THE DISAPPEARING CRIME OF ABORTION AND THE RECOGNITION OF A WOMAN'S RIGHT TO ABORTION: DISCERNING A TREND IN AUSTRALIAN ABORTION LAW?

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I INTRODUCTION

A *The Description of a Crime*

Late last century abortion was a serious crime in every jurisdiction in Australia. This stemmed from the fact that all Australian jurisdictions, in drafting and enacting their various penal codes early last century, tended to simply absorb aspects of the UK criminal law. Abortion was no different. Each jurisdiction consequently enacted legislation similar, if not practically identical, to sections 58 and 59 of the *Offences Against the Person Act 1861* (UK). As a result, attempting to perform an abortion,[1] and/or supplying abortifacients with like intent, was a serious crime. Penalties for performing or attempting an unlawful abortion ranged from 10 years imprisonment in New South Wales,[2] to life imprisonment in South Australia.[3] Less severe penalties usually applied for unlawfully supplying abortifacients,[4] but imprisonment was nonetheless prescribed.

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1 In other words it was not a necessary element of the offence that an actual termination of pregnancy resulted from the actions complained of.

2 *Crimes Act 1900* (NSW) s 82.

3 *Criminal Law Consolidation Act 1935* (SA) s 81.

4 See, eg, in New South Wales the penalty is 10 years imprisonment for performing the abortion (*Crimes Act 1900* (NSW) ss 82-83), and only 5 years for supplying the requisite drug or instrument (*Crimes Act 1900* (NSW) s 84). All other jurisdictions have similar discounts, with South Australia having the

In each jurisdiction the woman herself could be charged with the offence of attempting to procure her own abortion.[5] In essence, she was potentially liable to be imprisoned for an extended period of time for the crime of utilising her own body as if it were her own body. It might be suggested that this statement is somewhat audacious and overly simplistic, as it ignores the fact that a foetus is involved. In answer, one need only highlight that this crime was one of attempt: there was no need to show that a foetus had been harmed in any way whatsoever. Indeed, in Queensland and Western Australia, in order for a woman to be found guilty of the crime of attempting to procure her own abortion, it mattered not whether she was, in fact, pregnant at the relevant time.[6] In other words, she faced imprisonment for attempting the impossible. Although in all other jurisdictions a woman must have been pregnant if she was to be charged with attempting to procure her own abortion, it was still the case that there was no need to show that an actual termination of pregnancy had occurred.

This focus on the attempt of terminating the pregnancy, rather than any actual termination, was also a fundamental aspect of the crime as it applied to third parties. In all jurisdictions any person (other than the woman concerned) could be charged with the offence irrespective of whether the woman concerned was pregnant.[7] With respect to the crime of supplying the requisite drug or instrument, knowing that it was intended to be used to procure an abortion, it mattered not whether the woman was pregnant, or even whether the

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extreme difference between life imprisonment for performing the abortion (*Criminal Law Consolidation Act 1935* (SA) s 81), and 3 years for providing the requisite drug or instrument (*Criminal Law Consolidation Act 1935* (SA) s 82). The exception to this rule is the NT, where no distinction, in terms of penalty, is made between performing an abortion and supplying abortifacients (*Criminal Code Act 1983* (NT) ss 172-173).

5 See, eg, *Crimes Act 1900* (ACT) s 42; *Crimes Act 1900* (NSW) s 82; *Criminal Law Consolidation Act 1935* (SA) s 81(1); *Criminal Code Act 1924* (Tas) s 134(1); *Crimes Act 1958* (Vic) s 65.

6 *Criminal Code Act 1899* (Qld) s 225; *Criminal Code Act 1913* (WA) s 200.

7 See, eg, *Crimes Act 1900* (ACT) s 43; *Crimes Act 1900* (NSW) s 83; *Criminal Code Act 1983* (NT) s 172; *Criminal Code Act 1899* (Qld) s 224; *Criminal Law Consolidation Act 1935* (SA) s 81(2); *Criminal Code Act 1924* (Tas) s 134(2); *Crimes Act 1958* (Vic) s 65; *Criminal Code Act 1913* (WA) s 199.

drug or instrument was actually utilised with the requisite intent.[8] So, with respect to any person other than the woman concerned (although in Queensland and Western Australia the same applied to the woman concerned), early last century in all Australian jurisdictions, it was the case that individuals could be convicted, and imprisoned at length, for what amounted to attempting the factually or physically impossible.[9]

The law remained in this state until 1969, when the law in South Australia and Victoria was modified through legislative and judicial action respectively. The New South Wales judiciary followed Victoria in 1971, and the NT legislature imitated South Australia in 1974. Queensland had to wait until 1986, when it too followed the Victorian decision. In Western Australia, the ACT, and Tasmania the law remained unchanged until 1998 with respect to Western Australia and the ACT, and 2001 in Tasmania. The ACT again went through a substantial alteration of its law in 2002, as did Victoria in 2008. Minor legislative amendments occurred in the NT in 2006, and in Queensland in 2009.

Given the abovementioned legislative and judicial activity, it would be reasonable to assume that the first sentence of this article - '[l]ate last century abortion was a serious crime in every jurisdiction in Australia' - was a typographical error. There is no such mistake. The abortion law reform that occurred in a number of jurisdictions during the later part of the 20th century only provided for defences,

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8 See, eg, *Crimes Act 1900* (ACT) s 44; *Crimes Act 1900* (NSW) s 84; *Criminal Code Act 1983* (NT) s 173; *Criminal Code Act 1899* (Qld) s 226; *Criminal Law Consolidation Act 1935* (SA) s 82; *Criminal Code Act 1924* (Tas) s 135; *Crimes Act 1958* (Vic) s 66; *Criminal Code Act 1913* (WA) s 201.

9 Although this article will not discuss the issue of physical impossibility as a means of exculpating criminal responsibility, it should be noted that '[t]he application of impossibility to inchoate liability is an area of extreme and subtle difficulty': Desmond O'Connor and Paul Fairall, *Criminal Defences* (Butterworths, 3rd ed, 1996) 126. Suffice to say that the issue continues to be debated within the courts, with some jurisdictions following *Haughton v Smith* [1975] AC 476: see, eg, *Gulyas* (1985) 2 NSWLR 260; *Kristos* (1989) 39 A Crim R 86; while others have moved away from that reasoning: see, eg, *Britten v Alpogut* [1987] VR 929; *R v Lee* (1990) 1 WAR 411.

for both the woman concerned, and third parties performing the abortion or supplying the abortifacients, to the crime of attempting to procure an unlawful abortion. Such reforms, by establishing defences to the crime, meant it was possible to have lawful abortions in certain circumstances, but simultaneously failed to change the fundamental criminal status of abortion.[10]

Fortunately for Australian women seeking lawful abortion services, from 1998 onwards further reforms have been embarked upon by a number of jurisdictions, with much of this legislative activity aimed at decriminalising the procedure to various degrees. This recent liberalisation of abortion law in some jurisdictions has largely been achieved through medicalisation of the issue, whereby the practice is regulated by health or medical services law, rather than criminal law *per se*. In the ACT and Victoria the medicalisation process has now occurred to such an extent that an abortion performed by a qualified person is no longer defined as a crime in most circumstances. The ramifications of this will be dealt with later in the article.

B *The Proposed Interrogation*

The purpose of this article is to canvass and critique the various reforms that have occurred in abortion law since 1969. The current criteria for lawful abortion in each Australian jurisdiction will be discussed, and, based on an assessment of such criteria, a determination will be made as to how far each jurisdiction is from recognising a woman's right to abortion. It is beyond the scope of this article to attempt to prove this moral position; rather, the author

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[10] I acknowledge the point made by Gleeson that it may be unhelpful from a practical access to abortion services perspective to state that abortion is 'unlawful' or 'illegal': see Kate Gleeson, 'The Other Abortion Myth – the failure of the common law' (2009) 6 *Journal of Bioethical Inquiry* 69, especially given that prosecutions for the crime are rare (72-74, 79). But the facts remain: it is defined as a crime in a significant number of jurisdictions, and although rare, both prosecutions and convictions continue to occur: see, eg, *R v Sood* [2006] NSWSC 1141; *R v Brennan and Leach* (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010).

presumes that this moral right exists as a component of the (further presumed) right to reproductive freedom.[11] The article examines the legal reality of abortion law, and not the morality of abortion, but it must be noted that such legal analysis occurs within the context of the author's above stated moral position.

Given this emphasis, the following questions will be asked with respect to the law in each jurisdiction:

1. Is abortion, *prima facie*, a crime, and, if so, can a woman be charged for procuring, or attempting to procure, her own abortion?;

2. Do reasons/defences for abortion need to be provided or satisfied in order to constitute lawful abortion, and, if so, does the law require one or more medical practitioners to sign off with respect to such reasons/defences to constitute lawful abortion?;

3. Does the law require the abortion to be performed in a prescribed facility, or by a particular specialist medical practitioner for it to be lawful?;

4. Are there gestational time limits for lawful abortion?; and

5. Can medical practitioners remove themselves from the process via conscientious objection to the procedure?

These questions are all relevant to establishing whether or not a particular jurisdiction has recognised a woman's right to abortion for the following (non-exclusive) reasons:

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[11] The existence of this moral right is contentious. For a classic argument in support of this moral position see Rosalind P Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (Longman, 1984), especially at 373-378 and 384-387. Petchesky links reproductive freedom, and a right to abortion, to the universally recognised human rights of bodily integrity, self-determination and equality. For a classic argument against this moral position see J T Noonan Jr, 'An Absolute Value in History' in J T Noonan Jr (ed), *The Morality of Abortion: Legal and Historical Perspectives* (Harvard University Press, 1970) 1, 51-59. Noonan argues that no such right to abortion can exist because the foetus' right to life should take precedence.

Question 1 speaks for itself, as one cannot possess a right to commit a crime;[12]

Question 2 is relevant on a similar basis, as the necessity of providing reasons in order to exercise a right, and allowing the medical profession to decide whether those reasons are sufficient, is inconsistent with the full recognition of such a right;[13]

Question 3 deals with logistical issues that hinder the exercise of a woman's right to abortion, especially for women living in remote communities where particular specialists and facilities may not be available;

Question 4 is concerned with the imposition of time limits that serve to constrain the full exercise of a woman's right to abortion. That is, given that the 'foetus has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother',[14] the exercise of a woman's right to abortion should not be conditional upon the gestational age of the foetus; and

Question 5 raises the issue of whether medical practitioners' rights are placed before women's rights; that is, the exercise of the right to abortion should not be conditional upon a medical practitioner's exercise of his/her conscience.

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12 See Mark Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229, 229, 252.

13 It also grants medical practitioners a quasi-judicial role they are not qualified to exercise. This legal gate-keeping role of the medical profession raises other issues – see, eg, Belinda Bennett, 'Abortion' in Ben White, Fiona McDonald, and Lindy Willmott (eds), *Health Law in Australia* (LawBook Co/Thomson Reuters, 2010) 371, 377; Heather Douglas, 'Abortion reform: A state crime or a woman's right to choose?' (2009) 33 *Criminal Law Journal* 74, 84-86; Victorian Law Reform Commission, *Law of Abortion*, Final Report No 15 (2008) 80. Many of these problems are exacerbated when two medical practitioners are required to make the necessary decision, or if a specialist must certify or perform the procedure.

14 *In the Marriage of F* (1989) 13 Fam LR 189, 194 (Lindenmayer J). See also *Attorney General for the State of Queensland & Anor v T* (1983) 57 ALJR 285, 286 (Gibbs CJ); *R v Hutty* [1953] VLR 338, 339 (Barry J); *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 278; *Medhurst v Medhurst* (1984) 46 OR (2d) 263, 267; *C v S* [1987] All ER 1230, 1234, 1240-1243. Code States have adopted an analogous position, see *Criminal Code Act Compilation Act 1913* (WA), s269; *Criminal Code 1922* (Qld), s292; *Criminal Code 1924* (Tas), s 153(4).

Obviously, a number of the above assertions could be subject to further critical inquiry, but that is not the purpose of this article. This article only aims to answer the stated questions for each jurisdiction, and makes the assumption that if a negative answer can be provided for each of the above questions, then it would be reasonable to assert that a woman's right to abortion has been accepted in that jurisdiction. Each jurisdiction will be canvassed in order of the last *significant* legislative or judicial action on the subject. Thus, South Australia is the first jurisdiction to be exposed to the above interrogation, while Victoria will be last in line.[15]

II SOUTH AUSTRALIA: THE FIRST LEGISLATIVE REFORM

Prior to 1969 the law with respect to abortion was to be found in sections 81 and 82 of the *Criminal Law Consolidation Act 1935-1975* (SA). These sections were virtually identical to sections 58 and 59 of the *Offences Against the Person Act 1861* (UK). As a result, abortion was a serious crime and carried a potential sentence of life imprisonment. In 1969 a new section 82A was enacted, which defined the circumstances in which an abortion would be considered lawful; in essence, the new section described the elements of the defences available for the crime of abortion.

It must be noted that the 1969 amendment did not in any way alter the status of abortion as a serious crime. Sections 81 and 82 were not repealed, and are still applicable if a defence is not made out pursuant to section 82A. Thus, in South Australia abortion remains, *prima facie*, a felony, and if convicted a person is liable to be imprisoned for life. This penalty applies to either the woman concerned, or a third party performing the procedure or administering the medication.

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[15] Although Victoria last amended its law in 2008, and Queensland altered its applicable legislation in 2009, Queensland will be discussed prior to Victoria, as the 2009 Queensland amendments cannot be described as 'significant' legislative action.

In South Australia abortion is an inchoate offence: if one administers medical treatment (either through medication or surgery) 'with intent' to procure a miscarriage,[16] then the crime may be committed irrespective of whether or not actual termination of the pregnancy occurred,[17] and in the case of a third party (ie. not the woman concerned), irrespective of whether or not the woman was pregnant at the relevant time.[18] Thus, the woman concerned could be convicted of attempting to terminate her (actual) pregnancy, while the third party could be convicted of attempting a factual impossibility, and both would be liable to life imprisonment for those attempts.[19]

The legislative amendment of 1969 provided for valid defences to these crimes. The primary defence is that an abortion is lawful if performed by a legally qualified medical practitioner, after that person and another legally qualified medical practitioner have formed an opinion, in good faith, and after both personally examining the woman concerned, that 'the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated'.[20] In assessing this risk the medical practitioners may take account of the pregnant woman's 'actual or reasonably foreseeable environment'.[21] There is no need, unlike some other jurisdictions (discussed later in the article), to show further criteria, such as a serious danger, or proportionality requirements. As a result, the question each medical practitioner must answer is straightforward: what is more dangerous to maternal health, the abortion, or the continuation of the pregnancy?

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16 See *Criminal Law Consolidation Act 1935* (SA) s 81.

17 Ibid s 81(1).

18 Ibid s 81(2).

19 Similarly, section 82 states that a person supplying medication or instrument 'knowing that it is intended' to be unlawfully used 'with intent to procure the miscarriage of any woman' may be convicted of an offence, and it is no defence at all that the woman concerned was not pregnant, or that the supplied abortifacients were not so employed: *Criminal Law Consolidation Act 1935* (SA) s 82.

20 Ibid s 82A(1)(a)(i).

21 Ibid s 82A(3).

An abortion is also lawful if performed by a legally qualified medical practitioner after that person and another legally qualified medical practitioner have formed an opinion, in good faith, and after both personally examining the woman concerned, that 'there is a substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped'.[22] It is arguable that this second defence is superfluous, as in such a situation it would be reasonable to hold that the pregnant woman's mental health is thereby threatened in a way that would give rise to the primary defence.[23]

Provided any of the above situations exist, and the requisite opinions have been appropriately certified,[24] and provided the abortion is performed in a prescribed hospital,[25] the woman concerned has been residing in South Australia for at least two months prior to the procedure,[26] and the woman has been pregnant for less than 28 weeks,[27] then the abortion will be lawful in South Australia.[28] The legislation also allows medical practitioners (or

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22 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii).

23 There is the additional issue that framing a specific abortion defence in this way may be offensive, in that it might be construed as 'devaluing the existence of people who live with disabilities': VLRC, above n 13, 45. See also, Helen Pringle, 'Abortion and Disability: Reforming the Law in South Australia' (2006) 29 *University of New South Wales Law Journal* 207.

24 See *Criminal Law Consolidation Act 1935* (SA) s 82A(4)(a), that gives power to the Governor to make such regulations in relation to certification. See also, *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulations 1996* (SA) reg 5, that demands the certification of the relevant two opinions, the prescribed certificate is contained in Schedule 1 of the Regulations.

25 *Criminal Law Consolidation Act 1935* (SA) s 82A(1).

26 Ibid s 82A(2). Note that this residency requirement is only imposed with respect to the primary 'lesser evil' defence – if the abortion is performed on the grounds of foetal abnormality pursuant to section 82A(1)(a)(ii), then no such residency condition is imposed.

27 *Criminal Law Consolidation Act 1935* (SA) ss 82A(7)-(8).

28 Ibid s 82A(9). It is also the case, in common with all jurisdictions, that an abortion will be lawful if performed by a legally qualified medical practitioner in a case where s/he is of 'the opinion, formed in good faith, that the

indeed 'any person') to refuse to participate in the process, including merely providing information or referrals, if they have a 'conscientious objection'.[29]

In summary, and in answer to the questions presented earlier:

1. Abortion is a serious crime in South Australia, and carries a potential sentence of life imprisonment, for either the woman concerned or any other person;

2. Not only must reasons be provided in order to satisfy the requirements for a lawful abortion, but the law requires two medical practitioners to certify the existence of the requisite reasons for a lawful abortion. Given the comparative shortage of medical practitioners in rural and remote areas,[30] this requirement of a second opinion may prove to be extremely difficult for women in rural and remote areas to meet;

3. Although any medical practitioner may lawfully perform an abortion, it must be one of the medical practitioners providing the requisite opinion concerning sufficient reasons for abortion. The abortion itself must be carried out in a prescribed hospital;

4. An abortion performed at over 28 weeks gestation is clearly illegal, but an abortion post-viability, but less than 28 weeks gestation, may also be illegal. That is, section 82A(7) states that the defences under section 82A do not apply if the child is 'capable of being born alive', and although section 82A(8) defines any foetus of over 28 weeks gestation as a child

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termination is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman'. In such circumstances neither a second opinion, nor any other requirement (eg. hospitalisation or residency) is necessary: *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(b). It is arguable that this effectively codifies the common law defence to abortion: see *Queen v Anderson* [1973] 5 SASR 256, 270; Rankin, above n 12, 244; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 553.

29 *Criminal Law Consolidation Act 1935* (SA) s 82A(5). Note: if the abortion is necessary to save the pregnant woman's life or prevent 'grave injury' to her physical or mental health, then this conscientious objection clause does not apply (see section 82A(6)).

30 See Australian Institute of Health and Welfare, *Rural, regional and remote health: indicators of health system performance* (AIHW, 2008), 20-24.

> capable of being born alive for the purposes of s 82A(7), this is not an exclusive determination concerning viability, which leaves open the possibility that a foetus at less than 28 weeks gestation may nonetheless be deemed a child 'capable of being born alive';[31] and
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> 5. Any person, including medical practitioners that may otherwise be under a duty to provide medical treatment or advice, may refuse to participate in the process of performing a lawful abortion.

Although the basic defence to the crime of abortion is relatively straightforward, accessing lawful abortion services is a complex bureaucratic process in South Australia, involving at least two medical practitioners, and the certification of a number of administrative conditions. South Australia is thus in the ironic position, given that it was the first jurisdiction to tackle the issue legislatively in a manner that led to greater access to abortion services, of now having some of the more potentially restrictive abortion law in Australia. Certainly, in being unable to answer any of the above questions in the negative, South Australia fails in its obligation to recognise a woman's right to abortion.

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[31] This was held to be the case with respect to similar legislation on this point in *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 621 (Brook J). The problem with the 'child capable of being born alive' phrase is that it is inherently uncertain. Even if we hold the phrase to have the same meaning as viability, viability itself is a shifting standard, and courts have acknowledged this inherent ambiguity of viability - see *R v Iby* (2005) 63 NSWLR 278, 284-288; *R v Hutty* [1953] VLR 338; *C v S* [1988] 1 QB 135. A decision about whether a foetus is viable involves assessing not just the level of medical service, technology, and science available at that particular time, but also that particular individual's peculiar distinctions, such as weight, development, and general genetic constitution: see Bennett, above n 13, 385-387; VLRC, above n 13, 101-102.

III NEW SOUTH WALES: THE LAW OF THE COLONY

The law in New South Wales has not been altered legislatively for over a century. The relevant sections in the *Crimes Act 1900* (NSW) remain as they stood when the Act was enacted. In New South Wales one may be charged with providing medical treatment (either through medication or surgery) upon a woman 'with intent…to procure her miscarriage',[32] and it matters not whether she was actually pregnant at the relevant time.[33] The offence carries a potential penalty of ten years imprisonment. A person may also be charged with supplying abortifacients (either medication or instruments), 'knowing that the same is intended to be unlawfully used with intent to procure the miscarriage',[34] and if convicted may be imprisoned for no more than five years. With respect to this supplying charge, it matters not whether the woman was pregnant, or whether the supplied materials were actually utilised for the prohibited purpose. In common with South Australia, the woman herself may be charged with attempting to procure her own abortion,[35] and the abortion need not have been successful, but she must have been pregnant at the relevant time to be convicted. If convicted she faces ten years imprisonment.

As previously stated, the legislature has made no move to change this situation. Fortunately for New South Wales women, in 1971 a New South Wales court decided to follow an earlier 1969 Victorian decision that had created a defence to the charge of abortion, and thereby allowed for there to be lawful abortions. In 1969 the Victorian case of *R v Davidson*[36] had decided that the use of the word 'unlawfully' in the sections dealing with abortion in the *Crimes Act 1958* (Vic), namely sections 65 and 66, implied that certain abortions could be lawful.[37] These sections were framed in

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32 *Crimes Act 1900* (NSW) s 83.
33 Ibid.
34 Ibid s 84.
35 Ibid s 82.
36 [1969] VR 667.
37 Ibid 668.

almost identical terms to the New South Wales sections on abortion, as both were copied almost verbatim from sections 58 and 59 of the *Offences Against the Person Act 1861* (UK). In determining what abortions might be considered lawful, Justice Menhennitt of the Victorian Supreme Court applied the common law defence of necessity to the crime of abortion.[38] The *Davidson* decision meant that abortions would be considered lawful in Victoria provided the medical practitioner performing the abortion 'honestly believed on reasonable grounds'[39] that it was 'necessary to preserve the woman from a serious danger to her life or her physical or mental health[…]which the continuance of the pregnancy would entail'.[40] However, this 'serious danger' could not be the 'normal dangers of pregnancy and childbirth',[41] and the act must be, in all the circumstances, 'not out of proportion to the danger to be averted.'[42] If not performed, or attempted, according to the elements of the necessity defence so enunciated, the abortion would be unlawful.

The *Davidson* decision will not be further discussed here, as it has been adequately dealt with elsewhere,[43] and Victoria has now repealed all criminal law provisions dealing with medical abortion, such that the decision no longer has any real effect on Victorian abortion law. However, the decision was followed in New South Wales in 1971 by Judge Levine in *R v Wald*,[44]so remains historically relevant to that jurisdiction. Judge Levine further clarified the application of the necessity defence to the crime of abortion in two significant ways. First, although Justice Menhennitt had implied that the necessity defence was only available to medical practitioners in the case of abortion,[45] Judge Levine specifically stated that the defence, as it applied to the crime of abortion, was only available to

38 *R v Davidson* [1969] VR 667, 670-672.
39 Ibid 672.
40 Ibid.
41 Ibid.
42 Ibid.
43 See Rankin, above n 12, 232-234.
44 [1971] 3 DCR (NSW) 25. Judge Levine made it clear that he was following Justice Menhennitt in reaching his decision (at 29).
45 See *R v Davidson* [1969] VR 667, 672.

the medical profession.[46] This is a potentially troublesome aspect of the decision, as although it was perhaps made on the basis of preventing 'backyard' abortionists from availing themselves of the defence, a literal reading of the decision would also preclude the woman herself from utilising the defence. Thus, in New South Wales, a woman charged with attempting to procure her own abortion may have no positive defence to that charge.

Second, with respect to medical practitioners, Judge Levine broadened the scope of the defence by holding that, in assessing 'serious danger' to a woman's physical or mental health, a medical practitioner was not confined to purely medical considerations, and could consider 'any economic, social or medical ground or reason'.[47] Further, Judge Levine felt that this assessment need not be confined to an immediate assessment, but could include an assessment as to the woman's future health during the currency of the pregnancy, if the pregnancy were not terminated.[48]

There was a missed opportunity to further extend the assessment of 'serious danger' in the *Superclinics*[49] decision in 1995. The New South Wales Court of Appeal followed both *Davidson* and *Wald* in suggesting the test for a lawful abortion, and felt that, in line with *Wald*, economic and social factors should be considered when assessing a serious danger to the woman's health,[50] but Acting Chief Justice Kirby felt that the danger to the woman's health should not be confined to the currency of the pregnancy, but might also include an assessment of her health after the birth of the child.[51] As Kirby states:

> There seems to be no logical basis for limiting the honest and reasonable expectation of such a danger to the mother's psychological health to the period of the currency of the pregnancy

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46 *R v Wald* [1971] 3 DCR (NSW) 25, 29.
47 Ibid.
48 Ibid.
49 *CES v Superclinics (Australia) Pty Ltd* ('*Superclinics*') (1995) 38 NSWLR 47.
50 Ibid 59.
51 Ibid 60, 65. See also, *Veivers v Connolly* (1995) 2 Qd R 326, 329.

> alone. Having acknowledged the relevance of other economic or social grounds which may give rise to such a belief, it is illogical to exclude from consideration, as a relevant factor, the possibility that the patient's psychological state might be threatened *after* the birth of the child, for example, due to the very economic and social circumstances in which she will then find herself.[52]

This would have been an important interpretation of the law from a women's rights perspective, as it is reasonable to hold that, given an unwanted pregnancy, the (hypothetical) psychological state of the mother after (involuntary) childbirth is likely to provide grounds for a finding of serious danger to her mental health. Unfortunately, Kirby was alone in his determination that the *Wald* test should be so extended, so the majority decision can only be stated as approving the test laid down in *Wald*.[53]

In summary, in New South Wales the situation remains in practice less restrictive than a literal reading of the legislation suggests, as medical practitioners may make quite varied, yet potentially legally appropriate, determinations of 'serious danger' and proportionality. However, the point to remember is that abortion remains, *prima facie*, a crime in New South Wales, and no one knows what assessment a court might make of a particular medical practitioner's decision. As Justice Priestley stated in *Superclinics*:

> [A]s the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.[54]

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52 *Superclinics* (1995) 38 NSWLR 47, 60.

53 Ibid 59-60 (Kirby A-CJ), 80 (Priestley JA).

54 *Superclinics* (1995) 38 NSWLR 47, 83. Kirby A-CJ makes a similar point that the legal tests were 'open to subjective interpretation' (at 63).

This is hardly an ideal state of affairs, yet with respect to the relevant questions, New South Wales performs better than South Australia:

1. Abortion is a serious crime, and not only may the woman herself be charged with the offence, but she also may have no defence to that charge if the necessity defence is held to be only applicable to medical practitioners;

2. Reasons do have to be provided to raise the applicable defence to the crime, but only one medical practitioner needs to reach the required assessment;

3. The abortion need not be performed in any prescribed facility, and may be performed by any qualified medical practitioner;

4. No specific time limits are mentioned in the relevant common law decisions, and New South Wales has no child destruction provisions in the *Crimes Act 1900*,[55] so there would appear to be no upper limit on lawful abortions; and

5. It is uncertain whether medical practitioners may escape their duty, through conscientious objection, to properly advice their patients concerning abortion. There is no mention of a conscientious objection in either case law or legislation,[56] so one may assume that the right is not currently formally recognised. On the other hand, there is also no formal prohibition nor limitation of conscientious objection concerning abortion, so one may also assume that medical practitioners may do so if that is their inclination.

Thus, despite abortion being a crime, the application of the common law defence of necessity has resulted in a situation whereby there is

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55 Section 4(1) of the *Crimes Act 1900* (NSW) does refer to 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman' in a definition of grievous bodily harm to the pregnant woman, but otherwise does not mention the foetus.

56 However, conscientious objection provisions may be found elsewhere: see Department of Health (NSW), 'Pregnancy – Framework for Terminations in New South Wales Public Health Organisations' (Policy Directive, 2005) 5. These policy directives provide an obligation, limited to public health environments, to transfer care of the patient to another health professional in the case of a conscientious objection from the health professional initially approached by the woman.

relatively easy access to abortion services in New South Wales.[57] However, the current practice is inherently unstable, as it relies on the New South Wales medical profession continuing to provide abortion services on a liberal interpretation of the common law, which, in turn, relies upon the New South Wales government remaining with the present policy of not prosecuting those members of the medical profession that provide abortions.[58] If that prosecution policy were to change many members of the medical profession may find themselves convicted of the crime of unlawful abortion, as the application of the necessity defence to abortion is quite rigorous.

Not only are there two tests to satisfy – 1) that the abortion was necessary to avert a serious danger to the woman's physical or mental health, 'which the continuance of the pregnancy would entail'[59]; and 2) that the abortion was 'not out of proportion to the danger to be averted'[60] – but those two tests are hardly straightforward. For instance, the serious danger to the woman's health that necessitated the abortion cannot merely be 'the normal dangers of pregnancy and childbirth'.[61] Just what this means is unclear, as the first part of the test refers to dangers to the woman's health that the continuance of the pregnancy would cause, yet the later part of this test seems to suggest that such dangers, if they be 'normal', will be insufficient grounds for satisfying this test. What constitutes 'normal' dangers of pregnancy and childbirth? Does the fact that the pregnancy is unwanted deem the relevant dangers to be 'abnormal'? It is also unclear what precisely is involved with the second test of proportionality. The question remains unanswered as to just how serious must the danger to the woman's health be in order for the abortion to be a proportionate response? Does the law invite a moral determination on the worth of the foetus in this

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57 Gleeson makes the point that the common law regime is less restrictive in practice than most of the jurisdictions that have specifically legislated for lawful abortion: see Gleeson, above n 10, 77-82.

58 Although prosecutions still occur (see, eg, *R v Sood* [2006] NSWSC 1141), it remains exceedingly rare (see Gleeson, above n 10, 72-74, 79), which implies the existence of such a policy.

59 *Davidson* [1969] VR 667, 672.

60 Ibid.

61 Ibid.

respect? Case law is of no assistance in answering any of these questions. As if this were not enough legal uncertainty and complexity, both arms of the test must be satisfied at both an objective and subjective level, in that the relevant medical practitioner must not only honestly believe that both tests have been made out, but that belief must also be reasonable.[62]

Of course, in practice such legal complexity is probably lost on a particular medical practitioner, who may simply decide that the abortion is necessary to prevent harm (broadly defined to include physical, mental and socio-economic factors) to the woman concerned. Unfortunately, as Justice Priestley explained in *Superclinics*,[63] there is no way to predict whether a court would hold a particular medical practitioner's decision to be an appropriate application of the necessity defence, and thereby lawful. This level of legal uncertainty and instability invites prosecution, if a government were so inclined. In any case, with abortion remaining a serious crime, New South Wales fails in its obligation to recognise a woman's right to abortion.

IV THE NORTHERN TERRITORY: TWO FAILED ATTEMPTS AT REFORM

The NT legislature has embarked upon two instances of reform of abortion law: the first in 1974, and the second more recently in 2006. Like all Australian jurisdictions, the NT originally possessed the standard criminal law provisions making abortion an offence.[64] In 1974 the NT passed legislation modelled on the South Australian amendments, by enacting section 174 of the *Criminal Code Act* (NT).

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62 For a discussion of the elements of the necessity defence generally see Bronitt and McSherry, above n 28, 370-375.

63 See *Superclinics* (1995) 38 NSWLR 47, 83. See also, Douglas, above n 13, 86.

64 See *Criminal Code Act* (NT) ss 172-173 [prior to 2006 amendments].

This section created the defence to abortion in similar terms to the South Australian model, but had the further restriction that only gynaecologists or obstetricians could perform a lawful abortion.[65] The good faith opinion of that gynaecologist or obstetrician, along with that of another medical practitioner, after both examining the woman concerned, was necessary for an abortion to be lawful on either the greater risk to maternal health ground,[66] or the foetal abnormality ground,[67] with both of these grounds drafted in identical terms to the South Australian legislation. The NT legislation differed from the South Australian model in terms of gestational period limits, and age restrictions, both of which will be discussed with respect to the 2006 amendments.

In 2006 the NT legislature made further reforms to abortion law, redrafting section 174, and relocating it into section 11 of the *Medical Services Act* (NT). The only positive change made to the previous abortion provision was to remove the requirement of a gynaecologist or obstetrician. Thus, it is now the case that any medical practitioner may lawfully perform an abortion, if that person and another medical practitioner are satisfied of the requisite grounds.[68] However, although a gynaecologist or obstetrician need not perform the procedure, one of the medical practitioners required to form the requisite opinion must be either a gynaecologist or obstetrician, unless this is not 'reasonably practicable in the circumstances'.[69] The abortion must be performed in a hospital,[70] the woman concerned must not be more than 14 weeks pregnant,[71] and if the woman is less than 16 years of age those having authority in law must consent to the procedure.[72] No person is under any duty to assist in terminating a pregnancy if that person 'has a conscientious objection to doing so.'[73]

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65 *Criminal Code Act* (NT) s 174(1)(a).
66 Ibid s 174(1)(a)(i).
67 Ibid s 174(1)(a)(ii).
68 See *Medical Services Act* (NT) s 11(1).
69 Ibid s 11(2).
70 Ibid s 11(1)(c).
71 *Medical Services Act* (NT) s 11(1)(d)
72 Ibid s 11(5).
73 Ibid s 11(6).

A pregnancy of post 14 weeks gestation, but no more than 23 weeks gestation, is also lawful if it is performed by a medical practitioner who forms the opinion in good faith, after a medical examination of the woman, that the abortion is immediately necessary to prevent serious harm to the woman's physical or mental health.[74] It is also lawful for a medical practitioner to perform an abortion at any stage for the 'sole purpose of preserving' the woman's life.[75] In both of these situations the requirement for a second opinion and hospitalisation is waived, as is the requirement for a specialist opinion.

Section 11 of the *Medical Services Act* (NT) makes it clear that all abortions that fail to meet the conditions of that section remain unlawful. The original sections in the *Criminal Code Act* (NT) that made the attempted performance of an abortion (and/or the supply of abortifacients) a crime still exist in slightly modified form.[76] Thus, in answer to the requisite questions, the NT performs worse than either South Australia or New South Wales:

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74 *Medical Services Act* (NT) s 11(3).

75 Ibid s 11(4)(a).

76 Under section 208B(1) of the *Criminal Code Act* (NT) it is an offence to administer medication or use an instrument with the intent to procure a miscarriage. It also remains an offence to supply or obtain 'a drug, instrument or other thing' knowing that such is 'intended to be used with the intention of procuring the woman's miscarriage', and it is irrelevant whether the materials were actually utilised for that prohibited purpose (section 208C(1)). For both offences it remains immaterial whether the woman was pregnant in order to achieve a conviction (sections 208B(2) and 208C(2)), and the potential penalty remains at 7 years imprisonment (the NT stands alone in that the penalty for both performing the abortion and supplying the materials is identical. In other jurisdictions the penalty for supplying materials is less than the penalty for performing the abortion (whether through administering medication or providing surgery), and often much less).

1. Abortion remains a serious offence;[77]

2. Reasons need to be provided to satisfy the elements for a valid defence to the crime, and two medical practitioners have to provide the requisite opinions thereof;

3. The abortion must be performed in a hospital, and although it may be performed by any medical practitioner, one of the practitioners signing off on the required reasons for the abortion should be a gynaecologist or obstetrician;

4. Abortion is only lawful on the more liberal grounds until 14 weeks gestation. Between 14 and 23 weeks the abortion may be lawful on the harsher test that it is immediately necessary to prevent serious harm to the woman concerned. After 23 weeks gestation it would appear that no abortion is lawful, unless it is for the sole purpose of preserving the woman's life; and

5. The law allows for and supports full conscientious objection.

Although based on the South Australian model, the NT situation is more problematic from a rights perspective, as the defences copied from South Australia are only available up to 14 weeks gestation. The 2006 amendments achieved little of substance, as the old abortion provisions of the *Criminal Code* were not significantly revised (other than with respect to the specialist issue), so abortion remains a serious crime. In other words, the situation remains predominantly as it was in 1974. However, the fact that part of the law regulating abortion in the NT now resides in health law, rather than criminal law, is deserving of comment. This move is symbolically important, as it perhaps carries the political and social message that abortion is fundamentally a medical procedure. Such a perception may prove politically useful in any future legislative attempts at decriminalisation of abortion.

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[77] However, the manner in which sections 208B and 208C of the *Criminal Code* are drafted arguably implies that a woman can no longer be charged with procuring, or attempting to procure, her own abortion, as there is no mention of a woman doing acts upon herself, for the purpose of causing the termination of her pregnancy; rather, the legislation talks of 'a person' administering drugs 'to a woman', or using an instrument 'on a woman', or supplying abortifacients 'for a woman'. There are no clear decisions on this issue, so the matter remains uncertain.

V QUEENSLAND: THE STATE OF CONFUSION

The *Criminal Code Act 1899* (Qld) contains the standard offences in relation to abortion. In Queensland, it is unlawful to administer medication, or use 'any force of any kind, or…any other means whatever' with the intention of procuring a miscarriage of a woman.[78] The potential penalty for doing so is 14 years imprisonment. It is also unlawful to supply 'anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.'[79] The potential penalty for such supply is 3 years imprisonment. Similar to all other standard provisions on abortion, it matters not whether the woman concerned was pregnant at the relevant time.[80] As has been discussed, this was all standard throughout most of Australia.

Queensland sets itself apart by carrying this crime of attempting the impossible to the woman concerned. In Queensland, a woman may be charged with unlawfully administering medication to herself, or using 'force' or 'any other means whatever' upon herself, or permitting any such actions (whether medication or surgery) upon herself, 'with intent to procure her own miscarriage'.[81] If convicted she faces 7 years imprisonment, and it matters not whether she was actually pregnant at the material time.[82] To reiterate: she may be deprived of her liberty for 7 years for attempting the impossible, and doing so on her own body. It is hard to believe that this situation exists in contemporary Australia,[83] rather than a fundamentalist theocracy. It is her body, and if she was not pregnant, then she has

78 *Criminal Code Act 1899* (Qld) s 224.

79 Ibid s 226.

80 Ibid ss 224, 226. In the case of supplying with knowledge, it also matters not whether the supplied materials are actually utilised for the prohibited purpose.

81 Ibid s 225.

82 Ibid.

83 A woman was recently charged with this offence: see *R v Brennan and Leach* (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010). For a detailed discussion of this case see Kerry Petersen, 'Abortion laws and medical developments: A medico-legal anomaly in Queensland' (2011) 18 *Journal of Law and Medicine* 594, 597-599.

simply made use of her own body, harming no-one else (either a real or potential person). One may ask: What exactly is the societal evil that this criminal law seeks to address? Fortunately, there exist possible defences to this crime in Queensland. Unfortunately, the status and application of those defences remains uncertain.

In Queensland, there exists a possible statutory defence to the charge of unlawful abortion contained in section 282 of the *Criminal Code Act 1899* (Qld). This section was the subject of recent legislative amendment via the *Criminal Code (Medical Treatment) Amendment Act 2009* (Qld). The changes made were as follows: the previously worded section 282 stated that a person would not be acting unlawfully if they performed 'in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable having regard to the patient's state at the time and to all the circumstances of the case.'[84] There was a perceived problem with that old section, in that it was uncertain whether the administering of medication would qualify as a 'surgical operation'.[85] Consequently, the 2009 amendment made to the section was that the phrase 'or medical treatment' was inserted immediately after the phrase 'surgical operation'.[86] Nonetheless, the section 282 defence appears a very strict test: the defence is made out *only* if both the woman's life is in danger, and it is reasonable to so act. One would assume that if the woman's life was in danger, then such action would always be 'reasonable having regard to the patient's state at the time and all the circumstances of the case', but it is clear that both steps

84 *Criminal Code Act 1899* (Qld) s 282 [prior to 2009 amendments].

85 In *Queensland v B* [2008] QSC 231, [21]-[23] it was suggested that the section 282 defence would not cover the administration of drugs. See also Douglas, above n 13, 79-82; Petersen, above n 83, 597.

86 See *Criminal Code Act 1899* (Qld) s 282(1). Further subsections were also added, such that if the administration by a 'health professional' of a particular substance would be lawful under section 282, then it would also be lawful for that health professional to 'direct or advise another person, whether the patient or another person, to administer the substance' (s 282(2)). Provided the direction or advice was lawful, or the person so directed or advised reasonably believed that the direction or advice was lawful, then that person is also protected by the new legislation (s 282(3)).

of the test need to be satisfied to make the abortion lawful. A literal reading of the defence suggests that it would not be enough to show that merely the woman's health was threatened, even if seriously threatened, by the pregnancy.[87]

Fortunately for Queensland women seeking abortion the legislation is not the end of the matter, and case law exists that provides a broader test for a lawful abortion. In essence, the Queensland courts have applied a wide meaning to the phrase 'preservation of the mother's life'. In *R v Bayliss and Cullen*,[88] Judge McGuire of the District Court held that section 282 should be interpreted such that the phrase 'preservation of the mother's life' should include the preservation of her health 'in one form or another'.[89] Although this allows for more lawful abortions than a literal reading of the section would suggest, it is also the case, as Judge McGuire was quick to point out, that it would only be 'in exceptional cases'[90] that an abortion would be deemed lawful under section 282. The 2009 amendments to that section do not change this fact.

There is, however, a fundamental legal issue with Judge McGuire's decision, as it applied the cases of *Davidson* and *Wald* in arriving at an interpretation of section 282.[91] The problem with

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87 The amended section makes it clear that this remains the case, and that there is no less stringent test, because although section 282(1)(a) is framed such that it is lawful to perform a surgical operation or medical treatment upon 'a person or an unborn child for the patient's benefit', section 282(4) makes it clear that such operation or treatment would not include anything 'intended to adversely affect an unborn child'. It is arguable that one might still raise the defence under section 282 if the intent was to preserve the woman's health, and the foreseen, but not sought after, by-product of that treatment was the death of the foetus, but this would be a tenuous line of argument given the wording of the section.

88 (1986) 9 Qld Lawyer Reps 8.

89 Ibid 41. Judge McGuire offers a comprehensive discussion of s 282 at 33-35, 41-43.

90 Ibid 45.

91 In *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, 45, Judge McGuire expressly states that he is following *Davidson*, but was less enthusiastic about

utilising *Davidson* and *Wald* in determining the meaning of section 282 is that neither *Davidson* nor *Wald* were dealing with similar legislative defences, but rather were describing the application of the common law defence of necessity to the crime of abortion, and it is arguable that such common law defences should not apply in Code States.[92] Notwithstanding these issues, Judge McGuire's reasoning in this respect received approval in the Queensland Supreme Court decision of *Veivers v Connolly*.[93]

Leaving aside this issue for the time being, in answer to the questions posed in this article, Queensland looks similar to New South Wales:

1. Abortion is a serious crime, and the woman concerned may not only be charged, but it also does not matter whether she was, in fact, pregnant;

2. Reasons need to be provided for a lawful abortion, but only one medical practitioner is required to sign off on those reasons;

3. There is no need for a prescribed facility, nor a specialist medical practitioner;

4. There is no upper time limit for lawful abortion, other than, by virtue of the relevant child destruction provisions, at the time that 'a female is about to be delivered of a child'.[94] This may have implications for very late abortions, but section 282 is arguably applicable as a defence to a charge of child destruction in any case; and

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applying *Wald*, especially the extension of the test to include social and economic factors in determining impact upon health (at 26). However, ultimately his Honour conceded that *Wald* was probably also applicable (at 45). In *K v T* [1983] 1 Qd R 396 the Court similarly made it clear that *Davidson* applies in Queensland.

92 See Ben White and Lindy Willmott, 'Termination of a minor's pregnancy: Critical issues for consent and the criminal law' (2009) 17 *Journal of Law and Medicine* 249, 258 (the authors refer to *Queensland v Nolan* [2002] 1 QdR 454 as authority for this proposition); Bennett, above n 13, 376.

93 (1995) 2 Qd R 326, 329 (de Jersey J). See also *R v Brennan and Leach* (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010).

94 *Criminal Code 1899* (Qld) s 313(1).

5. There is no specific provision for medical practitioners to remove themselves from the process via conscientious objection, but there is also no express limitation upon their right to do so.

As said, the presiding interpretation of the law in Queensland is similar to the law in New South Wales. Thus, like New South Wales, the stability of the current legal situation is hardly ideal. The situation is even less certain in Queensland because the present legal environment was judicially achieved through what may be described as questionable judicial reasoning. It may well be decided that neither *Davidson* nor *Wald* are applicable in Queensland, with the result being that section 282 is interpreted more literally. If this occurred, abortion would only be lawful if the pregnancy was threatening the woman's life in some way. Queensland thus possesses, at least potentially, the most restrictive abortion law in Australia. It is to be lamented that, given the opportunity presented to significantly amend and clarify the law in 2009, the Queensland Parliament failed to do so.

VI WESTERN AUSTRALIA: THE MOVE TO HEALTH LAW

The process of moving the regulation of abortion from criminal law into health services law, and thus decriminalising the procedure, was instigated by the Western Australian Parliament in 1998. This was not entirely successful in Western Australia because, like the NT, abortion remains a crime within the *Criminal Code Act Compilation Act 1913* (WA). However, if performed by a medical practitioner, it is very unlikely that an abortion will be unlawful in Western Australia as a consequence of the 1998 amendments.

In 1998 the Western Australian Parliament passed the *Acts Amendment (Abortion) Act 1998* (WA). This Act repealed sections 199, 200 and 201 of the *Criminal Code*,[95] which were the standard provisions on abortion. A new section 199 was inserted into the *Criminal Code*, making all abortions, attempted abortions, and 'any act with intent to procure an abortion',[96] unlawful, unless done by a medical practitioner in good faith and with reasonable care and skill, and justified pursuant to section 334 of the *Health Act 1911* (WA).[97]

Under section 334(3) of the *Health Act 1911* (WA) an abortion is only justified if:

> (a) the woman concerned has given her informed consent; or
> (b) the woman concerned will suffer serious personal, family or social consequences if the abortion is not performed; or
> (c) serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed; or
> (d) the pregnancy of the woman concerned is causing serious danger to her physical or mental health.

The legislation then goes on to explain that the woman must give her informed consent (unless it is impracticable for her to do so), in order for the other reasons to be sufficient grounds for a lawful abortion.[98] This condition effectively renders grounds (b), (c), and (d) superfluous. If informed consent is provided, then the abortion is justified under the legislation. Section 334(5) sets out the criteria for informed consent as follows:

> **'Informed consent'** means consent freely given by the woman where -
> (a) a medical practitioner has properly, appropriately and adequately provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term;

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95 *Acts Amendment (Abortion) Act 1998* (WA) s 4.
96 *Criminal Code Act Compilation Act 1913* (WA) s 199(5).
97 *Acts Amendment (Abortion) Act 1998* (WA) s 7, inserts this new section 334 into the *Health Act 1911* (WA).
98 *Health Act 1911* (WA) s 334(4).

> (b) a medical practitioner has offered her the opportunity of referral to appropriate and adequate counselling about matters relating to termination of pregnancy and carrying a pregnancy to term; and
> (c) a medical practitioner has informed her that appropriate and adequate counselling will be available to her should she wish it upon termination of pregnancy or after carrying the pregnancy to term.

This imposition of mandatory counselling and referral is insulting to the woman concerned, as it presupposes that her consent would otherwise be ill informed, when, in fact, women seeking abortions are 'already well informed.'[99] There is also a logistical issue with this counselling requirement, as the medical practitioner providing the above counselling or referrals cannot perform or assist in the performance of the abortion.[100] This may hinder the exercise of a woman's right to abortion, especially in remote areas where multiple medical practitioners are not available. There is the further practical obstruction that no person or institution (including hospitals) is under any duty to participate in the performance of an abortion.[101] There exist further restrictions in the case of a woman who is a 'dependant minor',[102] which is defined as being less than 16 years of age, and being supported by a custodial parent(s)[103] or legal guardian(s).[104] In such cases, informed consent will not be regarded as being given unless the parent or guardian has been 'informed that the performance of an abortion is being considered and has been given the opportunity to participate in a counselling process and in consultations between the woman and her medical practitioner'.[105]

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99 Douglas, above n 13, 86. See also VLRC, above n 13, 120.
100 *Health Act 1911* (WA) s 334(6).
101 Ibid s 334(2).
102 Ibid s 334(8)(a).
103 Ibid s 334(8)(b).
104 Ibid s 334(8)(c).
105 Ibid s 334(8)(a). The woman seeking an abortion may apply to the Children's Court for an order that the parent or guardian should not be so notified and informed (s 334(9)), and if the Court grants the order, then informed consent may be given without such parental notification (s 334(11)), and the parent or guardian cannot appeal that order (s 334(10)).

Provided the grounds under section 334 have been met, the abortion may be performed by any medical practitioner (except the practitioner providing the requisite counselling or referral), and at any venue.[106] This is the case only if the woman has been pregnant for less than 20 weeks. If the unwanted pregnancy in issue is at least 20 weeks gestation, then the above provisions do not apply,[107] and an abortion will only be justified if two medical practitioners, who are members of a panel of at least six medical practitioners (nominated by the Minister), agree that the 'mother, or the unborn child, has a severe medical condition that justifies the procedure',[108] and the procedure is performed in an approved facility.[109]

The 1998 amendments make it clear that abortions not performed (or not attempted) according to those amendments remain unlawful,[110] and it is immaterial to such a charge whether the woman concerned was pregnant.[111] However, if a registered medical practitioner performs an unlawful abortion,[112] then that person may only be subject to a pecuniary penalty.[113] The removal of imprisonment as a potential penalty for medical practitioners that fail to meet the conditions for a lawful abortion suggests that in Western Australia abortion is now viewed as, *prima facie*, a medical procedure, and therefore lawful, provided it is performed by a member of the medical profession.[114]

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106 The abortion must still be performed in good faith and with reasonable care and skill (pursuant to *Criminal Code Act Compilation Act 1913* (WA) s 199(1)(a)), and the medical practitioner would be required to report the abortion on the prescribed form: see *Health Act 1911* (WA) s 335(5)(d).

107 *Health Act 1911* (WA) s 334(7).

108 Ibid s 334(7)(a).

109 Ibid s 334(7)(b).

110 *Criminal Code Act Compilation Act 1913* (WA) s 199(2).

111 Ibid s 199(5).

112 Or attempts to perform an unlawful abortion, or does 'any act with intent to procure an [unlawful] abortion': *Criminal Code Act Compilation Act 1913* (WA) s 199(5).

113 Ibid s 199(2). Presently a fine of up to $50,000 may be imposed upon conviction.

114 If a person who is not a medical practitioner performs or attempts an abortion, then that person may be subject to 5 years imprisonment if convicted: *Criminal Code Act Compilation Act 1913* (WA) s 199(3). There is, however, a surgical and medical treatment defence under section 259 of the *Criminal*

In terms of the relevant questions, Western Australia thus performs satisfactorily:

1. Although abortion remains a crime, for medical practitioners the penalty is purely monetary, and it is highly unlikely that a woman obtaining an abortion could be charged with any offence;[115]

2. Provided informed consent is given, then no reasons need to be provided in order to justify an abortion prior to 20 weeks gestation, but informed consent necessitates mandatory counselling by a medical practitioner. After 20 weeks gestation the abortion may still be lawful, but only if two medical practitioners from a panel of six decide that the woman or the foetus has a severe medical condition justifying the procedure;

3. Prior to 20 weeks gestation the abortion may be performed anywhere, and by any medical practitioner, except the practitioner providing the requisite counselling and referrals necessary to enable informed consent. After 20 weeks of pregnancy the abortion must be performed in an approved facility;

4. Under the informed consent ground, an abortion will only be lawful up to 20 weeks of pregnancy. After 20 weeks gestation the abortion may still be lawful, but on stricter grounds. There is an upper time limit to lawful abortion presented by the offence of child destruction, but this only comes into play 'when a woman is about to be delivered of a child';[116] and

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Code, which is specifically recognised as applying to the crime of abortion (s 199(3)). Section 259 functions such that it is lawful to administer in good faith and with reasonable care and skill, surgical or medical treatment 'to an unborn child for the preservation of the mother's life[…]if the administration of that treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case' (s 259(1)). As this defence is framed almost identically to the old section 282 of the *Criminal Code Act 1899* (Qld), it creates the possibility that the section might be interpreted to allow the common law decisions of *Davidson*, *Wald*, and *Bayliss and Cullen* to operate in Western Australia. However, with Western Australia being a Code state, this would seem unlikely, although it did happen in Queensland, which is also a Code state.

115 It is unlikely because neither section 199 of the *Criminal Code*, nor section 334 of the *Health Act*, refer to acts committed by the woman concerned.

116 *Criminal Code Act Compilation Act 1913*(WA) s 290.

5. A person may remove themselves from the entire process via conscientious objection.

The main positive aspect of the Western Australian situation from a women's rights perspective is that although two medical practitioners are necessary (one to provide counselling and referrals, and one to perform the operation), no reasons are required to justify the procedure, provided the pregnancy is less than 20 weeks. The fact that no reasons need be provided prior to 20 weeks gestation serves to highlight that the procedure is now perceived as a medical issue, and not a criminal issue. As Bennett comments, the Western Australian legislation was 'an important shift for regulation of abortion from the criminal law to health law'.[117] It is unfortunate that this liberal environment only exists until 20 weeks gestation, but given that late abortions are rare,[118] the practical consequences are probably negligible. The labelling of abortion as predominantly a woman's health concern is the first step towards removing abortion completely from the ambit of the criminal law, and subsequently recognising a woman's right to abortion. In Western Australia this is yet to be fully realised, but of the jurisdictions discussed so far, Western Australia comes the closest to fulfilling its obligation to recognise the right to abortion.

VII TASMANIA: A MISSED OPPORTUNITY

In common with all Australian jurisdictions, Tasmania possessed the standard provisions defining the crime of abortion.[119] Such legislation was not subject to legislative or judicial review until 2001, when the *Criminal Code Amendment Act (No 2) 2001* (Tas) was passed. This legislation expressly accepted that some abortions

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[117] Bennett, above n 13, 379.

[118] Current figures suggest that less than 1% of all abortions performed in Australia are performed after 20 weeks gestation: see Parliamentary Library Research Service, 'Abortion Law Reform Bill 2008' (Current Issues Brief No 4, Department of Parliamentary Services, Victoria, 2008) 34; VLRC, above n 13, 36.

[119] See *Criminal Code Act 1924* (Tas) ss 134-135.

could be lawful, and detailed when this might occur, but otherwise retained the standard provisions outlawing the procedure. Thus, it remains the case in Tasmania that the woman concerned, and any other person, may be charged with unlawfully attempting to procure an abortion, through either administering 'poison or other noxious thing' or using 'any instrument or other means', but it is now an element of the charge that the woman be pregnant at the relevant time.[120]

In 2001 defences to these offences were enacted, so that presently, under section 164 of the *Criminal Code Act 1924* (Tas), it is now possible to perform a 'legally justified' abortion in Tasmania, provided it is performed pursuant to that section;[121] if not, then the old standard provisions apply, and the abortion would, *prima facie*, be criminal.[122] Under section 164(2) the termination of a pregnancy is legally justified if:

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

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120 Ibid s 134. The unlawful supply of abortifacients (either medication or instruments) knowing that they were to be unlawfully used with the intention to procure a miscarriage of a woman is also a crime, and it matters not whether they were subsequently so utilised: *Criminal Code Act 1924* (Tas) s 135.

121 Ibid s 164(1). The legal situation in Tasmania is further complicated by the existence within the *Criminal Code* of a surgical operation defence. Under section 51(1) it is lawful for a person to 'perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances'. This section appears to allow for lawful abortion in conjunction with the criteria under section 164. Section 164 makes no reference to section 51(1), and by not mentioning section 51(1), it is arguable that it therefore applies to the performance of an abortion, in which case the regime in Tasmania is arguably far less restrictive than it would appear. On the other hand, it is likely that a court would hold that the legislature intended to override section 51(1) in the case of termination of pregnancy.

122 *Criminal Code Act 1924* (Tas) s 164(1).

In effect, the Tasmanian legislation is a blend of the both the South Australian and Western Australian legislation on abortion. Section 164(2)(a) is based upon the South Australian model, while section 164(2)(b) incorporates the predominant feature of the Western Australian legislation.

In assessing the requisite risk under section 164(2)(a), the two medical practitioners need not act in good faith (as is required under the South Australian legislation), and may 'take account of any matter which they consider to be relevant'.[123] In addition, although it is clear that only a registered medical practitioner may lawfully terminate a pregnancy,[124] unlike the case in South Australia, the legislation does not necessarily indicate that it must be one of the two providing the certification. Nor does the provision stipulate the necessity of performing the termination in a prescribed facility. However, one of the two medical practitioners providing the requisite certification must specialise in obstetrics or gynaecology.[125]

As to 'informed consent', section 164(9) states that this means:

> [C]onsent given by a woman where –
> (a) a registered medical practitioner has provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term; and
> (b) a registered medical practitioner has referred her to counselling about other matters relating to termination of pregnancy and carrying a pregnancy to term.

Such consent must be obtained unless it is 'impracticable' to do so,[126] but if it is impracticable for the woman to give such informed consent, the two medical practitioners providing the requisite certification must also provide a declaration in writing detailing the

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123 Ibid s 164(3).
124 Ibid s 164(6).
125 Ibid s 164(5).
126 *Criminal Code Act 1924* (Tas) s 164(2)(b).

reasons why it was impracticable for the woman to give her informed consent.[127] Unlike the case in Western Australia,[128] it would appear that the medical practitioner providing the counselling may also perform the abortion. In common with all other jurisdictions canvassed thus far, no person is under a duty to participate in any way with a termination of pregnancy, including merely providing advice or counselling, if they have a conscientious objection.[129]

In answer to the relevant questions, Tasmania performs on a par with South Australia:

1. Abortion remains a serious crime, and the pregnant woman concerned may be charged with the crime;

2. Not only do reasons need to be provided, but two medical practitioners must sign off on those reasons. In addition, the woman concerned must provide 'informed consent', which necessitates mandatory counselling;

3. The abortion need not be performed in any particular facility, and any medical practitioner may perform the abortion, but at least one of the practitioners providing the requisite certification must specialise in either obstetrics or gynaecology;

4. There is no upper time limit for lawful abortion mentioned under section 164, and although there exists a child destruction offence in Tasmania under section 165(1) of the *Criminal Code Act 1924* (Tas), section 165 is expressly made subject to section 164.[130] One may therefore assume that, provided the criteria for lawful abortion stipulated in section 164 are satisfied, then the abortion is legal regardless of period of gestation; and

5. Medical practitioners may remove themselves entirely from the process via conscientious objection.

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127 *Criminal Code Act 1924* (Tas) s 164(4).
128 See *Health Act 1911* (WA) s 334(6).
129 *Criminal Code Act 1924* (Tas) s 164(7).
130 *Criminal Code Act 1924* (Tas) s 164(1).

One suspects that the 2001 legislation represented a genuine effort by the Tasmanian Parliament to reform abortion law by further medicalising, and thereby decriminalising, the procedure to some extent. However, not only does abortion remain a crime, but all provisions dealing with abortion reside in the *Criminal Code*. This precludes any recognition of a right to abortion. Although there is recognition of the possibility of the procedure being lawful in some circumstances, the woman concerned must convince two medical practitioners that she has sufficient reasons for a lawful abortion, and then undergo mandatory counselling. This state of affairs leads to the conclusion that the legislative effort in 2001 constitutes a missed opportunity for significant reform.

VIII THE AUSTRALIAN CAPITAL TERRITORY: ESTABLISHING A BLUEPRINT FOR REFORM

The legislative initiatives of Western Australia in 1998 indicated the possibilities for reforming abortion law, and it was not long before another jurisdiction followed. The ACT enacted legislation in 2002 that went even further than the Western Australian amendments, and took the commendable step of removing medical abortion (ie. an abortion performed by a medical practitioner) from the criminal law; either in statute or common law.[131] In the ACT medical abortion is now solely regulated by health services law.[132] The ACT experience makes one optimistic for further change in other jurisdictions because in 1998 the ACT actually enacted quite restrictive abortion laws,[133] prior to repealing them only four years later,[134] and

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131 See *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT). For a discussion of this Act see Mark Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316, 329-332.

132 See *Health Act 1993* (ACT) ss 80-84.

133 See *Health Regulation (Maternal Health Information) Act 1998* (ACT). For a discussion of this Act and the law prior to 2002 see Rankin, above n 12, 249-251; Rankin, above n 131, 327-329.

134 See *Health Regulation (Maternal Health Information) Repeal Act 2002* (ACT).

replacing them by enacting the *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT). This Act inserted sections 55A-55E into the *Medical Practitioners Act 1930* (ACT), which were moved without amendment into the *Health Professionals Act 2004* (ACT), and finally came to currently reside (again without amendment from the initial 2002 legislation) in the *Health Act 1993* (ACT), as sections 80 to 84. In effect, the legislation defines a lawful abortion as one performed by a medical practitioner in an approved facility. There are no further requirements, nor mandatory counselling, and a woman need offer no reason whatsoever for requesting an abortion. Clearly, the ACT situation must be very close to abortion on demand.

Of course, in order to adequately regulate a process, the regulatory body (in this case the ACT Government, through the relevant Minister) needs to possess the power to reprimand or discipline those that refuse to be so regulated. As a consequence, although abortion was expressly removed from the ambit of the criminal law in the 2002 legislation, the 2002 provisions created two new offences within the *Health Act 1993* (ACT): namely, performing an abortion when not a qualified medical practitioner;[135] and performing an abortion in a non-approved medical facility.[136] If not a medical practitioner, a person is liable to 5 years imprisonment for performing an abortion,[137] while performing an abortion in a facility that has not been approved for the procedure carries a potential pecuniary penalty, or 6 months imprisonment, or both.[138] Unlike the previous offences in the *Crimes Act*, these new offences are not inchoate offences: the legislation is quite clear that, in order to be convicted of the above offences, the requisite administering of medication, use of instrument, or 'any other means',[139] must have actually caused a woman's miscarriage.[140]

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135 *Health Act 1993* (ACT) s 81.
136 Ibid s 82.
137 Ibid s 81.
138 *Health Act 1993* (ACT) s 82.
139 Ibid s 80(c).
140 Ibid s 80.

However, it is difficult to see any need for the creation of these new offences. That is, in constructing the legal situation whereby a woman could approach any medical practitioner and request an abortion, without fear of any criminal sanction, and most significantly in terms of reproductive freedom, without providing any reasons whatsoever, it would appear unnecessary to create any offences with respect to the abortion procedure.

Similarly, although the condition of an approved facility seems reasonable, there is no justification for imprisonment when this condition is not met. Surely, the imposition of a hefty fine would sufficiently dissuade medical practitioners from performing the procedure outside of approved facilities. Furthermore, in approving facilities for the procedure, the Minister need only be satisfied that it is 'suitable on medical grounds',[141] and cannot 'unreasonably refuse or delay a request for approval of a medical facility',[142] so there should be no shortage of such approved medical facilities. Consequently, there is negligible, if any, motive for performance of the procedure in a non-approved facility. Certainly, there is no indication of a disturbing medical trend that requires an offence of possible imprisonment to abate it.

Notwithstanding the creation of these new offences within the *Health Act*, it may be argued that ACT law now views the practice of abortion much like any other procedure over which the medical profession has a state sanctioned monopoly. The only significant distinction between abortion and any other medical procedure is that, with the case of abortion, no person is under any duty 'to carry out or assist in carrying out an abortion',[143] and may refuse to do so if that is requested of them.[144] Whether this extends to providing mere advice or referrals is not clear, but one would assume that the use of the word 'assist' indicates an intention to allow people to refuse to provide even such basic assistance. The addition of this

141 Ibid s 83(1).
142 Ibid s 83(3).
143 Ibid s 84(1).
144 Ibid s 84(2).

conscientious objector clause into the regulation of abortion in the ACT sits awkwardly with the achievements and purported purpose of the 2002 legislation. It is also the only obstacle that prevents the ACT from being described as an abortion on demand jurisdiction, as allowing full and unconditional conscientious objection is particularly negative from a women's access to abortion services perspective,[145] and certainly condescending to women.[146] The ACT is hardly alone in supporting the conscientious objector, but given the other aspects of the 2002 legislation that embrace recognition of a woman's right to abortion, it is disappointing that the ACT chose this path.

Nonetheless, with respect to the relevant questions, the ACT provides predominantly negative responses:

1. Abortion is not mentioned in the criminal law as such. All previous crimes in relation to abortion contained in either the common law or the *Crimes Act 1900* (ACT) have been abolished. Abortion is lawful when it is performed by a medical practitioner in an approved facility;

2. No reasons need to be provided by the woman suffering from the unwanted pregnancy, and she does not have to sit through mandatory counselling sessions;

3. Although the abortion must be performed in an approved facility, any medical practitioner may perform the procedure;

4. No upper time limit for lawful abortion is mentioned in the applicable legislation, but the ACT retains the crime of child destruction, which means that an extremely late abortion conducted 'in relation to a childbirth' may constitute a crime;[147] and

5. The law allows for medical practitioners to have a conscientious objection to the process, and thereby remove themselves from any involvement in the procedure.

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145 See Gleeson, above n 10, 81-82.
146 Ibid.
147 *Crimes Act 1900* (ACT) s 42.

As mentioned, the current legal situation in the ACT is very close to abortion on demand, and only fails to be so classified because a medical practitioner may still refuse to provide referrals for the service. Despite this flaw, the ACT in 2002 came closer than any previous jurisdiction to recognising a woman's right to abortion. As a consequence, it was stated soon after the ACT legislation was passed that 'the current ACT regime is the most we can presently hope for in the short term'.[148] In 2008 the Victorian Parliament proved this assessment premature.

IX VICTORIA: THE RECOGNITION OF A WOMAN'S RIGHT TO ABORTION?

Prior to 2008 Victorian abortion law functioned according to the standard abortion provisions inherited from sections 58 and 59 of the *Offences Against the Person Act 1861* (UK),[149] as interpreted by Justice Menhennitt in *R v Davidson*.[150] In other words, a draconian legislative system that nonetheless operated in practice, due to the application of the common law defence of necessity,[151] at a far more liberal level. This changed dramatically with the enactment of the *Abortion Law Reform Act 2008* (Vic).

This Act abolished any common law offence of abortion,[152] and amended the abortion provisions within the *Crimes Act 1958* (Vic),[153] such that the current section 65 of that Act now only makes

148 Rankin, above n 131, 335.
149 See *Crimes Act 1958* (Vic), ss 65-66 [prior to 2008 amendments].
150 [1969] VR 667.
151 Ibid 670-672.
152 See *Abortion Law Reform Act 2008* (Vic) s 11, which amended *Crimes Act 1958* (Vic) s 66.
153 See *Abortion Law Reform Act 2008* (Vic) s 11. Note: the Act also repealed the pervious provisions concerning the crime of child destruction: see *Abortion Law Reform Act 2008* (Vic) s 9.

it a crime for a non-qualified person to perform an abortion.[154] There is now no possible criminal charge against either the woman concerned,[155] or a qualified person.[156] A person is deemed to be 'qualified' if they are a 'registered medical practitioner',[157] with 'registered' meaning registered under the *Health Professions Registration Act 2005* (Vic),[158] or, if the abortion is performed by the administration or supplying of drugs, then a 'qualified' person may also be a registered pharmacist or registered nurse.[159] These achievements were all stated as purposes of the 2008 Act.[160]

In terms of the regulation of the procedure,[161] it is now the case that a registered medical practitioner may perform an abortion on any woman (ie. there are no age constraints),[162] provided she is not more than 24 weeks pregnant.[163] There are no other criteria. To repeat this achievement: The abortion may be performed anywhere, and for any reason, or rather, if a woman requests an abortion, and she is not more than 24 weeks pregnant, then that request is sufficient reason, and any registered medical practitioner may

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154 See *Crimes Act 1958* (Vic) s 65(1). In common with the ACT, abortion is no longer an inchoate offence: the defendant must have caused an actual termination of pregnancy in order for a conviction. The defendant must also have intended causing the termination of the pregnancy to be convicted under this section: *Abortion Law Reform Act 2008* (Vic) s 3. Somewhat inconsistently, 'perform an abortion' pursuant to the section also includes the supply of any 'substance knowing that it is intended to be used to cause an abortion', and it would appear that the supply of abortifacients may still be an inchoate offence, as it is not clear whether an actual abortion must take place utilising such substances, or whether the woman concerned needs to be pregnant at the relevant time: *Crimes Act 1958* (Vic) s 65(4).

155 *Crimes Act 1958* (Vic) s 65(2).

156 Ibid s 65. The 2008 Act made certain of this by also amending the various definition provisions in the *Crimes Act 1958* (Vic): see *Abortion Law Reform Act 2008* (Vic) s 10, that amends *Crimes Act 1958* (Vic) s 15.

157 *Crimes Act 1958* (Vic) s 65(3)(a).

158 *Abortion Law Reform Act 2008* (Vic) s 3(a).

159 *Crimes Act 1958* (Vic) s 65(3)(b).

160 *Abortion Law Reform Act 2008* (Vic) s 1.

161 The regulation of the performance of abortions by health practitioners was also an aim of the 2008 Act: *Abortion Law Reform Act 2008* (Vic) s 1(b)).

162 *Abortion Law Reform Act 2008* (Vic) s 3.

163 Ibid s 4.

terminate her pregnancy without inquiring further, and without providing certain 'counselling' or mandatory referrals. This is similar to the ACT, but without the ACT requirement of an approved facility. The Victorian Act went even further, allowing both registered pharmacists and registered nurses to supply or administer 'drugs to cause an abortion',[164] provided the woman is not more than 24 weeks pregnant.[165] Thus, as effective abortifacients become legally available, a woman in Victoria may simply walk into a pharmacy and purchase from a registered pharmacist, without providing any reason whatsoever for that purchase, such abortifacients as she desires, and self-administer them. This would be all perfectly legal, and especially advantageous to women living in remote communities, where access to a medical practitioner may be more difficult.[166] The Victorian legislation is, when compared with the law that preceded it, quite revolutionary.

The regulation of abortions after 24 weeks gestation is more onerous, but nowhere near as burdensome as other jurisdictions (with the exception of the ACT). A registered medical practitioner may perform an abortion after 24 weeks only if that medical practitioner 'reasonably believes that the abortion is appropriate in all the circumstances',[167] and that medical practitioner has consulted with 'at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.'[168] In determining whether an abortion is 'appropriate in all the circumstances', the legislation states that the registered medical practitioners must have regard to 'all relevant medical circumstances',[169] and 'the woman's current and future physical, psychological and social circumstances.'[170] These are very broad tests that allow the medical practitioners full scope to make

164 *Abortion Law Reform Act 2008* (Vic) s 6. The definition of registered pharmacists and registered nurses is those authorised under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).
165 *Abortion Law Reform Act 2008* (Vic) s 6.
166 See Douglas, above n 13, 85.
167 *Abortion Law Reform Act 2008* (Vic) s 5(1)(a).
168 Ibid s 5(1)(b).
169 Ibid s 5(2)(a).
170 Ibid s 5(2)(b).

any decision that they feel is appropriate. In addition, there is no requirement that the abortion be performed in a prescribed facility. As stated earlier, with the exception of the ACT, the tests in Victoria for lawful abortions after 24 weeks are actually *less* stringent than the tests for lawful pre-viability abortions in other jurisdictions.

With respect to the supply or administration of abortifacients when the woman is more than 24 weeks pregnant, the legislation only allows a registered pharmacist or registered nurse 'employed or engaged by a hospital' to do so, and only at the 'written direction' of a registered medical practitioner.[171] A registered medical practitioner may only so direct when the registered medical practitioner writing the direction, and at least one other registered medical practitioner, reasonably believe that the abortion is appropriate in all the circumstances,[172] and in assessing whether it is appropriate they should have regard to all relevant medical circumstances, and the woman's current and future physical, psychological and social circumstances.[173] As there is no longer the offence of child destruction in Victoria,[174] there appears to be no upper time limit for lawful abortion. This is to be applauded, as the cut-off point for lawful abortions still operating in many other jurisdictions is difficult to justify. That the Victorian legislation takes this step is not surprising, as it is truly innovative legislation.

The innovative, even radical, nature of the 2008 Act is further evidenced by the fact that it does not provide a full escape clause for the conscientious objector. In Victoria, 'if a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman',[175] then that practitioner must do so unless they have a conscientious objection. However, if a 'registered health practitioner'[176] has a conscientious objection to abortion, then that

171 *Abortion Law Reform Act 2008* (Vic) ss 7(3)-7(4).
172 Ibid s 7(1).
173 Ibid s 7(2).
174 Ibid s 9.
175 Ibid s 8(1).
176 Defined pursuant to the *Health Professions Registration Act 2005* (Vic).

practitioner must inform the woman of their conscientious objection to abortion,[177] and 'refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.'[178] Thus, the woman concerned is not significantly disadvantaged by a practitioner having such an objection. The 2008 legislation also restates the conventional position that any conscientious objection (either by a registered medical practitioner or a registered nurse) is irrelevant in an emergency, when the performance of an abortion is necessary to 'preserve the life of the pregnant woman'.[179] In such cases, the legislation expressly states that the health practitioner is under a duty to assist or perform an abortion.[180]

In the ACT the conscientious objection provisions constitute an absolute right, whereas in Victoria, although conscientious objection remains a right, it is conditional, as there is a duty to nonetheless refer the patient to a practitioner that has no such objection. Oreb comments that this 'compulsory obligation to refer'[181] is necessary to ensure the exercise of a right to abortion, and this abortion right necessarily limits the medical practitioner's right to conscience.[182]

However, there may be validity issues in this respect, especially in terms of possible ramifications due to the *Charter of Human Rights and Responsibilities Act 2006* (Vic), as section 14(1) of the Charter guarantees a 'right to freedom of thought, conscience, religion and belief', and section 14(2) demands that a 'person must not be coerced or restrained in a way that limits his or her freedom to

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177 *Abortion Law Reform Act 2008* (Vic) s 8(1)(a).

178 Ibid s 8(1)(b).

179 Ibid ss 8(3)-8(4). Other jurisdictions have similar provisions: see, eg, *Criminal Law Consolidation Act 1935* (SA) s 82A(6); *Criminal Code Act 1924* (Tas), s 164(8).

180 See *Abortion Law Reform Act 2008* (Vic) s 8(3) for the duty of registered medical practitioners and s 8(4) for the duty of registered nurses.

181 Naomi Oreb, 'Worth the wait? A critique of the Abortion Act 2008 (Vic)' (2009) 17 *Journal of Law and Medicine* 261, 262.

182 Ibid 268.

have or adopt a religion or belief in worship, observance, practice or teaching.' At first glance, it would appear that the limitation placed upon a medical practitioner's conscientious objection (ie. to make that objection known, and refer the patient to another practitioner without such an objection to abortion) interferes with this right to conscience. Further, section 15(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) guarantees that everyone may hold an opinion without interference, and it is arguable that this right is also violated by the failure to endorse and fully support conscientious objections.[183]

Of course, the Charter recognises that rights may be limited in some circumstances,[184] but the extent of this is uncertain. Furthermore, section 48 of the Charter specifically states that 'nothing in this Charter affects any law applicable to abortion or child destruction'. However, whether section 48 could be applied in this fashion is debateable, as the purpose of the section seems to have been to ensure that the Charter could not be utilised to decriminalise abortion.[185] Consequently, there may be future challenges to the validity of the conscientious objector aspect of the 2008 Act.

Presently, in answer to the questions posed in this article, Victoria is the only jurisdiction to provide negative answers to all the relevant questions (provided the woman concerned is not more than 24 weeks pregnant):

1. Abortion is not a crime if performed by a registered health practitioner, and the woman herself cannot be charged with any crime. The fact that it remains a crime for a non qualified person is no cause for alarm, as this is consistent with the law

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183 See Bennett, above n 13, 382.

184 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

185 That is, a purposive interpretation of the Charter may preclude section 48 being utilised to allow the limitations on conscientious objection under the *Abortion Law Reform Act 2008* (Vic): see Oreb, above n 181, 267. Cf VLRC, above n 13, 162, the VLRC did not seem to think that the conscientious objection clauses where inconsistent with the Charter, and that section 48 consequently applied.

with respect to all other medical procedures that involve surgery;[186]

2. No reasons need to be provided if the woman concerned is not more than 24 weeks pregnant, and no counselling is mandatory;

3. The termination of pregnancy may be performed anywhere, and by any registered medical practitioner. The lack of any facility conditions is reinforced by the fact that abortifacients may be supplied by any registered pharmacist or registered nurse;

4. Abortion is lawful under the above circumstances up to 24 weeks gestation, after which more onerous standards apply, but provided such conditions are met there is no upper time limit for lawful abortion; and

5. Although the law recognises the existence of a conscientious objection, a health professional cannot completely remove themselves from the process on that basis, and must refer the woman to another health professional that has no such objection.

On the basis of such findings, is it reasonable to conclude that Victoria now recognises a right to abortion? The movement from unlawful to lawful in Victoria has been described as a movement from 'merciful allowance…[to]…actionable right'.[187] Well, if not quite a right, it must be close. In defining abortion as essentially an elective medical procedure, the Victorian legislation is certainly 'an exciting model'.[188] In Victoria a woman who is less than 24 weeks pregnant may effectively demand an abortion, provide no reasons whatsoever for that abortion, nor have to receive any form of counselling, and the medical profession must accede to that demand

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[186] Surgery necessarily involves wounding or serious bodily harm, and thus may be described in the criminal law context as an aggravated assault, and the law is clear that one cannot consent to such an assault unless the assailant is a qualified person: see *Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218, 232; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719.

[187] Oreb, above n 181, 262. Oreb later expresses this as a 'qualified' actionable right (at 266).

[188] Douglas, above n 13, 86.

unless a particular member has a conscientious objection, in which case they need to refer the woman to another member who will satisfy her request for an abortion. This sounds like abortion on demand, and full recognition of a woman's right to abortion.

However, the above determination is based on the applicable law when a woman is not more than 24 weeks pregnant. After 24 weeks of pregnancy, if any right exists, it shifts to the medical profession,[189] who may 'impose on to women their own views of when abortion is permissible.'[190] That is, if a woman is more than 24 weeks pregnant, a registered medical practitioner may only perform an abortion if that medical practitioner, and one other medical practitioner, 'reasonably believes that the abortion is appropriate in all the circumstances'.[191] Although such medical practitioners must have regard to 'the woman's current and future physical, psychological and social circumstances'[192] in arriving at any decision as to the appropriateness of the abortion, the fact remains that it is their decision to make, and not the woman's decision. This transfer of the decision making power, from the woman concerned to the medical profession, once the woman reaches 24 weeks of pregnancy, precludes a finding that Victoria now recognises a woman's right to abortion.

X CONCLUSION

The title of this article suggested that the long standing legal categorisation of abortion as a serious crime was being eroded in contemporary Australia. Further, that this decriminalisation of the practice was accompanied, or compelled, by a recognition of a

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189 See Linda Clarke, 'Abortion: A Rights Issue?' in R Lee and D Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (1989) 155, 163-166; Rankin, above n 12, 245-246.

190 Clarke, above n 189, 166.

191 *Abortion Law Reform Act 2008* (Vic) ss 5(1)(a), s 5(1)(b).

192 Ibid s 5(2)(b).

woman's right to abortion. Unfortunately, the foregoing discussion has demonstrated that a woman's right to abortion remains unrecognised in all Australian jurisdictions. Indeed, abortion remains a serious crime in the majority of jurisdictions.[193] Most alarmingly from a reproductive rights perspective, in the majority of jurisdictions a woman may be convicted of attempting to procure her own abortion, face lengthy imprisonment, yet remain pregnant.

However, progress has clearly been made since late last century, such that medical abortion may no longer be defined as a crime in the ACT or Victoria, and is a crime that carries only a monetary penalty in Western Australia. Further, none of the above three jurisdictions require the woman concerned to provide any reasons for the abortion, at least at first instance.[194] In all other jurisdictions the woman must satisfy a medical practitioner that she has sufficient justification for the termination of her pregnancy, and in the NT, South Australia, and Tasmania she has to so convince two medical practitioners.

Upper time limits for lawful abortion also exist in all jurisdictions except New South Wales, Tasmania, and Victoria (and probably Queensland).[195] In the ACT and Western Australia an upper time limit is implicit by virtue of these jurisdictions retaining the offence of child destruction. Although this crime only operates when the child is actually being born,[196] it may impact upon the legality of very late abortions. In South Australia the upper limit for

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193 In New South Wales, Queensland, South Australia and Tasmania any person (including the woman concerned, and a medical practitioner) may be charged with the offence of attempting an unlawful abortion. In the NT unlawful abortion is also a crime, but it is questionable whether the woman can be charged with an offence.

194 In Western Australia and Vitoria reasons do need to be satisfied for a lawful abortion after 20 weeks and 24 weeks gestation respectively.

195 That is, although Queensland retains the offence of child destruction (see *Criminal Code 1899* (Qld) s 313(1)), as *Criminal Code 1899* (Qld) s 282 (the statutory defence applicable to abortion) also arguably applies to the offence of child destruction, the result may be that there is no upper time limit for lawful abortion.

196 Bronitt and McSherry, above n 28, 556.

lawful abortion is currently designated at 28 weeks gestation, but may prove to be as low as 22 weeks, depending upon a court's finding of viability. In the NT lawful abortion may only be performed until 23 weeks gestation. With the exceptions of the ACT and Victoria (and to a lesser extent Western Australia), there exists quite an array of other conditions placed upon a woman seeking a lawful abortion in Australia. There is, accordingly, a deplorable failure by the majority of Australian jurisdictions to satisfy their obligation to fully recognise a woman's right to abortion.

Conversely, since the turn of the 21st century, there has been a 'clear movement from abortion being dealt with under criminal law to it becoming part of health law.'[197] This is essential from a woman's reproductive rights perspective, as the full recognition of a woman's right to abortion necessitates that the practice be regulated in an identical fashion to any other medical procedure. If a woman's right to abortion is fully recognised, then her consent to the procedure (which would be performed, prescribed, or supervised by a qualified person) renders that procedure lawful.[198] This is arguably what has occurred in Victoria (provided the woman is not more than 24 weeks pregnant), and to a slightly lesser extent in the ACT. Are we therefore witnessing the genesis of the demise of the crime of abortion, and the recognition of a woman's right to abortion throughout Australia? Victoria and the ACT have indicated the way down this path, but the question remains: will the other jurisdictions follow their lead?

[197] Bennett, above n 13, 373.
[198] See VLRC, above n 13, 90.