

ABORTION LAW IN NEW SOUTH WALES: THE PROBLEM WITH NECESSITY

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I INTRODUCTION

In 1861 the United Kingdom Parliament enacted the *Offences against the Person Act*,¹ which, pursuant to ss 58–9, made abortion a criminal offence.² At the turn of the 20th century, New South Wales, along with all other Australian jurisdictions, enacted statutory provisions on abortion modelled on this 19th century English legislation. The NSW provisions, contained within ss 82–4 of the *Crimes Act 1900* (NSW), are practically identical to the *1861 UK Act*.³ Section 83 of the *Crimes Act 1900* (NSW) states as follows:

Whosoever: unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years.⁴

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1 *Offences against the Person Act 1861*, 24 & 25 Vict, c 100 ('1861 UK Act').

2 It has been suggested that s 58 merely codified an already existing common law offence — see Macnaghten J's comments in *R v Bourne* [1939] 1 KB 687, 689–90 ('*Bourne*') — but the preponderance of authorities indicates that it is extremely doubtful whether abortion (before or after quickening) was ever firmly established as a common law crime: see, eg, Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (W Clarke & Sons, first published 1644, 1817 ed) 47–50; William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (Clarendon Press, 1769) 198; D Seaborne Davies, 'The Law of Abortion and Necessity' [1938] *Modern Law Review* 126, 131–4; *R v Bayliss* (1986) 9 Qld Lawyer 8, 11; *R v Woolnough* [1977] 2 NZLR 508, 512–13. It is also of interest to note that, prior to the *1861 UK Act*, there were three previous instances of the UK legislature defining the crime of abortion: see *Malicious Shooting or Stabbing Act 1803*, 43 Geo 3, c 58, ss 1–2 ('*Lord Ellenborough's Maiming and Wounding Act*'); *Offences against the Person Act 1828*, 9 Geo 4, c 31, ss 8, 13 ('*Lord Lansdowne's Act*'); *Offences against the Person Act 1837*, 7 Wm 4 & 1 Vict, c 85, s 6.

3 As the Victorian decision in *R v Davidson* [1969] VR 667 ('*Davidson*') constitutes a significant part of the discussion of NSW abortion law in this article, it should be noted that the Victorian provisions originally contained within ss 65–6 of the *Crimes Act 1958* (Vic) were also practically identical to the *1861 UK Act* (and thus to ss 82–4 of the *Crimes Act 1900* (NSW)).

4 Note: s 82 creates the same offence with respect to the woman concerned if she attempts to perform her own abortion (although for the woman herself to be charged she must be pregnant), and s 84 creates an offence for the supply of 'any drug or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman' (and consistent with s 83, it does not matter whether or not the woman concerned was pregnant).

The UK judiciary began to moderate the otherwise draconian provisions of the 1861 UK Act from the late 1930s onwards,⁵ but it was not until the late 1960s that Australian jurisdictions moved on the matter. South Australia was first,⁶ passing legislation in 1969 that provided for lawful abortions in certain circumstances,⁷ followed by the Victorian and then NSW judiciaries. In Victoria the 1969 decision in *Davidson* interpreted the legislation in such a way as to permit lawful abortions provided the elements of the necessity defence were met.⁸ This defence will receive detailed analysis in this article, but for present contextual purposes a simple definition may be offered: '[b]y necessity is meant the assertion that conduct promotes some value higher than the value of literal compliance with the law';⁹ the necessity defence thus allows one to 'break the letter of the law if breaking the law will avoid a greater harm than obeying it'.¹⁰ The defence is utilitarian in nature,¹¹ as it serves to 'promote the greater social good',¹² especially in its simplistic 'lesser evils' formulation:¹³ 'one may lawfully commit what is otherwise an offence (an 'evil'), if the commission of that offence is necessary to avert a greater 'evil'.¹⁴ The defence of necessity therefore involves a comparative assessment of 'evils', and thus 'a choice of values'.¹⁵ These issues will be discussed at greater length below.

- 5 See *Bourne* [1939] 1 KB 687 — in which Macnaghten J established the principle that abortions could be performed lawfully under certain conditions. It is of interest to note that in 1906, Lord Alverstone CJ entertained the notion that an abortion could be performed for a lawful purpose, but declined to discuss the matter in any detail: see *R v Bond* [1906] 2 KB 389, 393–7. Post-*Bourne*, a number of cases followed Macnaghten J's reasoning but expanded the scope of the available defence: see, eg, *R v Bergmann* (Unreported, Central Criminal Court, Morris J, 14 May 1948) (a condensed version of the case can be found in Note, 'Alleged Conspiracy to Procure Miscarriages: Two Doctors Acquitted' [1948] 1 *British Medical Journal* 1008. It is also referred to by Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber & Faber, 1958) 154, 165; and by Bernard M Dickens, *Abortion and the Law* (MacGibbon & Kee, 1966) 50); C B Orr, 'R v Newton and Stungo' [1958] *Criminal Law Review* 469. In the late 1960s the legislature took over from the judiciary in this regard: see *Abortion Act 1967* (UK) c 87.
- 6 SA is described as 'first' because although the SA legislation was not enacted until after the *Davidson* [1969] VR 667 decision was handed down, the Bill was before the SA Parliament as early as 1968; thus, SA was the 'first' jurisdiction to seriously engage with the issue.
- 7 See *Criminal Law Consolidation Act 1935* (SA) s 82A.
- 8 [1969] VR 667.
- 9 Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 722.
- 10 D O'Connor and P A Fairall, *Criminal Defences* (Butterworths, 3rd ed, 1996) 103. See also Susan B Apel, 'Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction' (1991) 48 *Washington and Lee Law Review* 41, 42; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 74 (Lord Goff).
- 11 See Alan Brudner, 'A Theory of Necessity' (1987) 7 *Oxford Journal of Legal Studies* 339, 341; Barney Sneiderman and Marja Verhoef, 'Patient Autonomy and the Defence of Medical Necessity: Five Dutch Euthanasia Cases' (1996) 34 *Alberta Law Review* 374, 380; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 226–7, 239–40 (Brooke LJ).
- 12 Apel, above n 10, 42. A similar statement is provided by Tremblay: 'necessity condones the pursuit of the greater good rather than conformity with the letter of the law' — Hugo Tremblay, 'Eco-Terrorists Facing Armageddon: The Defence of Necessity and Legal Normativity in the Context of Environmental Crisis' (2012) 58 *McGill Law Journal* 321, 333.
- 13 See Sabine Michalowski, 'Relying on Common Law Defences to Legalise Assisted Dying: Problems and Possibilities' (2013) 21 *Medical Law Review* 337, 340.
- 14 See *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 236 (Brooke LJ).
- 15 Edward B Arnolds and Norman F Garland, 'The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil' (1974) 65 *Journal of Criminal Law and Criminology* 289, 295.

Davidson was followed and expanded upon in NSW by the 1971 decision in *R v Wald*.¹⁶ As a result of Judge Levine's interpretation of the necessity defence in *Wald*, NSW at the time of that decision had arguably the most liberal abortion regime in Australia. Since *Wald* was decided there have been some extensive judicial discussions of abortion law, but NSW courts have always ultimately settled on *Wald* as representing an accurate expression of the law.¹⁷ Thus, in NSW, the lawfulness or unlawfulness of an abortion rests upon a particular interpretation and (assumed) application of the common law defence of necessity.¹⁸

NSW is now the only Australian jurisdiction not to have legislated on the issue of abortion in over a century, and, along with SA,¹⁹ has seen no significant change in the law (legislative or judicial) for almost 50 years. Of course, this fact, in and of itself, is not necessarily cause for concern. It might well be argued that no change has been necessary because the *Wald* decision created a situation approaching abortion-on-demand, so was, and is, better left alone.²⁰ Putting aside the fact that while abortion remains a crime it can never be a woman's right,²¹ one might agree that a liberal interpretation of *Wald* would probably lead to an approach to providing abortion services that might allow an abortion for almost any reason. However, as the *R v Sood* prosecution highlighted, the law demands that there be adequate reason for the abortion.²² In 1938, in the landmark UK decision in *Bourne*,²³ Macnaghten J stated that 'the desire of a woman to be relieved of her pregnancy is no justification at all for performing the operation',²⁴ and this remains the law in NSW.²⁵ Yet, if abortion were a right, or if abortion-on-demand actually existed, the decision would be entirely in the woman's hands, and no 'reason'

16 (1971) 3 DCR NSW 25 ('*Wald*').

17 See, eg, two decisions of the NSW Supreme Court: *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311, 318; *R v Sood* [2006] NSWSC 1141 (31 October 2006) [16]. In 1995, the NSW Court of Appeal, in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 ('*Superclinics*'), did discuss the law of abortion at considerable length, but in the end result the majority chose to merely apply the reasoning in *Wald* (1971) 3 DCR NSW 25, rather than embark upon any novel approach. A similar decision was taken after some consideration by Simpson J of the NSW Supreme Court in *R v Sood* [No 3] [2006] NSWSC 762 (15 September 2006).

18 See, eg, *R v Sood* [No 3] [2006] NSWSC 762 (15 September 2006) [37], in which Simpson J made it clear that the lawfulness or unlawfulness of an abortion in NSW 'depends upon the law of necessity', citing *Davidson* [1969] VR 667.

19 Although it should be noted that in *R v Anderson* [1973] 5 SASR 256, 271 it was suggested that the necessity defence was still applicable in SA despite the legislature specifically addressing lawful abortion.

20 Kate Gleeson makes the point that the common law regime is actually less restrictive in practice than some of the jurisdictions that have specifically legislated for lawful abortion: see Kate Gleeson, 'The Other Abortion Myth — The Failure of the Common Law' (2009) 6 *Journal of Bioethical Inquiry* 69, 77–80. See also Heather Douglas, Kirsten Black and Caroline de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560, 570.

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

22 *R v Sood* [2006] NSWSC 1141 (31 October 2006) [18]–[23].

23 [1939] 1 KB 687.

24 *Ibid* 693.

25 See, eg, *Wald* (1971) 3 DCR NSW 25, 28–9; *Superclinics* (1995) 38 NSWLR 47, 82 (Priestley JA). In Queensland the point has also been made by Judge McGuire that '[t]here is no legal justification for abortion on demand': *R v Bayliss* (1986) 9 Qld Lawyer 8, 45.

would be required other than a woman's desire to no longer be pregnant; there would be no need to persuade a medical practitioner of sufficient grounds for the abortion.²⁶ But, again, legal pragmatists might argue that the present regime is as close to abortion-on-demand as we may realistically aspire to in the current political climate, and therefore reform is not necessary.²⁷ Or, to put it colloquially: 'If it ain't broke, don't fix it.'

The purpose of this article is to point out that the law on abortion in NSW is, in fact, theoretically 'broke'. This article aims to highlight that the current NSW law on abortion rests on a lower court decision that interprets and applies an archaic common law defence in a manner that sits uneasily with the present authoritative interpretation of that necessity principle. Put simply, it is the contention here that *Wald* is bad, or at least suspect, law, and bad or suspect law is, by definition, susceptible to being corrected, and how that 'correction' might look is worrying for those that argue that a right to abortion should be part of a woman's right to reproductive freedom, bodily integrity and/or equality.²⁸ This article will canvass the law of abortion in NSW, studying in detail how it has been interpreted in both *Davidson* and *Wald* (as *Wald* follows the reasoning in *Davidson*). The article will then trace the history of the common law defence of necessity in both the UK and Australia to illustrate the complexity and instability of this defence, and to, ultimately, argue that *Wald* constitutes an incorrect or dubious application and interpretation of that principle; if not at the time it was decided, then certainly now. In this manner, this article advocates for abortion law reform in NSW — specifically, the repeal of the offence of abortion — on the basis that the necessity defence is not theoretically coherent as it applies to the offence of abortion.

II ABORTION LAW IN NSW

A R v Davidson

As mentioned above, all Australian jurisdictions initially adopted the relevant abortion provisions of the *1861 UK Act*, and it was not until 1969 (when the SA parliament enacted s 82A of the *Criminal Law Consolidation Act 1935* (SA))²⁹ that an Australian jurisdiction legislated on the issue in order to allow for lawful

26 It is of interest to highlight a recent study that has found that many medical practitioners in NSW and Queensland fabricate 'reasons' for the abortion in order to satisfy the law in this respect: see Douglas, Black and de Costa, 'Manufacturing Mental Illness (and Lawful Abortion)', above n 20, 567–76. For more on that survey see Caroline de Costa, Heather Douglas and Kirsten Black, 'Making It Legal: Abortion Providers' Knowledge and Use of Abortion Law in New South Wales and Queensland' (2013) 53 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 184.

27 Contrary to such a view, it should be noted that a woman has recently been found guilty of the offence under s 82 of the *Crimes Act 1900* (NSW): that of self-administering a drug with the intent to procure her own miscarriage — see *DPP (NSW) v Lasuladu* [2017] NSWLC 11 (5 July 2017).

28 The obvious question that is generated from this conclusion that *Wald* is bad or suspect law — namely, why has *Wald* not already been overturned or distinguished? — is a question beyond the scope of the present article.

29 This provision was based largely on the *Abortion Act 1967* (UK) c 87.

abortions in specified circumstances. In that same year the decision in *Davidson*³⁰ brought about a similar practical effect in Victoria (ie that some abortions might be considered lawful under particular circumstances) by virtue of the application of the necessity defence to the crime of abortion.³¹

The case concerned a medical practitioner, Charles Kenneth Davidson, who was charged with four counts of unlawfully using an instrument to procure a miscarriage under s 65 of the *Crimes Act 1958* (Vic).³² Section 65 was practically identical to s 83 of the *Crimes Act 1900* (NSW) provided earlier in this article,³³ which is not surprising as both were ‘in substance in the same form’ as s 58 of the *1861 UK Act*.³⁴ The case dealt almost exclusively with the meaning of ‘unlawfully’ under s 65,³⁵ and was heard by Menhennitt J of the Victorian Supreme Court. His Honour held that the use of the word ‘unlawfully’ in s 65 implied that some abortions may be lawful,³⁶ and, after studying a number of referred authorities, Menhennitt J concluded that the common law defence of necessity was the appropriate principle to apply in that respect.³⁷

His Honour relied on Sir James Fitzjames Stephen’s definition of the doctrine as representing a correct formulation of the principle.³⁸ Stephen defined the principle of necessity as follows:

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.³⁹

30 [1969] VR 667.

31 It should be noted that *Davidson* [1969] VR 667 was not the first Victorian case in which the possibility of a defence to the crime of abortion was discussed: see, eg, *R v Trim* [1943] VLR 109, 113–17; *R v Carlos* [1946] VLR 15, 19.

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

33 There were slight differences as to order of wording, and the maximum penalty in Victoria was 15 years imprisonment, rather than the 10 year maximum applicable in NSW.

34 See *Davidson* [1969] VR 667, 668.

35 This was evident from Menhennitt J’s opening statement that ‘[t]he particular matter as to which I have heard submissions and on which I make this ruling is as to the element of unlawfulness in the charges’: *ibid* 667.

36 *Ibid* 668.

37 *Ibid* 670–1.

38 *Ibid* 670. It is also of interest to note that Stephen suggests that sacrificing a child during birth to save the life of the mother would be justified under the necessity defence — see Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 2, 110; Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan, 2nd ed, 1890) 77.

39 Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan, 4th ed, 1887) 24. Note: Menhennitt J refers to the first edition — Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan, 1877) 19 — in his judgment: *Davidson* [1969] VR 667, 670. However, the relevant wording is almost identical to the fourth edition that will be utilised in this article.

The above quotation was provided in full in Menhennitt J's judgment, and his Honour determined this definition of the concept contained the two elements of necessity and proportion, and, having discussed the necessity defence in some detail, his Honour found that the two elements of proportion and necessity were to be determined by 'subjective tests, subject to the beliefs being held on reasonable grounds'.⁴⁰

On this basis, Menhennitt J gave the following final direction to the jury:

For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not merely being the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted. ... [which means] the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.⁴¹

In other words, Menhennitt J held that serious danger to the woman's health amounts to the 'inevitable and irreparable evil' referred to by Stephen⁴² (and thus required to satisfy the necessity element of Menhennitt J's interpretation of the defence), and avoiding this serious danger to the woman's health outweighs breaking the law by performing an abortion — thus meeting Menhennitt J's interpretation of the proportion element of the defence. On this direction the defendant was found not guilty on all counts.

Davidson had a dramatic impact on the practice of abortion in Victoria as Menhennitt J declared that the necessity defence was not limited to life-threatening situations, and an abortion could be lawfully performed not only where there is a serious danger to the woman's life, but also where there is a serious danger to the woman's physical or mental health.⁴³ However, Menhennitt J's interpretation of the necessity defence that allowed such a finding is open to criticism. This critique of the decision will occur later in the article, after providing context for that analysis via canvassing the development of the necessity defence in both UK and Australian law. It is now more appropriate to turn to the decision in *Wald*.⁴⁴

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

41 *Ibid.*

42 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

43 [1969] VR 667, 671.

44 (1971) 3 DCR NSW 25. Note: prior to this decision, *Davidson* [1969] VR 667 was followed by Judge Southwell in an unreported Victorian case mentioned by Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, 44.

B R v Wald

In *Wald* the accused operated an abortion clinic in New South Wales and were charged under s 83 of the *Crimes Act 1900* (NSW).⁴⁵ Not only were the surgeons charged, but also the orderlies, the owners of the premises on which the abortions were carried out, and even those individuals who referred women to the clinic. Thus, many of the accused were charged with conspiracy (aiding and abetting) to commit abortion.⁴⁶ The case was presided over by Judge Levine of the New South Wales Court of Quarter Sessions.⁴⁷

The main defendants, Wall, Wald, Morris (all medical practitioners), and the Colbournes (the owners of the premises on which the abortions were performed) had separate counsel, and these counsel made very different submissions to the court. Wall and Wald relied on the defence in *Davidson*, while Morris and the Colbournes decided to pursue a novel approach that submitted that at common law the termination of pregnancy with the consent of the woman, after quickening, did not itself constitute an offence, unless harm resulted to the woman.⁴⁸ Judge Levine ultimately declined to accept the submission of Morris and the Colbournes,⁴⁹ and devoted the majority of his judgment to a consideration of *Davidson*. Judge Levine concluded that:

In my view the general principle laid down in *Davidson's* case, *supra*, does provide adequate criteria where the operation to terminate the pregnancy is skilfully performed, with the woman's consent, by duly qualified medical practitioners. ... Accordingly for the operation to have been lawful in this case the accused must have had an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life, or physical or mental health, which the continuance of the pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted.⁵⁰

However, in following *Davidson*, Judge Levine chose to expand upon Menhennitt J's ruling by indicating what may be considered relevant facts in determining a 'serious danger' to the woman's physical or mental health, and by extending the time period during which that assessment might occur:

In my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view

45 (1971) 3 DCR NSW 25.

46 Judge Levine dealt with the issue of conspiracy separately: see *ibid* 29–33.

47 'Courts of General and Quarter Sessions (generally referred to as Quarter Sessions) were [established] in New South Wales in 1824 ... [and] were given power to deal with all crimes and misdemeanours not punishable with death ... The court ceased on 1 July 1973 when the Quarter Sessions were abolished and the district courts took on the criminal as well as the civil jurisdiction': NSW State Archives and Records, *Quarter Sessions Guide* <<https://www.records.nsw.gov.au/archives/collections-and-research/guides-and-indexes/quarter-sessions-guide>>.

48 *Wald* (1971) 3 DCR NSW 25, 27–8.

49 *Ibid* 28.

50 *Ibid* 29.

could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health. It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy, if uninterrupted. In either case such a conscientious belief on reasonable grounds would have to be negated before an offence under s 83 of the Act could be proved.⁵¹

Upon this direction the jury acquitted all of the accused. In summary, by holding that medical practitioners could take into account economic and social grounds in assessing the danger to a woman's health, and by finding that this danger to health need not be present at the exact time that the abortion took place, if it could reasonably be expected to arise sometime during the course of the pregnancy, the *Wald* decision significantly expanded upon the Menhennitt J ruling and thereby laid the foundation for the current situation of relatively easy access to abortion services in NSW.⁵² The *Wald* decision remained largely accepted and unconsidered in NSW until 1995 when the Court of Appeal dealt with NSW abortion law in detail in *Superclinics*.⁵³ However, although Kirby ACJ in that case advocated an expansion of the Levine ruling in *Wald*,⁵⁴ ultimately the majority chose to simply follow and approve the test laid down in *Wald*.⁵⁵ Thus,

51 Ibid.

52 However, it should be noted that this does not mean that an abortion service provider may now act with impunity. If a medical practitioner performs an abortion without first satisfying the *Wald* requirements, they may be convicted: see *R v Sood* [2006] NSWSC 1141 (31 October 2006), in which a medical practitioner was convicted of unlawful abortion because she did not make the required assessment of 'the relative dangers of termination against the dangers of non-termination' (at [21]), and therefore could not have possessed the required belief in the necessity of the procedure (at [23]). See also *DPP (NSW) v Lasuladu* [2017] NSWLC 11 (5 July 2017), in which a woman who attempted to procure her own abortion through self-administering misoprostol was found guilty of an offence under s 82 of the *Crimes Act 1900* (NSW) — however, it should be noted that in this case the foetus was viable, being '28 weeks of age': at [24].

53 (1995) 38 NSWLR 47. For a more detailed discussion of *Superclinics* see Rankin, 'Contemporary Australian Abortion Law', above n 21, 237–42. *Davidson* and *Wald* were also followed in Queensland: *R v Bayliss* (1986) 9 Qld Lawyer 8, 41–5. For a discussion of this Queensland case see Rankin, 'Contemporary Australian Abortion Law', above n 21, 235–7.

54 Kirby ACJ saw no reason to limit the assessment of 'serious danger' to the woman's health to events occurring during the pregnancy. As his Honour explains:

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

Superclinics (1995) 38 NSWLR 47, 60 (emphasis in original). Such reasoning is echoed by de Jersey J in the contemporaneous Queensland Supreme Court case of *Veivers v Connolly* [1995] 2 Qd R 326, 329.

55 See *Superclinics* (1995) 38 NSWLR 47, 59–60 (Kirby ACJ), 80–2 (Priestley JA). *Wald* was also followed by Simpson J in *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006) [30].

Wald remains the authoritative statement of abortion law in NSW. However, in common with *Davidson*, the interpretation and development of the elements of the necessity defence by Judge Levine in *Wald* is problematic. Prior to discussing such issues, it now seems apposite to study that necessity principle in detail.

III THE NECESSITY DEFENCE

At the outset it should be said that this article does not attempt any detailed philosophical examination of the necessity principle,⁵⁶ and confines the analysis to the legal issues raised by the defence.⁵⁷ There will also be little discussion of the necessity defence outside the UK and Australia;⁵⁸ this limitation is justified by reference to the fact that this article is predominantly concerned with the law in NSW (and other Australian jurisdictions where relevant), and that the law on necessity was, at least initially, adopted from the UK. A study of UK law, especially with respect to investigating the historical origins of the defence, also serves a useful contextual purpose for present discussions on the matter.

A Necessity in the UK

Necessity is a defence with a long history and the birth of necessity is difficult to date with any precision, with some courts appearing to apply the principle as early as the 14th century,⁵⁹ but it was certainly generally accepted as a legitimate common law defence by the early 17th century, and has been raised in a small

- 56 As will become apparent, the necessity defence has potentially significant moral, economic and political ramifications that might prove quite revolutionary to contemporary society — see, eg, Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2nd ed, 2001) 159, who refers to the ‘Pandora’s Box’ that necessity potentially opens in allowing one to raise all kinds of social, political and economic arguments to commit what is otherwise a crime. For example, the defence might be utilised to justify homicide in euthanasia cases: see Michalowski, above n 13. Indeed, this has already occurred in the Netherlands: see Sneiderman and Verhoef, above n 11, 385–407. It might also be applied to justify or excuse the use of torture in interrogating suspected terrorists: see Paul Ames Fairall, ‘Reflections on Necessity as a Justification for Torture’ (2004) 11 *James Cook University Law Review* 21, 28–32; Paola Gaeta, ‘May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?’ (2004) 2 *Journal of International Criminal Justice* 785. The necessity defence may also come to the aid of those advocating civil disobedience to further political causes (such as environmental protection): see Tremblay, above n 12. The necessity defence has also been raised by anti-abortionists seeking to justify illegal behaviour, such as trespass to property: see Apel, above n 10; Patrick G Senfle, ‘The Necessity Defense in Abortion Clinic Trespass Cases’ (1987) 32 *Saint Louis University Law Journal* 523; Arlene D Boxerman, ‘The Use of the Necessity Defense by Abortion Clinic Protestors’ (1990) 81 *Journal of Criminal Law and Criminology* 677.
- 57 Of course, it should be noted that the fact that the necessity defence raises such moral and political issues serves to further complicate an already confusing and ambiguous legal doctrine.
- 58 It should, however, be noted that necessity is an established defence in Canada — see *Perka v The Queen* [1984] 2 SCR 232, 241–5; *Latimer v The Queen* [2001] 1 SCR 3. It has also been accepted and applied in the US for some time now: see Arnolds and Garland, above n 15, 291–2.
- 59 See the 1321 case recorded in the King’s Bench rolls and discussed by Sir Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown* (E and R Nutt and R Gosling, 1736) vol 1, 56–8.

number of cases ever since. The principle has, from its very beginning, exhibited high degrees of unpredictability, uncertainty, and inconsistency. Indeed, questions remain largely unresolved in the UK with regard to the defence's appropriate formulation and application. In particular, the current utilitarian 'lesser evils' approach to the defence was not always apparent.

Early decisions arguably referring to the principle tended not to develop the defence in terms of elements or criteria, but rather offered simple instances of when it may come into play.⁶⁰ The first clear judicial pronouncement on necessity was that provided by Serjeant Pollard in the mid-16th century case of *Reniger v Fogossa*.⁶¹

in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law ... where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion ...⁶²

Although scant on details the above statement does arguably represent a nascent 'lesser evils' approach to the issue. In the early 17th century there was a run of cases that appeared to apply the necessity principle so enunciated,⁶³ but there was no further development of the principle from Serjeant Pollard's foundational statement. It is at this juncture that one may therefore look to the early common law scholars for more detailed expositions of the necessity principle.⁶⁴ Turning first to Lord Bacon, who is arguably the earliest scholarly exponent and advocate of the necessity defence,⁶⁵ he provides a number of examples when the necessity defence might be applicable that are suggestive of a 'lesser evils' approach.⁶⁶ Perhaps Bacon's most pertinent and revolutionary example in this respect is that:

- 60 For example, in 1469 Justice Littleton concluded that one may legitimately pull down a house in order to prevent fire from spreading: (1469) YB Mich 9 Edw 4, fo 35a–b, pl 10. In 1499, Justice Rede held that jurors may leave the premises without the court's permission if a fight breaks out and they are escaping to avoid injury: (1499) YB Trin 14 Hen 7, fo 29b–30a, pl 4.
- 61 (1551) 1 Plow 1; 75 ER 1.
- 62 Ibid 18; 29–30. It is of interest to note that Serjeant Pollard appeared to base his statement on *Matthew* 12:3–4, which suggests that one may take (steal) bread if one is hungry.
- 63 See, eg, *The Case of the King's Prerogative in Saltpetre* (1606) 12 Co Rep 12, 12; 77 ER 1294, 1294; *Mouse's Case* (1608) 12 Co Rep 63, 63; 77 ER 1341, 1342; *Moore v Hussey* (1609) Hob 93, 96; 80 ER 243, 246; *Colt v Bishop of Coventry and Lichfield* (1612) Hob 140, 159; 80 ER 290, 307. For a later example see *Manby v Scott* (1659) 1 Lev 4, 4–5; 83 ER 268, 268.
- 64 It should be noted in this respect that the most eminent of such scholars remain persuasive authorities unless the law has expressly altered since their time: see *R v Casement* [1917] 1 KB 98, 141, quoting *Butt v Conant* (1820) 1 Brod & Bing 548, 570; 129 ER 834, 843 (Dallas CJ).
- 65 That is, although Bracton refers to a situation that suggests 'necessity', Bracton was really referring to self-defence rather than a general defence of necessity: see O'Connor and Fairall, above n 10, 106.
- 66 For example, Bacon states that 'if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth; this is no escape, nor breaking of prison': Francis Bacon, 'Maxims of the Law' in James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon* (Longmans, first published 1857, 1872 ed) vol 7, 344; and further allows that one might throw goods overboard to halt a sinking ship; or pull down another house in order to stop the spread of fire: at 344–5. Bacon also holds that self-defence is a form of necessity: at 346.

‘[i]f a man steal viands to satisfy his present hunger, this is no felony nor larceny.’⁶⁷ Nonetheless, as if to evidence the inconsistent nature of the necessity defence, Bacon’s most famous illustration of necessity is one that cannot be described as a ‘lesser evils’ situation:

So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.⁶⁸

The above ‘plank’ example is clearly not a ‘lesser evils’ approach because, assuming all life to be of equal worth, it is not the lesser evil to kill an innocent to save yourself.⁶⁹ Put simply, a ‘lesser evils’ defence would demand that, in killing one (or indeed many), there must be a net saving of lives for that killing to be justified.⁷⁰ Of course, it is not quite that simple as perhaps necessity is more than a purely utilitarian equation, and the fact that homicide is involved further muddies the waters as courts have always struggled dealing with necessity as a defence to murder,⁷¹ but these issues will be discussed later in the article. For now, we may simply highlight that Bacon viewed necessity as a general defence,⁷² but was inconsistent in his approach to its formulation and application.⁷³

Although Bacon’s approach received approval from his contemporary, William Noy (even to the point of supporting his radical principle that hunger justifies theft

67 Ibid 343. It is ‘revolutionary’ because deciding the conflict between life and property in favour of life clearly has revolutionary potential in a capitalist society that otherwise appears to decide this conflict in favour of private property. Of course, the nature of necessity is that it will often manifest as a conflict between life and property: see Glanville Williams, *Criminal Law: The General Part*, above n 9, 734.

68 Bacon, above n 66, 344. It is of interest to note that this plank example was approved by Stephen: see Stephen, *History of the Criminal Law*, above n 38, 108.

69 As Glanville Williams points out, as ‘the two lives must be accounted equal in the eye of the law and there is nothing to choose between them’, a ‘lesser evils’ approach cannot justify the killing: Glanville Williams, *Criminal Law: The General Part*, above n 9, 740. See also *R v Howe* [1987] 1 AC 417, 430–3 (Lord Hailsham LC).

70 As Glanville Williams explains — ‘[i]f his act was intended to result in a net saving of lives, it would surely be justified by necessity. Even the law of murder must yield to the compulsion of events’: Glanville Williams, *Criminal Law: The General Part*, above n 9, 739.

71 This ‘struggle’ is amply demonstrated in *R v Dudley* (1884) 14 QBD 273.

72 Bacon’s only limitations on the defence were that necessity could not be a defence to treason, and that the person raising the defence cannot have caused the circumstances giving rise to the situation of necessity: see Bacon, above n 66, 345–6.

73 Indeed, Bacon often mentioned necessity, not as a ‘lesser evils’ principle, but rather as a recognition that certain dire circumstances will compel action such that the actor cannot be held to be morally or legally accountable for such actions (see, eg, Bacon, above n 66, 343) — an approach more in line with the moral involuntariness perspective adopted by the Canadian courts: see, eg, *Perka v The Queen* [1984] 2 SCR 232, 250, 259. See also Glenys Williams, ‘Necessity: Duress of Circumstances or Moral Involuntariness?’ (2014) 43 *Common Law World Review* 1, 7–13.

to satiate that hunger),⁷⁴ other legal scholars were not so supportive. In particular, Sir Matthew Hale, whom Windeyer has described as the ‘greatest lawyer of the Restoration period’,⁷⁵ was adamant that no general defence of necessity was known to the common law,⁷⁶ and, in any case, could certainly neither justify homicide,⁷⁷ nor excuse a starving person from stealing food as ‘[m]en’s properties would be under a strange insecurity, being laid open to other men’s necessities, whereof no man can possibly judge, but the party himself’.⁷⁸

Blackstone repeated this view,⁷⁹ holding that the defence could neither justify nor excuse murder,⁸⁰ nor theft out of hunger or impoverishment.⁸¹ Nonetheless, the more authoritative Blackstone⁸² differs from Hale in that he holds that the necessity defence does exist in English common law, and provides a succinct statement of the ‘lesser evils’ approach:

There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man’s will, and oblige him to do an action, which without such obligation would be criminal. *And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two.* Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in choosing the less.⁸³

74 See William Noy, *The Principal Grounds and Maxims, with an Analysis; and a Dialogue and Treatise of the Laws of England* (S Sweet, 9th ed, 1821) 32–3. It is of interest to note that Bacon’s main authoritative rival of the time, Sir Edward Coke, had little to say on necessity, apart from discussing cases he decided on the issue (for example, *The Case of the King’s Prerogative in Saltpetre* (1606) 12 Co Rep 12; 77 ER 1294 — Coke discusses this case in Coke, above n 2, 83–4) whereas another 17th century writer, Hobbes, believed that to kill for self-preservation, or to steal out of hunger, was neither unlawful nor immoral: see Thomas Hobbes, *Leviathan* (Clarendon Press, first published 1651, 1909 ed) 232.

75 W J V Windeyer, *Lectures on Legal History* (Lawbook, 2nd revised ed, 1957) 217.

76 Hale, above n 59, 51–5.

77 That is, Hale states that the mariner in Bacon’s plank example ‘ought rather to die himself, than kill an innocent’: *ibid* 51.

78 *Ibid* 54. See also P R Glazebrook, ‘The Necessity Plea in English Criminal Law’ (1972) 30 *Cambridge Law Journal* 87, 116.

79 Blackstone, above n 2, 32.

80 Blackstone states in support of this conclusion — ‘for he ought rather to die himself, than escape by the murder of an innocent’: *ibid* 30. However, he nonetheless seems to favour Bacon’s plank example, justifying it by reference to ‘unavoidable necessity’, but he also suggests that this might be a case of self-defence, rather than necessity: at 186.

81 *Ibid* 31–2. For a critique of Hale’s and Blackstone’s view that economic necessity is no defence see Glanville Williams, *Criminal Law: The General Part*, above n 9, 734–5. See also East, who disagrees with both Hale and Blackstone, and directly challenges the view that necessity may not excuse murder: Edward Hyde East, *A Treatise of the Pleas of the Crown* (J Butterworth, 1803) vol 1, 294. There is also support from Russell for a ‘lesser evils’ defence: see Sir William Russell, *A Treatise on Crimes and Misdemeanours* (Garland Publishing, first published 1819, 1979 ed) vol 1, 664–5.

82 Blackstone is indisputably an authority in his own right, but such prestige is enhanced by the fact that his *Commentaries on the Laws of England* was the basis of Stephen’s *Commentaries* in the late 19th century: see Windeyer, above n 75, 243–5.

83 Blackstone, above n 2, 30–1 (emphasis added).

Blackstone's views in this respect were the basis of the position taken by Sir James Fitzjames Stephen in the most cited early exposition of necessity.⁸⁴ Stephen was the first scholar to clearly provide the elements of the defence as follows:

- (1) the conduct of the defendant was necessary to avoid 'inevitable and irreparable evil';
- (2) no more was done than was 'reasonably necessary' to avoid that evil;
- (3) the evil threatened 'could not otherwise be avoided' than by the action taken; and
- (4) the evil done to avoid that evil (ie the commission of the offence in question) was 'not disproportionate to the evil avoided'.⁸⁵

This formulation of the necessity defence has received consistent judicial support, and has arguably been the basis of most judicial pronouncements on the defence ever since.⁸⁶ However, Stephen himself, in a number of his publications, has emphasised the inherently uncertain nature of the defence of necessity. Stephen highlights the fact that the 'extent of this principle is unascertained',⁸⁷ and further noted:

Compulsion by necessity is one of the curiosities of law, and so far as I am aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient.⁸⁸

Stephen explains this issue further:

In short, it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards ... I see no good in trying to make the law more definite than this, and there would I think be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances.⁸⁹

The last sentence above perhaps echoes the fear expressed by both Hale and Blackstone, and further highlights the revolutionary potential of necessity to undermine both the stability and authority of the legal system (ie what does it say

84 The relevant paragraph will not be quoted here as it is provided in full above during the discussion on *Davidson* [1969] VR 667: see above n 39 and accompanying text. The famous quote is found in Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24 and is repeated in full by Menhennitt J in *Davidson* [1969] VR 667, 670.

85 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

86 See, eg, *Davidson* [1969] VR 667, 670–2; *R v Loughnan* [1981] VR 443, 448 (Young CJ and King J) ('*Loughnan*'); *R v Rogers* (1996) 86 A Crim R 542, 547 (Gleeson CJ) ('*Rogers*'); *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 240 (Brooke LJ). See also Yeo, who states that both UK and Australian courts have tended to place 'heavy reliance' upon Stephen's view in this respect: Stanley Yeo, 'Revisiting Necessity' (2010) 56 *Criminal Law Quarterly* 13, 36.

87 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

88 Stephen, *History of the Criminal Law of England*, above n 38, 108.

89 *Ibid* 109–10.

about such a system when one concludes that breaking the law is the ‘lesser evil’?), and the ideological foundations of our society (eg what sort of capitalism allows the starving to steal with impunity?). This fear of the potential ramifications of the necessity defence has been regularly repeated by the judiciary,⁹⁰ and is perhaps most forcibly espoused by Lord Coleridge CJ in *R v Dudley*:⁹¹ ‘it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime’.⁹²

There were arguably cases touching on necessity from the late 18th century through to the early 20th century,⁹³ but for present purposes the major UK case on the necessity principle was not heard until 1938 in *Bourne*.⁹⁴ This was a somewhat strange decision by Macnaghten J, as his Honour did not expressly state that the necessity defence was being applied to the matter before the court⁹⁵ (although there was reference to ‘what has always been the common law of England’),⁹⁶ yet comments made by the court lead inescapably to that conclusion. It is now generally accepted that the basis of his Honour’s decision was the common law principle of necessity.⁹⁷

In this case the defendant was charged with performing an unlawful abortion under s 58 of the *1861 UK Act*. Ultimately, Macnaghten J decided that the abortion was lawful provided ‘the termination of pregnancy [was] for the purpose

90 For a recent example, see *R v Quayle* [2006] 1 All ER 988, 1020–6 (Mance LJ) (*‘Quayle’*).

91 (1884) 14 QBD 273.

92 Ibid 288. Although the Court arguably recognised necessity as a common law defence (see Glazebrook, above n 78, 113–14), this case will not be further discussed as it ‘descended to mere rhetoric’ (Glanville Williams, *Criminal Law: The General Part*, above n 9, 742) and is thus ‘an entertaining story which is authority for nothing’: Peter Alldridge, ‘Duress, Duress of Circumstances and Necessity’ (1989) 139 *New Law Journal* 911, 911. See also Sneiderman and Verhoef, above n 11, 378; Rupert Cross, ‘Necessity Knows No Law’ (1968) 3 *University of Tasmania Law Review* 1, 2–4; Bernadette McSherry, ‘The Doctrine of Necessity and Medical Treatment’ (2002) 10 *Journal of Law and Medicine* 10, 16.

93 See, eg, *The Governor and Company of the British Cast Plate Manufacturers v Meredith* (1792) 4 Term R 794; 100 ER 1306; *R v Vantandillo* (1815) 4 M & S 73, 76; 105 ER 762, 763; *Humphries v Connor* (1864) 17 ICLR 1, 7 (O’Brien J); *R v Hicklin* (1868) LR 3 QB 360, 376–7 (Blackburn J), 378 (Lush J); *Burns v Nowell* (1880) 5 QBD 444; *R v Tolson* (1889) 23 QBD 168; *Cope v Sharpe [No 2]* [1912] 1 KB 496, 506–10 (Kennedy LJ).

94 [1939] 1 KB 687.

95 Indeed, on the face of it Macnaghten J was applying a defence under s 1(1) of the *Infant Life (Preservation) Act 1929*, 19 & 20 Geo 5, c 34 to the offence before the Court (Bourne was charged with using an instrument with intent to procure a miscarriage, contrary to the provisions of s 58 of the *1861 UK Act*): see *Bourne* [1939] 1 KB 687, 690–1. However, it is not altogether clear why his Honour felt that an exception in one statute was, in itself, grounds for reading a similar exception into the other, and, in any case, his Honour still had to define ‘unlawfully’ and did so by applying considerations that clearly stemmed from the necessity defence. The only plausible legal basis for Macnaghten J’s decision is the necessity principle: see Glanville Williams, *The Sanctity of Life and the Criminal Law*, above n 5, 152.

96 *Bourne* [1939] 1 KB 687, 691.

97 See Seaborne Davies, above n 2, 130; Ministry of Health Home Office, *Report of the Inter-Departmental Committee on Abortion* (Her Majesty’s Stationery Office, 1939) 31 [76], 70 [195]; Glanville Williams, *The Sanctity of Life and the Criminal Law*, above n 5, 152; Arnolds and Garland, above n 15, 291–2; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 231–2 (Brooke LJ); *Loughnan* [1981] VR 443, 451–5 (Crockett J).

of preserving the life of the mother'.⁹⁸ It was evident that the Court was applying a classic 'lesser evils' interpretation of the necessity defence as his Honour explained further that '[t]he unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother';⁹⁹ in other words, one may perform an abortion lawfully only if the abortion was necessary to avert a greater evil, namely, the death of the mother. His Honour also took a broad view of 'life' in this respect, finding that if a medical practitioner forms the view, on reasonable grounds, 'that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck',¹⁰⁰ then an abortion performed on that basis will constitute 'operating for the purpose of preserving the life of the mother'.¹⁰¹ As stated, this represents the classic utilitarian 'lesser evils' approach to the necessity defence.

Bourne was the last significant case in which necessity was successfully applied, or even discussed, for some time in the UK. It was not until the early 1970s that higher courts in the UK dealt with the issue. In *Southwark London Borough Council v Williams*¹⁰² the necessity defence was raised, and although the Court appeared to accept the existence of the defence it refused to apply it, ostensibly due to the Court's fear of the adverse implications of allowing a broader defence of necessity. Lord Denning MR exemplified this trepidation:

Else necessity would open the door to many an excuse. ... [I]t would open a way through which all kinds of disorder and lawlessness would pass. ... Necessity would open a door which no man could shut.¹⁰³

The necessity defence was also the subject of rudimentary discussion in *Buckoke v Greater London Council*,¹⁰⁴ but the Court similarly refused to apply it to the case at hand, extraordinarily deciding that the defence would not be available to the driver of a fire engine that ran a red light in order to save a life.¹⁰⁵ This decision is difficult to reconcile with a 'lesser evils' approach to necessity; indeed, if necessity cannot be applied in the above scenario, one struggles to envision cases where it might be applicable, and it comes as no surprise that the defence of necessity was rarely mentioned for some time after this decision.¹⁰⁶

98 *Bourne* [1939] 1 KB 687, 693.

99 *R v Bourne* [1938] 3 All ER 615, 620. Note: this quote does not appear in the Law Reports version of the case.

100 *Bourne* [1939] 1 KB 687, 694.

101 *Ibid.*

102 [1971] Ch 734 ('*Southwark*').

103 *Ibid* 743–4. The other judge in *Southwark*, Edmund Davies LJ, expressed similar sentiments — 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear — necessity can very easily become simply a mask for anarchy': at 745–6.

104 [1971] Ch 655.

105 *Ibid* 668–9.

106 In *Johnson v Phillips* [1975] 3 All ER 682 it could be argued that necessity was inferred when Wien J stated that 'a constable would be entitled ... to [direct motorists to disobey traffic regulations] if it were reasonably necessary for the protection of life or property', but the necessity defence was not expressly mentioned by the court: at 686.

It is at this point that UK law on necessity ceases to be particularly authoritative or persuasive for present purposes because by the early 1980s Australian law had developed its own interpretations and formulations of the necessity defence through the decisions in *Davidson*,¹⁰⁷ *Wald*,¹⁰⁸ and especially *Loughnan*,¹⁰⁹ which remains the landmark Australian decision on necessity (and will be discussed at length below).

Nonetheless, as an illustration of necessity's inconsistent and uncertain nature, it is interesting to point out that the UK courts in the late 1980s arguably implicitly extinguished the necessity defence (at least in its 'lesser evils' formulation) by creating a new defence of duress of circumstances,¹¹⁰ only to then revive the 'lesser evils' interpretation of the defence in the 1990s,¹¹¹ even applying the defence to murder at the turn of the 21st century.¹¹² So where does necessity currently sit in UK law? It is difficult to say.¹¹³ The most that can be said is that necessity (probably) remains a defence under UK common law. However, whether it is a defence of general application, or confined to specific offences, remains open to debate. Similar uncertainty is evident with regard to the elements of the defence, or even whether the defence is appropriately labelled 'necessity', 'duress of circumstances', or 'necessity by circumstances'. Put simply, 'the authorities are not consistent'.¹¹⁴ It has recently been said that the necessity defence holds a 'somewhat ambivalent and nebulous position' in the UK common law.¹¹⁵ Well over half a century ago Glanville Williams explained that '[t]he peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision',¹¹⁶ and it would appear that little has changed

107 [1969] VR 667.

108 (1971) 3 DCR NSW 25.

109 [1981] VR 443.

110 The defence of duress of circumstances was established in the Court of Appeal cases of *R v Willer* (1986) 83 Cr App R 225, 227 (Watkins LJ); *R v Denton* (1987) 85 Cr App R 246, 248 (Caulfield J); *R v Conway* [1989] QB 290, 296–7 (Woolf LJ); *R v Martin* [1989] 1 All ER 652, 653–4 (Simon Brown J). After this flurry of activity the defence was rarely mentioned again; although in *Quayle* reference was made to a defence of 'necessity by circumstances', it was clear that this was a reference to the necessity defence and not duress of circumstances: [2006] 1 All ER 988, 1019–20 (Mance LJ). For a discussion of the defence of duress of circumstances see D W Elliott, 'Necessity, Duress and Self-Defence' [1989] *Criminal Law Review* 611; Birju Kotecha, 'Necessity as a Defence to Murder: An Anglo-Canadian Perspective' (2014) 78 *Journal of Criminal Law* 341, 350–9; Michael Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes — Taking Human Life and the Defence of Necessity' (2006) 70 *Journal of Criminal Law* 147, 150–1; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 232–6 (Brooke LJ), 252–4 (Robert Walker LJ).

111 See, eg, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 174 (Lord Fraser); *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 74 (Lord Goff).

112 See *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 219–40 (Brooke LJ). For a concise philosophical analysis of this case, especially with respect to the rights-based v consequence (deontological v teleological) arguments, see Kotecha, above n 110, 343–8.

113 Arnolds and Garland note that judges often failed to discuss the legal principles of the defence, and '[a]s a consequence, it is impossible to demonstrate with any degree of satisfaction an historical development of the law of necessity': Arnolds and Garland, above n 15, 291.

114 Ian Howard Dennis, 'On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse' (2009) 3 *Criminal Law and Philosophy* 29, 31.

115 Glenys Williams, above n 73, 1. See also Michalowski, above n 13, 369; Kotecha, above n 110, 361.

116 Glanville Williams, *Criminal Law: The General Part*, above n 9, 728.

in the UK common law since then. This level of uncertainty with regard to the necessity defence is less apparent in Australian common law.

B Necessity in Australia: R v Loughnan

The law on necessity in Australia is less confusing and ambiguous than it currently stands in the UK for predominantly one reason: in Australian common law there exists a decision on the necessity defence that has been followed and applied ever since it was handed down by the Victorian Supreme Court: *Loughnan*.¹¹⁷

In *Loughnan*¹¹⁸ the court discussed the concept of necessity at length and delivered a comprehensive judgment on the principle. The case may be considered the landmark or definitive Australian decision on the necessity defence.¹¹⁹ In this case the defendant was charged with escaping prison and raised the necessity defence by arguing that he only did so as he feared for his life due to threats emanating from other prisoners.¹²⁰ The Court held that the common law defence of necessity remained good law,¹²¹ that it was a defence of general application,¹²² and importantly the court provided detailed exposition of the elements of the defence (but found that the defence was not made out in the case at hand).¹²³ In determining the elements of the necessity defence, the majority (consisting of Young CJ and King J) placed great emphasis upon Stephen's definition of the concept¹²⁴ (as cited by Menhennitt J in *Davidson*,¹²⁵ and quoted in full earlier in this article), and concluded that there were three elements to necessity: irreparable evil, immediate peril, and proportion.¹²⁶ The majority explained those elements as follows:

[1] [T]he criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect ...

[2] The element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril ...

117 [1981] VR 443.

118 Ibid.

119 See, eg, Yeo, who refers to the case as '[t]he leading pronouncement on necessity under Australian common law': Yeo, 'Revisiting Necessity', above n 86, 35.

120 It is of interest to note that there were actually two such prison escape cases argued before the Full Court of the Victorian Supreme Court in the late 1970s: *R v Dawson* [1978] VR 536 and *Loughnan* [1981] VR 443. Both cases involved the same escape from Pentridge prison, and both defendants essentially argued that they escaped prison as they feared for their lives due to threats emanating from other prisoners. In *R v Dawson* the necessity principle received scant judicial comment, but in *Loughnan* it formed the basis of the judgment.

121 See *Loughnan* [1981] VR 443, 447 (Young CJ and King J), 456–7 (Crockett J).

122 That is, the defence might apply to both common law and statutory crimes: *ibid* 450 (Young CJ and King J), 458 (Crockett J).

123 *Ibid* 447 (Young CJ and King J), 463–4 (Crockett J).

124 *Ibid* 448.

125 [1969] VR 667, 670.

126 *Loughnan* [1981] VR 443, 448.

[3] The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?¹²⁷

As to what might constitute ‘irreparable evil’, the majority felt that the ‘limits of this element are at present ill defined and where those limits should lie is a matter of debate’.¹²⁸ As the case before the court involved a threat of death (which amply satisfies the element of ‘irreparable evil’),¹²⁹ the majority chose not to provide those limits, other than stating that a consequence less than death ‘might be sufficient to justify the defence’.¹³⁰ As to the meaning of ‘imminent peril’, the majority similarly declined to concisely define the phrase,¹³¹ preferring to allow it to vary on a case by case basis.¹³² However, the point was made that it should be ‘an urgent situation of imminent peril ... [and] if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed’.¹³³ As to the element of proportion, again the majority failed to provide any detailed exposition, but they did seem to imply that even murder might be a proportionate response in certain circumstances.¹³⁴

To summarise the majority view:¹³⁵ for the defence of necessity to be applied there must exist ‘an urgent situation of imminent peril’.¹³⁶ Such ‘peril’ must be ‘certain’,¹³⁷ and it must be shown that the ‘peril’, if it had been permitted to eventuate, would have ‘inflicted irreparable evil’¹³⁸ upon the defendant, or upon others that he or she was bound to protect.¹³⁹ Finally, it must be shown that the steps taken by the defendant to avoid the ‘peril’ were not disproportionate to the ‘peril’, and this proportion element may be judged according to an assessment

127 Ibid.

128 Ibid.

129 Ibid.

130 Ibid.

131 Other than to effectively repeat previous definitions, for example — ‘an urgent situation of imminent peril must exist in which the accused must honestly believe on reasonable grounds that it is necessary for him to do the acts which are alleged to constitute the offence in order to avoid the threatened danger’: *ibid* 449.

132 *Ibid* 448.

133 *Ibid*.

134 This implication is read from the majority’s view that *R v Dudley* (1884) 14 QBD 273 should be distinguished, and a failure to state categorically that the defence could not be applied to homicide: *ibid* 449–50. *Contra* 456–7 (Crockett J).

135 The other judge in the case, Crockett J, also recognised the necessity defence but chose to formulate the defence in a more classical ‘lesser evils’ manner (indeed, Crockett J adopts a test that might be described more aptly as a ‘comparable evil’ test): *Loughman* [1981] VR 443, 459–60. His Honour also held that the defence would only be raised in ‘an urgent situation of imminent peril’, and that there should be no alternative for the defendant to act as they did to avoid the threatened ‘evil’, but his Honour felt that the proportion element would be satisfied if there was merely ‘the preservation of at least an equal value’, and his Honour does not refer to the need for there to be a ‘certain’ infliction of ‘irreparable evil’ as a condition of necessity: at 460.

136 *Ibid* 449.

137 *Ibid* 448.

138 *Ibid*.

139 *Ibid*.

of reasonably available alternatives to the action taken.¹⁴⁰ The defendant ‘must honestly believe on reasonable grounds’ that the urgent situation of imminent peril existed;¹⁴¹ whereas the tests for whether such peril would have constituted an ‘irreparable evil’ if allowed to occur, and whether the response to the peril was proportionate, appear to be purely objective. The reasoning of the majority in *Loughnan* has prevailed, with that decision being followed and applied ever since.¹⁴² As the Victorian Court of Criminal Appeal stated in *R v Dixon-Jenkins*, as a result of *Loughnan* the principles of necessity were ‘no longer in doubt’.¹⁴³ However, one final decision requires brief discussion — *Rogers*¹⁴⁴ — as not only is this a NSW appellate court judgment, but it has been argued by some other courts that *Rogers* slightly altered the effect of *Loughnan*, and this issue requires examination.

A similar fact situation to *Loughnan* presented itself in *Rogers*:¹⁴⁵ the defendant was charged with attempting to escape from prison and argued that he only did so as he feared for his life due to threats from other prisoners. The NSW Court of Appeal judgment was delivered by Gleeson CJ. His Honour reaffirmed the majority decision in *Loughnan* as being a correct statement of the law and agreed with the majority’s basic formulation of the elements of the defence of necessity.¹⁴⁶ However, Gleeson CJ, in reference to the *Loughnan* factors of ‘urgency and immediacy’¹⁴⁷ held:

it is now more appropriate to treat those ‘requirements’, not as technical legal conditions for the existence of necessity, but as factual considerations relevant, and often critically relevant, to the issues of an accused person’s belief as

140 Ibid.

141 Ibid.

142 Australian cases touching on necessity since *Loughnan* have always followed, applied, approved of, or been consistent with the majority decision in *Loughnan* — see, eg, *Rogers* (1996) 86 A Crim R 542; *R v Japaljarri* (2002) 134 A Crim R 261; *Dunje v Cross* (2002) 36 MVR 170; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Taiapa v The Queen* (2009) 240 CLR 95; *Mattar v The Queen* [2012] NSWCCA 98 (17 May 2012); *Leichhardt Council v Geitonia Pty Ltd [No 6]* (2015) 209 LGERA 120; *Police (SA) v Ludwig* (2015) 73 MVR 379. However, it is of interest to note that *Loughnan* no longer effectively applies in Victoria, as that jurisdiction has now legislated for a defence of ‘sudden and extraordinary emergency’ and expressly abolished the common law defence of necessity: see *Crimes Act 1958* (Vic) s 322R which creates the statutory defence and s 322S which abolished the common law defence. Versions of this defence of ‘sudden and extraordinary emergency’ can be found in most jurisdictions: *Criminal Code Act 1995* (Cth) s 10.3; *Criminal Code 2002* (ACT) s 41; *Criminal Code Act 1983* (NT) ss 33, 43BC; *Criminal Code Act 1899* (Qld) s 25; *Criminal Code Act Compilation Act 1913* (WA) s 25 — but, notably, not in NSW.

143 (1985) 14 A Crim R 372, 378.

144 (1996) 86 A Crim R 542. Note that, prior to *Rogers*, necessity came before the NSW courts in *R v White* (1987) 9 NSWLR 427. In that case, the court followed *Loughnan* and stated that, although courts should be reluctant to extend the necessity defence to novel situations, the defence was available for strict liability offences, and that the defence is more readily available the more minor the offence committed: *R v White* (1987) 9 NSWLR 427, 431–2, which is perhaps a pithy example of the proportion element in action.

145 (1996) 86 A Crim R 542.

146 Ibid 543–5.

147 Ibid 546.

to the position in which he or she is placed, and as to the reasonableness and proportionality of the response.¹⁴⁸

It has been argued that the effect of the above paragraph converts the elements of the necessity defence established in *Loughnan* to mere factual considerations.¹⁴⁹ With respect, such a view is tenuous and downplays the fact that Gleeson CJ did not discuss *Loughnan* in any way suggestive of not accepting *Loughnan* as being good law for NSW; indeed, his Honour expressly followed and applied *Loughnan*.¹⁵⁰ Furthermore, the passage in question was clearly stated with respect to the issues of ‘urgency and immediacy’, and not all the elements of the necessity defence espoused in *Loughnan*, and the considerations of ‘urgency’ and ‘immediacy’ were not elements of the defence in *Loughnan*, but rather issues relevant to the element of ‘imminent peril’.¹⁵¹ Thus, in this author’s opinion, in NSW the elements of necessity are those laid down by the majority in *Loughnan*. In common with other cases on necessity since *Loughnan*, Gleeson CJ in *Rogers* provided guidance on how one is to assess those elements,¹⁵² but the elements remain the same.¹⁵³ Consequently, if *Rogers* alters *Loughnan* at all, it is that, in assessing whether the ‘imminent peril’ element of the necessity defence is evident on the case before it, a court need not make a finding that the threat complained of was either ‘urgent’ or ‘immediate’; however, such issues remain relevant to the assessment of whether there existed a situation of imminent peril in the circumstances.

C A Summation of Necessity

As has been evident from the preceding discussion, the development of the necessity defence has been somewhat haphazard. Nonetheless, a number of conclusions may be made with confidence. First and foremost, it is indisputable that necessity is a defence recognised by Australian common law,¹⁵⁴ and continues

148 Ibid.

149 For example, Doyle CJ (with whom Anderson and Kelly JJ agreed) in *R v B, JA* (2007) 99 SASR 317 felt that although *Loughnan* accurately expressed the law, that decision must now be viewed through the lens of *Rogers*, and the effect of *Rogers* was such that the elements of the necessity defence espoused in *Loughnan* should not be viewed as legal conditions or requirements, but factual considerations relevant (and often critically relevant) to the defendant’s belief of the existence of the requisite peril and the reasonableness and proportionality of the response: *R v B, JA* (2007) 99 SASR 317, 322–323 [24]–[26]. See also *Bayley v Police* (2007) 99 SASR 413, 421–3 [34]–[37] (Gray J, with whom Sulan and White JJ agreed); *R v Patel [No 7]* [2013] QSC 65 (7 March 2013) [11].

150 See *Rogers* (1996) 86 A Crim R 542, 543–5.

151 [1981] VR 443, 448–9.

152 (1996) 86 A Crim R 542, 546–8.

153 See, eg, *Ahmadi v The Queen* (2011) 254 FLR 174, 179–80 [35]–[41] (Buss JA); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 496 (Gleeson CJ); *Leichhardt Council v Geitonia Pty Ltd [No 6]* 209 LGERA 120, 152–3 [142]–[146].

154 The necessity defence has been described ‘as a rubric of the common law’: *Loughnan* [1981] VR 443, 457 (Crockett J). See also Kenneth J Arenson, ‘Expanding the Defences to Murder: A More Fair and Logical Approach’ (2001) 5 *Flinders Journal of Law Reform* 129, 136–7; Stanley M H Yeo, *Compulsion in Criminal Law* (Lawbook, 1990) 53. Cf *R v Dawson* [1978] VR 536, 539 (Anderson J), 543 (Harris J).

to be so recognised by NSW appellate courts.¹⁵⁵ Although courts are eager to keep the applicability of the defence ‘within carefully confined limits’,¹⁵⁶ it is nonetheless probably a defence of general application available to both common law and statutory offences¹⁵⁷ (and not limited to particular offences),¹⁵⁸ although doubt remains as to whether it might apply to murder.¹⁵⁹ Of course, whether the necessity defence can apply to a charge of murder is a moot point with respect to the crime of abortion, as the foetus (not being a legal person) cannot be the victim of homicide.¹⁶⁰ However, a related issue is worth discussing — whether necessity is a justification or merely an excuse.¹⁶¹

Judgments are inconsistent on this issue.¹⁶² Both *Davidson*¹⁶³ and *Wald*¹⁶⁴ are suggestive of necessity as a justification, as is the more recent decision in *Bayley v Police*.¹⁶⁵ However, in *Rogers* it was held to be an excuse,¹⁶⁶ whereas in *Loughnan* Crockett J held it to be a justification,¹⁶⁷ while the majority did not decide on the

155 See, eg, *NSW v McMaster* (2015) 91 NSWLR 666, 706–9 [214]–[226] (Beazley P); *Simon v Condran* (2013) 85 NSWLR 768, 775–6 [33] (Leeming JA); *Mattar v The Queen* [2012] NSWCCA 98 (17 May 2012) [7] (Harrison J).

156 *R v B, JA* (2007) 99 SASR 317, 323 [25]. See also *Bayley v Police* (2007) 99 SASR 413, 426 [48], quoting *R v Latimer* [2001] 1 SCR 3, 19 [27].

157 See, eg, *Loughnan* [1981] VR 443, 458 (Crockett J); *Bayley v Police* (2007) 99 SASR 413, 420–1 [32]; *Leichhardt Council v Geitonia Pty Ltd [No 6]* (2015) 209 LGERA 120, 150–1 [137], [139]. It may even be applied to an offence of absolute liability: *R v Martin* [1989] 1 All ER 652; Tamara Walsh, ‘Defending Begging Offenders’ (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 58, 63–5. Cf *Quayle* [2006] 1 All ER 988, 1011, 1014.

158 See Yeo, *Compulsion in Criminal Law*, above n 154, 253–4. Cf *R v Pommell* [1995] 2 Cr App R 607, 613–4 (Kennedy LJ).

159 It has been suggested by a number of scholars that necessity may apply to murder: see, eg, Nathan Tamblin, ‘Necessity and Murder’ (2015) 79 *Journal of Criminal Law* 46, 47–8; Bohlander, above n 110, 157. *Contra* Michael D Bayles, ‘Reconceptualizing Necessity and Duress’ (1987) 33 *Wayne Law Review* 1191, 1205; Michalowski, above n 13, 344–6. However, the judiciary tend to be less enthusiastic in this respect: see, eg, *R v Howe* [1987] AC 417, 453 (Lord Mackay); *R v Brown* [1968] SASR 467, 490.

160 See *R v Hutty* [1953] VLR 338, 339; *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, 279; *C v S* [1988] QB 135, 140; *In the Marriage of F* (1989) 13 Fam LR 189, 194, 197.

161 It is related to the issue of the applicability of necessity to murder because a justificatory view of necessity would likely hold that the defence is applicable to murder in circumstances where there is a net saving of lives: see Glanville Williams, *Criminal Law: The General Part*, above n 9, 739; Yeo, *Compulsion in Criminal Law*, above n 154, 152–3; Glazebrook, above n 78, 114; Jeremy Finn, ‘Emergency Situations and the Defence of Necessity’ (2016) 34(2) *Law in Context* 100, 109. Of course, whether necessity might justify murder also clearly involves a tension between philosophies — teleological (save more lives) and deontological (never take a life). For further discussion see Kotecha, above n 110, 348–53.

162 See, eg, *Moore v Hussey* (1609) Hob 93, 96; 80 ER 243, 246, in which necessity is defined as an excuse, whereas in *Davidson* [1969] VR 667 Menhennitt J applied the defence as a justification, as did Brooke LJ in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 236. As further evidence of this inconsistency, the founder of modern necessity, Stephen, initially suggested that the defence was a justification (see Stephen, *History of the Criminal Law of England*, above n 38, 109–10), but later indicated that it was an excuse (see Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24).

163 See [1969] VR 667, 672.

164 See (1971) 3 DCR NSW 25, 29.

165 See (2007) 99 SASR 413, 427–8 [53].

166 (1996) 86 A Crim R 542, 547.

167 [1981] VR 443, 455–6, 458.

matter,¹⁶⁸ which is not unusual because when necessity is before a court the issue is often not discussed at all, or held to be of little import.¹⁶⁹ In a practical sense the distinction is probably of no consequence;¹⁷⁰ in particular, it does not impact upon the defendant that is acquitted in either case. However, there are significant political and symbolic ramifications of defining a defence as either a justification or an excuse.¹⁷¹

Put simply, a justification defines the conduct in question as ‘right’ conduct ‘deserving of praise’,¹⁷² whereas an excuse holds the conduct to be ‘wrong’ but the actor not to be morally blameworthy.¹⁷³ That is, the basis of justifications and excuses is to pronounce and reflect community values and expectations, and if an act is said to be justified, the court (as the theoretical guardian of society’s values) is saying that the conduct was right, and indeed, *should* have been done. On the other hand, a person who claims an excuse concedes that harm was done by the act and that the act was wrong, but that he or she should nonetheless be excused (eg on the basis of human frailty) in the circumstances.¹⁷⁴ With respect to the politically charged offence of abortion, it matters (politically, philosophically and symbolically) whether we define the action as ‘right’ or ‘wrong’; or rather whether we merely excuse the actor or applaud the act.¹⁷⁵

It is this author’s opinion that the current Australian formulation of the necessity defence denotes a justification rather than an excuse.¹⁷⁶ That is, justifications are

168 Ibid 450.

169 See, eg, *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 237 (Brooke LJ), 253 (Robert Walker LJ). See also Miriam Gur-Arye, ‘Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?’ (1986) 102 *Law Quarterly Review* 71, 89.

170 See Gur-Arye, above n 169, 88.

171 See Finn, above n 161, 102.

172 Yeo, *Compulsion in Criminal Law*, above n 154, 14–15. Yeo further explains that a justification indicates conduct that is ‘recognised by society as right conduct’: at 160. See also Finn, above n 161, 103.

173 See Kotecha, above n 110, 350; Jaime Lindsey, ‘A New Defence of Necessity in the Criminal Law’ (2011) 17 *UCL Jurisprudence Review* 122, 129–33.

174 As Yeo explains, an excuse constitutes an opportunity for the law to provide ‘censure but compassion within limits’: Yeo, *Compulsion in Criminal Law*, above n 154, 24. See also Finn, who states that ‘[i]n excusatory necessity the conduct is unlawful but the actor is excused because the actor could not be expected to withstand the peril and adhere to the law’: Finn, above n 161, 104.

175 Another point to recognise is that, if necessity is a justification, and abortion in those circumstances is therefore ‘right’, then it becomes unlawful for others to impede or resist the performance of that justified conduct: see Glanville Williams, *Criminal Law: The General Part*, above n 9, 745. For a detailed discussion of whether necessity is a justification or excuse, and the implications thereof: see Finn, above n 161, 101–8.

176 Much like self-defence, which may be viewed as simply a specific application of the necessity principle: see Victorian Law Reform Commission, *Defences to Homicide*, Report No 8 (2004) 110–11. However, it should be noted that some have argued that necessity is neither a justification nor an excuse, but a third (ill-defined) category of defence because the conduct is neither entirely ‘right’ nor ‘wrong’: see, eg, Kotecha, above n 110, 342. Kotecha goes on to conclude that necessity is better expressed as simply ‘an emergency ... where there is a sudden, urgent and often unexpected occurrence, occasion or circumstance that requires action’: at 353. See also Michelle Conde, ‘Necessity Defined: A New Role in the Criminal Defence System’ (1981) 29 *UCLA Law Review* 409, 439–42; Yeo, *Compulsion in Criminal Law*, above n 154, 28. Yeo also argues that there may exist both justificatory necessity and excusatory necessity: at 46.

consequentialist in nature,¹⁷⁷ tending to ‘favour net utility rather than respect for individuals and their rights’,¹⁷⁸ and the proportionality element (or ‘lesser evils’ basis, whereby one commits ‘evil’ only in order to avoid a greater ‘evil’) of the necessity defence is clearly framed in utilitarian terms:¹⁷⁹ hence, necessity is a justificatory defence.¹⁸⁰ Put another way, it must be a desirable social value that a member of society chooses the lesser evil, or avoids the greater evil. Since one is acting as society would desire one to act, society must therefore regard such conduct as ‘right’; the necessity defence must therefore be a justification.

This point about choosing the ‘lesser evil’ raises another issue with necessity that has probably been the primary basis for the judicial reluctance to apply the defence more liberally: the application of the necessity defence effectively compels a court to usurp the role of the legislature.¹⁸¹ That is, besides the obvious practical difficulty of weighing up and ordering competing, and often incommensurable,¹⁸² harms, values and/or interests,¹⁸³ in deciding which ‘acts are of more value to society or create more harm’,¹⁸⁴ a court is engaging in a utilitarian balancing of values in direct conflict with legislative policy;¹⁸⁵ essentially, holding that there are more important values than obeying the law.¹⁸⁶ In a purported liberal democratic society, such as Australia, the determination or prioritising of such competing interests or values is, in theory, the prerogative of the legislature.¹⁸⁷ In this sense, the necessity defence may serve to undermine parliamentary sovereignty.¹⁸⁸ This is the ‘democracy problem’ of necessity highlighted by Gardner.¹⁸⁹

177 As Glenys Williams explains — ‘justification is, in essence, consequentialist in nature because it favours a consequence that leads to the least harm or evil’: Glenys Williams, above n 73, 3.

178 Lindsey, above n 173, 132–3. See also Tamblin, above n 159, 52. For a detailed discussion of the utilitarian and deontological underpinnings of justification and excuse see Dennis, above n 114, 33–40.

179 See Brudner, above n 11, 341–2; Michalowski, above n 13, 340; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 238 (Brooke LJ); Tamblin, above n 159, 50; Laura Offer, ‘A Court of Law or a Court of Conscience: A Critique of the Decision in *Re A (Children)*’ (2012) 4 *Plymouth Law and Criminal Justice Review* 132, 141. Conde even goes so far as to suggest that necessity reflects the idiom that the end justifies the means: Conde, above n 176, 432. Cf Lindsey who argues that ‘[t]he proportionality test is not simply about the net costs or benefits of committing the crime, it requires an analysis of all the different avenues available and the relationship between the crime committed and the anger averted’: Lindsey, above n 173, 142.

180 See Edward M Morgan, ‘The Defence of Necessity: Justification or Excuse?’ (1984) 42(2) *University of Toronto Faculty of Law Review* 165, 183; Kotecha, above n 110, 349; Finn, above n 161, 102; Stanley Meng Heong Yeo, ‘Proportionality in Criminal Defences’ (1988) 12 *Criminal Law Journal* 211, 221; Yeo, *Compulsion in Criminal Law*, above n 154, 103; Loughnan [1981] VR 443, 459 (Crockett J).

181 See Dennis, above n 114, 30, 46; Lindsey, above n 173, 122, 128. For an example of a court struggling with this dilemma see *Quayle* [2006] 1 All ER 988, 1020–6.

182 See Dennis, above n 114, 30.

183 See Tamblin, above n 159, 54; Dennis, above n 114, 45–7.

184 Lindsey, above n 173, 133.

185 See Dennis, above n 114, 30, citing *Quayle* [2006] 1 All ER 988, 1020; *Perka v The Queen* [1984] 2 SCR 232, 248–52 (Dickson J).

186 See Lindsey, above n 173, 127–8. In essence, the court’s decision ‘will inevitably manifest a political choice’: Tremblay, above n 12, 364.

187 See Lindsey, above n 173, 139.

188 Ibid 128. The necessity defence also threatens ‘the law’s role as a framework of normative rules’: Tremblay, above n 12, 331.

189 Simon Gardner, ‘Necessity’s Newest Inventions’ (1991) 11 *Oxford Journal of Legal Studies* 125, 132.

On the other hand, the necessity defence may serve an indispensable purpose for the legal system itself: allowing for flexibility and adapting to (and accommodating where necessary) ‘evolving social realities’¹⁹⁰ when the law is not otherwise reflective of society’s current values.¹⁹¹ In this sense, ‘recognition of the defense of necessity ultimately works to increase the legitimacy of the law and improves the judicial process’.¹⁹² These issues highlight the complicated nature of the necessity defence, indicating its complex political and moral implications, and suggesting interesting areas for further analysis. However, for the purposes of this article, the focus needs to return to a purely legal examination; in particular, what are the exact elements of the defence, and does *Wald* express those elements correctly?

IV THE ELEMENTS OF NECESSITY: PROBLEMS WITH WALD

Ascertaining the precise nature of the elements of the necessity defence is a difficult task,¹⁹³ and the defence is probably ‘still in a process of development’,¹⁹⁴ even issues that appear, at first glance, to be straightforward, upon closer examination remain puzzling and contentious.¹⁹⁵ Nonetheless, an attempt at that formulation must be made.

As indicated earlier in the article, the first relatively concise, and authoritative, formulation of the elements of the defence was by Stephen, who concluded that necessity had four elements as follows: (1) the conduct of the defendant was necessary to avoid an ‘inevitable and irreparable evil’; (2) no more was done than was ‘reasonably necessary’ to avoid that evil; (3) the action taken was the only means by which to avoid the evil threatened; and (4) the evil done (ie the commission of the offence in question) to avoid the evil threatened was ‘not disproportionate to the evil avoided’.¹⁹⁶ Stephen did not suggest whether such elements were to be assessed upon subjective or objective grounds, but he makes no reference to subjective concepts, such as ‘belief’ or ‘intention’, so it is

190 Tremblay, above n 12, 330.

191 Ibid 344; Stanley Yeo, ‘Private Defence, Duress and Necessity’ (1991) 15 *Criminal Law Journal* 139, 150.

192 Benjamin Reeve, ‘Necessity: The Right to Present a Recognized Defense’ (1986) 21 *New England Law Review* 779, 810. Cf Tremblay, who argues that when raising the defence of necessity for acts of civil disobedience one is inherently questioning the rule of law and legal certainty: see Tremblay, above n 12, 321.

193 It has been said that ‘the precise ambit of the defence remains unclear’: O’Connor and Fairall, above n 10, 105. See also Fairall, above n 56, 22.

194 McSherry, above n 92, 10. See also Colleen Davis, ‘Criminal Law Implications for Doctors who Perform Sacrificial Separation Surgery on Conjoined Twins in England and Australia’ (2014) 4 *Victoria University Law and Justice Journal* 61, 72.

195 See Finn, above n 161, 114–16.

196 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24. Interestingly, in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, in which Brooke LJ claimed to be adopting Stephen’s definition of the defence verbatim, his Lordship found that there were only three elements; in effect, his Lordship dropped the element labelled (3) above from the necessity equation: at 240.

reasonable to assume that Stephen felt that the elements should be determined upon objective grounds.¹⁹⁷

The next significant formulation of the defence for present purposes is that of Menhennitt J in *Davidson*. Menhennitt J stated that he was following Stephen's definition, but held that there were only two elements to the defence: (1) necessity; and (2) proportion.¹⁹⁸ Under the Menhennitt ruling the act must have been necessary to avoid an 'evil', which was defined in the circumstances of that case as a 'serious danger' to a woman's life or health (but 'not merely being the normal dangers of pregnancy and childbirth'), and the act must not have been 'out of proportion' to that 'serious danger'.¹⁹⁹ Menhennitt J thereby effectively dropped Stephen's elements labelled (2) and (3) above. Menhennitt J held that the two elements of necessity and proportion were to be determined by reference to an honest belief on reasonable grounds.²⁰⁰

In *Wald* Judge Levine followed the Menhennitt ruling in *Davidson*, but arguably changed the test for proportionality from an assessment of the defendant's honest belief on reasonable grounds to a purely objective assessment of proportionality.²⁰¹ His Honour also extended the meaning of 'serious danger' to enable an assessment of how economic and social factors might impact upon a woman's health, and further that the assessment of whether there existed a serious danger to the woman's health could be extended to considerations throughout the pregnancy.²⁰² It has been suggested by Simpson J in *R v Sood [No 3]* that Judge Levine's test for whether there existed the requisite serious danger was purely subjective,²⁰³ but, with respect, that is a dubious argument as Judge Levine clearly explains that there needs to exist '*reasonable grounds* upon which an accused could *honestly and reasonably* believe there would result a serious danger to [a woman's] physical or mental health'.²⁰⁴ In any case, even if the assessment of whether there existed a serious danger is subjective, it is clear that the test for whether the abortion was necessary to avoid that serious danger remains a test of honest belief on reasonable grounds.²⁰⁵

The majority in *Loughnan* followed Stephen more closely, holding that necessity had three elements as follows: (1) the conduct in question was done to avoid 'irreparable evil'; (2) there was an urgent situation of imminent peril; and (3) the conduct committed was not out of proportion to that imminent peril, and this

197 Although, Stephen does utilise the phrase 'if the accused can show', which perhaps suggests that an honest belief on reasonable grounds is required: Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

198 See *Davidson* [1969] VR 667, 671–2.

199 Ibid 672.

200 Ibid.

201 See *Wald* (1971) 3 DCR NSW 25, 29.

202 Ibid.

203 See *R v Sood [No 3]* [2006] NSWSC 762 (15 September 2006) [32]–[34].

204 *Wald* (1971) 3 DCR NSW 25, 29 (emphasis added).

205 Ibid.

requirement is satisfied only when there was no alternative course of action to avoid that peril.²⁰⁶

The majority held that these elements were to be assessed on purely objective grounds, except for whether there existed a situation of imminent peril, which was to be assessed from the perspective of the defendant's honest belief on reasonable grounds.²⁰⁷ It is thus clear that *Loughnan* is a return to many aspects of Stephen's formulation of the necessity defence. There are slight differences, in that: (a) Stephen provided the additional requirement that the 'irreparable' evil must also be 'inevitable',²⁰⁸ whereas *Loughnan* used the term 'certain';²⁰⁹ and (b) *Loughnan* requires the existence of a situation of imminent peril.²¹⁰ *Rogers* followed *Loughnan*, but arguably changes the requirements of 'urgency and immediacy' to factual considerations relevant to the 'reasonableness and proportionality of the response'.²¹¹ In any case, the following arguments highlighting issues with *Wald* apply regardless of one's interpretation of *Rogers*; that is, irrespective of whether the three factors isolated by the majority in *Loughnan* should be viewed as elements or legal conditions or factual considerations, they would nonetheless need to be considered and addressed by any court before it came to a conclusion as to whether the necessity defence justified the offence before the court. So, although the effect of *Rogers* on *Loughnan* may be open to debate, that uncertainty does not significantly affect the following discussion. *Loughnan* is the definitive authority on the necessity defence as it has never been distinguished or questioned, but rather considered, followed and applied. Thus, given the purpose of this article, a comparison of the decision in *Wald* with *Loughnan* is crucial. Although it is acknowledged that the *Loughnan* elements are interconnected and, at times, interdependent, in the interests of clarity it is nonetheless appropriate to conduct that investigation with respect to each element in isolation.

A Proportionality

Of the *Loughnan* elements (or factual considerations) proportionality appears relatively straightforward:²¹² the act committed cannot be out of proportion to the threat avoided, and that must be objectively assessed,²¹³ as it cannot be left

206 [1981] VR 443, 448.

207 Ibid.

208 Stephen, *A Digest of the Criminal Law* (4th ed), above n 39, 24.

209 Ibid. In *Limbo v Little* (1989) 98 FLR 421 the NT Court of Appeal felt that the 'certain' requirement in *Loughnan* meant that the threat or peril complained of must be 'inevitable': at 449.

210 [1981] VR 443, 448. It is of interest to note that this criterion of imminent peril has support in a decision made shortly after the publication of Stephen's formulation — see, eg, *Cope v Sharp* [No 2] [1912] 1 KB 496, 510.

211 *Rogers* (1996) 86 A Crim R 542, 546.

212 Finn makes the point that although the proportionality criterion is clear in principle (ie 'that the harm caused was proportionate to the benefits intended to be gained'), it is often difficult to apply in practice: Finn, above n 161, 108.

213 See *Bayley v Police* (2007) 99 SASR 413, 427–8 [53].

to the defendant to make such ‘value-judgments’.²¹⁴ Proportionality must contain an objective test because it must be the court (and not the defendant) that decides whether the value assisted was greater than the value defeated;²¹⁵ otherwise one cannot say that society would approve of the choice of values.²¹⁶ As Crockett J explains:

the defence must be objective in the determination of equality or supremacy between competing values so that it is for the judge to decide ... whether the value assisted was greater than the value defeated.²¹⁷

In addition, if the test of proportionality is not objective, then the element of proportionality ceases to effectively exist. As Simpson J explains:

The first limb of the test concerns the (reasonably based) belief in the accused that it is necessary to do what is done for the relevant purposes. The second concerns the proportionality of what is done to the danger involved. But, if the issue in the second concerns the belief of the accused rather than the objective reality of the proportionality, nothing is added to the first test. That is, if an accused person honestly believes on reasonable grounds that it is necessary to do what is done, that necessarily incorporates a belief in the proportionality of that conduct. The second is entirely subsumed in the first. That is not so if an objective test is applied to the second limb. Accordingly, both because of authority, and because of the logic inherent in the Crown’s position, I concluded that the test of proportionality is an objective one.²¹⁸

However, as Yeo points out:

This still leaves unresolved the extreme difficulty of comparing the harms that could be quite different in nature. For example, is bodily harm always graver than damage to property? Can bodily harm be compared with deprivation of one’s liberty? And even if the same type of harms were involved, there is no guarantee of a ready answer. Is a severed limb comparable to a fractured skull? Should numbers count, so that it is justifiable for one human life to be lost in order for two to be saved? There can never be clear-cut answers to questions of this nature,

214 *Rogers* (1996) 86 A Crim R 542, 547. This view was also reflected in the Canadian Supreme Court in *Morgentaler v The Queen* [1976] 1 SCR 616, 678 (Dickson J): ‘No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.’

215 As Gleeson CJ stated — ‘the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law’: *Rogers* (1996) 86 A Crim R 542, 546. Whether the test is purely objective or both objective and subjective (ie an honest belief on reasonable grounds) is not significant for this purpose as the difference in this respect is negligible as a test of honest belief on reasonable grounds still necessitates an objective test as part of that analysis.

216 As indicated earlier, it is the proportionality element of necessity that denotes the defence as a justification, and a justification means that society approves of the conduct in question, and one may only hold that society so approves if the action taken is the lesser of two evils from an objective perspective. It should, however, be noted, as discussed earlier, that perhaps it should be the legislature, rather than the judiciary, that determines such ordering of values.

217 *Loughnan* [1981] VR 443, 461. See also *Quayle* [2006] 1 All ER 988, 1014–15; *R v Rodger* [1998] 1 Cr App R 143, 145.

218 *R v Sood* [No 3] [2006] NSWSC 762 (15 September 2006) [40]–[42].

as much depends on the social policy considerations, moral values and societal expectations attending the particular circumstances of the case at hand.²¹⁹

Loughnan provides some further guidance with respect to proportionality, holding that this element is assessed by reference to whether a reasonable person would conclude that the defendant had no ‘alternative to doing what he did to avoid the peril’.²²⁰ Another way to put this criterion is that the ‘the harm sought to be avoided “could not otherwise be avoided”’.²²¹ Thus, if alternatives are ‘reasonably available’,²²² or even merely ‘possible’,²²³ then the response will not be proportional and the defence fails.²²⁴ Gleeson CJ explained the rationale for this criterion of necessity:

The relevant concept is of necessity, not expediency, or strong preference. If the prisoner, or the jury, were free to consider and reject possible alternatives on the basis of value judgments different from those made by the law itself, then the rationale of the defence, and the condition of its acceptability as part of a coherent legal system, would be undermined.²²⁵

Of course, in relation to abortion such issues are not particularly relevant because abortion is the only means by which to avert the ‘greater evil’ (ie the continuance of the pregnancy); alternatives do not exist. Thus, the primary question with respect to proportionality is whether a ‘serious danger’ to a woman’s health constitutes the ‘greater evil’ compared to the destruction of the foetus. Both *Davidson* and *Wald* have held that it does. Initially in the abortion example the balancing of relevant harms or value judgments was between the woman’s life and the foetus’ life; in which case, as Macnaughten J concluded in *Bourne*, there is no question that the woman’s life was to be preferred.²²⁶ The saving of the woman’s life was then extended by the judiciary to saving her life or avoiding a serious danger to her health,²²⁷ which is an obvious and compelling extension as there is a hazy line between danger to life and danger to health. In this author’s opinion it is

219 Yeo, ‘Revisiting Necessity’, above n 86, 26–7.

220 [1981] VR 443, 448. See also *Bayley v Police* (2007) 99 SASR 413, in which the court held that ‘objectively viewed, there must have been no reasonable alternative course of action open to the accused’: at 427 [53]. In this way, the ‘considerations of reasonableness and proportionality go hand in hand’: *Rogers* (1996) 86 A Crim R 542, 548. Note: neither *Davidson* [1969] VR 667 nor *Wald* (1971) 3 DCR NSW 25 make reference to this issue.

221 *Rogers* (1996) 86 A Crim R 542, 547, quoting Stephen, *A Digest of the Criminal Law* (1st ed), above n 39, 19.

222 *Bayley v Police* (2007) 99 SASR 413, 428 [53]. For example, in order to get someone to hospital in an emergency, one might call an ambulance rather than drive illegally: see O’Connor and Fairall, above n 10, 112, citing *Osborne v Dent; Ex parte Dent* (Unreported, Supreme Court of Queensland, Macrossan J, 29 July 1982).

223 *Rogers* (1996) 86 A Crim R 542, 548.

224 See *R v B, JA* (2007) 99 SASR 317, 325 [44]; *Rogers* (1996) 86 A Crim R 542, 551. In *Bayley v Police* (2007) 99 SASR 413, the court made the point that such alternatives might constitute a lesser breach of the law: at 428 [53]. Cf Yeo, who claims that ‘there is no strict requirement preventing the defence from operating in the event of there being ... an alternative [non-legal] course of action’: Yeo, *Compulsion in Criminal Law*, above n 154, 89. East also argues that it is only when a legal alternative is available that the defence becomes unavailable: see East, above n 81, 294.

225 *Rogers* (1996) 86 A Crim R 542, 547.

226 [1939] 1 KB 687, 693–4.

227 See *Davidson* [1969] VR 667, 671.

indisputable that terminating a pregnancy to avoid a serious danger to a woman's health is a proportionate, 'lesser of two evils', response.

However, although the foetus is not a legal person,²²⁸ it does have value;²²⁹ indeed, it is of interest to note that it has been consistently held that the protection of foetal life was the predominant purpose of creating the offence of abortion.²³⁰ It should also be noted that there have been recent legislative attempts to grant the foetus further legal status.²³¹ If the foetus acquires more legal status Judge Levine's broadening of the assessment of the woman's health to include a consideration of economic and social factors becomes more problematic; that is, it is arguable that including such considerations implies that the foetus is of little, or no, value.²³² On the other hand, one might reasonably argue that it is the 'serious danger' to a woman's health that meets the proportionality requirement, and the means by which this 'serious danger' is to be assessed is not relevant for that determination. However, it may be that, sometime in the future, the foetus has such value recognised by law that even an abortion performed in order to avoid a serious danger to a woman's health may be held to not constitute a proportional response. This is clearly not presently the case, and there is currently no doubt that performing an abortion in order to avoid a serious danger to a woman's health meets the proportionality element from *Loughnan*, but the point is made

228 See *R v Hutty* [1953] VLR 338, 339; *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 279; *C v S* [1988] QB 135, 140; *In the Marriage of F* (1989) 13 Fam LR 189, 194, 197.

229 Obviously, different views are held on this issue. It is this author's opinion that the foetus has value, but only that attributed to the foetus by the pregnant woman herself: see Kristin Savell, 'Is the "Born Alive" Rule Outdated and Indefensible?' (2006) 28 *Sydney Law Review* 625, 660; Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35 *Sydney Law Review* 1, 26.

230 See, eg, *R v Bourne* [1938] 3 All ER 615, 620; *Wald* (1971) 3 DCR NSW 25, 28–9. In *Wald* Judge Levine made the comment that '[s]ociety has an interest in the preservation of the human species': at 28. In 1939 the Birkett Committee held that the prohibition of abortion had the three goals of: (1) to protect foetal life; (2) to increase population; and (3) to prevent a decline in moral standards, in particular sexual morality. It is noteworthy that the Committee did not consider the protection of women as even an ancillary objective of the legislation: see Ministry of Health Home Office, above n 97, 85 [231]–[235]. Other courts have suggested that the legislation had the dual-purpose of protecting both foetal and female life: see, eg, *R v Trim* [1943] VLR 109, 115; *R v Woolnough* [1977] 2 NZLR 508, 517; *R v Bayliss* (1986) 9 Qld Lawyer 8, 9. Alternatively, Keown argues that the prohibition of abortion was not about the protection of women nor foetuses, but rather primarily about medical domination — see John Keown, *Abortion, Doctors, and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge University Press, 1988) 49–80.

231 For example, proposed changes to culpable driving offences have suggested that 'reference to causing the death of another person, or harm to another person, includes causing the death or causing harm to an unborn child': Criminal Law Consolidation (Offences against Unborn Child) Amendment Bill 2013 (SA) cl 3. A similar Bill is currently before the NSW Parliament — see Crimes Amendment (Zoe's Law) Bill 2017 (NSW).

232 Judge Levine also implied that the foetus is of *no* value in his additional determination that the proportion element is confined to one relationship only — that of the danger of the operation *v* the danger to be averted: see *Wald* (1971) 3 DCR NSW 25, 29. See Brian Lucas, 'Abortion in New South Wales — Legal or Illegal?' (1978) 52 *Australian Law Journal* 327, 330–1, who makes the argument that Judge Levine thus failed to apply the proportion element of necessity consistently. See also Wild CJ of the New Zealand Court of Appeal, who felt that even *Davidson* [1969] VR 667 amounted to an act of 'judicial legislation' in this regard — see *R v Woolnough* [1977] 2 NZLR 508, 524. Judge McGuire also initially questioned the appropriateness of Judge Levine's introduction of economic and social factors for the same reason: see *R v Bayliss* (1986) 9 Qld Lawyer 8, 26.

to illustrate the precarious nature of allowing the provision of abortion services purely on the basis of the defence of necessity.

There are two further elements stated by the majority in *Loughnan* — succinctly labelled as ‘imminent peril’ and ‘irreparable evil’ — but prior to this discussion another facet of *Wald* (inherited from *Davidson*) requires analysis with respect to the element of proportionality: the ‘serious danger’ to the woman’s health that necessitates the abortion cannot merely be ‘the normal dangers of pregnancy and childbirth’.²³³

1 Normal Dangers

It is entirely unclear what either Menhennitt J or Judge Levine had in mind in adopting the above proviso. There seems to be no legal basis for its existence, and indeed it creates unnecessary uncertainty because the term ‘serious danger’ is ambiguous enough without compelling a court, or a medical practitioner, to also make a value judgment as to what constitutes a ‘normal danger’ of pregnancy or childbirth. What constitutes ‘normal’? Is the test confined to the woman concerned, or does it require an assessment of ‘normal’ for the ‘average’ pregnant woman? If a pregnancy is unwanted, does this make the situation self-evidently ‘abnormal’? If so, the proviso is superfluous.²³⁴

Of course, as abortion (especially early abortion) is always relatively safer than childbirth,²³⁵ without this proviso all abortions would be *prima facie* lawful because they are less of a threat to the woman’s life or health than childbirth, and are therefore always the ‘lesser evil’ in that regard; in other words, to not include this proviso potentially makes the prohibition of abortion redundant (ie unless the foetus is granted value). One might also postulate that the reason for the inclusion of this proviso was as an implied recognition of the interests of the foetus; that is, recognition that the ‘evil’ of abortion was not simply breaking the law but also the destruction of the foetus.

Alternatively, it might be argued that the reason for the inclusion of the proviso was as an implied rejection of a woman’s right to abortion;²³⁶ that is, without this proviso the law may approach something close to abortion-on-demand because an unwanted pregnancy, by definition, threatens a woman’s mental health and

233 *Wald* (1971) 3 DCR NSW 25, 29; *Davidson* [1969] VR 667, 672.

234 See *R v Woolnough* [1977] 2 NZLR 508, 519 (Richmond P).

235 For example, in South Australia, in the most recent five-year recorded period (2011–15), the maternal mortality rate was 8.9 per 100 000 women, yet from 1980 to 2015 there was only one recorded maternal death associated with induced abortion: see SA Health Pregnancy Outcome Unit, *Maternal and Perinatal Mortality in South Australia 2015* (September 2017) SA Health, 13–14 <<http://www.sahealth.sa.gov.au/wps/wcm/connect/634bc993-4048-4f64-ae0-54a7fa044333/Maternal+and+Perinatal+Mortality+in+SA+2015.PDF?>>.

236 Judge Levine was quite clear that his Honour rejected any such right: see *Wald* (1971) 3 DCR NSW 25, 28.

is thus self-evidently a serious danger to her health.²³⁷ If so, this is hardly a commendable legal basis for the proviso, but it is difficult to imagine a defensible legal reason for its existence. Whatever the reason for its inclusion, the phrase is cause for concern as it allows a court to hold that, because certain threats to the woman's health constitute 'normal dangers' of pregnancy and childbirth, such threats cannot be used to raise the necessity defence. Thus, this proviso makes the law potentially far more restrictive.

Although clearly problematic, the proviso may be largely ignored because it has no legal basis in terms of a correct interpretation of the necessity defence; that is, the majority in *Loughnan* do not mandate any such limitation or proviso on the assessment of any of the elements of the necessity defence. Despite the many issues highlighted above, one may thus conclude that, in holding that averting a serious danger to a woman's health justifies an abortion, Judge Levine was meeting the element of proportion: terminating the pregnancy in such circumstances is the only means by which to avoid that serious danger to the woman's health and (at least presently) would clearly constitute the 'lesser evil'. The issue that now requires discussion is whether this 'serious danger' to the woman's health adequately meets the *Loughnan* element of 'irreparable evil'.

B Irreparable Evil: What Harm Threatened Is Sufficient?

The majority in *Loughnan* were clear that the threat complained of, if allowed to eventuate, would have 'inflicted ... irreparable evil' upon the defendant, or upon others that he or she was bound to protect.²³⁸ Yeo makes the point that 'irreparable evil' is a 'non-specification'.²³⁹ That may be so, but, as explained in *Quayle*, 'the law has to draw a line at some point in the criteria which it accepts as sufficient' to constitute an irreparable evil.²⁴⁰ In *Quayle* it was held that the avoidance of 'pain' was insufficient in that respect.²⁴¹ In recent years the Supreme Court of South Australia has suggested that only threats of death or serious injury will be sufficient to meet the irreparable evil requirement.²⁴² Conversely, it has also been held that the 'irreparable evil' required to raise the defence need not be threats to life or limb, or indeed threats to person at all, but danger to property might suffice

237 This was the position taken by Kirby ACJ: see *Superclinics* (1995) 38 NSWLR 47, 64–6. In the same case Priestley JA made the point that if an unwanted pregnancy itself constituted a serious danger to the woman's health, then this would create a situation of abortion on demand, which is not the *Wald* doctrine and consequently not the law as abortions are only 'lawfully available in the limited circumstances described in *Wald*': at 82.

238 [1981] VR 443, 448, quoting *Davidson* [1969] VR 667, 670.

239 Yeo, 'Revisiting Necessity', above n 86, 39.

240 [2006] 1 All ER 988, 1026 [77].

241 *Ibid.* Cf Glanville Williams who argues that 'great pain or distress' would be sufficient: Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 2nd ed, 1983) 604.

242 See *R v B, JA* (2007) 99 SASR 317, 323 [30]; *Bayley v Police* (2007) 99 SASR 413, 427–8 [53]. See also *Southwark* [1971] Ch 734, 743–4 (Lord Denning MR). It is arguable that the majority in *Loughnan* also came to this conclusion: see *Loughnan* [1981] VR 443, 448.

in some circumstances.²⁴³ Under Crockett J's view of necessity in *Loughnan*, any 'peril' or 'evil' will be sufficient to raise the defence provided the response taken was intended not to result in greater harm.²⁴⁴

Although a serious danger to a woman's health meets even the more conservative view (ie that the threat must be that of death or serious injury), Judge Levine's broadening of the ambit of that assessment to include economic and social factors may be problematic. Of course, as mentioned above, it may be argued that it is the 'serious danger' that satisfies the element of 'irreparable evil', and how that 'serious danger' is assessed (in terms of the factors to be considered in arriving at a determination of 'serious danger') is not the issue. This is probably correct, but a related issue is that raised by Kirby ACJ in *Superclinics*: what level of risk is to constitute a 'serious danger' to the pregnant woman's health?²⁴⁵ This is perhaps more of a practical than legal concern, but it is noteworthy that neither *Davidson* nor *Wald* provides any real assistance in answering this question.²⁴⁶ Of course, as highlighted by Kirby ACJ, the law thus invites a case by case analysis,²⁴⁷ but this is unavoidable as '[t]he inquiry cannot satisfactorily be further limited. ... [G]iven the wide variety of particularities which will arise for consideration in each case'.²⁴⁸

C Imminent Peril

The final *Loughnan* element that requires analysis is that of imminent peril: that in order to raise the necessity defence there must exist 'an urgent situation of imminent peril'.²⁴⁹ This element has arguably been an aspect of necessity since its inception,²⁵⁰ and in common with many aspects of the necessity defence, the meaning of the term 'imminent peril' is ambiguous;²⁵¹ in particular, it remains unclear whether the threat needs to be immediate. On this point, the majority in *Loughnan* indicated that immediacy would usually be required to successfully

243 See, eg, *Dunjey v Cross* (2002) 36 MVR 170, 182 (Miller J). It should be noted that this case dealt with the sudden or extraordinary emergency defence under s 25 of the *Criminal Code Act Compilation Act 1913* (WA), but the court also held that this statutory defence was a codification of the necessity defence: *Dunjey v Cross* (2002) 36 MVR 170, 179. Of course, the proportion element of the defence would still need to be satisfied in such cases, so the possible actions one might take as a consequence of a threat to property will be far more limited than if one were taking necessary action as a consequence of a threat to a person. See also Glanville Williams, *Criminal Law: The General Part*, above n 9, 729; Yeo, *Compulsion in Criminal Law*, above n 154, 73. *Contra* the Supreme Court of Canada in *Morgentaler v The Queen* [1976] 1 SCR 616, in which the Court was quite adamant that economic considerations will very rarely raise the necessity defence: at 654.

244 [1981] VR 443, 459–60.

245 See (1995) 38 NSWLR 47, 63.

246 Judge Levine did briefly discuss the meaning of 'serious danger to ... mental health', but did not address the level of risk required in that regard: *Wald* (1971) 3 DCR NSW 25, 30.

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

248 *Ibid* 66.

249 [1981] VR 443, 449 (Young CJ and King J), 457 (Crockett J).

250 See, eg, *Southwark* [1971] Ch 734, 743 (Lord Denning MR), 746 (Edmund Davies LJ); *Morgentaler v The Queen* [1976] 1 SCR 616, 678; *Perka v The Queen* [1984] 2 SCR 232, 244.

251 See Yeo, 'Revisiting Necessity', above n 86, 22–4.

raise the necessity defence.²⁵² Other courts have come to similar conclusions, holding that ‘imminence’ equates to ‘immediacy, in the sense that the compulsion is present and continuous’,²⁵³ or that the threat must be ‘imminent and operative’.²⁵⁴ In one of the recent *Patel* decisions the Supreme Court of Queensland held that the element of imminence is essentially a requirement of ‘immediacy’²⁵⁵ or ‘immediate risk’.²⁵⁶

However, *Rogers*, if it changes *Loughnan* at all, arguably affects this element of ‘imminent peril’ by explaining that this element does not require that the peril be either urgent or immediate; although such issues are often critically relevant factual considerations.²⁵⁷ Yeo has suggested that perhaps the requirement of imminence ‘emphasises the feature of emergency or urgency contained in [most] situations of necessity’,²⁵⁸ but the defence does not necessarily require immediacy;²⁵⁹ thus, brief intervals of time between the threat and its realisation are not fatal to raising the defence.²⁶⁰ Similarly, Lord Goff in *Re F (Mental Patient: Sterilisation)* held that an emergency situation is not a ‘criterion or even a prerequisite; it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency’.²⁶¹ Indeed, it may be that ‘imminent’ simply means ‘certain’ or ‘inevitable’.²⁶²

On the other hand, if there is no situation of immediacy or urgency it may prove difficult to show that the action was reasonably necessary to avoid the peril,²⁶³ or that decisive action was even required,²⁶⁴ that is, the luxury of time will usually

252 [1981] VR 443, 448. See also *Leichhardt Council v Geitonina [No 6]* (2015) 209 LGERA 120, in which the court indicated that an interval of time was fatal to the defence: at 157–8 [166]–[167].

253 *R v Dawson* [1978] VR 536, 539 (Anderson J). See also *Quayle* [2006] 1 All ER 988, 1027. See also Gardner, who states that necessity may only be successfully raised in ‘pathological situations of great immediacy and pressure’: Gardner, above n 189, 127.

254 *Bayley v Police* (2007) 99 SASR 413, 428 [53].

255 *R v Patel [No 7]* [2013] QSC 65 (7 March 2013) [14].

256 *Ibid* [15].

257 *Rogers* (1996) 86 A Crim R 542, 546.

258 Yeo, *Compulsion in Criminal Law*, above n 154, 253.

259 *Ibid* 88. Yeo later explained that perhaps we should focus instead on ‘the “urgency” (in the sense of a pressing or compelling need) for the defendant to have done what he or she did’: Yeo, ‘Revisiting Necessity’, above n 86, 23.

260 See Yeo, *Compulsion in Criminal Law*, above n 154, 253–4.

261 [1990] 2 AC 1, 75.

262 See *Limbo v Little* (1989) 98 FLR 421, 448–9; Kotecha, above n 110, 355. Such a view of ‘imminent’ has been utilised to preclude the application of the necessity defence to anti-nuclear and environmental protests because the view was taken that the threat of nuclear holocaust or environmental catastrophe is not sufficiently inevitable or certain: see, eg, *Limbo v Little* (1989) 98 FLR 421, 448–9. In another anti-nuclear ‘protest’ case, that of *R v Dixon-Jenkins* (1985) 14 A Crim R 372, the court appeared to add a new element to the defence; namely, that the defendant’s actions need to impact on the removal of the peril/threat complained of. However, no definitive decision was made in that respect: at 378. See also Tremblay, who states that a ‘peril is considered imminent enough if it is remote in time but its realization is inevitable’: Tremblay, above n 12, 335.

263 See Yeo, *Compulsion in Criminal Law*, above n 154, 89.

264 As was explained in *Perka v The Queen* [1984] 2 SCR 232, there must be ‘clear and imminent peril’, quoting *Morgentaler v The Queen* [1976] 1 SCR 616, 678, such that ‘normal human instincts cry out for action and make a counsel of patience unreasonable’: *Perka v The Queen* [1984] 2 SCR 232, 251. See also Kotecha, above n 110, 354.

create alternatives for action. In addition, even if immediacy is not required and a time interval is permitted, that interval will be minutes, and perhaps hours, not months or years.²⁶⁵ Thus, whether or not ‘imminent’ means ‘immediate’, the requirement of an ‘imminent peril’ must be, in some way, time sensitive.²⁶⁶

This element of imminent peril is nowhere to be found in either *Davidson* or *Wald*. Most notably for present purposes, Judge Levine’s determination in *Wald* that a medical practitioner may look to a woman’s reasonably foreseeable environment and speculate as to what will occur (ie with respect to factors creating a ‘serious danger’ to the woman’s health) during the entire pregnancy seems completely at odds with this element of the necessity defence and arguably falls far short of this criterion of imminence. The relevant statement by Judge Levine is as follows:

It may be that an honest belief be held that the woman’s health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, *although not then in serious danger*, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy ...²⁶⁷

This finding that the danger to health need not be present at the exact time that the requisite assessment is made, or even when the abortion takes place, if it could reasonably be expected to arise sometime during the course of the pregnancy, is extremely problematic because if the woman concerned is not in actual and present serious danger when the requisite assessment is made and/or the abortion is performed, it is arguable that no imminent peril existed; thus, the necessity defence is not available in such situations. It is reasonable to hold that, in some such cases, where the ‘evil’ or ‘peril’ to be averted is yet to materialise, the abortion will occur prior to any imminent danger,²⁶⁸ and consequently that abortion will be unlawful as it fails to meet this element of the necessity defence.

Of course, one might argue that it is the *continuance* of the pregnancy that poses the requisite threat to the woman’s life or health; thus, the threat is not only clearly imminent, but already existing.²⁶⁹ Or perhaps an unwanted pregnancy is, by definition, an emergency situation? In any case, the Levine ruling in this regard is concerning, and indeed may be described as bad or suspect law in this respect, because his Honour effectively states that even when there is clearly *no* urgent situation of imminent peril, the necessity defence may apply, and this is plainly incorrect. Before leaving this discussion of the element of ‘imminent peril’ one final issue should be briefly mentioned: that of prior fault.

265 See Yeo, ‘Revisiting Necessity’, above n 86, 22.

266 See Kotecha, above n 110, 360–1.

267 *Wald* (1971) 3 DCR NSW 25, 29 (emphasis added).

268 See Bohlander, above n 110, 151.

269 However, it is difficult to argue that the further extension of time advocated by Kirby ACJ in *Superclinics* (that allows for the consideration of economic, medical and social factors that may arise after the birth of the child in arriving at an assessment of whether the woman’s health is in serious danger due to the continuance of her pregnancy) might satisfy any reasonable interpretation of ‘imminent peril’: see *Superclinics* (1995) 38 NSWLR 47, 60. It is of interest to note that this aspect of Kirby ACJ’s decision was seemingly followed by Simpson J in *R v Sood* [2006] NSWSC 1141 (31 October 2006) [22].

It has been suggested that if the defendant brought about or caused the situation that compelled the acts sought to be justified by necessity, then that prior fault precludes the application of the defence.²⁷⁰ This is arguably a logical proviso because if the defence does not have this limitation then one could, conceivably, ‘set up’ a scenario in order to commit an illegal act that was intended all along, and then claim that the act was done only out of necessity. Such a proviso would clearly have dreadful potential consequences for applying the necessity defence to abortion. For instance, if a woman has engaged in unprotected sexual intercourse of her own free will and with full knowledge that pregnancy was a possible result of that conduct, could it be said that she has created (equally with her sexual partner) the peril that she now wishes to avoid? Fortunately, this prior fault proviso is not mentioned in *Davidson*, *Wald*, *Loughnan* or *Rogers*, so is probably not correct law in Australia.²⁷¹

V CONCLUSION

Much of the above discussion sounds like speculation; and, unfortunately, it is. The nature of the necessity defence is such that these issues and questions have few definitive answers,²⁷² as the applicable legal tests are so ‘open to subjective interpretation’.²⁷³ Nonetheless, assuming *Loughnan* to be the leading authority (which has been argued in this article), it is clear that *Wald* possesses serious shortcomings and may be described as bad, or at least suspect, law. In particular, the *Wald* decision appears inconsistent with the *Loughnan* element of imminent peril. At best, *Wald* rests on shaky ground,²⁷⁴ and this alone is sufficient reason to legislate so as to ensure legal certainty. Indeed, the current practice is itself inherently unstable, as it relies on the NSW medical profession continuing to provide abortion services on a liberal interpretation of the common law, which, in turn, relies upon the NSW government retaining the present policy of not generally prosecuting those members of the medical profession that provide abortions.²⁷⁵ If

270 See Bacon, above n 66, 345–6; *Perka v The Queen* [1984] 2 SCR 232, 255; Yeo, *Compulsion in Criminal Law*, above n 154, 252; *Leichhardt Council v Geitonina [No 6]* (2015) 209 LGERA 120, 158–9 [170]; *Nguyen v The Queen* [2005] WASCA 22 (25 February 2005) [30] (McLure J). Cf Glazebrook, above n 78, 115.

271 Furthermore, as the law currently operates in practice, it is only medical practitioners that would potentially need to raise the necessity defence, so provided the medical practitioner who performs the abortion did not impregnate the woman concerned, this prior fault limitation would have little impact.

272 See, eg, Yeo, who concludes that there are ‘many controversies plaguing any discourse on the subject’: Yeo, ‘Revisiting Necessity’, above n 86, 50. Members of the judiciary have described the defence as ‘vague and elusive’ (*R v Dawson* [1978] VR 536, 543 (Harris J)), and ‘obscure’ (*Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 219 (Brooke LJ)).

273 *Superclinics* (1995) 38 NSWLR 47, 63 (Kirby ACJ).

274 The point was made by Fryberg J in *R v Patel [No 7]* [2013] QSC 65 (7 March 2013) that ‘[i]t seems to me that the formulation of Justice Menhennitt cannot survive the formulation ... [in *Loughnan*] ... [and] ... while it did not overrule [*Davidson*] ... it reformulated the common law position in relation to the defence of necessity’: at [10].

275 That is, although prosecutions do occur — see, eg, *R v Sood* [2006] NSWSC 1141 (31 October 2006) — they are extremely rare.

that prosecution policy were to change, many members of the medical profession may find themselves convicted of the crime of unlawful abortion as the application of the necessity defence to abortion is, as evident from this article, potentially quite rigorous. Furthermore, an important point made by both Kirby ACJ and Priestley JA in *Superclinics* was that as the law stands it is extremely difficult to say whether *any* proposed abortion would be lawful.²⁷⁶ That is, in NSW abortion remains, *prima facie*, a crime and abortions are only 'lawfully available in the limited circumstances described in *Wald*,'²⁷⁷ and whether that test for necessity would be made out is unknown until a court of law seeks to apply it. As Priestley JA explained:

as the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a common law criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.²⁷⁸

Certainly, those at the coalface remain puzzled by the current law in NSW, and there is evidence that some members of the medical profession tend to either ignore the law,²⁷⁹ or 'manufacture mental illness'²⁸⁰ with respect to the woman concerned on the assumption that this satisfies the test in *Wald*. It is submitted that a significant number of abortions may be performed on grounds that a court might hold to be insufficient grounds to make the abortion lawful. As Douglas, Black and de Costa concluded consequent to their comprehensive survey of medical practitioners in Queensland and NSW:

According to the present research, doctors providing abortions in New South Wales and Queensland routinely feel compelled to behave, at best, misleadingly but often dishonestly and unethically in order to behave 'legally'. In the context of this study, doctors necessarily focused on the woman's mental health concerns, rather than physical health, to justify the abortion. Commonly doctors expressed frustration at having to invent diagnoses of mental health issues for women requesting a termination in order to bring the abortion within the law. Often this required doctors to ignore or reframe the woman's view of her circumstances.²⁸¹

To this situation, one must add the legal problems with *Wald* highlighted in this article; that is, that *Wald*, which forms the legal basis of abortion practice in NSW, is probably an incorrect interpretation and application of the necessity defence. Given the importance of lawful abortion services to women's reproductive

276 See *Superclinics* (1995) 38 NSWLR 47, 61, 66 (Kirby ACJ), 83 (Priestley JA).

277 *Ibid* 82 (Priestley JA).

278 *Ibid* 83 (emphasis in original).

279 See Douglas, Black and de Costa, 'Manufacturing Mental Illness (and Lawful Abortion)', above n 20, 572.

280 *Ibid* 568, 576.

281 *Ibid* 574.

freedom, there is a need to rest the provision of that service upon a more solid legal foundation.

There are two viable options in this respect: (1) codify the necessity defence,²⁸² or (2) abolish the offence of abortion. As to the first option, this has already effectively occurred in most Australian jurisdictions (other than NSW, Tasmania and SA) with the enactment of ‘sudden and extraordinary emergency’ provisions.²⁸³ As an example, the *Criminal Code 2002* (ACT), s 41 provides as follows:

(1) A person is not criminally responsible for an offence if the person carries out the conduct required for the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies only if the person reasonably believes that — (a) circumstances of sudden or extraordinary emergency exist; and (b) committing the offence is the only reasonable way to deal with the emergency; and (c) the conduct is a reasonable response to the emergency.

However, whether the performance of an abortion on grounds similar to current practice in NSW (ie a practice that is predicated upon a liberal interpretation of the grounds outlined in *Wald*) would satisfy such criteria depends upon the circumstances of a particular abortion, and many abortions may be held to not constitute ‘circumstances of sudden or extraordinary emergency’.²⁸⁴ This is especially the case with respect to medical practitioners looking to a woman’s reasonably foreseeable environment in making the assessment of ‘serious danger’ to her health (ie the above discussion concerning ‘imminent peril’ seems even more pertinent under such a provision).

Thus, it would appear that the most effective means by which to resolve the mess of abortion law in NSW is to simply abolish the offence of abortion. Such reform would also result in NSW no longer being the outlier within Australia with respect to abortion law, both in regard to its continued reliance on the common law defence of necessity, and its continued criminalisation of abortion. With the

282 As Bohlander explains — ‘it is always preferable to have a clear and considered piece of legislation than to rely on judicial inventions that can by the very nature of the judicial process only occur on a case-by-case basis’: Bohlander, above n 110, 150. See also Finn, above n 161, 116.

283 See *Criminal Code Act 1995* (Cth) ss 10.1–10.3; *Criminal Code 2002* (ACT) s 41; *Criminal Code Act 1983* (NT) ss 33, 43BC; *Criminal Code Act 1899* (Qld) s 25; *Crimes Act 1958* (Vic) ss 322I, 322R; *Criminal Code Act Compilation Act 1913* (WA) s 25. In Qld and WA there is also a specific medical treatment defence in certain circumstances — see *Criminal Code Act 1899* (Qld) s 282; *Criminal Code Act Compilation Act 1913* (WA) s 259. Although not completely synonymous with the common law defence of necessity such provisions are clearly similar to that defence: see Meredith Blake, ‘Doctors Liability for Homicide under the WA Criminal Code: Defining the Role of Defences’ (2011) 35 *University of Western Australia Law Review* 287, 308; see also *Dunjey v Cross* (2002) 36 MVR 170, 179 (Miller J). In fact, such statutory defences appear to be based on a ‘lesser of two evils’ principle: see Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 97 (2007) 184–5.

284 In addition, one may reasonably assume that courts would be as reluctant to apply the statutory defence as they have been to apply the common law necessity defence for those reasons highlighted by Gleeson CJ — ‘[n]or can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed’: *Rogers* (1996) 86 A Crim R 542, 546.

exception of Queensland²⁸⁵ (and perhaps South Australia),²⁸⁶ all other jurisdictions have effectively decriminalised abortion (to varying degrees). Western Australia was the first to do so in 1998,²⁸⁷ followed by the ACT in 2002,²⁸⁸ and then Victoria in 2008.²⁸⁹ Tasmania and the NT have embarked upon a number of legislative reforms over the years,²⁹⁰ finally achieving the decriminalisation of medical abortion in 2013 and 2017 respectively.²⁹¹

The fact that most Australian jurisdictions have now legislated to decriminalise abortion, and regulate the service solely through health law, demonstrates the relative legislative (though not necessarily political) ease by which this can be achieved. The preceding discussion has highlighted the current complexities plaguing abortion law in NSW, but it does not follow that removing such complexities is a difficult task. Put simply, if the NT, Tasmania, Western Australia, the ACT and Victoria can so legislate, then surely NSW can do so. Any

285 In Queensland abortion remains a serious crime (see *Criminal Code Act 1899* (Qld) ss 224–6), and lawful access to abortion services is solely based on an interpretation of the statutory defence under *Criminal Code Act 1899* (Qld) s 282: see *R v Bayliss* (1986) 9 Qld Lawyer 8. Although there was some legislative activity in 2009 (see *Criminal Code (Medical Treatment) Amendment Act 2009* (Qld)), only minor amendments were made to the s 282 defence, such that abortions realised through abortifacients were also potentially covered by the defence (ie prior to the 2009 amendments it was arguable that only ‘surgical’ abortions would be lawful). For a more detailed discussion of abortion law in Queensland see Mark Rankin, ‘The Disappearing Crime of Abortion and the Recognition of a Woman’s Right to Abortion: Discerning a Trend in Australian Abortion Law?’ (2011) 13(2) *Flinders Law Journal* 1, 23–6.

286 That is, although *Criminal Law Consolidation Act 1935* (SA) s 82A allowed for lawful abortions in specified circumstances, abortion remains, prima facie, a serious crime — see ss 81–2.

287 See *Acts Amendment (Abortion) Act 1998* (WA), which decriminalised medical abortions, now governed by *Health (Miscellaneous Provisions) Act 1911* (WA) s 334. For further discussion see Rankin, ‘The Disappearing Crime of Abortion’, above n 285, 26–31.

288 See *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT), which completely removed abortion from the criminal law. In the ACT abortion is now lawful if performed by a medical practitioner in an approved facility pursuant to *Health Act 1993* (ACT) ss 80–4. For a discussion of the ACT law see Mark Rankin, ‘Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory’ (2003) 29 *Monash University Law Review* 316, 329–35.

289 See *Abortion Law Reform Act 2008* (Vic).

290 For a discussion of such past reforms see Rankin, ‘The Disappearing Crime of Abortion’, above n 285, 31–5 (for Tasmania) and 18–21 (for the NT).

291 See *Reproductive Health (Access to Terminations) Act 2013* (Tas) and *Termination of Pregnancy Law Reform Act 2017* (NT). The term ‘medical abortion’ refers to the termination of pregnancy by a qualified health practitioner, and the definition of a qualified health practitioner is contained within the relevant legislation. It should also be noted that both Tasmania and the NT maintain quite rigorous tests for lawful abortions over a specified gestation period: in Tasmania the ‘pregnancy of a woman who is not more than 16 weeks pregnant may be terminated by a medical practitioner with the woman’s consent’ (*Reproductive Health (Access to Terminations) Act 2013* (Tas) s 4), but after 16 weeks a termination is only lawful under similar conditions as exist in SA (see *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 5); and in the NT termination of pregnancy by a suitably qualified medical practitioner (or another authorised health practitioner or authorised pharmacist, at the direction of the suitably qualified medical practitioner) at not more than 14 weeks is now relatively straightforward, in that the relevant medical practitioner has to consider the termination to be ‘appropriate in all the circumstances, having regard to: (a) all relevant medical circumstances; and (b) the woman’s current and future physical, psychological and social circumstances; and (c) professional standards and guidelines’ (*Termination of Pregnancy Law Reform Act 2017* (NT) s 7). However, the process becomes more difficult after 14 weeks, as two suitably qualified medical practitioners must consider the abortion appropriate in all the circumstances, and abortion is generally not permitted after 23 weeks (see *Termination of Pregnancy Law Reform Act 2017* (NT) s 9).

of the above mentioned jurisdictions provide useful templates for NSW abortion law reform, but this author advocates for the Victorian model as it (arguably) goes further than the other legislative models in enhancing women's reproductive rights by removing most barriers to accessing abortion services.²⁹² It should also be noted that, prior to the *Abortion Law Reform Act 2008* (Vic), the law on abortion in Victoria was practically identical to NSW. The way forward for NSW is clear: unambiguously abolish the offence of abortion,²⁹³ and then regulate the service in the same manner as any other medical procedure.²⁹⁴

This would achieve the objective of resolving the issues with NSW abortion law highlighted in this article clearly and efficiently; if there is no crime, then there is no need for a defence of necessity, or any other defence. As a pro-choice advocate, one is hesitant in drawing attention to the flaws in the law outlined in this article (as the current interpretation and prosecution of that law serves to allow relatively easy access to abortion services in NSW), but as abortion law reform in NSW has been stagnant for almost 50 years, one must operate on the assumption that all fuel for the fire of repeal is worthwhile. It is hoped that this article may be viewed as further argument in favour of the repeal of the offence of abortion.

292 For a more detailed discussion of Victorian abortion law see Rankin, 'The Disappearing Crime of Abortion', above n 285, 39–46.

293 A good template in this respect is *Abortion Law Reform Act 2008* (Vic) ss 10–11.

294 Unfortunately, the most recent attempt to decriminalise abortion and regulate the service through health law in NSW failed: see *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016* (NSW).