas A. Shannon, 'Fetal Status: Sources and Implications,' *Journal of Medicine and Philosophy* 22, 1997, 420; Smith & Brogaard, 'Sixteen Days,' 55–56.

8 Diamond, 'Abortion, Animation and Biological Hominization,' 311–312; Marc Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' *Utilitas* 23, 2011, 189; John Burgess, 'Could a Zygote Be a Human Being?' *Bioethics* 24, 2010, 63.

9 For a more in depth discussion of the biological process of twinning see Smith & Brogaard, 'Sixteen Days,' 54–58; Eberl, 'The Beginning of Personhood,' 141–149; William Werpehowski, 'Persons, Practices, and the Conception Argument,' *Journal of Medicine and Philosophy* 22, 1997, 482–485.

10 For the purposes of this article, I will ignore the fact that conception is a process, and not a moment, as advocates of this position appear to assume. For a discussion of this issue see Mark Rankin, 'The Roman Catholic Church and the Foetus: A Tale of Fragility,' *Flinders Journal of Law Reform* 10, 2007, 282; and Lynne Rudder Baker, 'When Does a Person Begin?' *Social Philosophy and Policy* 22, 2005, 26.

11 For further discussion on this view of immediate ensoulment see Mark Rankin, 'The Roman Catholic Church and the Foetus,' 275–281.

12 There also exist 'cross-over' points of view that float between these two camps – see, e.g., Lee, who favours a secular conservative position that he labels the 'substance'

general consensus among advocates of the secular conservative view with respect to the fundamental criterion for personhood: to be a person one must be an individual organism. This criterion of ontological individuality is rarely viewed as a sufficient condition of personhood, but there seems to be almost unanimous agreement that it is a necessary condition of personhood.[13] There is commonality here with the conservative theological position, as most (if not all) believers in immediate ensoulment maintain that only individuals have souls – it is not a collective concept.[14]

It is of interest to note that the Human Embryo Research Panel decided in 1994,[15] largely in response to this overwhelming consensus, that the pre-implantation embryo did not have the same status as a person because of its inherent capacity to divide, and that therefore the appearance of the primitive streak, which signals the termination of that capacity, also signaled a significant ontological change.[16] In finding that no person existed prior to the primitive streak, the Panel essentially adopted what I will call 'the twinning argument'

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view of personhood, while simultaneously supporting the principle of immediate ensoulment – Patrick Lee, 'A Christian Philosopher's View of Recent Directions in the Abortion Debate,' *Christian Bioethics* 10, 2004, 7–31; and Patrick Lee, *Abortion and Unborn Human Life,* Washington DC: Catholic University of America, 1996. Another example of this position might be the Catholic Church, which although clearly adopting the conservative theological view, nonetheless tends to buttress that view by reference to the secular science of genetics – see Pope Pius XII, '*Humani Generis,*' *Acta Apostolicae Sedis* 42, 1950, 568, 574–575; and John Paul II, 'The Gospel of Life: *Evangelium Vitae,*' *Acta Apostolicae Sedis* 87, 1995, 401.

13 Christopher Tollefsen, 'Embryos, Individuals, and Persons: An Argument Against Embryo Creation and Research,' *Journal of Applied Philosophy* 18, 2001, 69; George Khushf, 'Embryo Research: The Ethical Geography of the Debate,' *Journal of Medicine and Philosophy* 22, 1997, 505; Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 612–613& 623; Smith & Brogaard, 'Sixteen Days,' 45–46.

14 See, e.g., Sacred Congregation for the Doctrine of the Faith, 'Declaration on Procured Abortion,' *Acta Apostolicae Sedis* 66, 1974, 730; John Paul II, 'The Gospel of Life,' 401; Mahoney, *Bioethics and Belief,* 62–67; Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 613–614; and Eberl, 'The Beginning of Personhood,' 137–151.

15 This panel was formed by the US National Institutes of Health in January 1994. It provided a report in September 1994, and the Advisory Committee to the Director of the National Institutes of Health unanimously approved the report later that year.

16 Carol A. Tauer, 'Embryo Research and Public Policy; A Philosopher's Appraisal,' *Journal of Medicine and Philosophy* 22, 1997, 427–431.

(TA).[17] The Panel is not alone in this response to the question of foetal personhood.[18] The purpose of this paper is to critique this response.

In answer to TA some scholars have simply pointed out that twinning is accidental and consequently so rare that TA advocates are arguing by way of an improbable 'hypothetical possibility, rather than by current actuality,'[19] and the fact that 'there is no intrinsically directed potential for monozygotic twinning in every conceptus'[20] should render TA irrelevant. This is a specious rebuttal to TA, as although twinning may be rare,[21] it is not illusory, and remains an actual possibility in all conceptions. It must therefore be addressed.[22]

Advocates of TA maintain that both theological and secular conservative views on foetal personhood are inadequate because they cannot account for the biological phenomenon of monozygotic twinning. With respect to the theological conservative view, TA essentially asks the question: If the soul is indivisible, and is in existence at conception, then what happens to the soul when the pre-implantation embryo splits into two distinct organisms, that may go on to become two distinct human persons, or remain as distinct pre-implantation embryos for a period, but then recombine into the one individual person? TA answers this question by stating that, as souls cannot split or fuse, no soul is present, and accordingly no person exists, while twinning and recombination

17 See Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 191, who labels the same position 'the twinning/fusion argument.'

18 Indeed, the level of scholarship in this area has led Curtis to conclude that TA is the major argument against the conservative position on foetal personhood – Benjamin L. Curtis, 'A Zygote Could be a Human: A Defence of Conceptionism Against Fission Arguments,' *Bioethics* 26, 2012, 136.

19 Mark Johnson, 'Quaestio Disputata: Delayed Hominization – A Rejoinder to Thomas Shannon,' *Theological Studies* 58, 1997, 714.

20 Beckwith, 'The Explanatory Power of the Substance View of Persons,' 47.

21 Johnson suggests that twinning only occurs in 0.25% of cases, whereas Beckwith believes it to be in only 0.003% of cases – see, respectively, Mark Johnson, 'Delayed Hominization: Reflections on Some Recent Catholic Claims for Delayed Hominization,' *Theological Studies* 56, 1995, 751–754; Beckwith, 'The Explanatory Power of the Substance View of Persons,' 47. There is more support for Johnson's figure – see Gregor Damschen, Alfonso Gomez-Lobo, and Dieter Schonecker, 'Sixteen days? A Reply to B. Smith and B. Brogaard on the Beginning of Human Individuals,' *Journal of Medicine and Philosophy* 31, 2006, 172.

22 Burgess, 'Could a Zygote Be a Human Being?' 65.

are possible.[23] This answer involves one relatively non-controversial assumption – i.e., that souls cannot split or fuse – and one controversial assumption – i.e., the necessity of soul splitting (in the case of twinning) or soul fusion (in the case of recombination), when perhaps there exist other viable alternatives to explain what occurs at the soul level during these biological processes.

TA operates against the secular conservative view in a more direct fashion, simply pointing out that the pre-implantation embryo cannot be a person because it is not an individual.[24] This view denies ontological individuality to the pre-implantation embryo by virtue of the biological fact that it is capable, as a result of twinning, of becoming two or more persons.[25] So, again we see one reasonably non-controversial assumption – i.e., that ontological individuality is a necessary condition of full moral personhood – and one controversial assumption – i.e., that a being capable of self-replication or division cannot be an individual.

Throughout this paper I will not oppose the non-controversial assumptions inherent in TA. Henceforth, I will assume that souls cannot split or fuse (of course, this also necessitates accepting the controversial assumption that souls exist in the first place),[26] and that ontological individuality is a necessary con-

23 Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo'; Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 54–69; Donceel, 'Immediate Animation and Delayed Hominization,' 98–99; Diamond, 'Abortion, Animation and Biological Hominization,' 312.

24 See, e.g., Diamond, 'Abortion, Animation and Biological Hominization,' 315–319.

25 As stated earlier, there is some cross-over here with the conservative theological view as it is generally agreed that only individuals have souls. This point is well made by Christian Munthe, 'Divisibility and the Moral Status of Embryos,' *Bioethics* 15, 2001, 383–385. It also works in the other direction, as Ford, an early advocate of TA as against the theological conservative view, clearly demonstrated the applicability of TA to the secular conservative view – Norman Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science*, Cambridge, UK: Cambridge University Press, 1988, 119–182. It should, however, be noted that Ford is no longer an advocate of TA, and now adopts a more conventional Catholic view on foetal personhood – see, e.g., Norman Ford, 'The Moral Significance of the Human Foetus,' in Richard E. Ashcroft, Angus Dawson, Heather Draper, and John R. McMillan (eds), *Principles of Health Care Ethics*, Hoboken NJ: Wiley, 2nd ed, 2007, 387–392.

26 Of course, there is also no reason to assume that souls do not exist – see Michael J Selgelid, 'Moral uncertainty and the moral status of early human life,' *Monash Bioethics Review* 30, 2012, 54–55.

dition of full moral personhood. In addition, as TA does not apply to the post-implantation embryo, there is no need for this paper to make any comment concerning the personhood of the post-implantation embryo. Dealing first with ontological individuality, as this criterion for personhood exists in both the secular and theological conservative camps,[27] the question we must ask, in examining the merits of TA, is as follows: Is the pre-implantation embryo an individual?

Individuality: the argument from biology

An obvious place to begin to address the question of whether the pre-implantation embryo is an individual is to determine whether the biological facts themselves point to an answer. Advocates of TA would have us believe that prior to the appearance of the primitive streak the pre-implantation embryo is merely a cluster of individual cells,[28] and lacks the 'sort of individuation and multicellular unity'[29] necessary to establish the existence of an individual organism. Smith and Brogaard discuss this issue at length, and claim that although the cells of the pre-implantation embryo are collected together within the same membrane,[30] there is no 'causal interaction'[31] between the cells within this shared membrane. Accordingly, the pre-implantation embryo cannot be described as a 'unified causal system,'[32] which they argue is necessary for personhood.[33] Consequently, they describe each cell within the shared membrane as existing effectively as a separate zygote,[34] and the number of zygotes multiplies at every instant of successful (cellular) fission.[35] According

27 For a comprehensive metaphysical discussion of 'individuation' – see Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 467–475.
28 See Smith & Brogaard, 'Sixteen Days,' 60; Rudder Baker, 'When Does a Person Begin?' 26.
29 Ford, *When Did I Begin?* 175.
30 Smith & Brogaard, 'Sixteen Days,' 46.
31 Ibid, 55. Indeed, they argue that some forms of yeast are 'more properly unified' – Ibid, 60.
32 Ibid, 49.
33 Ibid, 58.
34 Ibid, 55.
35 Ibid, 59.

to Smith and Brogaard the multi-cellular pre-implantation embryo is thus 'not one but many,'[36] or at least 'potentially many.'[37]

On the basis of such findings, TA supporters view the appearance of the primitive streak and the event of implantation, which signals cellular differentiation and the loss of totipotency, as the point at which the embryo may be described as an individual.[38] For TA advocates, it is at this time that a 'radical and categorical'[39] change occurs that converts the embryo from a 'mere mass of homogenous cells'[40] into a 'discrete, coherent' organism;[41] in essence, an individual.[42]

Of course, this is but one side's interpretation of biology. Opponents of this view argue that the pre-implantation embryo is 'integrated' biologically,[43] has 'biological unity' from conception,[44] and remains a 'unified and self-directing'[45] organism. Beckwith explains that, although totipotent, the cells of the pre-implantation embryo are interacting with each other in a unified manner,[46] and 'are functioning in ways consistent with their being constituent parts of a unified organism.'[47] There is recent evidence that such cells are communicating with each other,[48] or interacting in some way,[49] and it is thus reasonable to

36 Ibid, 60.
37 Ibid, 66.
38 Rudder Baker, 'When Does a Person Begin?' 27; Smith & Brogaard, 'Sixteen Days,' 63. It is also of interest to note that the appearance of the primitive streak has been interpreted to signify the creation of a real human body in the hylomorphic sense – see Eberl, 'The Beginning of Personhood,' 137–151.
39 Diamond, 'Abortion, Animation and Biological Hominization,' 316.
40 Smith & Brogaard, 'Sixteen Days,' 60.
41 Ibid, 62–63.
42 Consequently, if twinning has occurred (and recombination has not), we would have had two pre-implantation embryos, that at this point may now be defined as two distinct individuals according to this view.
43 Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 497–499.
44 Johnson, 'Delayed Hominization,' 744–749 & 763.
45 Ibid, 753.
46 Beckwith, 'The Explanatory Power of the Substance View of Persons,' 49–50.
47 Ibid, 49. Also see Tollefsen, 'Embryos, Individuals, and Persons,' 71–74; Lee, 'A Christian Philosopher's View of Recent Directions in the Abortion Debate,' 9.
48 Jan Deckers, 'Why Eberl is Wrong: Reflections on the Beginning of Personhood,' *Bioethics* 21, 2007, 274.
49 Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 196–197.

assume some 'form of over-all coordination'[50] suggestive of a unified casual system, isolated from its surroundings;[51] in essence, a human individual.

The opposing arguments concerning individuation presented above rely on fundamentally identical biological 'facts.'[52] It would therefore appear that biology does not, in itself, provide a clear answer to whether the pre-implantation embryo is an individual. The biological 'facts' do not speak for themselves, but rather are open to interpretation.[53] This finding perhaps illustrates the point made by Khushf: that biological concepts such as 'individuation' and 'unity' are not really 'empirically accessible,'[54] and that those who make such determinations beg the question of personhood, as one's view of unity or individuation involves an interpretation of facts that essentially turn on one's already formed values or view of the criteria for personhood.[55]

That is, if one holds the view that the pre-implantation embryo is not an individual, then biology may be utilised to support this view, and the same biological facts may be exploited to support the counter argument that the pre-implantation embryo is an individual. As a consequence:

> There is no deep, recondite truth to be discovered about whether these cells together constitute an organism or whether instead the organism begins to exist only later, when the proliferating cells lose their totipotency, become differentiated, and begin to be tightly allied both organizationally

50 Damschen et al., 'Sixteen days? A Reply,' 170.

51 In this respect it is significant that '[t]here is not only a complete, connected external boundary, but, more precisely, a membrane or a physical covering – the *zona pellucida* – surrounding the cells. This membrane does not divide or disappear. The division takes place *within* its boundaries.' Ibid, 169.

52 As evidence of the fluid nature of such 'facts,' it is interesting to note that Eberl changed his view of biology, from holding that we are viewing a mere cluster of cells, to finding that there is 'evidence of an inchoate organization and intercommunication among the cells that constitute an early embryo…functional interdependence among the cells.' – Jason T. Eberl, 'A Thomistic Perspective on the Beginning of Personhood: Redux,' *Bioethics* 21, 2007, 284.

53 Tollefsen, 'Embryos, Individuals, and Persons,' 71–74.

54 Khushf, 'Embryo Research,' 508.

55 Ibid, 507–509; Tollefsen, 'Embryos, Individuals, and Persons,' 71–74; Jason Morris, 'Substance Ontology Cannot Determine the Moral Status of Embryos,' *Journal of Medicine and Philosophy* 37, 2012, 349. Cf Thomas A. Shannon, 'Response to Khushf,' *Journal of Medicine and Philosophy* 22, 1997, 527.

> and functionally. Neither of these views is definitely true—or definitely false. This is because there is really nothing more to a human organism than a collection of cells functioning together in complex ways. Whether the cells within the zona pellucida are sufficiently integrated to constitute an organism is simply underdetermined by our concept of an organism. The claim that the zygote is the earliest stage of the organism is something that we are neither rationally compelled to accept nor rationally compelled to deny.[56]

So, perhaps it is better to study the implications of the process under scrutiny? Specifically, what are the implications of the idea that twinning involves organism division?

The significance of indivisibility

For advocates of TA the ability to replicate or divide precludes ontological individuality. As Shannon states: 'Until they are individualized through the restriction process, the pre-implantation embryo is not an individual because it is not yet indivisible.'[57] One of the advantages of this view is that it does not need to make any assertions concerning interpretation of biology, and indeed may accept the possibility that there is unification and organism individuation in the biological sense from conception.[58] TA simply asserts that an organism capable of self-replication cannot be described as an individual.[59] Accordingly, the argument against the secular conservative view on foetal personhood may be summarised as follows:

1. only individuals may be persons;

56 Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life*, New York: Oxford University Press, 2002, 28–29.

57 Thomas A. Shannon, 'Delayed Hominization: A Further Postscript to Mark Johnson,' *Theological Studies* 58, 1997, 716.

58 In addition, it should be noted that there is an argument that biological unity or genetic distinctiveness is not the same as ontological individuality in any case – see Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 612–614.

59 See, e.g., Smith & Brogaard, 'Sixteen Days,' 66.

2. if a being is capable of becoming two or more persons then it cannot be an individual;
3. until approximately 13–16 days after conception the pre-implantation embryo may become, as a result of twinning, more than one person; and
4. therefore, the pre-implantation embryo cannot be a person from conception because it is not an individual at conception.

To put this another way: this view presupposes that an individual must not be divisible 'into surviving individuals of the same kind as itself,'[60] and prior to the loss of totipotency at the achievement of implantation, the pre-implantation embryo is so divisible, and therefore not an individual.[61] As stated in the introduction, the above proposition 1 will not be challenged. However, proposition 2 is susceptible to criticism. Although it is indisputable that the pre-implantation embryo is manifestly divisible while twinning remains possible,[62] TA fails to adequately establish the significance of this biological fact; in particular TA does not prove a necessary association between indivisibility and individuality. The argument that a pre-implantation embryo is not yet one because it might yet be two merely assumes that divisibility is inconsistent with individuality, and there exist a number of arguments contrary to this assumption.[63] TA states that if A can divide into beings of the same kind as itself, A cannot be an individual, but arguably the mere potential to become many does not preclude the individuality of the holder of that potential.

The classic example given to illustrate this point is that of the flatworm: flatworms are capable of division, so that one flatworm may divide and become two flatworms, yet this fact does not necessarily prove that prior to that division the original flatworm was not a unitary individual.[64] Similarly, it has been highlighted that bacteria and amoebae reproduce through organism division,

60 Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 464.
61 Smith & Brogaard, 'Sixteen Days,' 66.
62 Ibid, 67.
63 Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 476–479; and Munthe, 'Divisibility and the Moral Status of Embryos,' 394–397.
64 John Haldane and Patrick Lee, 'Aquinas on Human Ensoulment, Abortion and the Value of Life,' *Philosophy* 78, 2003, 273; Beckwith, 'The Explanatory Power of the

and they were clearly individual bacteria or amoebae prior to reproducing.[65] To allow that an individual exists prior to implantation is to allow that pre-implantation embryos, like flatworms, bacteria and amoebae, may be described as individuals despite possessing the potential for division.[66]

Of course, human beings are clearly not flatworms,[67] bacteria or amoebae, so perhaps the better example might be that of cloning: In the future human cloning may move from the theoretically feasible to the practically commonplace. In such a scenario our cells may be described as *effectively* (although arguably not 'naturally') totipotent for life.[68] This future human being therefore has the capacity to duplicate herself whenever she so desires, yet she cannot be described as less of an individual than present human beings (that are unable to avail themselves of this future technology) because (other than having access to such technology) she is 'exactly (genetically) similar' to present human beings.[69] The example of cloning thus appears to establish quite convincingly that cellular

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Substance View of Persons,' 47–48; Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 487.

65 Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 479.

66 In addition, the simple recognition that reproduction may occur via organism division is arguably another reason why the capacity for such division should not preclude an organism from being described as an individual – see Khushf, 'Embryo Research,' 505–509; A Chadwick Ray, 'Humanity, Personhood, and Abortion,' *International Philosophical Quarterly* 25, 1995, 244.

67 Smith & Brogaard, 'Sixteen Days,' 69.

68 It might be disputed that our cells are not totipotent in such a scenario because cloning requires that the particular somatic cell be inserted into the enucleated egg cell and activated before it may be said to be totipotent. In response to this argument I say that: 1. The argument is predicated upon current technology, and my example is set in an undefined 'future,' in which it is feasible to assume that cloning may not require this level of external manipulation; and 2. I define a 'totipotent' cell (for the purposes of this example) to mean a cell that is 'capable of developing into another whole organism,' and the fact that such external manipulation is required does not preclude a finding that this definition is met (this is a similar definition to that adopted by Ford – see Norman Ford, *The Prenatal Person: Ethics from Conception to Birth*, Oxford: Blackwell Publishing, 2002, 56).

69 It might be argued that an answer to this question depends upon whether genetic duplication results in identity duplication. I agree with Manninen that one does not necessarily result in the other – see Bertha Alvarez Manninen, 'Cloning and individuality: Why Kass and Callahan are wrong (but maybe a little right),' *Monash Bioethics Review* 30, 2012, 66–73. This issue of personal identity will not be discussed in this paper. For such an in-depth analysis see McMahan, *The Ethics of Killing*, 3–94.

totipotency is not significant for defining and describing individuation.[70] It might be countered that cloning requires external manipulation or external intervention,[71] so such a future human being is not capable of division in and of itself – that is, there is no 'natural' or inherent internal ability to divide – so may nonetheless be defined as an individual without affecting the strength of the TA assumption concerning a necessary link between individuality and indivisibility.[72]

However, it is questionable whether the cloning example is any less 'natural' than other evolutionary changes through time. That is, we are entering into an era of human development in which the distinction between organic humanity and technological humanity may become blurred. Indeed, one might argue that whatever we create is 'natural' for us.[73] Alternatively, one may allow the external manipulation exception, and simply grant a hypothetical alien the ability to divide 'generating two successors that are both qualitatively identical to their originator.'[74] Such creatures might also bind together to form one individual.[75] If this alien were similar to us in other ways – being self-conscious, intelligent, and sentient – should we deny this alien individuality, and therefore personhood, merely on the basis that it is capable of self-replication?[76] If the alien analogy seems inapplicable, what if we imagine a future where, through natural evolutionary changes, humans have developed this ability to self-replicate? Surely, such humans would be individual, yet clearly divisible, persons?[77]

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70 Beckwith, 'The Explanatory Power of the Substance View of Persons,' 45–49. The cloning example is another way of illustrating Parfit's split-brain thought experiment on this issue – see Derek Parfit, *Reasons and Persons*, Oxford: Oxford University Press, 1984, 254–264.

71 Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 485.

72 Smith & Brogaard, 'Sixteen Days,' 66; Lee, 'A Christian Philosopher's View of Recent Directions in the Abortion Debate,' 10–12.

73 It is also arguable that the focus on the 'natural' ability to divide places too much weight on 'natural' - see Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 194.

74 Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 194.

75 Ibid.

76 Ramsey concludes on the basis of this alien illustration that an ability to twin or divide must be irrelevant to any findings as to a being's moral standing – Ibid, 194–195.

77 Munthe, 'Divisibility and the Moral Status of Embryos,' 387–388.

What these various scenarios serve to illustrate is that it is not the ability to divide (whether this is defined as 'internal' or 'external,' 'natural' or 'unnatural') that is crucial for the moral question of individuality and hence personhood. The ultimate question in this respect cannot be: is that being capable of division? Indeed, by focusing on division one thereby denigrates more worthwhile criteria for moral standing, such as sentience.[78]

It may be the case that the ordinary conception of a person does not allow one person to split into two,[79] but there is nothing inherently irrational about allowing for this ability in a conception of personhood. Just because something is potentially two, it does not logically follow that it is not actually presently one – a stick is potentially two if broken, but before this event it is still one.[80] Put simply, the ability or capacity to undergo division is not a good reason to hold that the possessor of that potential is not a unique individual.[81] As it does not seem absolutely necessary to insist upon indivisibility in order for an organism to constitute an individual, one may conclude that TA is not fatal to the secular conservative view on foetal personhood. However, the implications of TA for the theological conservative position may be more profound.

Souls and twinning

As we have seen, TA is not fatal to a secular conservative position on foetal personhood that accepts individuation as a necessary condition of personhood. The pre-implantation embryo may be considered an individual from concept-

78 Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 192. Munthe raises the related point that such reasoning is incompatible with the view that human persons possess unique values that have meaning – see Munthe, 'Divisibility and the Moral Status of Embryos,' 387–388.

79 Jean Porter, 'Individuality, Personal Identity, and the Moral Status of the Pre-embryo: A Response to Mark Johnson,' *Theological Studies* 56, 1995, 767.

80 Damschen et al, 'Sixteen days? A Reply,' 172–173.

81 Jeff McMahan, 'Killing Embryos for Stem Cell Research,' *Metaphilosophy* 38, 2007, 177; Deckers, 'Why Eberl is Wrong: Reflections on the Beginning of Personhood,' 275; Eberl, 'A Thomistic Perspective on the Beginning of Personhood: Redux,' 287; Deckers also believes that there is no good reason to hold that divisibility precludes ensoulment – see Deckers, 'Why Eberl is Wrong: Reflections on the Beginning of Personhood,' 278–280.

ion as the biological facts do not unambiguously determine otherwise, and there is no persuasive reason to preclude a finding of ontological individuality to a being merely because it has the potential to divide. However, once the concept of the soul is introduced problems arise, as the soul, although immaterial, is presumably incapable of fission or fusion.[82] That is, an individual organism may be divisible, but the soul is indivisible.[83] As souls cannot divide as cells divide, advocates of TA thereby assert that twinning disproves immediate animation (i.e., the theological conservative justification for personhood from conception), as it highlights the metaphysical impossibility that underlies it, because, in essence, one soul cannot be divided into two.[84] As explained in the introduction to this article, there is universal agreement within the conservative theological camp that the human soul is both created at conception and is indivisible. Accordingly, TA appears at first glance to create serious doubt as to the correctness of the conservative theological position. Many scholars over the years have made this point quite forcibly.[85] As Tauer states: 'such a being cannot have a human soul, if one accepts the metaphysical notion of the soul as an indestructible, indivisible supposit.'[86] As a consequence, such authors argue that no soul exists until twinning and recombination are no longer possible, and accordingly the soul is not acquired until the development of the primitive streak or implantation,[87] 'when there is an unambiguously individual subject capable of receiving the soul.'[88]

The point made here by TA is that although twinning may constitute cellular replication, it cannot signify soul replication. Does this mean that TA is fatal

82 Burgess, 'Could a Zygote Be a Human Being?,' 66.
83 Eberl, 'A Thomistic Perspective on the Beginning of Personhood: Redux,' 285; Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 613.
84 Diamond, 'Abortion, Animation and Biological Hominization,' 315.
85 Ibid, 312 & 321; Donceel, 'Immediate Animation and Delayed Hominization'; Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo.'
86 Carol A Tauer, 'The Tradition of Probabilism and the Moral Status of the Early Embryo,' in Patricia Beattie Jung & Thomas A Shannon (eds), *Abortion and Catholicism: The American Debate*, Virginia: Crossroad, 1988, 56
87 Eberl, 'The Beginning of Personhood,' 149–150; Mahoney, *Bioethics and Belief*, 62–67; Diamond, 'Abortion, Animation and Biological Hominization,' 321.
88 Mahoney, *Bioethics and Belief*, 66–67.

to the conservative theological position? Well, no, because at the metaphysical level there may be a number of other options to describe what happens to the soul when twinning occurs;[89] namely, something that does not involve soul division.

For instance, a common suggestion has been that all that occurs in twinning is the end of one person with a soul and the birth or creation of two or more persons with individual souls.[90] That is, what we see at twinning is not A giving rise to B, so that we have twins A + B, but rather A ceasing to exist in the creation of twins B + C.[91] Under this conception, we may assume that A has soul A from conception, and that twinning involves the death of A (and the consequent release of soul A) and the creation of B and C with respective souls B and C.[92] Indeed, it has been argued that A *must* cease to exist upon twinning because otherwise we must hold that either B or C are identical to A, and this cannot be the case as A cannot be identical to B or C, because if A is identical to B, then A must also be identical to C, and A cannot be identical to both B and C, as B and C are clearly not identical as they are self-evidently ontologically distinct.[93] In other words, if A does not cease at twinning, then we must allow that twinning could result in A + A, which is a logical absurdity.[94]

89 For example, Shoemaker suggests that there exist four possibilities when pre-implantation embryo A becomes twins A1 and A2, but only two of those will be dealt with here, as the remaining two are not consistent with immediate animation – see Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 63–65.

90 See Donald McCarthy, 'Moral Responsibility for Abortion, Euthanasia, and Suicide,' in Edward Gratsch (ed), *Principles of Catholic Theology: A Synthesis of Dogma and Morals*, New York: Alba, 1981, 333–337; Andrew C Varga, *The Main Issues in Bioethics*, New York: Paulist Press, 1984, 64–65.

91 Chadwick Ray, 'Humanity, Personhood, and Abortion,' 241–245; McMahan, 'Killing Embryos for Stem Cell Research,' 177; Damschen et al, 'Sixteen days? A Reply,' 174; Munthe, 'Divisibility and the Moral Status of Embryos,' 390; Morris, 'Substance Ontology Cannot Determine the Moral Status of Embryos,' 333.

92 Eberl, 'A Thomistic Perspective on the Beginning of Personhood: Redux,' 285.

93 See McMahan, *The Ethics of Killing*, 25–26; Ingmar Persson, 'Two Claims About Potential Human Beings,' *Bioethics* 17, 2003, 510; Burgess, 'Could a Zygote Be a Human Being?,' 62–64.

94 Cf Howsepian who believes that there is 'no insuperable metaphysical barrier to the possibility' that B, but not C, is identical to A – see A. A. Howsepian, 'Four Queries Concerning the Metaphysics of Early Human Embryogenesis,' *Journal of Medicine and Philosophy* 33, 2008, 142. Also see Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 483.

The death (or cessation)[95] of A at twinning thus appears a solid hypothesis, but it also means that the conservative camp must concede that both B and C are created *after* the original conception of A.[96] Put another way, immediate animation remains applicable in such circumstances – it is just that B and C had a later conception than A, but this does not affect the existence of A as a distinct individual with a soul from conception.[97] As one may readily note, holding that twinning necessarily involves the death of the original pre-implantation embryo does produce a rather convoluted application of immediate ensoulment. The situation is further complicated when recombination occurs, as applying the same logic we must conclude that both B and C die at the creation of D; two or more people die in order for one new person to be created .[98] D may still acquire a soul at D's 'conception,' but this will occur much later than the original ovum fertilization that created A. From this perspective we may see in some cases the creation of a person(s) at A's conception, B and C's later 'conception,' and D's even later 'conception'; we may still hold that the pre-implantation embryo is ensouled, and is therefore a person, from the original (and each subsequent) conception, but it does produce an arguably contrived application of principle. It also suggests that we should view both twinning and recombination as somewhat tragic events.[99]

One might reasonably argue that this proposed scenario appears counter-intuitive,[100] and the question should be posed: assuming that God directly

95 Cessation is probably a better description because there is no corpse, so nothing appears to have 'died' in the ordinary sense of that word – see Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 190. That is, it is better to just hold that A goes out of existence or simply 'ceases' – see Burgess, 'Could a Zygote Be a Human Being?,' 69; McMahan, *The Ethics of Killing*, 27.

96 Damschen et al, 'Sixteen days? A Reply,' 173; and McMahan, *The Ethics of Killing*, 26.

97 Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 193.

98 Alternatively, we might suggest that only one of B and C souls is released and the other simply moves to inhabit the newly created D body – see Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 65.

99 Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 199; and McMahan, *The Ethics of Killing*, 26.

100 It is also inconsistent with the point made by Parfit that cell division should not be confused with death – see Parfit, *Reasons and Persons*, 262.

creates each rational soul,[101] if God is omniscient and knows that the cells will divide, effectively killing A (and in the case of recombination both B and C), why not just wait until totipotency is over and then assign souls at that stage? Why assign a soul to a body destined to die within a matter of days?[102] Of course, time is relative, and souls are presumably not only indivisible, but also indestructible and infinite, so whether a soul exists in a human body for 10 days or 100 years becomes largely insignificant, as both periods of time are relatively equally negligible compared to infinity.

Nonetheless, this scenario does raise the related issue of massive death rates of soul infused human beings. That is, if the soul is in existence at conception, this leads to questions concerning God's motive as between 55%–60% of all pre-implantation embryos die,[103] and about 30% never survive to differentiation.[104] Why does God create only to destroy?[105] It does seems very wasteful,[106] and certainly counter-intuitive as 'we do not lament a loss of life when twinning occurs, nor do we try to prevent it.'[107] Shannon and Wolter conclude that such 'vast embryonic loss intuitively argues against the creation of a principle of immaterial individuality at conception.'[108] Such losses are magnified by virtue of recombination, when B and C die in order to create D.[109] Of course, the fact that there is a high death rate does not, in and of itself, necessarily lead to the conclusion that the original zygote A lacks either a soul or moral status.[110] However, such issues led Shoemaker to conclude that the process of twinning dictates one of two propositions:

101 An assumption most theologians support – see, e.g., Eberl, 'A Thomistic Perspective on the Beginning of Personhood: Redux,' 289.
102 Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 63–65.
103 Cahill, 'The Embryo and the Fetus: New Moral Contexts,' 127; Daniel Dombrowski & Robert Deltete, *A Brief, Liberal, Catholic Defense of Abortion*, Champaign, IL: University of Illinois Press, 2000, 52; Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 618–619.
104 Diamond, 'Abortion, Animation and Biological Hominization,' 312–314.
105 Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 618–619.
106 Eberl, 'The Beginning of Personhood,' 156; Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 68.
107 Burgess, 'Could a Zygote Be a Human Being?,' 64.
108 Shannon & Wolter, 'Reflections on the Moral Status of the Pre-embryo,' 619.
109 Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 65.
110 Deckers, 'Why Eberl is Wrong: Reflections on the Beginning of Personhood,' 281.

1. Two (or more) souls were there all along in zygote A from conception; or
2. No souls are present until after twinning is completed or no longer possible.[111]

Proposition 2 clearly refutes the theological conservative position, but proposition 1 has some support within the conservative camp.[112] Koch-Hershenov provides a description of this process whereby she accounts for twins by suggesting that what we see in twinning is actually a case of divine intervention whereby B and C (that have existed since conception, but appearing to be just A) simply separate when the cells divide during the twinning process.[113] This account answers the criticism of requiring A to cease in order to create B and C, because under this scenario A never existed, except as a vessel for B and C – both of which existed since conception.[114] In other words, she asserts that two souls can share the same material dimensions. In this case, two souls share the fertilized single celled egg, and 'are spatially coincident at fertilization, each united to matter.'[115] They then separate at some stage prior to implantation. When twinning does not occur we only ever had one soul, and when twinning does occur we always had two souls present in the same body. Indeed, Munthe has suggested that 'such divine interventions may be what *cause* twinning or make it possible.'[116]

This view has been described as the 'Multiple Occupancy View.'[117] Not only does it avoid the counter-intuitive necessity to regard twinning as tragic, and perhaps even 'a little creepy,'[118] but by defining A as simply the initial stage

111 Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 69–75.
112 Eugene Mills, 'Dividing Without Reducing: Bodily Fission and Personal Identity,' *Mind* 102, 1993, 37–51.
113 Rose Koch-Hershenov, 'Totipotency, Twinning, and Ensoulment at Fertilization,' *Journal of Medicine and Philosophy* 31, 2006, 155–160.
114 Deckers, 'Why Eberl is Wrong: Reflections on the Beginning of Personhood,' 274; Curtis, 'A Zygote Could be a Human,' 137–138.
115 Koch-Hershenov, 'Totipotency, Twinning, and Ensoulment at Fertilization,' 160.
116 Munthe, 'Divisibility and the Moral Status of Embryos,' 384.
117 Curtis, 'A Zygote Could be a Human,' 136–142.
118 Burgess, 'Could a Zygote Be a Human Being?,' 68.

of B and C, we may also thereby trace our continuity to conception.[119] The main problem with this theory is that it does not account for recombination. That is, we may logically hold that if A undergoes fission and becomes B and C, then B and C were there all along, but if B and C subsequently undergo fusion to become D, we cannot logically say that D was there all along.[120] As a consequence, Burgess concludes that the biological events of recombination or chimeras are fatal to the Multiple Occupancy View.[121]

Another problem with the multiple occupancy account is an apparent lack of theological consistency, especially with respect to the doctrine of hylomorphism. It is difficult to accept that two souls (which are indivisible) can occupy or share the one body,[122] when the hylomorphic tradition defines a person as the union of form (soul) and matter (body). Koch-Hershenov herself accepts that 'human beings are hylomorphic composites of form and matter,'[123] and argues that the fertilized egg 'is the proper matter for the human form,'[124] but contends that an accurate interpretation of Aquinas allows that more than one human form may share identical matter.[125] This is a novel interpretation of Thomistic hylomorphism that has its critics,[126] especially Eberl, who argues that only '*one* rational soul informs the matter of each individual human organism.'[127] On the other hand, what may we really say with any level of conviction concerning the nature of divine intervention regarding souls? As Munthe points out, given the imprecise nature of the soul, divine interventions and so forth, 'anything seems to be imaginable regarding souls and twinning.'[128] Consequently, although TA does present significant issues for the theological conservative position, one cannot say with certainty that it disproves that position.

119 Curtis, 'A Zygote Could be a Human,' 136–142.
120 Burgess, 'Could a Zygote Be a Human Being?,' 64–65.
121 Ibid, 68.
122 Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 63–65.
123 Koch-Hershenov, 'Totipotency, Twinning, and Ensoulment at Fertilization,' 140.
124 Ibid, 155.
125 Ibid, 150–155.
126 See, e.g., Shoemaker, 'Embryos, Souls, and the Fourth Dimension,' 66.
127 Eberl, 'A Thomistic Perspective on the Beginning of Personhood: Redux,' 286.
128 Munthe, 'Divisibility and the Moral Status of Embryos,' 384.

Conclusion: the issue of continuity

Although not fatal to the conservative position on foetal personhood (whether this position is arrived at by virtue of a belief in immediate animation or a secular argument), TA does highlight weaknesses inherent in that position. The title to this article posed the question – can one be two? – and it would seem a reasonably universal maxim that only individuals may be described as persons; hence, it is logically impossible for one to be two.[129] However, there seems no conclusive basis for finding that an individual cannot be capable of division. In other words, although one *cannot* be two, one *can* be potentially two.[130]

Nonetheless, what TA does achieve, or rather what the biological process of monozygotic twinning means, is that it is highly questionable whether we, as born human persons, may trace ourselves with certainty as such to the moment of fertilization. That is, although the twins B and C are self-evidently not identical, they are also genetically indistinguishable, so even if we hold that A did not cease upon twinning, and is thus either B or C, it remains impossible to determine which twin was A. Accordingly, neither B nor C can state categorically that they were ever A. Of course, if we hold that A ceases upon twinning, then we can state with certainty that neither B nor C were ever A.[131] Consequently, the adult human person (who is a twin) cannot conclude with any certainty that they were ever A.[132] In terms of continuity, the most we can say with absolute certainty is that we existed subsequent to loss of totipotency at the appearance of the primitive streak and/or implantation.[133] One might counter with 'but I'm

129 Rudder Baker, 'When Does a Person Begin?,' 25–27.

130 Guenin, 'The Nonindividuation Argument Against Zygotic Personhood,' 485. Note: Guenin makes the argument from the other side – namely, that the potential of each cell (prior to the loss of totipotency) to become a distinct human person is not the same as each cell being a distinct human person simply by virtue of this potentiality – but the premise is similar, if not identical.

131 Burgess, 'Could a Zygote Be a Human Being?' 62–64.

132 The same reasoning would apply to recombination: such that the adult human person could only trace themselves to D, and not to B and C that recombined to form D – see Howsepian, 'Four Queries Concerning the Metaphysics of Early Human Embryogenesis,' 143–46.

133 This conclusion is further substantiated when one takes into consideration the placenta: that is, a zygote gives rise to a human being and a placenta, and it cannot be both, so the human being can only trace herself to that point in embryonic

not a twin, so I do have unbroken continuity from conception.' However, as you can never know with certainty whether twinning occurred at some point in your embryonic development,[134] you cannot trace yourself back to the original conception with certainty. The only indisputable view, in terms of continuity, is to say you existed from implantation.

Consequently, the position that better supports the conservative view that we are persons from conception is to follow Koch-Hershenov and hold that, in the case of twinning, B and C were there all along: they were already in existence prior to twinning, and what appeared to be a unique individual A, was in fact simply a housing or storage vessel for the two unique twins B and C.[135] However, as explained earlier, this position cannot account for the biological event of recombination. Perhaps the better view, from the perspective of defending the conservative position, is to argue that there might be spatiotemporal continuity between A and the subsequent persons B and C.[136] That is, we may accept that A does not equal either B or C, but rather hold that A is a 'temporal part' of both B and C.[137] As Curtis explains: 'to *say* that every human is identical to the zygote they developed from *is just to say that every human has a temporal part that is a zygote*.'[138] In this way, we may hold that A and B are parts of one unique human individual, while simultaneously viewing A and C as parts of another unique human individual.[139]

According to this view, we may say that B was once A, even though C was also once A: A grows into both B and C. Thus, we may establish continuity from conception because B's and C's 'ongoing ontological identity is not threatened

development and not before – see Burgess, 'Could a Zygote Be a Human Being?,' 61–70.

134 Ramsey, 'Twinning and Fusion as Arguments against the Moral Standing of the Early Human Embryo,' 202.

135 Koch-Hershenov, 'Totipotency, Twinning, and Ensoulment at Fertilization.'

136 Curtis, 'A Zygote Could be a Human,' 142; Howsepian, 'Four Queries Concerning the Metaphysics of Early Human Embryogenesis,' 154.

137 Curtis, 'A Zygote Could be a Human,' 137.

138 Ibid.

139 Ibid. Cf St John concerning the issue of how much change is required before identity may be said to be violated – see Jeremy St John, 'And on the fourteenth day…potential and identity in embryological development,' *Monash Bioethics Review* 27, 2008, 16–18.

by the fact that they were once only one individual.'[140] Recombination is not fatal to this theory as B and C may simply be defined as temporal parts of the recombined D. This view may also be described as an implicit recognition of the fact that '[h]uman development is continuous.'[141] Morris has made the point that, because human developmental changes are so subtle (and so numerous), biology cannot help identify substance changes because it is difficult to justify any particular one stage as significant.[142] Morris accordingly concludes that any attempt to utilise a biological process to assign moral status is not supported by current understandings of developmental biology.[143]

From this perspective, neither conception nor twinning are particularly significant biological events in human development. To return to the initial question – is TA fatal to the conservative position on foetal personhood? – we must answer in the negative. TA certainly highlights weaknesses with respect to specific elements of the conservative position, but the biological phenomenon of twinning does not, of itself, disprove that position. Nonetheless, the continuing debate on this issue does serve to illustrate that although we may assign moral status to a particular foetus, to attempt to justify that value judgment by reference to a biological event seems fraught with problems. We would do better to look elsewhere when we seek to defend such moral decisions.

140 Deckers, 'Why Eberl is Wrong: Reflections on the Beginning of Personhood,' 279.
141 Morris, 'Substance Ontology Cannot Determine the Moral Status of Embryos,' 348.
142 Ibid, 333.
143 Ibid, 349.

The Offence of Child Destruction: Issues for Medical Abortion

Mark J Rankin*

Abstract

All jurisdictions in Australia permit, within specified parameters, the performance of an abortion by a qualified medical practitioner. Yet most jurisdictions also maintain an offence of child destruction. This article argues that the offence of child destruction may protect the foetus from early in the second trimester of pregnancy, and thus overlaps with the otherwise lawful practice of medical abortion. This situation creates a site of conflict and confusion for the criminal law, and results in serious legal uncertainty as to what constitutes a lawful medical abortion. The article contends that the most appropriate and effective resolution of these issues is to abolish the offence of child destruction.

I Introduction

This article examines the offence of child destruction, and considers the potential impact of this offence on the practice of medical abortion. Medical abortion — defined as the performance of an abortion by a qualified health professional — although theoretically remaining a crime in most Australian jurisdictions,[1] is nonetheless permitted to varying degrees.[2] Indeed, in the ACT[3] and Victoria[4] (and

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1 See *Crimes Act 1900* (NSW) ss 82–4; *Criminal Code Act* (NT) sch 1 ss 208C, 208B ('*Criminal Code* (NT)'); *Criminal Code Act 1899* (Qld) sch 1 ss 224–6 ('*Criminal Code* (Qld)'); *Criminal Law Consolidation Act 1935* (SA) ss 81–2; *Criminal Code Act 1924* (Tas) sch 1 ss 134–5 ('*Criminal Code* (Tas)'); *Criminal Code Act Compilation Act 1913* (WA) app B s 199 ('*Criminal Code* (WA)').

2 In New South Wales certain medical abortions are permitted by virtue of the common law defence of necessity, rather than any legislative initiatives: see *R v Davidson* [1969] VR 667; *R v Wald* (1971) 3 DCR (NSW) 25; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47. In Queensland a combination of legislative and judicial activity has allowed for medical abortions in specific circumstances: see *R v Bayliss* (1986) 9 Qld Lawyer Reps 8 ('*Bayliss*'); *Veivers v Connolly* [1995] 2 Qd R 326; *Criminal Code* (Qld) s 282. In the other jurisdictions it has been purely legislative reform that has achieved relatively easy access to medical abortion services: see *Medical Services Act* (NT) s 11; *Criminal Law Consolidation Act 1935* (SA) s 82A*; Criminal Code* (Tas) s 164.

3 In effect, the Australian Capital Territory legislation defines a lawful abortion as one performed by a medical practitioner in an approved facility: *Health Act 1993* (ACT) ss 80–4.

4 In Victoria it is now the case that abortion is not a crime if performed by a registered health practitioner prior to the foetus reaching 24 weeks gestation: *Abortion Law Reform Act 2008* (Vic) ss 4, 6. After 24 weeks gestation, further criteria must be met: ss 5, 7.

to a lesser extent in Western Australia)[5] medical abortion is no longer a crime. It is not necessary for the purposes of this article to provide a detailed analysis of Australian abortion law; it will suffice to state that, in every jurisdiction in Australia, medical abortion is justifiable in a broad set of circumstances.[6] The purpose of this article is to emphasise that some medical abortions performed in accordance with such legal conditions (and therefore assumed to be lawful or permitted abortions), may nonetheless constitute the offence of child destruction.

With the exceptions of New South Wales[7] and Victoria,[8] child destruction is an offence in every Australian jurisdiction.[9] At first glance, the offence as described in most jurisdictions seeks to protect a child during the process of birth.[10] However, as will be shown, closer examination reveals that the offence may also protect the child in utero, and from early in the second trimester of pregnancy. Given that approximately eight per cent of abortions are performed during, or after, this period,[11] the offence of child destruction thereby overlaps with the practice of otherwise lawful medical abortion.[12]

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5 See *Health Act 1911* (WA) s 334. In Western Australia medical abortions not meeting the requirements of the *Health Act* are still defined as criminal (*Criminal Code* (WA) s 199), but a medical practitioner found guilty under s 199 is only liable to a pecuniary penalty: s 199(2).

6 For a discussion of such circumstances see Heather Douglas, 'Abortion Reform: A State Crime or a Woman's Right to Choose?' (2009) 33 *Criminal Law Journal* 74; Belinda Bennett, 'Abortion' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2010) 371; Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1.

7 New South Wales has never possessed an offence of child destruction: see Kerry Petersen, 'Classifying Abortion as a Health Matter: The Case for De-criminalising Abortion Laws in Australia' in Sheila McLean (ed), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate, 2006) 353, 360.

8 In 2008 the Victorian Parliament repealed *Crimes Act 1958* (Vic) s 10, thereby abolishing the offence: *Abortion Law Reform Act 2008* (Vic) s 9.

9 It should be noted that jurisdictions label the offence differently, and only the Australian Capital Territory continues to refer to the offence as 'child destruction': *Crimes Act 1900* (ACT) s 42. The most common title for the crime is 'killing unborn child', which may be found in the Northern Territory, Queensland and Western Australian legislation: *Criminal Code* (NT) s 170; *Criminal Code* (Qld) s 313(1); *Criminal Code* (WA) s 290. In Tasmania the charge is 'causing the death of a child before birth': *Criminal Code* (Tas) s 165; while in South Australia it would appear that the appropriate charge may be 'unlawful abortion', although this is unclear: see *Criminal Law Consolidation Act 1935* (SA) s 82A(7). I have chosen to label the offence 'child destruction' in this article as this is the title utilised in the original UK Act: *Infant Life (Preservation) Act 1929* (UK) 20 Geo 5 s1(1) ('*1929 UK Act*').

10 See *Crimes Act 1900* (ACT) s 42; *Criminal Code* (NT) s 170; *Criminal Code* (Qld) s 313(1); *Criminal Code* (WA) s 290.

11 In 2010 it was found that approximately 6.3 per cent of abortions were performed between 15 and 19 weeks gestation, and 1.8 per cent after 20 weeks gestation: Wendy Scheil et al, *Pregnancy Outcome in South Australia 2010* (Pregnancy Outcome Unit, SA Health, Government of South Australia, 2012) 11, 54. South Australia is the only jurisdiction with mandatory reporting requirements sufficient to provide such specific information, but one may reasonably extrapolate that most other states have comparable incidences of such early second trimester abortions: see Angela Pratt, Amanda Biggs and Luke Buckmaster, *How Many Abortions are There in Australia? A Discussion of Abortion Statistics, Their Limitations, and Options for Improved Statistical Collection* (Research Brief No 9, Parliamentary Library, Parliament of Australia, 2005), Social Policy Section, 9–11.

12 See Thomas Faunce, 'The Carhart Case and Late-Term Abortions — What's Next in Australia?' (2007) 15 *Journal of Law and Medicine* 23, 28.

This article will canvass the offence of child destruction in each jurisdiction, and, by way of an analysis of the applicability and definition of the phrase 'a child capable of being born alive' and the common law 'born alive' rule, highlight the potential scope of the offence to protect a foetus in utero from the second trimester of pregnancy. The conclusion reached is that the mere existence of the offence of child destruction creates serious legal uncertainty as to what constitutes a lawful medical abortion; in essence, the maintenance of the offence may serve to make the lawful unlawful. Law reforms designed to alleviate this prospective legal conundrum will be considered, along with the policy implications inherent within such reforms.

II The Offence of Child Destruction

A *History and Description: Protecting 'A Child Capable of Being Born Alive'*

Each Australian jurisdiction created the offence of child destruction at different times and in slightly varied ways, but, despite minor regulatory discrepancies, the offence throughout Australia arguably protects a 'child capable of being born alive'. In South Australia there is no doubt that this is the case, as the offence was copied almost verbatim from the original United Kingdom ('UK') legislation.[13] The UK Parliament created the offence in 1929, in order to fill a perceived 'gap' in the criminal law: that without the offence of child destruction, no protection was afforded a child during the process of delivery, as neither homicide (which only applies to a born individual) nor unlawful abortion (which protects the foetus) were considered appropriate to protect a child killed during the course of childbirth, in that such a child is neither wholly in utero, nor fully extruded from its mother.[14] Hence, the enactment of the *Infant Life (Preservation) Act 1929* (UK) ('*1929 UK Act*'). Section 1(1) of this Act states:

> [A]ny person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of a felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life.

The primary legal complexity raised by this offence is the utilisation of the phrase 'child capable of being born alive'. Given the proclaimed basis for the creation of the offence — to protect the child during the process of birth[15] — the inclusion of the phrase seems unnecessary. Indeed, if the phrase had not been

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13 *Criminal Law Consolidation Act 1935* (SA) s 82A(7), (8). Prior to abolishing the offence in 2008 Victoria possessed an almost identical provision: *Crimes Act 1958* (Vic) s 10 (since repealed by *Abortion Law Reform Act 2008* (Vic) s 9).

14 See United Kingdom, *Parliamentary Debates*, House of Lords, 22 November 1928, vol 269, cols 70 (Lord Darling), 270–2 (Lord Atkin), 275–8 (Lord Hailsham LC). See also Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, 41; I J Keown, 'The Scope of the Offence of Child Destruction' (1988) 104 *Law Quarterly Review* 120, 120.

15 There appears little doubt that this was the legislative purpose of the original Bill, but such clear confinement of the offence to a child during the process of birth was eroded by various amendments during the Bill's passage: see Keown, above n 14, 121–8.

included, and the offence was expressly and clearly confined to causing the death of a child during delivery, then the conflicts with medical abortion that will be raised in this article would not necessarily arise.[16] Nonetheless, the phrase was copied into the South Australian legislation. As to what constitutes a 'child capable of being born alive', the *1929 UK Act* (and the South Australian legislation) answers that a foetus of at least 28 weeks gestation is assumed to constitute such a child,[17] but this is expressed as a rebuttable presumption;[18] leaving open the possibility that a foetus of less than 28 weeks gestation may also be a child capable of being born alive.[19] Herein resides the potential for conflict with the otherwise lawful practice of medical abortion. This crucial phrase — 'child capable of being born alive' — will be dealt with below.

In the Code jurisdictions of Queensland, the Northern Territory, and Western Australia, the offence is defined in a slightly different manner (and in the case of Queensland and Western Australia the offence was created earlier than the *1929 UK Act*).[20] Importantly for present purposes, the relevant provisions in these jurisdictions do not possess the phrase 'child capable of being born alive'. The offence of 'killing unborn child' is described in these jurisdictions as:

> Any person who, when a female is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, the person would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life.[21]

In the Australian Capital Territory the offence of 'child destruction' is defined in broadly similar terms as follows:

> A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to a childbirth and before the child is born alive —
>
> (a) prevents the child from being born alive; or
>
> (b) contributes to the child's death; is guilty of an offence punishable, on conviction, by imprisonment for 15 years.[22]

As may be seen, the wording of the Australian Capital Territory provision differs from the Code jurisdictions' legislation in a number of respects, but such

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16 Of course, some abortions use the method of inducing labour, usually through the administration of prostaglandins, and these abortions might still be caught by an offence of child destruction so framed.

17 *1929 UK Act* s 1(2); *Criminal Law Consolidation Act 1935* (SA) s 82A(8); see also *Crimes Act 1958* (Vic) s 10(2) (since repealed by *Abortion Law Reform Act 2008* (Vic) s 9).

18 *Criminal Law Consolidation Act 1935* (SA) s 82A(8); *Rance Mid-Downs Health Authority* [1991] 1 QB 587, 605, 620 ('*Rance*').

19 *1929 UK Act* s 1(2); *Criminal Law Consolidation Act 1935* (SA) s 82A(7), (8); see also *Crimes Act 1958* (Vic) s 10(2) (since repealed by *Abortion Law Reform Act 2008* (Vic) s 9).

20 Section 313 was inserted into the *Criminal Code* (Qld) in 1901; s 290 resided within the *Criminal Code* (WA) when originally enacted.

21 *Criminal Code* (Qld) s 313(1); *Criminal Code* (NT) s 170; *Criminal Code* (WA) s 290. The above quote is taken from the Queensland legislation. The Western Australian legislation differs slightly by referring to 'a woman' rather than 'a female', and the Northern Territory legislation differs by stating 'a woman or girl' instead of 'a female'.

22 *Crimes Act 1900* (ACT) s 42.

differences are not overly significant for present purposes. For example, although the Australian Capital Territory legislation uses the phrase 'in relation to a childbirth', rather than the phrase 'about to be delivered of a child', both phrases arguably possess similar literal meaning (one might say that both phrases are equally plain or equally vague). In any case, in terms of any potential overlap with medical abortion, the most notable characteristic of the Australian Capital Territory and Code jurisdictions' legislation is that they all create an offence that, at first glance, only operates within a specific and narrow timeframe: when the process of birth has begun, or when delivery is imminent.

However, the phrase 'prevents the child from being born alive' (contained in both the Australian Capital Territory and Code jurisdictions' provisions), arguably only makes logical sense if the child was actually *capable* of being so born alive. That is, without such an interpretation the phrase would lead to absurdity: how may one prevent a child from being born alive if that child could not possibly be born alive? Rationally, it is only once a certain gestational age has been reached, and a foetus becomes capable of being born alive, that one may be charged with taking action to prevent that foetus from being born alive. This legislative expression thus demands the application of the 'Golden Rule' of statutory interpretation.[23]

The 'Golden Rule' is that a construction should be adopted that avoids irrationality or absurdity,[24] provides 'a reasonable meaning',[25] and thereby gives rational effect to the words used,[26] as it cannot be thought to have been Parliament's intention to adopt a construction that is irrational.[27] Applying the Golden Rule, the relevant phrase should thus be read as 'prevents the child [*being a child capable of being born alive*] from being born alive'. This was the conclusion reached by McGuire J in *Bayliss*.[28] His Honour, in studying the *Criminal Code* (Qld) s 313, quoted above,[29] held that it closely resembled, and established a similar offence, to the *1929 UK Act* s1.[30] Significantly for present

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23 See the classic framing of the rule in *Grey v Pearson* (1857) 10 ER 1216, 1234 (Lord Wensleydale). See also *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 371 (Dixon J).

24 *Heading v Elston* (1980) 23 SASR 491, 494 (King CJ); *Lindner Pty Ltd v Builder's Licensing Board* [1982] 1 NSWLR 612, 615 (Samuels JA). See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 29.

25 *Sakhuja v Allen* [1973] AC 152, 183 (Lord Pearson). Also see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

26 See J J Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822, 826–8.

27 *Footscray City College v Ruzicka* (2007) 16 VR 498, 505 (Chernov JA); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 304–5 (Gibbs CJ); *Fry v Bell's Asbestos & Engineering Pty Ltd* [1975] WAR 167, 169–70 (Jackson CJ); *Pinner v Everett* [1969] 3 All ER 257, 258–9 (Lord Reid).

28 (1986) 9 Qld Lawyer Reps 8. For a more detailed analysis of this case see Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229, 235–7.

29 His Honour provides a comprehensive legislative history of the section: *Bayliss* (1986) 9 Qld Lawyer Reps 8, 34–7 (McGuire J).

30 Ibid 13–14.

purposes, McGuire J felt that the 'child' referred to in s 313 should be read as 'one capable of being born alive'.[31]

Given the lack of any other decisions specifically interpreting the offence, McGuire J's reasoning is especially significant, as, although the binding nature of precedent is reduced to mere persuasive authority in the field of statutory construction,[32] there remains 'a strong influence constraining a court to adhere to a previously stated interpretation of an Act'.[33] Further, as Parliament's intention is paramount in interpreting a statute,[34] the fact that Parliament has opted not to change the legislation subsequent to a judicial interpretation may be construed as evidence that Parliament agrees with that interpretation.[35] There is thus a strong case for holding that the offence of child destruction in Queensland protects a child capable of being born alive.

As the offence is expressed in identical terms in both Western Australia and the Northern Territory, one may reasonably argue that an identical interpretation should apply in those jurisdictions. Of course, it should also be noted that statutory interpretation is not a discipline of law with binding rules,[36] but rather 'rules of common sense',[37] and further that such rules do not always point in the one direction.[38] The only certainty of statutory interpretation is that Australian courts are under a duty 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[39] This duty to give effect to the purpose or object of the Act is also emphasised in Acts interpretation legislation,[40] but how that intention, object or purpose is ascertained is largely left to the discretion of each court. In the present case, a court may, in determining Parliament's intention, simply apply a literal meaning to the phrase 'about to be

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31 Ibid 37.

32 *Maunsell v Olins* [1975] AC 373, 382 (Lord Reid).

33 Pearce and Geddes, above n 24, 11.

34 See, eg, *Acts Interpretation Act 1954* (Qld) s 14A.

35 See Pearce and Geddes, above n 24, 11, 108. Indeed, the re-enactment presumption of statutory interpretation holds that the legislature is assumed to have approved of a previous judicial interpretation if the legislation in question has been re-enacted subsequent to that interpretation: see, eg, *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106–7.

36 *Brennan v Comcare* (1994) 50 FCR 555, 572–3 (Gummow J); *McNamara v Consumer Trading and Tenancy Tribunal* (2005) 221 CLR 646, 661 (McHugh, Gummow and Heydon JJ).

37 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

38 See Pearce and Geddes, above n 24, 7–12. For instance, one might apply the same 'Golden Rule' approach and arrive at the converse conclusion that a court should interpret the offence of child destruction so as to avoid the absurdity of (re)criminalising an otherwise lawful termination. In answer, one might counter that, reading the Act as a whole (ie a rule of statutory construction suggested in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 514 (Mason J)), the legal effect of interpreting the offence of child destruction so as to protect a child capable of being born alive is not to (re)criminalise an otherwise lawful medical procedure, but rather to establish a gestational limit as to what may constitute a lawful medical abortion — hence there is no absurdity in such an interpretation.

39 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ).

40 See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18.

delivered of a child' or 'in relation to a childbirth',[41] and subsequently hold the offence to be applicable only during the process of birth.[42] Or a court might focus on the fact that the legislation in question is penal in nature, and thus seek to interpret the phrase(s) in such a way as to 'avoid the penalty in any particular case',[43] which might suggest strictly limiting the scope of the offence to acts committed during the birth of the child.

However, neither of the above approaches would receive support from superior courts. The High Court has made it clear that the old rule that penal statutes should be interpreted in favour of the defendant 'has lost much of its importance', and such legislation should now be interpreted using 'the ordinary rules of construction'.[44] Similarly, the literal approach to statutory interpretation has recently lost favour with the High Court, which now advocates a more contextual approach to determining the meaning of words.[45] As the majority stated in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[46]

In addition, a literal approach to the provision does not necessarily yield a narrow interpretation. For instance, Murray J, in delivering the majority judgment in *Martin v The Queen (No 2)*,[47] explained in obiter that the 'process' of delivery does not necessarily occur within a particularly limited timeframe:

> 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 while she is pregnant and carrying a live foetus?[48]

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41 A court may be more likely to do so in the Australian Capital Territory, as no previous decisions exist to the contrary (unlike the situation in Queensland and Western Auastralia, and by extension the Northern Territory), and a different phrase would be the subject of interpretation (ie 'in relation to a childbirth' rather than 'about to be delivered of a child').

42 The classic statement of the literal approach to statutory interpretation may be found in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

43 *Tuck v Priester* (1887) 19 QBD 629, 638 (Lord Esher MR).

44 *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J). See also *Waugh v Kippen* (1986) 160 CLR 156, 164. Indeed, it is arguable that this has been the Australian approach since Isaacs J's comments in *Scott v Cawsey* (1907) 5 CLR 132, 154–5.

45 See *Bropho v Western Australia* (1990) 171 CLR 1, 19–20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 396–7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–4 (McHugh, Gummow, Kirby and Hayne JJ); *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019, 1028–9 (Kirby J).

46 (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ).

47 (1996) 86 A Crim R 133.

48 Ibid 138.

There is thus a strong argument in favour of applying the offence in the above Code jurisdictions[49] to acts causing the death of a child capable of being born alive.[50] If such an interpretation holds — and there have been no decisions contrary to this suggested construction — then the above Code jurisdictions possess an offence of similar practical effect (in terms of a potential overlap with medical abortion) to the current South Australian offence, which was modelled on the *1929 UK Act*.

The case for interpreting the offence in the Australian Capital Territory in a like manner is less compelling, as the terms of the offence are slightly different to the Code jurisdictions, but the Australian Capital Territory provision does contain the phrase 'prevents the child from being born alive',[51] and, as argued above, in order to avoid absurdity this phrase should be read as 'prevents the child [*being a child capable of being born alive*] from being born alive'. Of course, it is inherently uncertain how an Australian Capital Territory court might interpret the offence, but given that *Bayliss*[52] is the only Australian decision on point, and that McGuire J's reasoning appears to be a reasonable application of the Golden Rule approach to statutory interpretation, one may state with confidence that, if not likely, it is certainly a strong possibility that an Australian Capital Territory court would adopt the above construction. It is an appropriate rule of statutory interpretation to seek to derive meaning by reading the Act as a whole,[53] and it is noteworthy that the related Australian Capital Territory offence of 'concealment of birth'[54] does not apply if the mother was less than 28 weeks pregnant.[55] One may reasonably assume that this focus on 28 weeks is for reasons consistent with those expressed in the relevant UK and South Australian provisions on child destruction: that a foetus of 28 weeks gestation is presumed to be a child capable of being born alive.[56] Thus, the discussion concerning what constitutes a 'child capable of being born alive' has relevance to not only South Australia, but also the Australian Capital Territory the Northern Territory, Queensland and Western Australia.

Before embarking upon this discussion, it is interesting to note the Tasmanian situation with respect to the offence of child destruction, as it constitutes a possible reform template for the other jurisdictions that retain the offence. Section 165(1) of the Tasmanian *Criminal Code* states that:

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49 It must be conceded that the argument is stronger in Queensland and Western Australia (where judicial pronouncements consistent with this author's suggested construction of the legislation exist: *Bayliss* (1986) 9 Qld Lawyer Reps 8, 37; and *Martin v The Queen (No 2)* (1996) 86 A Crim R 133, 138–9).

50 In his report, Finlay came to the conclusion that such provisions actually go further and appear 'to cover unborn children from the time pregnancy has been detected in the pregnant woman': Mervyn D Finlay, 'Review of the Law of Manslaughter in NSW' (Report, NSW Department of Attorney General and Justice, Criminal Law Division, 2003) 80.

51 *Crimes Act 1900* (ACT) s 42.

52 *Bayliss* (1986) 9 Qld Lawyer Reps 8.

53 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 514 (Mason J).

54 *Crimes Act 1900* (ACT) s 47.

55 Ibid s 47(1)–(2).

56 *1929 UK Act* s 1(2); *Criminal Law Consolidation Act 1935* (SA) s 82A(8).

> Any person who causes the death of a child which has not become a human being in such a manner that he would have been guilty of murder if such child had been born alive is guilty of a crime.[57]

As may be seen, the Tasmanian offence, labelled 'causing death of child before birth', does not contain any words similar to the phrase 'when a female is about to be delivered of a child', nor does it refer to the principle of 'a child capable of being born alive', nor does it contain a phrase akin to 'prevents the child from being born alive'. In terms of arriving at an appropriate interpretation with respect to the scope of the Tasmanian offence, the associated crime of 'concealment of birth', which sits in the same part of the *Criminal Code* (Tas) as the above offence, may be instructive.[58] The offence of concealment of birth does not apply until the foetus has 'reached such a stage of maturity as would in the ordinary course of nature render it probable that such child would live'[59] — in other words, does not apply until the child is capable of being born alive. Adopting a contextual approach to statutory interpretation, it would be reasonable to argue that the offence of 'causing death of child before birth' should be interpreted consistently with the 'concealment of birth' offence, and consequently both offences should be applicable to the death of a foetus that may be described as a 'child capable of being born alive'.[60]

However, the construction of the Tasmanian legislation is no longer particularly significant in terms of potential conflicts with the practice of medical abortion, as the 2001 amendments made to the law regulating medical abortion in Tasmania designated that s 165 was expressly subject to s 164, which deals with lawful termination of pregnancy.[61] This strategy of retaining the offence of child destruction, but making it effectively inapplicable to cases of lawful medical abortion, although preferable to allowing the potential conflict between medical abortion and child destruction to remain, is nonetheless problematic, and, in this author's opinion, should not be the template for reform in other jurisdictions. Apart from the obvious lack of legal simplicity, by leaving the offence of child destruction intact, the fact remains that a medical practitioner performing an abortion that she or he believes is lawful pursuant to the relevant abortion legislation is still in a position of inherent legal uncertainty because, if that abortion is subsequently deemed not to be in accordance with that legislation, then the offence of child destruction is regenerated and would be applicable to that

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57 *Criminal Code* (Tas) s 165(1).

58 That is, reading the Act as a whole in deriving meaning: see, eg, *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 514 (Mason J).

59 *Criminal Code* (Tas) s 166(2).

60 A New Zealand case, *R v Woolnough* [1977] 2 NZLR 508, dealt with a provision practically identical to the *Criminal Code* (Tas) s 165(1) — *Crimes Act 1961* (NZ) s 182 — and held that the offence is probably not applicable to an early foetus, but is certainly applicable to a foetus in the later stages of pregnancy: at 516–17.

61 *Criminal Code* (Tas) s 164(1) (as inserted by *Criminal Code Amendment Act (No 2) 2001* (Tas)). A similar legislative reform was embarked upon in the UK in 1990, when the UK Parliament recognised the potential overlap between the offence of child destruction and medical abortion. Amendments were accordingly made to the *Abortion Act 1967* (UK) such that the offence of child destruction created by the *1929 UK Act* could not be committed by a registered medical practitioner performing an abortion in accordance with the *Abortion Act 1967* (UK) — see *Human Fertilisation Embryology Act 1990* (UK) s 37(4).

procedure.[62] Clearly, the most effective reform option that would guarantee the removal of all legal ambiguity and potential overlap between lawful medical abortion and the offence of child destruction would be to simply abolish the offence of child destruction. This is what occurred in Victoria in 2008.[63] To abolish the offence has the dual advantages of legislative simplicity and legal clarity. This preferred reform template will be discussed further in the conclusion.

In summarising the various offences of child destruction currently operating in Australia, the major point to be emphasised is that all such offences arguably protect a 'child capable of being born alive'. It will be shown through an analysis of this phrase, and the related born alive rule, that such offences thereby protect the foetus from as early as 16 weeks gestation. Prior to this examination, the final preliminary issue that requires clarification is that of defences, as one cannot fully understand the nature and scope of an offence without appreciating the influence of available defences to that crime.

Only South Australia and Tasmania expressly provide for a defence to the crime of child destruction: in these jurisdictions it is a complete defence if the act that caused the death of the child was done in good faith for the preservation of the mother's life.[64] The prosecution must prove that the act in question was not done with this legitimate intent in order to secure a conviction.[65] In the Australian Capital Territory, Queensland, the Northern Territory and Western Australia this defence is not apparent within the relevant provisions (indeed, no specific defence is provided for in these jurisdictions), but may apply in any case through application of surgical operation[66] or emergency[67] defences.

The various *possible* defences[68] to the crime of child destruction do not significantly impact on the potential overlap of the offence with the practice and regulation of medical abortion. In each jurisdiction such defences (with the possible exception of Queensland) are far narrower and restrictive, and more onerous for the defendant, than the defences available for unlawful abortion, or the conditions prescribed for lawful medical abortion. This is most clearly demonstrated in the Australian Capital Territory, where medical abortions are now

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62 It is for this reason (among others) that the Victorian Law Reform Commission ('VLRC') described the UK approach (which, as noted above, is similar to the Tasmanian model in this respect) as 'not a considered response': VLRC, *Law of Abortion*, Final Report No 15 (2008) 108.

63 The VLRC recommended abolishing the offence of child destruction: ibid 108–9. The Victorian legislature followed that recommendation in 2008: *Abortion Law Reform Act 2008* (Vic) s 9.

64 *Criminal Law Consolidation Act 1935* (SA) s 82A(7); *Criminal Code* (Tas) s 165(2). Also see *1929 UK Act* s 1(1).

65 This legislative defence was utilised in the landmark abortion decision of *R v Bourne* [1939] 1 KB 687, in which Macnaghten J held that it was possible to perform a lawful abortion on the same grounds — that is, in good faith for the purpose only of preserving the woman's life: at 690–1.

66 *Criminal Code* (Qld) s 282; *Criminal Code* (WA) s 259.

67 *Criminal Code* (WA) s 25; *Criminal Code 2002* (ACT) s 41; *Criminal Code* (NT) s 33.

68 Any suggested defences to the offence of child destruction are speculative, with the exception of South Australia and Tasmania (which both expressly provide for statutory defences to child destruction), and Queensland, where *Bayliss* (1986) 9 Qld Lawyer Reps 8 has suggested the availability of a legislative defence to the crime: at 37 and 41.

lawful,[69] and solely regulated by health services law.[70] The only condition is that the medical abortion be performed in an approved facility,[71] whereas the possible defence options for a medical practitioner charged with child destruction may be limited to 'sudden or extraordinary emergency',[72] or perhaps the common law defence of necessity.[73]

Broadly comparable discrepancies between the legal tests for justified medical abortion, and those for justified child destruction, exist in other jurisdictions. To summarise:[74] in South Australia, as noted above, the defence for child destruction demands that it was necessary to preserve the mother's life,[75] whereas the defence for unlawful abortion is made out if 'the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated';[76] in the Northern Territory a medical abortion is lawful on similar 'greater risk' grounds,[77] but the defence to child destruction, if there is a defence, is probably limited to the excuse (that is, not a justification) of 'sudden and extraordinary emergency';[78] and in Western Australia a medical abortion is considered lawful if performed with the woman's 'informed consent',[79] whereas the defence to child destruction might be constrained to 'emergency'[80] or the 'surgical and medical treatment' defence,[81] which is only made out when the treatment was necessary 'for the preservation of the mother's life'.[82]

As stated above, the possible exception to this is Queensland, as the appropriate defence for unlawful abortion — the 'surgical operations and medical treatment' defence[83] — may also apply to child destruction. Although the defence would only be applicable in order to 'preserve the mother's life',[84] this aspect of the s 282 defence has been interpreted quite broadly when applied to the offence of

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69 *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT). For a discussion of this Act, see Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316, 329–32.

70 *Health Act 1993* (ACT) ss 80–4.

71 Ibid s 82.

72 *Criminal Code* (ACT) s 41.

73 See, eg, *R v Davidson* [1969] VR 667, 670–2. For a brief discussion of issues that may arise in applying this defence to child destruction see Kristin Savell, 'Is the "Born Alive" Rule Outdated and Indefensible?' (2006) 28 *Sydney Law Review* 625, 649–50.

74 The following brief statements about the law of abortion in each jurisdiction are simplistic in the extreme and serve only to highlight what is necessary to prove the point being made: that different and more limited defences may be applicable to child destruction than to abortion. For a more detailed description and analysis of current Australian abortion law see Rankin, above n 6.

75 *Criminal Law Consolidation Act 1935* (SA) s 82A(7).

76 Ibid s 82A(1)(a)(i).

77 *Medical Services Act* (NT) s 11.

78 *Criminal Code* (NT) s 33.

79 *Health Act 1911* (WA) s 334(3)(a). 'Informed consent' is defined under the legislation as only possible subsequent to mandatory counselling and referral (s 334(5)).

80 *Criminal Code* (WA) s 25.

81 Ibid s 259.

82 Ibid s 259(1)(b). Of course, this phrase might be interpreted quite broadly, as it was with respect to the similar provision in Qld: *Bayliss* (1986) 9 Qld Lawyer Reps 8.

83 *Criminal Code* (Qld) s 282.

84 Ibid s 282(1)(b).

unlawful abortion.[85] One may reasonably assume that it would be similarly constructed if held to be also appropriate to the offence of child destruction. If s 282 is applicable to both abortion and child destruction, then justified medical abortion is simultaneously justified child destruction; if the defence under s 282 is satisfied, then the medical practitioner is thereby exculpated for both offences. However, the applicability of s 282 to the offence of child destruction in Queensland is by no means certain,[86] and until a superior court,[87] or the legislature, expressly makes this connection between child destruction and s 282, the overlap between otherwise justified medical abortion and unlawful child destruction remains a possibility in Queensland. Thus, it remains the case in all jurisdictions that one cannot rely on the fact that the abortion is otherwise lawful: it may nonetheless be child destruction if that abortion was performed on a child protected by that offence; a child capable of being born alive.

B *The Latent Scope of the Offence: Defining 'A Child Capable of Being Born Alive'*

There have been no Australian decisions turning on the offence of child destruction, nor the interpretation of the phrase 'child capable of being born alive', but in the UK two higher courts have dealt specifically with the phrase. The matter of *C v S*[88] was the first time a UK court had considered the meaning of the phrase 'child capable of being born alive' in the context of the offence of child destruction.[89] The case focused on a foetus of approximately 18–21 weeks gestation, and concerned an application by the father of this foetus to obtain an injunction to prevent the mother from terminating the pregnancy. The father sought the injunction on the basis that any such abortion would constitute an offence, as the foetus was a child capable of being born alive pursuant to *1929 UK Act* s 1.

Justice Heilbron delivered the decision at first instance. Her Honour felt that the phrase 'child capable of being born alive', although 'ambiguous',[90] and 'capable of different interpretations',[91] should nonetheless be interpreted consistently with the common law born alive rule.[92] Her Honour held that the born alive rule required that a child actually breathe for it to be said to be 'born alive', and accordingly determined that the capacity to breathe was essential for a child to be described as 'capable of being born alive'.[93] As it was not clear on the evidence before the court whether the foetus in question was capable of breathing, Heilbron J held that no (hypothetical) offence could be established, as the (hypothetical) prosecution would thus be unable to prove that the foetus was a 'child capable of

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85 See *Bayliss* (1986) 9 Qld Lawyer Reps 8.

86 The court in *Rance* [1991] 1 QB 587 held that legislation providing defences for unlawful abortion does not provide defences to the offence of child destruction: at 628.

87 McGuire J implied that s 282 may be applicable to the offence contained in s 313, but made no specific finding on this point: *Bayliss* (1986) 9 Qld Lawyer Reps 8, 37, 41.

88 [1987] 1 All ER 1230.

89 For a detailed contemporaneous study of the case see David P T Price, 'How Viable is the Present Scope of the Offence of Child Destruction?' (1987) 16 *Anglo-American Law Review* 220, 220–5.

90 *C v S* [1987] 1 All ER 1230, 1238.

91 Ibid 1239.

92 Ibid 1238–9.

93 Ibid.

being born alive'.[94] Justice Heilbron's decision was upheld on appeal.[95] The case is thus strong authority contrary to the view that viability is required by the phrase,[96] as the capacity to breathe is reached prior to most concepts of viability,[97] and the court was quite clear in rejecting viability as a necessary condition for a child capable of being born alive.[98]

In the other UK case to deal with the phrase, that of *Rance*,[99] the court essentially followed *C v S*. In *Rance*, the parents of a child born with severe disabilities brought an action against the health authority and a medical practitioner for negligently failing to diagnose the child's handicap when an ultrasound was performed when the mother was 26 weeks pregnant. The plaintiffs claimed damages for the cost of raising the child, as they claimed that, had they known of the child's disabilities when the ultrasound was performed, the mother would have aborted the child. The defendants contended that the mother could not have lawfully terminated her pregnancy because a foetus of 26 weeks gestation was a child capable of being born alive, and thereby protected by the *1929 UK Act* s 1(1).

In delivering a decision in favour of the defendants, Brooke J, in line with the court in *C v S*, was in no doubt that the phrase 'child capable of being born alive' was to be interpreted in accordance with the 'born alive' rule.[100] His Honour felt that this interpretation of the phrase was consistent with Parliament's intention in 1929,[101] and further that Parliament intended to protect the child so described even when in the mother's womb.[102] Justice Brooke held that a child must be fully born and 'breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother'[103] to be said to be born alive. His Honour subsequently held that if a foetus had reached a stage where it was capable, if it were to be born, of living and breathing through its own lungs without any connection to the mother, then it was a child capable of being born alive,[104] and thereby protected by the offence of child destruction.[105] This was the case even if such a foetus would probably only have breathed and lived for a few hours,[106] thus rejecting any notion

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94 Ibid 1239–41.

95 Ibid 1242 (per Donaldson MR).

96 Price, above n 89, 225–6. The case received contemporaneous criticism for not determining that the phrase 'child capable of being born alive' is synonymous with viability: see, eg, Keown, above n 14, 141–2. It also received contemporaneous support for this conclusion: see, eg, Price, above n 89, 231–4.

97 Keown, above n 14, 141–2. Cf Victor Tunkel, 'Late Abortions and the Crime of Child Destruction: (1) A Reply' [1985] *Criminal Law Review* 133, 136, who argues that the capacity to breathe is virtually synonymous with viability.

98 *C v S* [1987] 1 All ER 1230, 1242. Also see Price, above n 89, 231–5.

99 *Rance* [1991] 1 QB 587.

100 Ibid 620–1.

101 Ibid 620. See also Gerard Wright, 'The Legality of Abortion by Prostaglandin' [1984] *Criminal Law Review* 347, 348–9. Cf Keown, above n 14, 129–31, 138–40; Price, above n 89, 225; Tunkel, above n 97, 135–6. The Victorian Law Reform Commission, in its own assessment of the *1929 UK Act*, concluded that the legislative intent in this respect was uncertain: see VLRC, above n 62, 98.

102 [1991] 1 QB 587, 620.

103 Ibid 621.

104 Ibid 620–2.

105 Ibid 628.

106 Ibid 616–17, 626–7.

of viability, which would argue for a more sustained period of survival.[107] The court decided that a foetus of 26 weeks gestation was capable of breathing if born,[108] so the foetus in question was a child capable of being born alive, and consequently any abortion performed on that foetus would have been unlawful.[109]

Although both of the above UK decisions focus on the capacity to breathe in establishing whether a child is capable of being born alive, it must be noted that this attention to breathing stems from a specific understanding of the born alive rule; an interpretation that relies almost solely on the 1874 case of *R v Handley*,[110] which held that a child was born alive only if it breathed.[111] As will be shown, Australian courts have adopted a more expansive view of the born alive rule. At time of writing, no further cases have interpreted the phrase 'child capable of being born alive', either in the UK or Australia. In determining an appropriate meaning of the phrase for contemporary Australian law, we are therefore left with the paramount guiding principle, derived from the two UK cases discussed above, that the phrase should be interpreted consistently with the common law born alive rule.[112] It is thus not only instructive, but mandatory, to analyse what actually constitutes the born alive rule.

C *The Born Alive Rule*

The born alive rule has a long history,[113] and has been described as 'a fundamental part of our legal system.'[114] It originated in the criminal law principle that only a born human being — one that has 'completely proceeded into the world from its mother's body'[115] — may be the victim of homicide.[116] A number of UK decisions in the 19th century cemented this principle within the common law canon,[117] and

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[107] Conversely, the court did provide obiter statements that suggested no definitive determination was being made on this point: ibid 621–2. Also see the earlier Court of Appeal case of *McKay v Essex Area Health Authority* [1982] 2 All ER 771, 780 (Stephenson LJ).

[108] [1991] 1 QB 587, 624.

[109] Ibid 628.

[110] (1874) 13 Cox CC 79 ('*Handley*').

[111] Ibid 80–1 (Brett J); *Rance* [1991] 1 QB 587, 620; *C v S* [1988] QB 135, 151.

[112] *C v S* [1987] 1 All ER 1230, 1239 (Heilbron J); *Rance* [1991] 1 QB 587, 621.

[113] Earliest references to a nascent rule may be found in the 16th century: see Stanley B Atkinson, 'Life, Birth and Live Birth' (1904) 20 *Law Quarterly Review* 134, 154. The earliest known judicial expression of the born alive rule is *R v Sims* (1601) Goldsborough 176; 75 ER 1075.

[114] VLRC, above n 62, 97.

[115] James Fitzjames Stephen, *A History of the Criminal Law of England Volume III* (MacMillan & Co, 1883) 2.

[116] See Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (W Clarke & Sons, 1791) 50; William Hawkins, *Pleas of the Crown* (S Sweet, R Pheney and A Maxwell, first published in 1716, 1824 ed) 94–5; Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (W A Stokes and E Ingersoll, first published in 1736, 1847 ed) 432–3; Stephen, above n 115, 2; Waller, above n 14, 37–9.

[117] See *R v Poulton* (1832) 5 C & P 329, 330; 172 ER 997, 998; *R v Enoch* (1833) 5 C & P 539, 541; 172 ER 1089, 1090; *R v Brain* (1834) 6 C & P 349, 349–50; 172 ER 1272, 1272; *R v Crutchley* (1837) 7 C & P 814, 815–16; 173 ER 355, 356; *R v Sellis* (1837) 7 C & P 850, 851; 173 ER 370, 370.

Australian criminal courts in the 20th and 21st centuries have maintained the rule.[118] The rule has also found expression in civil cases, with courts holding that a child *en ventre sa mere* does not have any legal rights (including being a party to an action), as it 'has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother.'[119]

Although the law recognises that a child may bring an action for damages for injuries sustained before birth,[120] the law also emphasises that such a claim only 'crystallises on the birth, at which date, but not before, the child attains the status of a legal persona, and thereupon can then exercise that legal right.'[121] Thus, the creation of this 'fictional construction'[122] in order to benefit the born individual does not deviate from the born alive principle, as the child must subsequently be born alive to benefit from this fictional construction. In a sense, the courts have created a 'potential right', and 'the child must attain by his birth the necessary capacity in order to enforce the right'.[123] This type of retrospective acknowledgment, provided the child is born alive, can also be found in the criminal law, in the sense that an intention to cause the death of the foetus in utero may amount to the mens rea for murder if the child is subsequently born alive (and then dies from those prenatal wounds intentionally inflicted), despite the fact that there existed no legal person at the time the requisite intention to kill that [non]-person was formed.[124]

Notwithstanding such fictional construction anomalies, the common law is unambiguous in its demand that a child be born alive before it may be bestowed

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118 See *R v Hutty* [1953] VLR 338, 339; *R v F* (1996) 40 NSWLR 245, 247–8; *R v King* (2003) 59 NSWLR 472, 490; *R v Iby* (2005) 63 NSWLR 278, 282–3 ('*Iby*'); *Barrett v Coroner's Court of South Australia* (2010) 108 SASR 568, 573–5 ('*Barrett*').

119 *In the Marriage of F* (1989) 13 Fam LR 189, 194. See also *A-G (Qld) ex rel Kerr v T* (1983) 57 ALJR 285, 286 (Gibbs CJ); *K v T* [1983] 1 Qd R 396, 401; *A-G (Qld) ex rel Kerrv T* [1983] 1 Qd R 404, 407. All these Australian decisions place great emphasis on the judgment of Baker P in *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 279.

120 See the landmark decision in *Watt v Rama* [1972] VR 35, 360 (Winneke CJ and Pape J); 376–7 (Gillard J). See also *Lynch v Lynch* (1991) 25 NSWLR 411, in which this reasoning was extended to enable a born child to even sue its mother for injuries sustained in car crash while in utero, but the court (aware of the obvious dangers of such an extension) expressly confined the decision to negligent driving: at 414–16.

121 *C v S* [1987] 1 All ER 1230, 1234 (Heilbron J).

122 This term was used as early as 1935 in *Elliot v Lord Joicey* [1935] AC 209, in which Lord Russell of Killowen explained that, provided it was 'within the reason and motive of the gift', a child *en ventre sa mere* may be considered 'born' or 'living' or 'surviving' for the purposes of a will, such that, if subsequently born alive, that child would then be within a class of children or issue described as 'surviving' at the particular point of time referred to in the will. His Lordship described this as a 'fictional construction' in order to benefit the born individual: at 233–4.

123 *Watt v Rama* [1972] VR 353, 375. See also *R v Sood (Ruling No 3)* [2006] NSWSC 762 (15 September 2006) [45]–[49] (Simpson J).

124 See *R v F* (1993) 40 NSWLR 245, 247–8 (Grove J); *R v Martin* (1996) 86 A Crim R 133, 139 (Murray J). See also P H Winfield, 'The Unborn Child' (1942) 8 *Cambridge Law Journal* 76, 78; Waller, above n 14, 52. The *Criminal Code* (Tas) s 153(5) expressly indicates that the killing of such a child may constitute homicide irrespective of whether the injuries that caused its death were received before, during, or after its birth. Cf *A-G's Reference (No 3 of 1994)* [1998] AC 245.

with legal personality.[125] As to what actually constitutes 'born alive', perhaps the best exposition of the rule is that delivered by Barry J in *R v Hutty*:[126]

> Murder can only be committed on a person who is in being, and legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord: that does not prevent it from having a separate existence. But it is required, before the child can be the victim of murder or of manslaughter or of infanticide, that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs.[127]

The test for whether a child has been born alive thus has two components: first, that the child is fully extruded from the womb of its mother; and second, that it has a separate and independent existence after birth.[128] It is noteworthy that once separated and existing independently, the child is considered born alive, and there is no condition that it need survive for any specified period of time. Courts have been clear in holding that the 'born alive rule has never encompassed a requirement of viability in the sense of the physiological ability of a newly born child to survive as a functioning being'.[129] Therefore, despite the fact that it is doomed and will not survive for any length of time, provided it lives for a moment, a pre-viable child born alive may be the victim of homicide.[130]

Of the two limbs of the test for a child being born alive, the first is relatively straightforward — complete extrusion means 'completely delivered from the body of its mother'[131] (although the child may still be attached via the umbilical cord)[132] — but the second limb of the test creates some uncertainty. In particular, the question may be posed as to what constitutes a 'separate and independent existence in the sense that it does not derive its power of living from its mother'?[133] Or, as Spigelman CJ put it in *Iby*, 'what constitutes "life" for the purposes of the born

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125 This article will not discuss whether birth is an appropriate point at which to bestow legal personhood, or whether other points of reference, such as foetal viability, are more suitable. For excellent discussion of these issues see Patricia A King, 'The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn' (1979) 77 *Michigan Law Review* 1647; Savell, above n 73. King argues that birth should be abandoned as the designator of personhood, and that viability is the more appropriate signifier of legal personality, while Savell persuasively defends the common law position, from both a legal and moral perspective.

126 [1953] VLR 338.

127 Ibid 339.

128 See *R v F* (1996) 40 NSWLR 245, 247–8; *R v King* (2003) 59 NSWLR 472, 490; *Iby* (2005) 63 NSWLR 278, 283; *Barrett* (2010) 108 SASR 568, 573–5.

129 *Iby* (2005) 63 NSWLR 278, 286 (Spigelman CJ). See also *Barrett* (2010) 108 SASR 568, 574, 579 (White J), 591–2 (Peek J).

130 *R v Senior* (1832) 1 Mood 347; 168 ER 1298; *R v West* (1848) 2 C & K 784; 175 ER 329, 330; *Iby* (2005) 63 NSWLR 278, 286–7; *Barrett* (2010) 108 SASR 568, 579 (White J), 591–2 (Peek J).

131 *R v Hutty* [1953] VLR 338, 339 (Barry J).

132 Ibid; *Iby* (2005) 63 NSWLR 278, 283.

133 *R v Hutty* [1953] VLR 338, 339.

alive rule?'[134] The real question is thus an evidentiary one: what physical (and thereby measurable) manifestation would satisfy this test?

In the 19th century the UK courts offered up a number of possibilities as to what particular indicator is required as evidence of 'life'. For example, in *Handley*[135] the court felt that a child breathing, and living by reason of its breathing, through its own lungs alone, was indicative of an independent existence from its mother, and was therefore both sufficient and necessary to establish that the child had been born alive.[136] As noted above, the courts in *C v S* and *Rance* followed the decision in *Handley* in deciding that breathing was required to satisfy the born alive rule, and that therefore the capacity to breathe was essential for a child to be described as capable of being born alive. However, this focus on *Handley* is questionable given that equally authoritative cases prior to *Handley* had explained that this breathing requirement should not be the crucial indicator,[137] as a child might breathe prior to being fully born,[138] or not breathe unassisted for some time after birth.[139]

Another early view put forward was that only a child with independent circulation (that is, independent of its mother's circulation) could be described as having a separate and independent existence.[140] However, this too was soon discarded as the essential condition for establishing independent vitality.[141] The issue remained largely unsettled in the UK until the decisions of *C v S* and *Rance* revived the *Handley* principle that breathing was the crucial indicator of life for the purposes of the born alive rule. In Australia courts tended not to place emphasis upon such specific indicators of life, preferring to adopt a broader field of inquiry, exemplified by Barry J's conclusion that life was indicated by a child 'living by virtue of the functioning of its own organs'.[142] Two recent higher court decisions have continued this trend, and have arguably settled the issue as to what constitutes a sign of life or vitality for the purposes of satisfying the separate and independent existence test of whether a child has been born alive. Neither of these decisions fixated upon any particular indicator of life, but rather held that any sign of life will suffice.

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134 (2005) 63 NSWLR 278, 284. See also Atkinson, above n 113, 142, who, at the turn of last century, expressed that question as what '"ocular demonstration" of a physiological token of vitality, however curtailed must be exhibited, after a child is born into the world?' Atkinson answers that a 'clear vital act'(at 142) or 'a clear sign of independent vitality' is necessary: at 135.

135 (1874) 13 Cox CC 79.

136 Ibid 80–1 (Brett J).

137 See *R v Poulton* (1832) 5 C & P 328; 172 ER 997, 998; *R v Enoch & Pulley* (1833) 5 C & P 539; 172 ER 1089.

138 See *R v Poulton* (1832) 5 C & P 328; 172 ER 997; *R v Enoch & Pulley* (1833) 5 C & P 539; 172 ER 1089.

139 See *R v Brain* (1834) 172 ER 1272. The recent Australian case of *Iby* came to the same conclusion: (2005) 63 NSWLR 278, 286.

140 See *R v Enoch & Pulley* (1833) 5 C & P 539; 172 ER 1089; *R v Wright* (1841) 173 ER 1039.

141 See *Brock v Kellock* (1861) 3 Giff 58, 68–9; 66 ER 322, 326 (Lord Stuart); *R v Pritchard* (1901) 17 TLR 310, 311.

142 *R v Hutty* [1953] VLR 338, 339.

In *Iby*,[143] the New South Wales Court of Criminal Appeal considered the issue at length prior to reaching a decision.[144] The appellant in this case had been convicted of the manslaughter of a child that issued from its mother at 38 weeks gestation, and the appeal against that conviction was based on the claim that the child had not been born alive; hence, the appellant had not caused the death of a legal person. A particular focus of the appellant's case was the lack of evidence that the child had breathed independently.[145] In delivering the judgment of the Court dismissing the appeal, and holding that the child in question had been born alive, Spigelman CJ held that the second limb of the born alive test — that the child has a separate and independent existence after birth — was really just asking whether, once it was demonstrated that the child was fully extruded, the child actually lived.[146] His Honour felt that this could be shown by 'many overt acts including crying, breathing, heartbeat'[147]and so forth. His Honour also confirmed that breathing was not a necessary condition in this respect (and thereby declined to follow the reasoning in *Handley*),[148] but breathing independently of the mother was sufficient,[149] because 'any sign of life after delivery is sufficient'.[150] Thus, the second limb of the born alive test becomes relatively straightforward as a result of this decision: did the child show *any* sign of life?

In 2010 the Full Court of the South Australian Supreme Court delivered a judgment on the issue that applied this reasoning from *Iby* in the broadest sense. In *Barrett*[151] the Court heard an application for judicial review of a decision of the Deputy State Coroner that the Coroner's Court had jurisdiction to conduct an inquest into the death of a newborn infant. The Court was thus asked to determine whether the child had been born alive, as the Coroner's Court would only have such jurisdiction if the child in question was a legal person. In interpreting the common law born alive rule, the Court, consistently with the decision in *Iby*, held that '*any* sign of life after the complete delivery of an infant will be sufficient to satisfy the rule'.[152] The Court decided that even a very faint sign of life, and even in the absence of any other sign of life, was sufficient for the purposes of the born alive rule.[153] In the facts before the Court, the sign of life held to satisfy the test, and thus constitute a sign of life sufficient for the child to be said to have been born alive,[154] was the presence of a pulseless electrical activity ('PEA') in an infant's heartbeat.

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143 (2005) 63 NSWLR 278.
144 For a more in-depth discussion of this aspect of the case see Ian Freckelton, 'The "Born Alive" Rule' (2006) 13 *Journal of Law and Medicine* 285, 285–8.
145 *Iby* (2005) 63 NSWLR 278, 280.
146 Ibid 284–5.
147 Ibid 285.
148 Ibid.
149 Ibid.
150 Ibid 288.
151 (2010) 108 SASR 568.
152 Ibid 575 (emphasis in original).
153 Ibid 577.
154 Ibid 602.

This is applying the phrase 'any sign of life' quite literally. The facts of the case, expressed by White J,[155] indicate that the child in question was born apparently lifeless, but that when an ambulance crew applied a heart monitor to the child's body it registered a PEA. Despite attempts at resuscitation, no other signs of life were recorded or observed. There was no heartbeat, no pulse, no breathing, no moving, no crying, and 'the only possible sign of life was the PEA registered on the heart monitor'.[156] The nature of a PEA is such that it is the weakest indication of heart activity, and is not a heartbeat or pulse as such, but rather an indicator of minor irregular contractions of the heart.[157] The Court held that, despite not being supported by any other indication of life, and despite being short in duration, it was nonetheless 'an indication of vitality',[158] and '[t]he prospect that death is almost certain does not deprive an indication of life of its effect as a sign of life'.[159]

As a result of these two recent decisions on the born alive rule, one may now assert that Australian law recognises that there is no 'single indicator'[160] or necessary criteria of life, and the test is 'satisfied by any indicia of independent life'.[161] Consequently, a child fully extruded from its mother that shows any sign of life, no matter how faint or fleeting, will have been born alive.[162] This interpretation of the born alive rule is consistent with a literal interpretation of most Australian legislation that defines the attainment of legal personhood,[163] and with the current World Health Organisation (and South Australian government) definition of 'live birth'.[164] As stated above, one might reasonably conclude that the matter is now settled, and any sign of life will suffice to constitute being born alive. This raises the question: does the phrase 'child capable of being born alive' carry similar connotations?

Returning to the UK decisions of *C v S* and *Rance*, one may state that those cases stand for three legal propositions that logically follow each other:

1. That the phrase 'child capable of being born alive' must be interpreted consistently with the born alive rule;

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155 Ibid 570–2.

156 Ibid 572.

157 For White J's discussion of the details of a PEA: ibid 576–7. For Peek J's analysis of the PEA: 580–3. Indeed, it was submitted by counsel that a PEA only indicates a potential for life, but the Court disagreed and decided that it was evidence of actual life: at 577–9 (White J); 588–91 (Peek J).

158 Ibid 578 (White J).

159 Ibid 579 (White J). See also identical comments by Peek J: at 591–2.

160 Ibid 574 (White J). See also *Iby* (2005) 63 NSWLR 278, 284–90.

161 *Iby* (2005) 63 NSWLR 278, 287 (Spigelman CJ).

162 Ibid 287–8.

163 *Criminal Code* (Tas) s 153(4); *Criminal Code* (Qld) s 292; *Criminal Code* (NT) s 1C; *Criminal Code* (WA) s 269. New South Wales and the ACT insist upon the 'wholly born' child having breathed before it can be described as a legal person: *Crimes Act 1900* (NSW) s 20*; Crimes Act 1900* (ACT) s 10.

164 See World Health Organization, *Reproductive Health Indicators: Guidelines for their Generation, Interpretation and Analysis for Global Monitoring* (WHO, 2006) 16; Maternal, Perinatal and Infant Mortality Committee, *Maternal, Perinatal and Infant Mortality in South Australia 2010* (SA Health, Government of South Australia, 2012) 62.

2. That the born alive rule demands that a child be fully extruded from the mother, and be breathing independently (albeit briefly and with no hope of survival), in order to be labelled 'born alive'; and

3. Accordingly, a foetus in utero that has the capacity to so breathe constitutes a child capable of being born alive, and is thereby protected by the offence of child destruction.

As stated previously, there are no Australian decisions on the phrase or the offence, so we may take these UK decisions as being particularly persuasive authority on how the phrase should be interpreted. However, the recent Australian decisions on the born alive rule — *Iby* and *Barrett* — serve to modify the above propositions as they apply in Australia; namely, proposition '2' is no longer good law in Australia, and Australian common law now holds that a wholly extruded child showing any sign of life (albeit briefly and with no hope of continued survival) will suffice as a child born alive. This determination, in turn, amends proposition '3' to: a foetus in utero that has the capacity, if fully born, to show any sign of life is a child capable of being born alive, and is thereby protected by the offence of child destruction.

What do these legal conclusions mean for the practice of medical abortion in those jurisdictions that retain the offence of child destruction? Put simply, an otherwise lawful medical abortion performed on a foetus that, if fully born, would show *any* sign of life, even for an instant, may constitute the offence of child destruction. As to how many otherwise lawful medical abortions may be caught by the offence of child destruction so enunciated, one must first determine how early in a pregnancy a foetus might be described as a child capable of being born alive. In other words, at what stage of gestation is a foetus likely to show any sign of life if fully born? As will be shown, current data suggests that this may occur at a relatively early stage in gestation, thereby bringing the potential operation of the offence of child destruction into the practice realm of a significant number of medical abortions.

D *'Any Sign of Life'*

There is no question that a viable foetus would satisfy the above definition of a child capable of being born alive, as 'viability' self-evidently indicates that such a born child would show signs of life; indeed, would be likely to survive. Although viability is an inherently ambiguous term,[165] the current medical consensus is that it is usually reached sometime between 23 and 24 weeks gestation.[166]

Of course, a foetus may also show brief signs of life if fully born at a pre-viable stage. The World Health Organization holds that the beginning of the perinatal period starts at 22 weeks gestation, as this is assumed to be the age at which a foetus is capable of showing signs of life if born.[167] Indeed, it has been

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165 Price, above n 89, 226–31; King, above n 125, 1654, 1678–9; Savell, above n 73, 643.

166 Noel French, 'Consensus Statement on Perinatal Care' (2007) 43 *Journal of Paediatrics and Child Health* 492; VLRC, above n 62, 101.

167 World Health Organization, above n 164, 25, 29 and 36.

amply demonstrated that signs of life will be evident in a fully born foetus of only 20 weeks gestation.[168] In South Australia, where comprehensive records on both abortion and live births (defined as 'complete expulsion or extraction from its mother…[and showing after such separation]…any…evidence of life')[169] are available, in 2010 there were 26 live births of foetuses under 24 weeks gestation,[170] and 11 live births recorded of foetuses that weighed less than 400 grams.[171] Given that the mean birth weight of foetuses born at 20 weeks gestation is between 385 grams and 418 grams,[172] it is reasonable to extrapolate that some of these live births would probably have been of foetuses of less than 20 weeks gestation. The Maternal, Perinatal and Infant Mortality Committee of the Government of South Australia consequently presumes that a foetus of 20 weeks gestation is inherently capable of live birth.[173] One may therefore conclude that the overlap between the offence of child destruction (as defined in this article) and the practice of medical abortion occurs with certainty from 20 weeks gestation. The question presents itself: could this overlap occur even earlier?

In terms of relevant foetal development, although the heart begins to beat as early as 22 days,[174] it is not fully formed until about 10 weeks gestation,[175] and the vasculature or circulatory system is mostly completed at 12 weeks gestation.[176] In terms of brain development, at 16 weeks gestation a template for a recognisable human brain exists.[177] Consequently, it is not surprising that there exist reports that foetuses at 16 weeks gestation have survived birth (albeit briefly).[178] Given that any sign of life will suffice for a child to be described as being born alive, the evidence therefore leads to two conclusions: that a foetus of 20 weeks or more gestation *is capable* of being born alive; and that a foetus of between 16 and 19 weeks gestation *is probably capable* of being born alive. These conclusions have significant repercussions for the practice of medical abortion.

As said at the introduction to this article, medical abortion is permitted in a wide set of circumstances. In some jurisdictions (notably the Northern Territory and Western Australia for present purposes) the criteria for lawful abortion changes at certain points of foetal gestation,[179] but, with the exception of the

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168 J Bhatia, 'Palliative Care in the Fetus and Newborn' (2006) 26 (Supp 1) *Journal of Perinatology* 24; P I Macfarlane, S Wood and J Bennett, 'Non-Viable Delivery at 20–23 Weeks Gestation: Observations and Signs of Life after Birth' (2003) 88 *Archives of Disease in Childhood Fetal and Neonatal Edition* 199.

169 Maternal, Perinatal and Infant Mortality Committee, above n 164, 62.

170 Ibid 26.

171 Maternal, Perinatal and Infant Mortality Committee, above n 164, 24.

172 Ibid 82–3.

173 Ibid 19–20.

174 William Larsen, *Human Embryology* (Churchill Livingstone, 3rd ed, 2001) 177–9.

175 Ibid 158.

176 Ibid 196.

177 Ibid 420.

178 See Keown, above n 14, 133.

179 In the Northern Territory medical abortion is permitted on relatively liberal grounds only up to 14 weeks gestation: *Medical Services Act* (NT) s 11(1)(d). From 14 to 23 weeks gestation an abortion must be 'immediately necessary to prevent serious harm' to the pregnant woman: s 11(3). After 23 weeks gestation, an abortion will only be lawful if it is necessary for the sole purpose of preserving the pregnant woman's life: s 11(4)(a). In Western Australia, medical abortion is lawful on liberal grounds up to 20 weeks gestation: *Health Act 1911* (WA) s 334(7). After 20 weeks, two medical

Northern Territory, it is also the case that all jurisdictions that retain an offence of child destruction simultaneously allow lawful medical abortion, on liberal (but varied) terms, until the foetus is viable.[180] Given the finding that a foetus of 20 weeks gestation is a child capable of being born alive, and a foetus of 16 weeks is probably capable of being born alive, then one would assume that a not insignificant number of medical abortions are legally suspect.

As to exact figures nationwide, it is impossible to state conclusively, as South Australia is the only jurisdiction that publishes sufficiently detailed data on abortions.[181] Although less specific data is available elsewhere,[182] it cannot be relied upon to the same extent as the South Australian data.[183] Nonetheless, it would be reasonable to extrapolate from the South Australian data that broadly comparable figures might be found in most other jurisdictions.[184] In South Australia, approximately 1.8 per cent of all medical abortions that occur per year are performed at or after 20 weeks gestation,[185] and about 6.3 per cent of all medical abortions per year are performed between 15 and 19 weeks gestation.[186] Given previous conclusions, this means that, in South Australia, approximately 90 abortions per year are performed upon a child capable of being born alive (that is, a foetus of at least 20 weeks gestation), and approximately 320 abortions per year are performed on a child that is probably capable of being born alive (that is, a foetus of between 15 and 19 weeks gestation).[187] As stated above, it is not unreasonable to assume that most other jurisdictions would present with broadly equivalent figures. To state the obvious: the potential ramifications of the offence of child destruction to the practice of medical abortion are significant.

III Conclusion

If Australian courts were to follow the UK courts, and interpret the phrase 'a child capable of being born alive' consistently with the born alive rule, which in

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practitioners, who are members of a panel of at least six medical practitioners (nominated by the Minister), must agree that the 'mother, or the unborn child, has a severe medical condition that justifies the procedure': *Health Act 1911* (WA) s 334(7)(a). The procedure must be performed in an approved facility for it to be considered lawful: s 334(7)(b).

180 For a discussion of the varied time constraints in each jurisdiction, see Douglas, above n 6; Bennett, above n 6; Rankin, above n 6.

181 The Australian Capital Territory, New South Wales, the Northern Territory, Victoria and Western Australia also collect data concerning abortions, but do not regularly publish such data: Pratt et al, above n 11, 7.

182 For example, the Health Insurance Commission publishes data concerning certain items under the Medicare Benefits Schedule ('MBS') that may indicate an abortion has been performed. This data suggests that approximately 74 000 abortions are performed every year in Australia. However, this data is unpredictable as the items counted under the MBS often do not actually result in an abortion, and the Medicare data necessarily excludes any privately funded abortions. Furthermore, such data only indicates the total number of abortions, and not the gestational age of the foetus: ibid 3–6.

183 Ibid 7, 9–10.

184 Ibid; Petersen, above n 7, 356.

185 Scheil et al, above n 11, 11, 54. Comparable figures have been found in previous years: see Chan et al, *Pregnancy Outcome in South Australia 2008* (Pregnancy Outcome Unit, SA Health, Government of South Australia, 2009) 11.

186 Scheil et al, above n 11, 11, 54. Also see Chan et al, above n 185, 11.

187 Ibid.

Australia is currently satisfied upon any sign of life, then there is clear overlap between the practice of medical abortion and the offence of child destruction.[188] Although most abortions are performed prior to the second trimester of pregnancy,[189] many abortions are performed in the second trimester,[190] which is the period during which the foetus might be said to be capable of exhibiting demonstrable signs of life if delivered during that gestational stage. In those jurisdictions that retain the offence of child destruction, such second trimester medical abortions may constitute that offence, leaving the medical practitioners who perform them 'vulnerable to criminal liability'.[191]

Of course, this conclusion presupposes two legal steps being satisfied: first, that the jurisdictions of the Australian Capital Territory, the Northern Territory, Queensland and Western Australia possess an offence of child destruction that not only protects a child in relation to childbirth or imminent delivery, but also a foetus that may be described as a child capable of being born alive (in South Australia, where the provision is based on the UK model, the phrase is expressly utilised in the legislation, so there is no doubt that this step is satisfied), second, Australian courts would determine the phrase 'child capable of being born alive' in the context of the born alive rule, resulting in a foetus capable of showing any sign of life if fully born being a child capable of being born alive for the purposes of the offence of child destruction.

There is no Australian case law directly on point, so no determinative assessment may be made of whether either of the above two legal preconditions would be met. However, this lack of an authoritative determination means that the possibility exists that the above presumptions represent an accurate statement of the law currently operating in the Australian Capital Territory, the Northern Territory, Queensland, South Australia, and Western Australia. In South Australia, where the relevant legislation is practically identical to the *1929 UK Act*, it might be said that the interpretation suggested above is probably correct. In the other jurisdictions mentioned one may only state categorically that the suggested interpretation is possible. However, in Queensland and Western Australia that possibility has been brought into sharper focus by comments made by the judiciary in those states consistent with the above stated presumptions.[192] In any case, the important conclusion is that there exists a possibility that certain otherwise lawful medical abortions may be unlawful as they constitute the offence of child destruction. This is irrefutable: such a possibility exists. In those jurisdictions that retain the offence of child destruction it thus becomes unclear as to what actually constitutes a lawful medical abortion.[193]

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188 See VLRC, above n 62, 7, 96–103.

189 In 2010, 91.9 per cent of abortions in South Australia were performed prior to 14 weeks gestation: Scheil et al, above n 11, 11, 54. In 2008, 92.7 per cent of abortions in South Australia were performed prior to 14 weeks gestation: Chan et al, above n 185, 11.

190 Scheil et al, above n 11, 11, 54; Chan et al, above n 185, 11.

191 VLRC, above n 62, 7.

192 See *Martin v The Queen (No 2)* (1996) 86 A Crim R 133, 138–9; *Bayliss* (1986) 9 Qld Lawyer Reps 8, 34–7.

193 See VLRC, above n 62, 7.

The existence of an offence of child destruction thereby creates confusion, 'unnecessary complexity',[194] and inherent legal ambiguity with respect to the practice of medical abortion.[195] The offence remains entirely open to interpretation;[196] thus while the offence exists there is potential to utilise it to charge medical practitioners for performing otherwise lawful abortions.[197] There is obviously a case for reform, if only in the interests of achieving legal clarity and certainty. Only two jurisdictions, Tasmania and Victoria, have attempted to do so. For reasons already highlighted, the Tasmanian response should not be followed. Rather, the Victorian approach of simply abolishing the offence of child destruction is the reform template that other jurisdictions should adopt.

The major policy argument[198] against such reform may be that put forward by some members of the House of Lords in creating the offence of child destruction in the UK in 1929: that without the offence there is a 'lacuna in the law'.[199] However, it is questionable whether abolishing the offence of child destruction would create such a gap in the law,[200] as it is feasible that the offences of unlawful abortion and homicide sufficiently cover the field in this respect. To put the argument simply: as no person exists until born alive, the applicable charges should be unlawful abortion prior to birth, and murder, manslaughter or infanticide once the child is born alive. In effect, the offence of unlawful abortion protects the potential legal person, while the offence of homicide covers the actual legal person. In deciding the appropriate charge, a court need only determine whether or not the victim in question had been born alive for the purposes of the law; if so, then it may be homicide and, if not, then the appropriate charge should be unlawful abortion. This argument that there is no gap in the law is supported by the fact that prosecutions are extremely rare: it is an offence almost entirely unutilised.[201] If there is no gap in the law, then the crime of child destruction is superfluous to needs, and only serves to create uncertainty and needless legal complexity.[202]

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194 Ibid.

195 Ibid 100–5.

196 Ibid.

197 Ibid 105.

198 There may exist additional policy arguments in favour of maintaining an offence of child destruction. For example, maintaining both offences of unlawful abortion and child destruction may be desirable in order to grant courts varied sentencing options. In the Northern Territory, Queensland and Western Australia, the penalty for child destruction is life imprisonment: *Criminal Code* (NT) s 170; *Criminal Code* (Qld) s 313; *Criminal Code* (WA) s 290. The penalty for unlawful abortion is seven years imprisonment in the Northern Territory: *Criminal Code* (NT) s 208B; 14 years imprisonment in Queensland: *Criminal Code* (Qld) s 224; in Western Australia the penalty for unlawful abortion is A$50 000 if the defendant is a medical practitioner: *Criminal Code* (WA) s 199(2), and five years' imprisonment if the defendant is not a medical practitioner: *Criminal Code* (WA) s 199(3).

199 *Rance* [1991] 1 QB 587, 620 (Brooke J).

200 This was a point recognised by Lord Atkin at the time the original Bill was debated: *Parliamentary Debates*, above n 14, col 272. The VLRC adopted this view in its analysis of the offence of child destruction: VLRC, above n 62, 98–100.

201 VLRC, above n 62, 106–9; Finlay, above n 50, 74–80.

202 VLRC, above n 62, 7, 103.

On the other hand, one cannot ignore the reality that, in all jurisdictions other than South Australia,[203] the elements of the offences of unlawful abortion and child destruction differ in one crucial respect: to obtain a conviction for unlawful abortion it is essential that the defendant intended to terminate the pregnancy in question,[204] whereas such an intention is not necessarily an element of the offence of child destruction. This distinction may, in certain circumstances, be quite significant. For example, a defendant who physically assaults a pregnant woman, with the unintended result that the pregnancy is terminated, cannot be convicted of unlawful abortion, but may be convicted of child destruction. This assault example suggests that retaining the offence of child destruction meets a need of the criminal law. However, the fact that only one conviction for child destruction has ever been recorded in Australia suggests that this need must be negligible,[205] and given the potential legal issues associated with maintaining the offence within a legal regime that otherwise allows for medical abortion, it therefore remains preferable to abolish the offence of child destruction and leave this need unmet. In any case, there exists an alternative, other than preserving an offence of child destruction, which would satisfactorily encompass the above assault scenario: simply define 'harm', for the purposes of an assault on a woman, as including the loss of her pregnancy.

This option was raised in the 2003 case of *R v King*,[206] in which the respondent had been charged under the *Crimes Act 1900* (NSW) s 33 with the intentional infliction of grievous bodily harm. The respondent had assaulted a pregnant woman, kicking and stomping on her stomach when she was approximately 24 weeks pregnant, and had thereby caused the loss of her pregnancy.[207] The question before the court was whether causing the death of the foetus might constitute grievous bodily harm to the mother.[208] Chief Justice Spigelman, in delivering the judgment of the court, held that such action did constitute grievous bodily harm to the mother (at least for the purposes of s 33), as the foetus should be considered part of the mother.[209]

In accordance with the reasoning of this decision, the New South Wales legislature subsequently passed the *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW),[210] which amended the *Crimes Act 1900* (NSW) such that s 4(1)(a) now defines 'grievous bodily harm' as the 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm'. Thus, for the purposes of the various

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203 In South Australia, the elements for unlawful abortion and child destruction are identical, except child destruction only applies to a child capable of being born alive: *Criminal Law Consolidation Act 1935* (SA) ss 81–2, 82A(7)–(9).

204 *Criminal Code* (NT) s 208B(1)(b); *Criminal Code* (Qld) s 224; *Criminal Code* (WA) s 199(5).

205 Finlay, above n 50, 74–9. In his comprehensive study of the offence throughout Australia, Finlay found seven instances of charges being laid, but cites the decision of *Molo* (Unreported, Supreme Court of Queensland, 10 December 1999) as being the only recorded conviction.

206 (2003) 59 NSWLR 472.

207 Ibid 474.

208 Ibid 479.

209 Ibid 479–91.

210 For a discussion of this amendment see Savell, above n 73, 658–60; VLRC, above n 62, 106–7.

assault provisions,[211] and the dangerous driving occasioning grievous bodily harm provision,[212] the destruction of the foetus constitutes grievous bodily harm to the mother.

The obvious benefit of the above approach is that it results in a satisfactory reconciliation between allowing medical abortion (that is, medical terminations of pregnancy are expressly excluded from the above definition of grievous bodily harm), protecting (pregnant) women from assault, and appropriately acknowledging the death of the foetus 'through the persona of the person most responsible for actualising their personhood'.[213] Indeed, defining harm to the pregnant woman in this way effectively protects the foetus from conception.[214] Of course, this arrangement of the various interests is predicated upon there being no offence of child destruction in New South Wales. The advantages of this system were realised by the Victorian Parliament in 2008, when it simultaneously abolished the offence of child destruction[215] and amended the definition of 'serious injury' under the *Crimes Act 1958* (Vic) s 15 so that 'serious injury includes the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm'. [216]

Due to the dearth of case law or legislative clarification on the subject, many of the conclusions reached within this article may be described as speculative; however, the necessity of such conjecture serves to highlight one of the major problems with retaining the offence of child destruction: it is an untested area of the criminal law, and thus manifestly creates legal ambiguity. The uncertainty as to what actually constitutes the offence of child destruction flows into the practice of medical abortion. If it is unclear whether or not a particular medical abortion may constitute the offence of child destruction, then it is equally unclear whether or not a particular medical abortion may be described as lawful. This state of affairs is completely unsatisfactory and demands legislative reform. This is achieved most effectively by the concurrent abolition of the offence of child destruction, with the expansion of the definition of serious or grievous bodily harm to a (pregnant) woman to include the destruction of the foetus, other than in the course of a medical procedure.

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211 See, eg, *Crimes Act 1900* (NSW) ss 33, 33A, 35, 35A, 39, 54, 59.
212 Ibid s 52A.
213 Savell, above n 73, 660.
214 Ibid 658–9.
215 *Abortion Law Reform Act 2008* (Vic) s 9 (repealing *Crimes Act 1958* (Vic) s 10).
216 *Crimes Act 1958* (Vic) s 15 (as amended by *Abortion Law Reform Act 2008* (Vic) s 10(2)).

Safe Access Zone Legislation in Australia: Determining an Appropriate Legislative Template for South Australia and Western Australia

MARK J RANKIN*

Abstract

Most jurisdictions in Australia have established safe access zones around premises that provide abortion services. Only South Australia and Western Australia have yet to do so. This article provides a comparative analysis of the existing legislation in all jurisdictions, in order to determine an appropriate legislative template for South Australia and Western Australia.

I INTRODUCTION: THE PURPOSE OF SAFE ACCESS ZONES

Safe access zones are legislatively designated areas around premises that provide abortion services, within which certain conduct is prohibited.[1] Such legislation serves to protect patients accessing those services, or staff providing those services, from being routinely subject to harassment and/or intimidation (among other prohibited conduct) by anti-abortion activists.[2] The need for such protection is 'compelling',[3] as there exists substantial evidence from various jurisdictions of both the quantity and severity of anti-abortion activity that has occurred in the vicinity of abortion clinics

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[1] This is the term utilised in most jurisdictions (ie, NSW, Victoria, the NT and Queensland). In the ACT it is labelled a 'protected area' or 'protected facility': see *Health Act 1993* (ACT) s 85(1), and in Tasmania simply an 'access zone': see *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1).

[2] See, eg, Department of Health, Government of Western Australia, *Safe access zones – A proposal for reform in Western Australia* (2020) 11('*WA Report*'). It should, however, be noted that the legislation is 'view-point neutral', and '[t]here is no discrimination between pro-abortion and anti-abortion communications': *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1, 18, 28, 31–32 (Kiefel CJ, Bell and Keane JJ) ('*Clubb v Edwards*'). That is, the relevant provisions prohibit communications with respect to abortion within the designated area, whether such communications are pro-choice or anti-abortion: at 97–98 (Gordon J). However, the practical effect of (and the legislative intention behind) the legislation is to curtail the activities of anti-abortion protestors: at 18, 24 (Kiefel CJ, Bell and Keane JJ), 42–43 (Gageler J).

[3] South Australian Law Reform Institute, *Abortion: A Review of South Australian Law and Practice* (Report 13, October 2019) 431 ('*SALRI Report*').

prior to the establishment of safe access zones.[4] Safe access zones are thus necessary in terms of allowing patients '[u]nimpeded access' to appropriate health care, and health professionals unimpeded access to their place of employment;[5] thereby providing 'safe passage' for such persons.[6] It has been held by the High Court in *Clubb v Edwards, Preston v Avery* ('*Clubb v Edwards*')[7] that the purpose of safe access zones is to promote public health and protect the safety, wellbeing, privacy and dignity of persons (both patients and staff) accessing abortion service facilities.[8] The plurality in that decision explained that:

> A measure that seeks to ensure that women seeking a safe termination are not driven to less safe procedures by being subjected to shaming behaviour or by the fear of the loss of privacy is a rational response to a serious public health issue. The issue has particular significance in the case of those who, by reason of the condition that gives rise to their need for healthcare, are vulnerable to attempts to hinder their free exercise of choice in that respect.[9]

The establishment of safe access zones in most jurisdictions 'has had a significant impact on the ability of Australian women to access abortion services',[10] and it has been argued that ensuring safe access to abortion is 'a concomitant of compliance with international human rights norms',[11] and that 'safe access zones represent a crucial vehicle for protecting women's fundamental rights.'[12] In terms of specific rights protected by safe access zones, the rights to privacy and human dignity are the most obvious.[13] However, safe access zones also serve to protect reproductive

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[4] See, eg, Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws* (Report No 76, June 2018) 171–174; WA Report (n 2) 13–15, 21–22; SALRI Report (n 3) 407–409, 417, 423–426; Ronli Sifris, Tania Penovic and Caroline Henckels, 'Advancing Reproductive Rights Through Legal Reform: The Example of Abortion Clinic Safe Access Zones' (2020) 43(3) *University of New South Wales Law Journal* 1078.

[5] See *Clubb v Edwards* (2019) 366 ALR 1, 24 (Kiefel CJ, Bell and Keane JJ).

[6] Ibid 99 (Gordon J).

[7] (2019) 366 ALR 1.

[8] Ibid 17–19, 30 (Kiefel CJ, Bell and Keane JJ), 48 (Gageler J), 67 (Nettle J), 93 (Gordon J). Edelman J felt the purpose of safe access zones was to ensure that women 'seeking access to medical termination services can do so in safety and without further fear, intimidation, or distress': at 119. Also see SALRI Report (n 3) 398, 431.

[9] *Clubb v Edwards* (n 5) 24 (Kiefel CJ, Bell and Keane JJ).

[10] Sifris, Penovic and Henckels (n 4) 1079. In other words, safe access zones are 'achieving their objective': at 1086.

[11] Ibid 1080.

[12] Ronli Sifris and Tania Penovic, 'Anti-Abortion Protest and the Effectiveness of Victoria's Safe Access Zones: An Analysis' (2018) 44(2) *Monash University Law Review* 317, 340.

[13] With respect to the right to privacy see Ronli Sifris and Suzanne Belton, 'Australia: Abortion and Human Rights' (2017) 19(1) *Health and Human Rights Journal* 209, 213–4. In *Clubb v Edwards* (n 5) the plurality focused on the right to dignity, which their Honours described as a fundamental human right, and further explained that: 'to force upon another person a political message is inconsistent with the human dignity of that person': at 17 (Kiefel CJ, Bell and Keane JJ).

rights, and reproductive rights are necessary for gender equality.[14] There is thus a patent public interest in creating safe access zones, as the basic human rights protected by safe access zones indisputably warrant protection. Specific legislation to create safe access zones is thus required,[15] at least in the short term.[16]

Safe access zones have been established in every jurisdiction other than South Australia ('SA') and Western Australia ('WA'). The first jurisdiction to do so was Tasmania in 2013,[17] followed by Victoria and the Australian Capital Territory ('ACT') in 2015,[18] the Northern Territory ('NT') in 2017,[19] and finally New South Wales ('NSW') and Queensland in 2018.[20] As a result of legislative inaction on this issue, women and health professionals in SA and WA continue to be denied their basic rights. Clearly, legislative action on this issue is required in both SA and WA.[21] The purpose of this article is to suggest a legislative template for SA and/or WA, based on a comparative analysis of the legislation in other

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[14] See Christine Forster and Vedna Jivan, 'Abortion Law in New South Wales: Shifting from Criminalisation to the Recognition of the Reproductive Rights of Women and Girls' (2017) 24 *Journal of Law and Medicine* 850, 858–9.

[15] See SALRI Report (n 3) 431.

[16] That is, while it remains clear where abortion service providers are geographically situated, and such premises are relatively few in number, legislating for safe access zones is necessary. However, once abortion is fully decriminalised, and thereby treated like any other healthcare, with no specialist facility required for the vast majority of abortions, then it is reasonable to assume that the premises at which both medication and surgical abortion will be available will become more varied and widespread (this is especially the case with early medication abortion ('*EMA*'), which may potentially be accessed through telemedicine), and once this occurs there is less of a need for exclusion zones because abortion services, being available almost everywhere, are effectively nowhere in particular. To frame this point as a question: where would protestors gather once abortion services are effectively available at most, if not all, hospitals, private clinics, pharmacies and/or a patient's own home? However, until this is achieved, safe access zones are a necessity. Perhaps as recognition of this future reality most jurisdictions expressly preclude pharmacies from being designated as protected premises: see, eg, *Public Health and Wellbeing Act 2008* (Vic) s 185B; *Public Health Act 2010* (NSW) s 98A; *Termination of Pregnancy Law Reform Act 2017* (NT) s 4; *Termination of Pregnancy Act 2018* (Qld) s 13(b).

[17] See *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 9–12.

[18] See *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic), which inserted Part 9A into the *Public Health and Wellbeing Act 2008* (Vic); *Health (Patient Privacy) Amendment Act 2015* (ACT), which inserted ss 85–87 into the *Health Act 1993* (ACT). Some minor changes were made to the provisions on safe access zones by the *Health (Improving Abortion Access) Amendment Act 2018* (ACT).

[19] See *Termination of Pregnancy Law Reform Act 2017* (NT) ss 14–16.

[20] See *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW); *Termination of Pregnancy Act 2018* (Qld) ss 14–15.

[21] It should be noted that safe access zone legislation is usually enacted post decriminalisation of abortion, which SA is yet to achieve, so there is an argument that the focus should always be primarily upon decriminalisation: see Sifris and Belton (n 13) 217–18. However, there is an exception to this 'rule', as NSW passed safe access zone legislation while abortion remained, prima facie, a criminal offence: see *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW), which amended Part 6A of the *Public Health Act 2010* (NSW), prior to abortion being decriminalised by the *Abortion Law Reform Act 2019* (NSW).

jurisdictions that have created safe access zones. The focus of this analysis will be the extent to which the legislation meets its purpose; that purpose being (whether it is expressly stated in the legislation or not) the promotion of public health, and the protection of the safety, wellbeing, privacy and dignity of persons (both patients and staff) accessing abortion service facilities.[22]

However, as is often (if not inevitably) the case, legislation enacted to protect certain rights does so at the expense of other rights.[23] A detailed analysis of rights discourse is beyond the scope of this article, but it will suffice to say that (at least in Australia) no right is absolute,[24] so competing rights must be assessed in some way,[25] and an appropriate balance needs to be struck.[26] In Australia, the competing right to the reproductive (and other) rights mentioned immediately above, that safe access zones serve to protect and enhance, is the implied freedom of political communication.[27]

II The Implied Freedom of Political Communication

The implied freedom of political communication has a relatively short history,[28] but it has nonetheless been subject to quite extensive judicial interpretation since its inception.[29] The implied freedom was unanimously

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[22] Members of the High Court have indicated that this is the purpose of both the Victorian and Tasmanian legislation: see *Clubb v Edwards* (n 5) 17, 30 (Kiefel CJ, Bell and Keane JJ), 67 (Nettle J), 93 (Gordon J), 119 (Edelman J). It should be noted that the Victorian legislation expressly states such a purpose, whereas the Tasmanian legislation is silent in that respect.

[23] The clearest example of this is with respect to individual liberty—defined simplistically as the right to do as one pleases. This right is necessarily curtailed in civilized society in order that other individual's rights may be protected. Perhaps Nozick illustrates this tension best as follows: 'My property rights in my knife allow me to leave it where I will, but not in your chest': Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 171. Although not clearly on point, Nozick does provide a dramatic example of how rights between individuals are often in competition.

[24] Which is not to say that all rights are equal.

[25] A relevant instance in this respect is the balancing of a health professional's right to conscientious objection, with a woman's right to life and health. That is, a medical practitioner may excuse themselves from participating in an abortion on the grounds of conscientious objection, but in most jurisdictions the medical practitioner cannot do so if the woman's life is at risk, or she is at risk of serious physical injury, in which case her rights outweigh the medical practitioner's right to conscientious objection: see, eg, *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6. SALRI refer to such issues as 'competing considerations': SALRI Report (n 3) 430.

[26] See, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 219 (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Clubb v Edwards* (n 5) 21 (Kiefel CJ, Bell and Keane JJ).

[27] Of course, it should be noted that the implied freedom of political communication is not an individual right as such, but rather a limit on legislative power, but the argument is nonetheless apt.

[28] It was first recognised in 1992: see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[29] See, in particular, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Coleman v Power* (2004) 220 CLR 1; *McCloy* (n 26); *Brown v Tasmania* (2017) 261 CLR 328.

confirmed by the High Court in 1997 in *Lange v Australian Broadcasting Corporation* ('*Lange*'),[30] and that decision has been applied ever since.[31] The freedom of political communication is implied from ss 7, 24, 64 and 128 (among others)[32] of the *Constitution* that establish the various mechanisms of 'representative and responsible government',[33] because '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government'.[34] The implied freedom 'protects the free expression of political opinion',[35] but it is not an individual right; rather it 'operates as a limit on the exercise of legislative power to impede that freedom of expression'.[36] However, the implied freedom is not absolute,[37] and 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'.[38] Thus, legislation will not be invalid solely on the basis that it burdens the implied freedom because that burden may be justified.[39]

In determining the constitutional validity of an impugned law (ie assessing whether an impugned law impermissibly burdens the implied freedom) the High Court has developed a three-pronged test[40] that may be expressed in the following questions:

1. 'Does the law effectively burden the freedom in its terms, operation or effect?';[41]

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[30] *Lange* (n 29).

[31] That is, although the tests articulated in *Lange* have been reinterpreted and/or refined over the years, no court has questioned the authority of *Lange*: see, eg, *McCloy* (n 26) 200 (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (n 29) 359 (Kiefel CJ, Bell and Keane JJ).

[32] See *Lange* (n 29) 567.

[33] Ibid 557–93.

[34] Ibid 559. The Court also expressed this idea in the following terms: 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia': at 571. Also see *McCloy* (n 26) 193 (French CJ, Kiefel, Bell and Keane JJ), 279 (Gordon J); *Brown v Tasmania* (n 29) 359 (Kiefel CJ, Bell and Keane JJ).

[35] *Brown v Tasmania* (n 29) 359 (Kiefel CJ, Bell and Keane JJ).

[36] Ibid. Also see *Lange* (n 29) 560–561; *McCloy* (n 26) 280 (Gordon J).

[37] See *Lange* (n 29) 561; *McCloy* (n 26) 194 (French CJ, Kiefel, Bell and Keane JJ).

[38] *Lange* (n 29) 561. Also see *McCloy* (n 26) 280 (Gordon J).

[39] See *Brown v Tasmania* (n 29) 359, 361 (Kiefel CJ, Bell and Keane JJ); *McCloy* (n 26) 213–214 (French CJ, Kiefel, Bell and Keane JJ); *Lange* (n 29) 561.

[40] In *Lange*, the Court only referred to a two-limbed test, whereby questions 2 and 3 are conflated—see *Lange* (n 29) 561–562, 567—but identical issues are covered in either the two or three question tests: see *McCloy* (n 26) 280–281 (Gordon J). The test is nonetheless now referred to as the '*McCloy* Test': see *Clubb v Edwards* (n 5) 10 (Kiefel CJ, Bell and Keane JJ). As the Court confirmed the authority of not just *McCloy*, but also *Lange* and *Brown*, others have labelled the test as the '*Lange-McCloy-Brown* test': Sifris, Penovic and Henckels (n 4) 1088.

[41] *McCloy* (n 26) 194 (French CJ, Kiefel, Bell and Keane JJ); *Clubb v Edwards* (n 5) 10 (Kiefel CJ, Bell and Keane JJ).

2. If so, 'is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?';[42] and
3. If so, 'is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?'[43]

A negative response to the first question self-evidently ends the enquiry concerning validity, but a positive response to question 1, combined with a negative response to either question 2 or 3, invalidates the impugned law, as it thereby constitutes an impermissible burden on the implied freedom of political communication. In terms of whether the impugned law is reasonably appropriate and adapted to advance its purpose, the High Court has adopted a structured proportionality approach.[44] This 'proportionality test'[45] or 'analysis'[46] has three stages, assessing whether the impugned law is:

1. Suitable, 'in the sense that it has a rational connection to the purpose of the law';[47]
2. Necessary, 'in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom';[48] and
3. Adequate in the balance, which requires 'a judgment, consistently with the limits of the judicial function, as to the balance between

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[42] *Brown v Tasmania* (n 29)364 (Kiefel CJ, Bell and Keane JJ), 376 (Gageler J); *Clubb v Edwards* (n 5) 10 (Kiefel CJ, Bell and Keane JJ). Also see *McCloy* (n 26) 194 (French CJ, Kiefel, Bell and Keane JJ).

[43] *Brown v Tasmania* (n 29) 364 (Kiefel CJ, Bell and Keane JJ), 376 (Gageler J); *Clubb v Edwards* (n 5) 10 (Kiefel CJ, Bell and Keane JJ). Also see *McCloy* (n 26) 194 (French CJ, Kiefel, Bell and Keane JJ).

[44] See *McCloy* (n 26) 195 (French CJ, Kiefel, Bell and Keane JJ). This was the view of the majority in *McCloy*; other members of the Court decided the case without reference to proportionality analysis. For example, Gageler J preferred to simply ask whether 'the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory object': at 222. Also see *Lange* (n 29) 562 where the Court suggested a 'proportionality' criterion, but did not make a formal decision in that regard. In *Brown v Tasmania* (n 29) Gageler J made the point that this proportionality assessment was merely 'a tool of analysis' and not a constitutional principle itself (at 376), but Edelman J felt that it is was nonetheless an 'indispensable tool': at 122.

[45] *McCloy* (n 26) 194 (French CJ, Kiefel, Bell and Keane JJ).

[46] *Clubb v Edwards* (n 5)10 (Kiefel CJ, Bell and Keane JJ).

[47] Ibid. Also see *McCloy* (n 26) 195 (French CJ, Kiefel, Bell and Keane JJ).

[48] *Clubb v Edwards* (n 5) 10 (Kiefel CJ, Bell and Keane JJ). Also see *McCloy* (n 26) 195 (French CJ, Kiefel, Bell and Keane JJ). Indeed, it has been said that 'the availability of other measures which are just as practicable to achieve a statute's purpose, but which are less restrictive of the freedom, may be decisive of invalidity': *Brown v Tasmania* (n 29) 370 (Kiefel CJ, Bell and Keane JJ).

> the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom'.[49]

All three criteria of the proportionality analysis must be met in order to satisfy question 3 of the fundamental constitutional validity test. If not, then the impugned law is invalid as an impermissible infringement or limitation on the implied freedom.[50]

The above principles serve as the constitutional law context to the recent decision of *Clubb v Edwards*,[51] in which the High Court was tasked with determining the constitutional validity of the Tasmanian and Victorian safe access zone legislation. Essentially, the question before the Court was: do such laws impermissibly burden the implied freedom of political communication?[52] This High Court decision will not be discussed in detail, as it deals with matters of constitutional law well beyond the scope of this article,[53] but it demands some analysis.[54]

With respect to the three questions determinative of validity, the Court decided that the implied freedom of political communication was burdened by the Tasmanian and Victorian safe access zone legislation.[55] Some judges felt that the burden was 'limited',[56] 'slight',[57] not 'quantitatively

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[49] *Clubb v Edwards* (n 5) 10 (Kiefel CJ, Bell and Keane JJ). Also see *McCloy* (n 26) 195 (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (n 29) 360, 369 (Kiefel CJ, Bell and Keane JJ).

[50] See, eg, *McCloy* (n 26) 195 (French CJ, Kiefel, Bell and Keane JJ).

[51] *Clubb v Edwards* (n 5).

[52] For a succinct and informative discussion of this freedom, and how it might apply to anti-abortion protestors, see Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards*; *Preston v Avery*' (2018) 40 *Sydney Law Review* 395. It should be noted that this article was published prior to the High Court handing down its decision on the issue.

[53] For a concise summary of this case see Ruth Higgins, 'Current Issues: The High Court and Reproductive Rights' (2019) 93 *Australian Law Journal* 613. For a more detailed analysis see SALRI Report (n 3) 400–406; Sifris, Penovic and Henckels (n 4) 1086–1096.

[54] In the interests of brevity, and for the purposes of this article, the two appeals (ie the Clubb appeal relating to the Victorian legislation, and the Preston appeal with regard to the Tasmanian legislation) will be conflated, rather than discussed separately. Note: the plurality did make comment that the Tasmanian and Victorian provisions were different, in that the Tasmanian provisions were less limited in scope, but decided that 'these differences do not warrant a different result': *Clubb v Edwards* (n 5) 30 (Kiefel CJ, Bell and Keane JJ). It should also be noted that three judges held that it was unnecessary to decide the constitutional law issue with respect to the Clubb appeal because the appellant had not engaged in conduct that could be described as political communication: at 32–33 (Gageler J), 87 (Gordon J), 107 (Edelman J).

[55] See, eg, ibid 16, 30 (Kiefel CJ, Bell and Keane JJ). It is arguable that this is hardly surprising given the political nature of abortion—see Gageler J, who held that protests 'on the subject of abortion are inherently political', so any limitation on the ability to so protest clearly burdens the implied freedom: at 41. Cf Nettle J, who makes the point that 'although abortion is a subject matter of political controversy, it does not follow that all communications about abortion are political': at 64.

[56] Ibid 28 (Kiefel CJ, Bell and Keane JJ).

[57] Ibid 32 (Kiefel CJ, Bell and Keane JJ).

significant',[58] or 'insubstantial and indirect'.[59] These determinations tended to be based on findings that the infringement on the implied freedom was geographically limited, non-discriminatory, and confined to the topic of abortions.[60] However, other judges described the burden as 'direct, substantial and discriminatory',[61] or 'deep and wide'.[62] Either way,[63] once it is decided that the implied freedom is burdened by the impugned law, that burden must be justified,[64] so the Court must then determine the other two questions relevant to constitutional validity.

The Court held that the burden was justified because, in answer to questions 2 and 3 of the applicable test, the purpose of the impugned law was legitimate,[65] (that purpose being 'protecting the safety, wellbeing, privacy and dignity of persons accessing premises where terminations are provided'),[66] and the law was reasonably appropriate and adapted to advance that legitimate object.[67] In terms of the proportionality analysis relevant to question 3 of the test, it was held that the legislation was suitable (ie it had a rational connection to the purpose of the law),[68] necessary (in the sense that there was no obvious and compelling alternative to achieve that purpose),[69] and adequate in the balance (being the balance between the importance of the purpose of the impugned law and the extent of the restriction it places on the implied freedom).[70] As concluded by the plurality:

> The burden on the implied freedom is limited spatially, and is confined to communications about abortions. There is no restriction at all on political communications outside of safe access zones. There is no discrimination between pro-abortion and anti-abortion communications. The purpose of the prohibition justifies a limitation on the exercise of free expression within that limited area. And the justification of the prohibition draws

[58] Ibid 82 (Nettle J).
[59] Ibid 100 (Gordon J).
[60] Ibid 32 (Kiefel CJ, Bell and Keane JJ), 98 (Gordon J).
[61] Ibid 43 (Gageler J).
[62] Ibid 131 (Edelman J).
[63] Of course, it should be noted that the greater the restriction on the implied freedom, the more compelling the purpose of the impugned law needs to be: ibid 46 (Gageler J).
[64] Ibid 20 (Kiefel CJ, Bell and Keane JJ).
[65] See, eg, ibid 17–18 (Kiefel CJ, Bell and Keane JJ).
[66] Ibid 30 (Kiefel CJ, Bell and Keane JJ), 67 (Nettle J).
[67] Ibid 28, 32 (Kiefel CJ, Bell and Keane JJ), 86–87 (Nettle J).
[68] Ibid 31 (Kiefel CJ, Bell and Keane JJ), 74 (Nettle J).
[69] See, eg, ibid 24–25 (Kiefel CJ, Bell and Keane JJ), 74–75, 84–86 (Nettle J).
[70] See, eg, ibid 27–28 (Kiefel CJ, Bell and Keane JJ), 86 (Nettle J). This conclusion was also reached by judges that felt the interference with the implied freedom was significant: see Gageler J at 52, Edelman J at 132. Of course, it is only when 'the public interest in the benefit sought to be achieved by the legislation is manifestly outweighed by an adverse effect on the implied freedom that the law will be invalid': at 21 (Kiefel CJ, Bell and Keane JJ). Nettle J felt that the impugned law must have a 'grossly disproportionate' effect on the implied freedom to be invalid: at 70–73.

> support from the very constitutional values that underpin the implied freedom.[71]

This decision, although only made with respect to the Tasmanian and Victorian legislation, effectively means that the safe access zone legislation in other jurisdictions 'appear to be safe' from a constitutional challenge.[72]

III Safe Access Zone Legislation

Tasmania was the first jurisdiction to create safe access zones in 2013.[73] In Tasmania, an 'access zone' is defined as 'an area within a radius of 150 metres from premises at which terminations are provided'.[74] Within this area certain behavior is prohibited, namely:

> (a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or (c) footpath interference in relation to terminations; or (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or (e) any other prescribed behaviour.[75]

If found guilty of engaging in such prohibited behavior within the access zone, a person faces a fine of approximately $13,000, imprisonment for up to 12 months, or both.[76] An additional offence (carrying an identical maximum penalty) is created for a person that publishes or distributes a recording of 'another person accessing or attempting to access premises at which terminations are provided without that person's consent.'[77] If a

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[71] Ibid 28 (Kiefel CJ, Bell and Keane JJ). Also see Nettle J at 78–79: 'The effect of the proscription on the implied freedom, although qualitatively not insignificant, is quantitatively minimal. The proscription is not grossly disproportionate to and does not go far beyond what is necessary for the achievement of the purposes…[so]…is adequate in the balance.' It is of interest to note that this decision accords with the statement made six years earlier by the Tasmanian Minister for Health in her Second Reading Speech, that: 'access zones provide the appropriate balance between the right to protest and protecting women from being exposed to those who seek to shame and stigmatise them. Women are entitled to access termination services in a confidential manner without the threat of harassment': Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 51 (Ms Michelle O'Byrne).

[72] Sifris, Penovic and Henckels (n 4) 1096.

[73] See *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 9–12.

[74] Ibid s 9(1).

[75] Ibid s 9(1).

[76] Ibid s 9(2). The current maximum fine is $12,600 (ie 75 penalty units): see *Penalty Units and Other Penalties Act 1987* (Tas) s 4A. It should also be noted that law enforcement officers, acting in the course of duty, are permitted to intentionally record a person accessing or attempting to access such premises: s 9(3).

[77] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(4). 'Distribute' includes: '(a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and (b) make available for access by someone, whether by a particular person

police officer reasonably believes that a person is committing, or has committed, any of the recording offences, the officer may detain and search that person, and seize and retain the recording and 'any equipment used to produce, publish or distribute the recording.'[78] Police officers are also empowered to require a person that they reasonably believe is committing, or has committed, any of the above mentioned offences to provide their name and address,[79] and to arrest them without warrant if they refuse to comply or the officer reasonably believes that they have provided false information in that respect.[80]

The Tasmanian legislation is innovative and comprehensive. The parameters of the designated access zone are large enough to meet the objective of protecting women and health workers,[81] but sufficiently geographically limited to ensure constitutional validity.[82] In *Clubb v Edwards*, Justice Nettle suggested that 150 metres was a suitable range because reducing that radius would not have a 'significant quantitative effect on the freedom of political communication', but 'any reduction in the radius would be likely to compromise the effectiveness of the proscription.'[83] Consistent with that finding, it has been argued that a radius of 150 metres from the relevant premises is both necessary and sufficient to meet the objectives of safe access zones.[84]

In Tasmania, the definition of prohibited behaviour within that zone is broad enough to encompass all manner of protest that anti-abortion activists currently employ, and said definition is future proof as it enables

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or not; and (c) enter into an agreement or arrangement to do anything mentioned in paragraph (a) or (b) ; and (d) attempt to distribute': s 9(1).

[78] Ibid s 9(5). If the person in question is subsequently found guilty of the offence any item seized is forfeited to the Crown for appropriate destruction or disposal: s 9(6).

[79] Ibid s 9(7).

[80] Ibid s 9(9). It is also an offence to fail to so comply, or to provide false information: s 9(8). Police officers may issue and serve infringement notices if they reasonably believe that an infringement offence has been committed: s 11(2).

[81] See, eg, WA Report (n 2) 28–30; Sifris and Penovic (n 12).

[82] That is, members of the High Court have concluded that the burden on the implied freedom of political communication that results from safe access zone legislation is 'slight', and a factor relevant to this conclusion is the limited 'geographical extent' of the safe access zone. It was held that 150 metres was an appropriate size in that respect: *Clubb v Edwards* (n 5) 27 (Kiefel CJ, Bell and Keane JJ). Cf Gageler J, who felt that 150 metres was 'close to the maximum reach that could be justified as appropriate and adapted to achieve the protective purpose' of the legislation: at 52.

[83] Ibid 77 (Nettle J). Edelman J essentially agreed, explaining that although reducing the zone would result in a lesser burden on the implied freedom of political communication, such reduction would protect 'far fewer of those accessing the premises,' which defeats the purpose of the legislation: at 127.

[84] In Victoria the Minister for Health made the point that the zone of 150 metres was chosen after consultation with stakeholders, and it was decided that this distance was 'sufficient to protect people accessing the premises': Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3976 (Ms Jill Hennessy). Also see SALRI Report (n 3) 434.

'any other prescribed behaviour' to be subsequently prohibited.[85] The powers granted to law enforcement officers are sufficient to police the access zones, and the penalties for committing the relevant offences are adequate to dissuade such offending, but not excessive, which is a relevant consideration in terms of the constitutional validity of the legislation.[86] It therefore comes as no surprise that most jurisdictions have been guided, to varying degrees, by the Tasmanian model.

Marked differences between jurisdictions do exist, and will be discussed below, but the level of commonality between jurisdictions is worth highlighting. For instance, in terms of the parameters of the area designated as a safe access zone, all jurisdictions other than the ACT follow Tasmania in providing for a distance of 150 metres from the relevant premises.[87] In the ACT the protected area must be at least 50 metres from the protected facility,[88] but the Minister may declare a larger area 'sufficient to ensure the privacy and unimpeded access for anyone entering, trying to enter or leaving the protected facility',[89] provided it is 'no bigger than necessary to ensure that outcome'.[90] The ACT also differs from all other jurisdictions in limiting the 'protection period' in relation to a protected facility from 7am to 6pm on any day that the facility is open.[91]

In terms of prohibited conduct within a safe access zone, again most jurisdictions broadly follow the Tasmanian model in terms of defining what constitutes prohibited behavior,[92] including the recording, publishing, or distribution of prohibited material.[93] All jurisdictions have also created

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[85] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1). The Governor is empowered to make such further regulations pursuant to s 12.

[86] See, eg, *Clubb v Edwards* (n 5) 27–28 (Kiefel CJ, Bell and Keane JJ).

[87] Victoria follows Tasmania in virtually identical terms by providing for an area 'within a radius of 150 metres from premises at which abortions are provided' (*Public Health and Wellbeing Act 2008* (Vic) s 185B), while the NT and NSW designate an area 'within 150 metres' of the relevant premises (*Termination of Pregnancy Law Reform Act 2017* (NT) s 4; *Public Health Act 2010* (NSW) s 98A). It should be noted that the scope for the relevant premises is slightly wider in NSW, in that the protected area is around 'reproductive health clinics' (or pedestrian access points to such clinics), which are defined as clinics that provide medical services that relate to aspects of human reproduction or maternal health, not including a pharmacy: *Public Health Act 2010* (NSW) s 98A. In Queensland the area is defined as 150 metres from an entrance to the relevant premises (*Termination of Pregnancy Act 2018* (Qld) s 14(2)), but there is scope to make regulations to establish a lesser or greater distance to meet the purposes of the legislation: *Termination of Pregnancy Act 2018* (Qld) ss 14(3)–(4).

[88] *Health Act 1993* (ACT) s 86(3)(a).

[89] Ibid s 86(3)(b).

[90] Ibid s 86(3)(c).

[91] Ibid s 85(2).

[92] See ibid s 85; *Public Health and Wellbeing Act 2008* (Vic) ss 185B, 185D; *Termination of Pregnancy Law Reform Act 2017* (NT) s 14; *Termination of Pregnancy Act 2018* (Qld) s 15; *Public Health Act 2010* (NSW) ss 98C, 98D.

[93] See *Health Act 1993* (ACT) s 87; see *Public Health and Wellbeing Act 2008* (Vic) s 185E; *Termination of Pregnancy Law Reform Act 2017* (NT) s 15; *Termination of Pregnancy Act 2018* (Qld) s 16; *Public Health Act 2010* (NSW) s 98E. Most jurisdictions stipulate that the

offences for engaging in such prohibited behavior within the prescribed area that have broadly similar penalties applicable.[94] In Victoria and the NT, police are granted similar search and seizure powers to the Tasmanian legislation if the relevant officer reasonably believes an offence is being committed, or has been committed. However, in these jurisdictions the police powers are broader than in Tasmania. Not only can police officers in the NT and Victoria base a search and seizure on reasonable grounds that an offence is going to be committed (rather than is being, or has been, committed), but the ambit of the search and seizure power is wider than in Tasmania. In the NT, all manner of items may be seized (ie seizure is not limited to items related to the production, publication and distribution of recordings, as it is in Tasmania), including posters, leaflets and other documents.[95] In Victoria, the search (and seizure) power is not limited to searching a person, as power is granted to apply for a warrant in order to enter a residence for search and seizure purposes.[96] Nonetheless, perhaps with the exception of Victoria, the Tasmanian legislation remains preferable to all other jurisdictions for a number of reasons.

First and foremost, the Tasmanian model is succinct and uncomplicated, and as any lawyer knows, verbosity and complexity in legislation invites greater interpretative divergence. Given the fundamental purpose of safe access zone legislation—to protect the safety, well-being, privacy and dignity of women and health workers—the less potential legal loopholes presented in the legislation, the more likely the legislation will meet this purpose. Legal loopholes come in many forms, but it is clear that the creation of further elements necessary to prove offences, or the establishment of further defences to those offences, are potential issues in this respect. The Tasmanian model has few such issues, whereas most other jurisdictions have enacted legislation that can be criticised on this basis.

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police, employees, or persons acting on behalf of the relevant facility, are exempt from committing these offences. Some jurisdictions make these exemptions for all the offences (see, eg, *Termination of Pregnancy Law Reform Act 2017* (NT) s 14(2)), whilst others confine the exemption to the recording, publishing and distributing offences (see, eg, *Public Health Act 2010* (NSW) s 98E(3)).

[94] In the NT the maximum penalty is a fine of $15,500 or 12 months imprisonment: see *Termination of Pregnancy Law Reform Act 2017* (NT) ss 14(1), 15(1); in Victoria the maximum penalty is a fine of $19,826 or 12 months imprisonment: see *Public Health and Wellbeing Act 2008* (Vic) ss 185D, 185E; in NSW the maximum penalty is a fine of $5,500 or 6 months imprisonment or both, but increases to a fine of $11,000 or 12 months imprisonment or both for the second or subsequent offence: see *Public Health Act 2010* (NSW) ss 98C–98E; in the ACT the applicable penalty is markedly less, with only a maximum fine of $4,000 for engaging in prohibited behaviour within a protected area (see *Health Act 1993* (ACT) s 87(1), unless a person visually records another person, in which case the penalty is $8,000, or 6 months imprisonment, or both: s 87(2); in Queensland the maximum penalty is a fine of $2,611, or 1 year's imprisonment: see *Termination of Pregnancy Act 2018* (Qld) ss 15(3), 16(3).

[95] *Termination of Pregnancy Law Reform Act 2017* (NT) s 16(2).

[96] *Public Health and Wellbeing Act 2008* (Vic) s 185F.

For example, in the NT additional elements are added to the relevant offences, in that the prohibited conduct must be intentional,[97] although presence in the safe access zone may be merely reckless.[98] The prohibited conduct must also be without the relevant person's consent and 'without a reasonable excuse',[99] and the prosecution must prove that the conduct in question 'may result in deterring the person' to which the conduct is directed from entering or leaving the relevant premises, or performing or receiving a termination of pregnancy.[100] Thus, not only are there additional elements required to establish the commission of the relevant offences in the NT, but the convoluted mixture of subjective and objective tests for those elements creates an environment that the savvy protestor might well manipulate to their advantage.[101] The NT model should thus be avoided by SA and/or WA.

There are similar issues with the ACT legislation. Although the basic definition of prohibited behaviour is broadly comparable to the Tasmanian definition,[102] reference is made to an intention to 'stop a person' from entering the protected facility or having or providing an abortion.[103] A subjective element must also be proved with respect to the offence of publishing visual data of a person entering or leaving a protected facility (or attempting same): that is, the intention of such publication must be to stop a person from having or providing an abortion (including having or providing a medication abortion).[104] From a prosecutor's perspective this is more problematic than the NT model. In the NT, the conduct itself must be proven to be intentional, but it need only be shown that such conduct 'may result' in deterring a person from having or providing an abortion (or entering or leaving the relevant premises), whereas in the ACT the prosecution must prove that the defendant intended their conduct to have that effect; indeed, an intention not just to deter a person, but to 'stop' a person from having or providing an abortion (or entering or leaving the relevant facility).

This element of the offence is also problematic in terms of the objective of safe access zone legislation. That is, given that the purpose of such legislation is to protect the safety, wellbeing, privacy and dignity of persons

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[97] *Termination of Pregnancy Law Reform Act 2017* (NT) s 14(1)(a).
[98] Ibid s 14(1)(b).
[99] Ibid s 14(4)(a).
[100] Ibid s 14(4)(a).
[101] With respect to the intentionally recording and/or publishing or distributing recordings of a person accessing or leaving the relevant premises (or attempting same) the NT follows Tasmania in that, in order to constitute an offence, the recording must be without said person's consent (s 15(1)(b)), but differs from Tasmania in creating a 'reasonable excuse' defence to such conduct: ibid s 15(3).
[102] *Health Act 1993* (ACT) s 85(1).
[103] Ibid.
[104] Ibid ss 87(2)(a)–(b).

accessing the premises providing terminations,[105] the harm sought to be avoided by the creation of the relevant offence should be assessed from the perspective of the (reasonable) person accessing those premises. It is the effect that the conduct in question has on that reasonable person that is the relevant consideration, not what the person engaging in that conduct intended. Put another way, the purpose of the legislation demands that consequences of conduct are the focus, not what the relevant actor intended those consequences to be. For these reasons, the ACT is not an appropriate legislative template.

The Queensland legislation has a positive attribute in comparison, in that the definition of prohibited communications is expressed more generally than in Tasmania, as it includes conduct that 'relates to terminations or could reasonably be perceived as relating to terminations',[106] but follows the example of the NT in insisting that the conduct in question 'would be reasonably likely to deter a person' from entering or leaving the premises, requesting or undergoing an abortion, or performing or assisting in the performance of an abortion.[107] The Queensland model is thus preferable to the ACT model because the requisite test is objective,[108] but can be criticised in a similar fashion to the NT model.

The Queensland legislation also adds an element to the prohibited recording offence. Queensland broadly follows the NT by providing that, in order for a visual or audio recording of a person entering or leaving a protected premises to constitute an offence, it must be done without their consent or without reasonable excuse,[109] but further demands that such recordings contain information that identifies or is likely to lead to the identification of the person being recorded.[110] Given the stated purpose of the Queensland legislation, which is to 'protect the safety and well-being, and respect the privacy and dignity, of' both persons accessing the services provided at the protected premises, and persons employed therein,[111] it is difficult to see the necessity or justification for this additional identification element of the prohibited recording offence. That is, the mere recording of a person entering or leaving the relevant premises (or attempting to do so) without their consent or without reasonable excuse is sufficient violation

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[105] See, eg, *Clubb v Edwards* (n 5) 17–19, 30 (Kiefel CJ, Bell and Keane JJ), 48 (Gageler J), 67 (Nettle J), 93 (Gordon J).
[106] *Termination of Pregnancy Act 2018* (Qld) s 15(1)(a).
[107] Ibid s 15(1)(c).
[108] Indeed, the legislation stresses this objective nature of the test by expressly stating that the conduct need not actually be seen or heard, nor actually deter anyone, in order to constitute prohibited conduct: ibid s 15(2).
[109] Ibid s 16(2).
[110] Ibid s 16(1). In common with most other jurisdictions, publishing or distributing such recordings without reasonable excuse or without that person's consent is an offence: s 16(3). Both 'distribute' and 'publish' are given broad definitions: s 16(5).
[111] Ibid s 11.

of their dignity and privacy regardless of whether they can be subsequently identified (or likely to be so identified) in that recording.

This identification element can also be found in the NSW legislation, but it is less susceptible to criticism. In NSW the relevant offence is that of publishing or distributing a recording of another person within the safe access zone without their consent, when the recording is likely to lead to the identification of that person.[112] The prohibited recording offence is established if a person intentionally captures visual data of another person within the safe access zone without that person's consent.[113] So, unlike the situation in Queensland, the mere recording of a person without their consent is an offence, as it should be for reasons already discussed. NSW also allows for a reasonable excuse defence (similar to that existing in the NT), but, again, it is less of an issue in NSW because the defence is only available for the offence of obstructing a footpath or road within the safe access zone leading to a clinic,[114] and is not applicable to all prohibited behaviour offences.

However, the NSW legislation should not be a template for SA and/or WA because NSW stands alone in providing exemptions from the legislation that are completely inconsistent with the objects of establishing safe access zones. The NSW legislation states those objects as being:

> (a) to ensure that the entitlement of people to access health services, including abortions, is respected, and (b) to ensure that people are able to enter and leave reproductive health clinics at which abortions are provided without interference, and in a manner that protects their safety and well-being and respects their privacy and dignity, including employees and others who need to access such clinics in the course of their duties and responsibilities.[115]

Despite such objects, the NSW legislation then provides a blanket exemption from all safe access zone offences for conduct occurring 'in a church, or other building, that is ordinarily used for religious worship, or within the curtilage of such a church or building',[116] or 'in the forecourt of, or on the footpath or road outside, Parliament House'.[117] One might argue that because these exemptions are confined to specific premises, and appear to reflect strongly held societal views concerning religious tolerance and freedom of political communication, they are not overly problematic. This argument may reasonably be applied to the Parliament House exemption, and probably to conduct occurring within a place of religious worship, but to allow such conduct 'within the curtilage' of said places of

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[112] *Public Health Act 2010* (NSW) s 98E(2). In common with other jurisdictions 'distribute' is defined broadly: s 98E(4).
[113] Ibid s 98E(1).
[114] Ibid s 98C(3)
[115] Ibid s 98B.
[116] Ibid s 98F(1)(a).
[117] Ibid s 98F(1)(b).

worship provides an obvious loophole for anti-abortion campaigners. That is, one need only establish a place for worship within a safe access zone (although, admittedly, it may need to be established for some period of time in order to satisfy the 'ordinarily used for religious worship' criterion of the exemption), and then protest immediately outside that building in full view, and within audible distance, of the protected facility, thereby defeating the purpose of creating a safe access zone around that facility. Obviously, it would take some amount of planning and resources for anti-abortion activists to avail themselves of this loophole, but the NSW legislation also offers an exemption from all safe access zone offences that is easily met:

> the carrying out of any survey or opinion poll by or with the authority of a candidate, or the distribution of any handbill or leaflet by or with the authority of a candidate, during the course of a Commonwealth, State or local government election, referendum or plebiscite.[118]

This exemption is alarming from a women's rights perspective, as during such periods of 'election, referendum or plebiscite' it is arguable that safe access zones in NSW effectively cease to exist because the eligibility criteria for obtaining the relevant candidate status would be satisfied by most anti-abortion activists.[119] Clearly, the NSW legislation should not be a model for SA and/or WA.

In common with Queensland and NSW, the Victorian legislation states that the predominant purpose of establishing safe access zones is 'to protect the safety and wellbeing and respect the privacy and dignity' of both people accessing abortion services, and people providing said services,[120] and that one of the principles that underpins the establishment of safe access zones is that 'the public is entitled to access health services, including abortions'.[121]

However, unlike NSW, the Victorian legislation does not grant exemptions completely at odds with these purposes and principles. Victoria followed the Tasmanian model more closely than other jurisdictions, and arguably improved upon it; which cannot be said of any other jurisdiction for reasons already articulated. Prohibited behavior is defined in Victoria as:

> (a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or

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[118] Ibid s 98F(1)(c).

[119] That criteria being: 18 years of age or older, an Australian citizen, and an elector entitled to vote or qualified to become such an elector: see <https://www.aec.gov.au/Elections/candidates/>; <https://www.elections.nsw.gov.au/Political-participants/Candidates-and-groups/Candidate-nomination-for-state-elections>.

[120] *Public Health and Wellbeing Act 2008* (Vic) s 185A.

[121] Ibid s 185C.

> impeding that person by any means; or (b) subject to subsection (2), communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety; or (c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or (d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or (e) any other prescribed behaviour.[122]

Clearly there is a debt owed to the Tasmanian model in the Victorian definition, but certain distinguishing factors warrant discussion. First, what constitutes prohibited behaviour in Victoria is, in some instances, broader than the Tasmanian model due to the use of the phrase 'by any means' in clauses (a), (b) and (d) above.[123] Conversely, the Victorian model requires more from the prosecution in that the communication referred to in clause (b) must be 'reasonably likely to cause distress or anxiety', and both the prohibited interference or impediment in clause (c), and the prohibited recording in clause (d), must occur 'without reasonable excuse'.[124] Furthermore, in common with NSW, the publication or distribution of recordings of a person entering or leaving the relevant premises (or attempting same) without that person's consent or without reasonable excuse is only an offence in Victoria if that recording 'contains particulars likely to lead to the identification' of that person.[125] However, the NSW model is to be preferred in this respect because the Victorian identification element has the additional requirement that the person likely to be identified must also be likely to be identified as 'a person accessing premises at which abortions are provided.'[126] In Tasmania, no such identification element is required, nor should it be for reasons previously articulated. However, this criticism is more applicable to the recording offence, rather than the publishing offence. That is, the mere act of

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[122] Ibid s 185B(1). The condition referred to (ie, 'subject to subsection (2)') means that an employee or other person who provides services at the relevant premises is exempt from the prohibition: s 185B(2).

[123] The same phrase may be found in the NSW legislation, where it is an offence to 'make a communication that relates to abortions, by any means, in a manner' that may be seen or heard by a person accessing or leaving the relevant premises (or attempting to do same): *Public Health Act 2010* (NSW) s 98D. In Tasmania, the phrase is only applicable to the intentionally recording offences: *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1).

[124] However, although the Tasmanian legislation does not explicitly create the defence of 'without reasonable excuse', such a condition might logically be implied in certain circumstances. For example, if an individual were driving a motor vehicle that ceased to function (through no fault of the driver) within the designated area, this might constitute an interference or impediment, but such an individual would likely have a reasonable excuse for such interference or impediment.

[125] *Public Health and Wellbeing Act 2008* (Vic) s 185E(a). 'Distribute' is defined in almost identical terms as the Tasmanian legislation: s 185B.

[126] Ibid s 185E(b).

recording a person seeking to enter or leave the relevant premises is reasonably likely to cause that person distress or anxiety, and this is reasonably likely to occur regardless of whether that person may subsequently be identified in that recording. Thus, mandating an identification element for the recording offence is antithetical to the objects of the legislation. Whereas, once that event is completed, and the law moves to the publication offence, the condition that the published material needs to enable the requisite identification is not as obviously incompatible with the objects of the legislation. At the point of publication (at which point the offence of recording has self-evidently been committed) further distress or anxiety is not reasonably likely to occur if the person recorded cannot be identified.

Another distinguishing aspect of the Victorian legislation (already briefly mentioned) is that the police are granted wide investigatory powers to apply for search warrants for evidence of the commission of offences at 'particular places' if the police officer believes on reasonable grounds that prohibited recordings have been, or will be within 72 hours, made, published, or distributed.[127] If the search warrant is issued, the police may enter the named place, search and seize anything mentioned in the warrant,[128] or anything that the police officer reasonably believes could have been included in the warrant and it is necessary to seize it 'to prevent its concealment, loss or destruction or its use in the commission' of the relevant offence.[129] In Tasmania the police may detain and search a person, and seize and retain recordings, but there is no power granted to search a premises.

In terms of the Victorian qualification that only communications that are 'reasonably likely to cause distress or anxiety'[130] are prohibited, it is arguable that this element of the offence sits uncomfortably with the purpose and principles of the Victorian legislation (referred to above). However, it should be acknowledged that the test is an objective one,[131] and will often be easily met, at least for patients. That is, although 'mere discomfort or hurt feelings' is insufficient to satisfy the test,[132] given the already distressing nature of accessing abortion services, and the inherent vulnerability of patients accessing that service,[133] it is not unreasonable to

[127] Ibid s 185F. Note that only a police officer at or above the rank of sergeant may make such an application to a magistrate: s 185F(1).
[128] Ibid s 185F(2).
[129] Ibid s 185G.
[130] The same requirement can be found in the NSW legislation: see *Public Health Act 2010* (NSW) s 98D.
[131] See *Clubb v Edwards* (n 5) 26 (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* [2020] VSC 49, [53].
[132] See *Clubb v Edwards* (n 5) 19 (Kiefel CJ, Bell and Keane JJ), 76 (Nettle J); *Clubb v Edwards* [2020] VSC 49, [100].
[133] Justice Kennedy makes the point that such persons will 'already be likely to be feeling distressed or highly vulnerable': *Clubb v Edwards* [2020] VSC 49, [107].

assume that any communication from a stranger, 'raising an issue of a highly personal nature',[134] as a patient enters or leaves the relevant premises (or attempts to do so) will self-evidently be reasonably likely to cause distress or anxiety. Indeed, it is arguable, given the vulnerability of patients, and the highly personal nature of accessing abortion services, that there exists a substantial chance that the mere approach by a stranger will cause distress or anxiety.[135] That is, the relevant words and/or conduct cannot be considered in isolation, and the test is determined by an assessment of the nature and impact of those words and/or conduct on the reasonable person accessing the premises, and that reasonable person will already probably be in a vulnerable and anxious state.[136] It is of interest to note in this respect that Justice Nettle of the High Court, in comparing the Tasmanian and Victorian legislation on this point, concluded that despite the Tasmanian legislation having no such express limitation, the 'practical reality' was that both 'provisions have much the same effect' because:

> as a matter of common sense and ordinary experience, the reasonable likelihood is that virtually any form of protest about terminations within the access zone capable of being seen or heard by persons accessing the premises at which termination services are provided would cause distress or anxiety to persons accessing or attempting to access the premises.[137]

Thus, in terms of a legislative template for SA and/or WA, either the Victorian or Tasmanian model is appropriate.[138] A further argument in favour of adopting either the Tasmanian or Victorian legislation as a template is that both models have received approval from the High Court as being constitutionally valid legislation.[139]

IV Conclusion

It is this author's opinion that although either the Tasmanian or Victorian legislation would be an appropriate legislative template, the best template for safe access zone legislation in SA and/or WA is a blend of the Tasmanian and Victorian models. As stated earlier, the Tasmanian model's simplicity and relative unambiguity in meeting the objectives of safe access zone legislation sets it apart from all other jurisdictions, and should for this reason be followed closely, with the result that the Victorian model's imposition of further elements for the relevant offences be discarded. That is, although the element for a prohibited communication offence of insisting that the communication is 'reasonably likely to cause distress or anxiety' has been interpreted broadly by both the High Court and the

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[134] Ibid [108].
[135] Ibid [78].
[136] See *Clubb v Edwards* (n 5) 24 (Kiefel CJ, Bell and Keane JJ).
[137] Ibid 81 (Nettle J). However, it is unclear whether this would apply to a health worker.
[138] For quick reference tables that provide key features of all jurisdictions see SALRI Report (n 3) 413; WA Report (n 2) 43–50.
[139] See *Clubb v Edwards* (n 5).

Victorian Supreme Court,[140] it is a complicating factor probably best left out of the legislation.[141] Similarly, although the 'without reasonable excuse' qualification in the Victorian legislation only applies to the interference or impediment offence and the intentionally recording offence (and not the prohibited communications offence), it is also best avoided in the interests of simplicity. The convoluted identification requirements of the publication or distribution of recordings offence in the Victorian legislation should also be eschewed. However, the Victorian model's purpose and principles statements should be adopted, not just for their symbolic importance, but also in terms of framing potential future interpretations of the legislation.[142] The police powers conferred by both models should be amalgamated so as to provide authorities with the ability to adequately enforce the legislation consistent with such objectives.

Finally, the broad scope of the Victorian prohibited communications offence should be implemented: that is, 'communicating by any means in relation to abortion'.[143] This phrase encompasses all types of communications and captures both words and conduct,[144] and may even prohibit certain silent vigils.[145] This is an important distinction because the Tasmanian provisions only refer to 'a protest in relation to terminations',[146] which is similar to the ACT provisions that prohibit 'a protest, by any means',[147] and the ACT Magistrates Court recently decided that certain modes of silent prayer do not constitute such 'protest'.[148] This seems at odds with the comments made by the plurality in *Clubb v Edwards* that '[s]ilent but reproachful observance of persons accessing a clinic for the

[140] Ibid; *Clubb v Edwards* [2020] VSC 49.

[141] Having said that, there might be some concern that without such a condition the constitutional validity of the legislation might be called into question because the communication prohibition then becomes 'excessive': see *Clubb v Edwards* (n 5) 19, 26 (Kiefel CJ, Bell and Keane JJ). However, the Tasmanian legislation has no such condition and that legislation was held to be constitutionally valid. Indeed, Nettle J stated that whether the condition exists or not 'in effect makes little difference' in that regard: at 84 (Nettle J). Also see at 30 (Kiefel CJ, Bell and Keane JJ).

[142] That is, the contextual or purposive approach to statutory interpretation currently reigns in Australian courts, which means that legislation will be interpreted in a manner that promotes the stated purpose of that legislation: see, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Also see Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1107.

[143] *Public Health and Wellbeing Act 2008* (Vic) s 185B(1). With the exceptions of Tas and the ACT, all other jurisdictions utilise sufficiently broad phrases similar to Victoria: see *Public Health Act 2010* (NSW) s 98D(1); *Termination of Pregnancy Law Reform Act 2017* (NT) s 14(4)(b); *Termination of Pregnancy Act 2018* (Qld) s 15(1)(a).

[144] See *Clubb v Edwards* [2020] VSC 49, [56]–[76].

[145] See *Clubb v Edwards* (n 5) 25 (Kiefel CJ, Bell and Keane JJ). Gageler J expressly states that the legislation 'extends to peaceful demonstration … [and] … a silent vigil': at 41. Also see *Clubb v Edwards* [2020] VSC 49, [51] (Kennedy J).

[146] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1).

[147] *Health Act 1993* (ACT) s 85(1).

[148] See *Bluett v Popplewell* [2018] ACTMC 2, [86].

purpose of terminating a pregnancy may be as effective, as a means of deterring them from doing so, as more boisterous demonstrations'.[149] However, the ACT Magistrates Court found that the defendants were operating individually,[150] and that the silent prayer in question 'involved no component of expression, communication or message to those around them',[151] so the decision is arguably consistent with the above comments from *Clubb v Edwards*.[152] Nonetheless, the ACT case highlights potential issues with limiting the prohibited communication to 'a protest', and the Victorian model should be followed in this respect as it more closely aligns with the purpose of the legislation, which for reasons already discussed, must look to the consequences of the conduct, and not merely the conduct itself.

A *Postscript*

Subsequent to this article being accepted for publication there has been significant legislative activity in both WA and SA on safe access zones. In SA there have been a number of safe access zone Bills introduced into the South Australian Parliament since the last election in 2018,[153] with the most recent being the Health Care (Safe Access) Amendment Bill 2020, introduced by Ms Natalie Cook MP in the House of Assembly on 3rd June 2020. This Bill passed the House of Assembly on 23rd September 2020, and is now before the Legislative Council. The Bill seeks to insert provisions into the *Health Care Act 2008* (SA) in order to establish 'health access zones' around 'protected premises' and 'any public area within 150 metres of the protected premises'.[154] The Bill is modelled on the Victorian legislation. It follows Victoria in stating that the object of establishing health access zones is 'to ensure the safety, wellbeing, privacy and dignity of people accessing abortion services, as well as health professionals and other people providing abortion services',[155] and prohibits behaviour within a health access zone in a manner broadly similar to the Victorian legislation.[156] Of particular note is that the Bill follows Victoria in

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[149] *Clubb v Edwards* (n 5) 25 (Kiefel CJ, Bell and Keane JJ).

[150] See *Bluett v Popplewell* [2018] ACTMC 2, [84].

[151] Ibid [85].

[152] It is of interest to note that the South Australian Law Reform Institute has suggested that silent prayer vigils should be expressly prohibited in order to remove any doubt in this regard: see SALRI Report (n 3) 433.

[153] See Statutes Amendment (Abortion Law Reform) Bill 2018 (SA); Health Care (Health Access Zones) Amendment Bill 2019 (SA). Both of these Bills have lapsed.

[154] See Health Care (Safe Access) Amendment Bill 2020 (SA) s 48B.

[155] Ibid s 48C(1). In contrast to the Victorian legislation, the Bill then highlights its own limits, consistent with comments made by the High Court, that the relevant prohibited behaviour only applies within the health access zone, and that engaging in lawful protest 'in relation to a matter other than abortion' is not prohibited within a health access zone: s 48C(2).

[156] Ibid s 48B. The prohibited behaviour includes recording and publishing offences (ss 48B, 48D, 48F). The publication offence follows Victoria in only prohibiting publications that identify, or are likely to lead to the identification, of the person recorded: s 48F.

prohibiting communication by any means, and requiring that such communication is 'reasonably likely to cause distress or anxiety'.[157] If found guilty of the relevant offences, the applicable penalties are comparable to other jurisdictions.[158] The police are granted power to direct a person to immediately leave a health access zone if 'the police officer reasonably suspects that a person has engaged, or is about to engage, in prohibited behaviour in a health access zone',[159] but unlike the Victorian legislation, the Bill does not grant search and seizure powers.

In WA, the Public Health Amendment (Safe Access Zones) Bill 2020 was introduced in the Legislative Assembly on 14th October 2020. This Bill seeks to amend the *Public Health Act 2016* (WA). Consistent with the recommendations made by the Department of Health in the report published in early 2020,[160] the Bill follows the Victorian legislation closely. The Bill contains a purpose provision that is identical to the Victorian model,[161] and the relevant prohibited behaviour is defined in a virtually identical manner.[162] In contrast to the Victorian legislation, the Bill does not confer any powers on the police, and a review of the provisions are mandated after five years.[163] The WA Bill also distinguishes itself from all other jurisdictions by providing for mandatory imprisonment; that is, the applicable penalty is 'imprisonment for 1 year *and* a fine of $12,000'.[164] Whether such a penalty would withstand a constitutional challenge is open to speculation.[165]

It would be premature to comment further on either Bill, as the final form of any such legislation establishing safe access zones, assuming such legislation is enacted, is a matter of conjecture. However, as it stands, in largely following the Victorian model (to varying degrees) both Bills have much to commend them, for reasons articulated in this article.

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[157] Ibid s 48B.

[158] The penalty for engaging 'in prohibited behaviour in a health access zone' is $10,000 or imprisonment for 12 months: ibid s 48D.

[159] Ibid s 48E(1). A person that refuses such direction, or leaves but then returns within 24 hours, may be fined $10,000: ss 48E(4), 48E(5).

[160] See WA Report (n 2) 36.

[161] See Public Health Amendment (Safe Access Zones) Bill 2020 (WA) s 202N.

[162] Ibid ss 202O, 202P, 202Q.

[163] Ibid ss 306B, 306C.

[164] Ibid s 202P(1) [italics added].

[165] That is, the High Court has only held the Tasmanian and Victorian legislation to be constitutionally valid, so legislation that constitutes a greater burden on the implied freedom of political communication (and it is arguable that a greater penalty translates into a greater burden) may not necessarily be valid legislation.