

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

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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 funded¹ 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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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 Repts 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 decriminalisation, 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 1837²⁰). 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 negated 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 Repts 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 Appeal⁶⁷ 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 Qd 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 negated, 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 legislation¹¹² 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.

A Smallish Blow for Liberty? The Significance of the Communist Party case

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The Communist Party Dissolution Act 1950 (Cth) was presented by some of its critics as a first step towards totalitarianism, and the High Court's decision in the Communist Party case has been welcomed as having possibly saved Australia from that fate. In this article, I argue that, except insofar as it related to the Communist Party itself, the Dissolution Act was less repressive than many of its critics maintained. Had the Act survived, the Commonwealth would have been hard-pressed to use it against bodies other than the Communist Party, and against people who had not been members of the party. The under-enforcement of previous pieces of anti-communist legislation suggests the government would have been wary about making use of its powers under the Act.

The High Court's decision itself reaffirmed its commitment to the rule of law, and in doing so protected Australian democracy. However, in doing so, it affirmed the non-reviewability of decisions by the Governor-General, and it left the Commonwealth (and the States) with considerable powers which they could use against communists. The subsequent failure of the Commonwealth and the States to make much use of their legislative powers highlights the degree to which government was subject to political as well as legal constraints. However, the Commonwealth's use of its discretionary powers highlights the degree to which it was nonetheless able to pursue a limited anti-communist agenda.

INTRODUCTION

It is now fifty years since the High Court's decision in the *Australian Communist Party v Commonwealth* (the 'Communist Party case').¹ The decision proved to be a remarkably non-controversial one, given the passions of the time.² That this was so is partly attributable to the fact that the Court's anti-socialist decisions in the later 1940s effectively immunised it from attack from those most likely to have

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¹ (1951) 83 CLR 1.

² 80% of those surveyed in a June 1951 Gallup Poll said that they would vote 'Yes' in the referendum to overturn the decision: Australian Gallup Polls *Australian Public Opinion Polls July 1951*, 775-87. Evidence of its acceptance is provided by the lack of any criticism of the decision in parliamentary speeches in support of the *Constitutional Amendment (Powers to Deal with Communists and Communism) Bill* and by editorials in media which had supported the *Dissolution Act*: George Winterton, 'The significance of the *Communist Party case*' (1992) 18 *Melbourne University Law Review*, 630. Sir Garfield Barwick wrote caustically of the decision in a memorandum of advice to the Solicitor-General: 'I have re-read the judgments. I must confess that views which take so long to express, hedged round with so much explanation, naturally excite comment. However, let bygones be bygones. At least I have been patient enough to re-read them' Barwick to Bailey 26 June 1951 National Archives of Australia (NAA): A467/1 BUN20/SF7/51. But if anyone is likely to criticise a decision it is a KC who has advised a losing party that it had a strong case. He made no comment on the case in his 1995 reminiscences other than to mention that he had been opposed to Evatt: Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Reminiscences* (1995) 109.

regretted its decision to find against the constitutionality of the *Communist Party Dissolution Act 1950* (Cth) (the Dissolution Act). It is also attributable to the technical strength of the majority judgments, which follow almost inexorably both from principle and from precedent. Ross Anderson, an early commentator on the decision, treats its significance as lying primarily in its implications for the balance between Federal and State powers, and treats the case as of considerably less importance than the Bank Nationalisation decisions.³ For others, however, the decision was of far greater importance. According to them, the decision, and the failure of the subsequent referendum may have saved Australia from totalitarianism. This, understandably, was the view taken by communists. Aarons, for instance, writes that:

Menzies was determined to press ahead with the totalitarian program of banning the ACP and taming the trade union movement forever. Once he started on the road, the logical result would have been a full-blooded effort to impose a police state and crush all opposition. It was rumoured, not too fancifully, that he planned a concentration camp for the Reds on King Island - he had already interned Thomas and Ratliff in 1941 and he believed the danger was much greater in 1951.⁴

This view was also shared by some Labor opponents of the legislation.⁵ It is also a view shared by scholars and judges, albeit in a slightly qualified form. Williams in his generally illuminating paper on the case suggests that:

[t]he *Dissolution Act* was significant because in seeking to suppress communism in Australia it compromised the freedom of political speech and association previously enjoyed by the Australian people. The Act may have instilled another, equally intolerant form of totalitarianism in Australia. One only has to look at the history of nations such as South Africa and Chile in the early 1950s, which passed legislation similar to the *Dissolution Act*, to realise

³ Ross Anderson, 'Australian Communist Party v The Commonwealth' (1951) 1(3) *University of Queensland Law Journal* 34, 34, 42-3.

⁴ Laurie Aarons, 'Confessions of a failed outlaw' in Elsa Atkin and Brett Evans (eds), *Seeing Red: the Communist Party Dissolution Act and Referendum 1951 - Lessons for Constitutional Reform* (1991) 23, 29. Lockwood places the concentration camps on Flinders Island, and states that he was shown the relevant plans, which would have been put into effect if the referendum had passed: Rupert Lockwood, 'Seeing red - and darker colours' in Elsa Atkin and Brett Evans (eds), *Seeing Red: the Communist Party Dissolution Act and Referendum 1951 - Lessons for Constitutional Reform* (1991) 111, 118, 125. His account leaves open the question of who had prepared the plans, and whether anyone with authority to do so had approved their implementation. Were they prepared with a view to their immediate post-referendum implementation, or were they contingency plans to be used in the event of Australia becoming involved in a war with the Soviet Union (in which case the ACP had claimed it would support the Soviet Union)? There was no provision for internment under the *Dissolution Act*. Had the referendum been passed, it would probably have permitted the passage of legislation under which declared communists could have been interned, but Lockwood does not refer to the existence of plans for such legislation.

⁵ The Bills and the Act were similarly interpreted by a number of Labor parliamentarians: eg Edward ('Eddie') Ward ('Government is endeavouring to establish a police state in Australia'): Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2654; Clyde Cameron ('Government is seeking to institute in this democracy a worse form of tyranny than the Communists seek to establish in Korea'): Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 119.

that such legislation may have laid the foundations for a police state.⁶

Winterton's verdict is more cautious, but he nonetheless considers that the decision may have been of fundamental importance for the future of civil liberties in Australia.

Had the validity of the Act been upheld and the Act enforced unscrupulously by the government, its effect on the Labor movement would surely have been disastrous. It was noted earlier that Menzies had stated in Parliament that the objectives of the Communist Party and the Labor party were identical. This made the Australian Labor Party potentially eligible for 'declaration', subject to limited judicial review by a single judge, but without further appeal therefrom.⁷

Kirby, discussing Evatt's role in the 1951 referendum (the government's response to the decision) argues that had he not joined battle:

We might have seen the adornment of the Communist Party Dissolution Act with the panoply of security measures now seen in its successor in South Africa. We might have seen the establishment of the Un-Australian Activities Committee. The arrests at midnight for nothing more than holding stigmatising ideas. The 'declaration' of persons and organisations as 'banned'. Public stigmatisation, name-calling, alienation. A witch-hunt society.⁸

There is an element of hyperbole in many of these statements. Taken literally, Williams' reference to 'another, equally intolerant form of totalitarianism' implies that had the 1951 referendum passed and the Act been re-enacted, the Menzies government would have behaved in a similar way to Hitler, Mao or Stalin. Yet previous anti-communist measures had done no such thing, and it is hard to believe that if 72,000 voters had cast their votes differently in the 1951 referendum, Australia would have been at serious risk of a descent into totalitarianism (as opposed, say, to authoritarianism).⁹

There are also problems with Winterton's argument that, but for the decision, an unscrupulous government could have 'declared' the ALP to be an unlawful association. Even if his legal analysis is correct (and I shall argue that it may not be), his suggestion ignores the fact that according to the decision, *State*

⁶ George Williams 'Reading the judicial mind: appellate argument in the Communist Party case' (1993) 15 *Sydney Law Review* 3, 3. The Chilean law was in fact passed in the late 1940s: National Archives of Australia (NAA): A1838 1493/2. Moreover, between the making of the law and the overthrow of the Allende government in 1973, it was one of the few South American states in which elections were competitive and reasonably free, and in which there had been no irregular transfers of executive power: Charles Taylor and Michael Hudson *World Handbook of Political and Social Indicators* (2nd ed, 1972) tables 2.9, 3.10.

⁷ Winterton, above n 2, 654. In fact it is not clear that Menzies had made this observation. It was Chifley whom Winterton cites as authority for the proposition that the ALP could be declared under the Act.

⁸ Michael Kirby, 'HV Evatt, the Anti-Communist referendum and liberty in Australia' (1990) 7 *Australian Bar Review* 93, 119. His comments must be understood as referring to the referendum as distinct from the *Dissolution Act*. If, as I argue, the scope of the Act reflected constitutional constraints, it is possible that, had the referendum succeeded, one consequence might have been more draconian legislation. If that had been so, the decision in the *Communist Party case* would, arguably, have to be seen as a tragedy, whose political effect was to expand the Commonwealth's power to pass repressive legislation.

⁹ The estimate makes allowance for the requirement that the 'yes' vote receive both a majority of votes, and a majority of votes in a majority of States.

parliaments possessed the power to proscribe political parties. It follows therefore that an unscrupulous State government could have legislated to proscribe the ALP, or for that matter, the Liberal or Country parties. Yet no State government (and there have been several which have shown themselves to be economical with political morality) ever availed itself of this power or even contemplated doing so. Moreover, there is an element of political unreality to the suggestion that a government which was prepared to engage in an effective coup d'état would be worried about whether this would be unconstitutional.

Even Kirby is not altogether convincing. The South African analogy is not a good one. The history of a polity in which 70-80% of the population was disenfranchised can throw only limited light on how Australia would have developed. In any case, while the South African legislation resembled the Australian Act, even in its original form, it was far more wide-ranging, and included significantly fewer safeguards.¹⁰ If analogies are to be drawn, instead, from liberal-democracies, they could be drawn with quite different lessons from the experience of Canada. There, at least in Ontario, the party was illegal during the early 1930s, and it was banned again in 1940. Three hundred communists were interned during the war. But the imprisonment of the Ontario communist leaders produced sympathy for the party. The war-time sanctions operated with only limited success, and did not create an appetite for ever more repressive measures. Post-war governments decided firmly against banning the party.¹¹ Nor did the Federal Republic of Germany's banning of the Communist Party under the postwar constitution set the Republic down the path towards totalitarianism. Indeed, lessons could even be drawn from Australia, where the party was treated as illegal between 1940-42, but where the ban was enforced in a rather perfunctory manner.¹² Conversely, the United States demonstrates that a less repressive statutory regime than that provided by the *Crimes Act 1914* (Cth)¹³ and the *Dissolution Act* could coexist with repression on a far greater scale than ever existed in Australia. More encouragingly, it also illustrates that revulsion against repressive excesses can eventually constrain governments (and unduly compliant

¹⁰ Its definition of communism was sufficiently wide to include the advocacy of civil disobedience as a means of achieving legal change: *R v Sisulu* 1953 3 SA 276 (Appellate Division); *R v Alwyn* 1955 3 SA 207 (Appellate Division). See in particular the definitions of 'communism' and 'communist' in the *Suppression of Communism Act* 44 of 1950 (S Af).

¹¹ Winterton, above n 2, 655 states that if the ban had been upheld, 'Australia would have had the dubious distinction of being the only English-speaking democracy to ban the Communist Party'. This is correct only if the phrase 'after World War II' is implied. In the early 1930s, the party was held by an Ontario court to be an unlawful association under the Canadian equivalent of the *Crimes Act 1914* (Cth), Part IIA. It was banned, as such, in 1940. See Norman Penner, *Canadian communism: the Stalin years and beyond* (1987) 117-21, 166-215, 225.

¹² Since it was banned under Regulations which were subsequently held to be *ultra vires*, it was never, technically, illegal. The government agreed to lift the ban in December 1942, but did not make the relevant proclamation until March 1943, after the Director-General of Security had drawn its attention to the fact that the lifting of the ban had never been gazetted: Director to Deputy-Director of Security, Qld 10 March 43 NAA: A6122/17 985, Gazette No. 66 of 1943 (25 March 43). On the operation of the ban, see for example, Alistair Davidson, *The Communist Party of Australia. A short history* (1969) 80-3, 90-1; Stuart Macintyre, *The Reds* (1998) 396-411.

¹³ The *Crimes Act 1914* (Cth) Part IIA provides that bodies and their affiliates which advocate or encourage the revolutionary overthrow of the Commonwealth or the Constitution (*inter alia*) are unlawful associations. They may be dissolved, and those associated with them may be guilty of a range of offences. The legislation is discussed in: S Ricketson, 'Liberal law in a repressive age: communism and the rule of law, 1920-1950' (1976) 3 *Monash University Law Review* 101, and Roger Douglas, 'Keeping the revolution at bay: the Unlawful Associations provisions of the Commonwealth Crimes Act' (2001) *Adelaide Law Review* (forthcoming).