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Abortion and the law in New South Wales

by

Talina Drabsch

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Abortion and the law in New South Wales

by

Talina Drabsch

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EXECUTIVE SUMMARY

The practice of inducing an abortion has existed for many years and remains controversial to this day. The debate on the availability and regulation of abortion services can at times be extremely divisive, yet surveys have found that the majority of Australians are fairly moderate in their view of how accessible the procedure should be. Whilst this paper highlights some aspects of the current debate, it is primarily concerned with the way abortion is regulated in New South Wales, throughout the rest of Australia, and in some overseas jurisdictions.

Section one (pp 1-12) of this paper defines some of the key terms used in the context of abortion. It also provides a statistical overview of the number of abortions in Australia and the characteristics of those who undergo the procedure. Nevertheless, the limitations of abortion statistics are noted. This section also outlines the position of those who are 'pro-life' and 'pro-choice' and examines the results of a survey of the attitudes of Australians toward abortion. It discusses the competing rights and interests that may be involved, namely those of the pregnant woman, foetus, biological father and medical staff.

In section two (pp 13-18), a history of the development of the law on abortion is included. It describes the various statutory provisions that have operated in the United Kingdom, and their impact on the development of abortion law in Australia.

Much of the law on abortion continues to be located in the various Crimes Acts and Criminal Codes that apply in Australia. Section three (pp 19-25) examines the law in New South Wales, noting the relevant provisions of the *Crimes Act 1900* (NSW) and the judicial interpretation of these sections in the case of *R v Wald*. The civil matter of *CES v Superclinics (Australia) Pty Limited* is also considered. This section notes some of the parliamentary attempts throughout the years to increase the restrictions on the provision of abortion services in New South Wales.

Section four (pp 26-34) compares the regulation of abortion in the various Australian jurisdictions. In Tasmania and Western Australia, the threatened prosecution of medical practitioners who performed abortions after decades of non-prosecution sparked recent reform of the law. The Australian Capital Territory is the only jurisdiction to have completely decriminalised abortion.

The regulation of abortion in Canada, New Zealand, the United Kingdom, and the United States of America is discussed in section five (pp 35-49). This is preceded by a brief overview of the different stances toward abortion worldwide.

Finally, various aspects of the current debate on abortion are discussed in section six (pp 50-59). Some of the weaknesses of the current law are noted, and opinions on whether abortion is best characterised as a health or criminal issue are analysed. This section examines some of the benefits and concerns associated with the use of emergency contraception and the abortion pill, and discusses the implications of late-term abortions. The use of 'bubble-zone' legislation to protect providers of abortion services is also considered.

1 INTRODUCTION

The practice of abortion has existed for a long time and is ‘not an isolated modern phenomenon’.[1] However, abortion remains a controversial issue with attitudes toward it varying enormously. Some stress their complete opposition to abortion irrespective of the circumstances of the individual pregnancy. Others believe abortion should be available on demand with no limitations to its provision. Many people hold an opinion that lies somewhere between these poles. According to a number of opinion polls, most Australians approve of decisions about abortion being made by the woman concerned, with few supporting the increase of restrictions on its availability.[2]

Whilst some politicians at both the state and federal level have been quite vocal in relation to the issue of abortion,[3] many desire to stay away from the debate, as they deem it a private matter. For example, then Premier Carr reportedly stated:

> In my view, abortion is a matter responsibly left for discussion between a woman and a doctor, and that’s the position we will take in this state.[4]

This paper is primarily concerned with the regulation of abortion in New South Wales (NSW). It examines the law relevant to abortion in NSW, and compares it to the position in other jurisdictions in Australia and overseas. However, it also provides a brief overview of some aspects of the current debate, including issues surrounding the abortion pill, late-term abortions and ‘bubble zones’.

1.1 Definitions

This section defines some of the terms commonly used in the abortion debate.

- *Abortion*

Abortion has been defined as the miscarriage of a foetus whether naturally or artificially caused.[5] The Royal Commission on Human Relationships classified ‘abortion’ in its 1977 report as the:

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1 Crowley-Cyr L, ‘A century of remodeling: the law of abortion in review’, *Journal of Law and Medicine*, 7(3) February 2000, p 252.

2 Petersen K, ‘Abortion in Australia: a legal misconception’, *Australian Health Review*, 29(2) May 2005, p 142.

3 For example, Nile F, ‘Nile re-ignites abortion debate’, *Media Release*, 23/2/05; Nile F, ‘The Rev Fred Nile raises abortion issue in NSW Parliament’, *Media Release*, 8/2/05; Boswell R, ‘Boswell welcomes answers to questions on abortion’, *Media Release*, 19/4/05; ‘Women MPs join to defend abortion’, *Sydney Morning Herald*, 9/3/05, p 10.

4 ‘Dearth of statistics drives churches’ bid for reform’, *The Australian*, 3/2/05, p 2.

5 Healey J, ‘The Abortion Issue’, *Issues in Society*, vol 213, Spinney Press, Thirroul, 2005, p 41.

> termination of pregnancy before the foetus has attained viability, ie become capable of independent extra-uterine life.[6]

The medical definition of abortion is:

> the expulsion or removal of a fetus from the uterus.[7]

The public generally uses the term 'miscarriage' to describe a spontaneous abortion. In this paper, the term 'abortion' is limited to the artificial termination of a pregnancy.

The most common method of abortion involves a suction curette, where the lining and contents of the uterus are removed by applying suction to the inside of the uterus with a small plastic tube.[8] The uterus is subsequently scraped with a curette to ensure nothing remains. The procedure is performed in the first trimester and takes less than 15 minutes. After 12 weeks an abortion may involve 'the insertion of hygroscopic rods, to soften the cervix over a number of days, before surgical removal of the foetus; or the use of prostaglandin suppositories to induce labour'.[9]

- *Foetus*

The technical definition of a foetus refers to the embryo when fully formed about eight weeks after conception. However, the Royal Commission on Human Relationships defined a 'foetus' as 'the human embryo from conception to delivery' in its 1977 report.[10] The term 'foetus' is similarly defined in this paper.

- *Late-term abortion*

According to Ellwood, 'the term "late termination" is understood by most obstetricians to mean one that is carried out at or above 20 weeks' gestation'.[11] However, this may vary slightly between jurisdictions.

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6 Royal Commission on Human Relationships (Chair: Justice Elizabeth Evatt), *Final Report*, volume 3, 1977, p 135.

7 Pratt A, Biggs A and Buckmaster L, *How many abortions are there in Australia? A discussion of abortion statistics, their limitations, and options for improved statistical collection*, Parliamentary Library Research Brief, no 9, 2004-05, p 2.

8 Ibid, p 2.

9 Healey, above n 5, p 41.

10 Royal Commission on Human Relationships, above n 6, p 147.

11 Ellwood D, 'Late terminations of pregnancy – an obstetrician's perspective', *Australian Health Review*, 29(2) May 2005, p 139.

- *Partial birth abortion*

A 'partial birth abortion' is a procedure in which a living intact foetus is partially vaginally delivered, then killed before being completely removed from the birth canal.[12] Partial birth abortions have been topical in the US in recent years. For further discussion, see section 5.5.3 of this paper.

- *Therapeutic abortion*

A therapeutic abortion is an abortion considered to be medically required.

1.2 Statistical overview

1.2.1 Number of abortions

The number of abortions in Australia each year is commonly cited as somewhere between 70,000 and 100,000. It is believed that one in three women in Australia have an abortion at some point in their life, with one in four pregnancies terminated.[13] According to the Victorian Government's Better Health Channel, the typical profile of a woman who requests an abortion is:[14]

- in her 20s;
- single;
- childless;
- well educated; and
- employed.

Caution should be exercised when using statistics on the termination of pregnancy. It is also difficult to obtain accurate figures on the number of abortions. According to Pratt et al, this is because:

> there is no national data collection on abortion, there is no uniform method of data collection, collation or publication across the states and territories, and the data sources that are available all have several significant limitations.[15]

There are three sources of publicly available data on the number of abortions, which may provide some indication of its prevalence:[16]

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12 Crowley-Cyr, above n 1, p 260.

13 Healey, above n 5, p 41.

14 Victorian Government, Better Health Channel, 'Abortion in Australia', www.betterhealth.vic.gov.au Accessed 22/7/05.

15 Pratt et al, above n 7, p 2.

16 Ibid, p 3.

1. Medicare;
2. Hospitals; and
3. South Australia.

Medicare data should be used with care. Whilst abortions are funded in part by Medicare, the procedure does not have a discrete item number. The item numbers that correspond to the termination of pregnancy include procedures other than induced abortions, such as those undertaken as the result of a miscarriage.[17] Medicare data is also limited in that women who have an abortion in a public hospital as a public patient do not claim the rebate. Some other women who are eligible for the rebate may choose not to lodge a claim for various reasons.

The categories on the Medicare Benefits Schedule that are relevant to abortion include:[18]

- Item 35643: Evacuation of the contents of the gravid uterus by curettage or suction curettage.

- Item 16525: Management of second trimester labour, with or without induction, for intrauterine fetal death, gross fetal abnormality or life threatening maternal disease.

The Health Insurance Commission collates the figures on the number of services for each item number. The following table sets out the number of services processed from July 2004 to June 2005 for items 35643 and 16525.[19] For both item numbers, the greatest number of services was processed for patients in the 25 to 34 years age group.

Services processed for Medicare Benefits Schedule items 35643 and 16545 (July 2004 to June 2005)

State	35643	State	16525
New South Wales/Australian Capital Territory	30,608	New South Wales	222
Victoria/Tasmania	18,031	Victoria	304
Queensland	13,980	Queensland	122
South Australia/Northern Territory	987	South Australia	57
Western Australia	7,597	Western Australia	29
		Tasmania	18
		Australian Capital Territory	8
		Northern Territory	7
Total	**71,203**		**767**

Source: Health Insurance Commission, 'Medicare Benefits Schedule Item Statistics Reports', www.hic.gov.au Accessed 29/7/05.

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17 Ibid, p 4.

18 Ibid, p 3; Australian Government, Department of Health and Ageing, *Medicare Benefits Schedule Book*, 2004, pp 196 and 273.

19 Health Insurance Commission, 'Medicare Benefits Schedule Item Statistics Reports', www.hic.gov.au Accessed 29/7/05.

The Pregnancy Outcome Statistics Unit in the South Australian Department of Health collates statistics on abortions notified by medical practitioners in South Australia.[20] Pratt et al highlight the limitations of the Medicare and hospital data before acknowledging that, whilst the South Australian data 'has limited utility for estimating the total number of abortions which take place in Australia each year, the South Australian data is extremely valuable in that it is the only comprehensive, publicly available data set on abortion in Australia'.[21] In 2002 there were 5417 abortions notified in South Australia (17.2 terminations for every 1000 women aged 15 to 44). The rate of abortion in South Australia has been relatively stable for the last seven years.[22] Pratt et al estimate that there would have been approximately 73,300 abortions in Australia in 2002 if the South Australian figures were replicated nationally.[23]

A study by Chan and Sage, which examined South Australian hospital morbidity statistics, South Australian statutory notifications of abortions, Medicare statistics and hospital morbidity statistics, estimated that the number of abortions in Australia in 2003 was 84,460 (19.7 per 1000 women between the ages of 15 and 44).[24] According to Chan and Sage, the national abortion rate in 1985 was 17.9 per 1000 women between the ages of 15 and 44 with a peak of 21.9 per 1000 reached in 1995.[25] They found that the highest abortion rate occurred amongst women between the ages of 20 and 24 (31.2 per 1000).[26] The following graph illustrates the variation in the estimated abortion rate per 1000 women aged 15 to 44 in Australia between 1985 and 2003. It demonstrates that the rate has generally been decreasing since 1995.

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20 For information on the Pregnancy Outcome Statistics Unit see: South Australia, Department of Health, 'Pregnancy Outcome Statistics Unit', www.dh.sa.gov.au/pehs

21 Pratt et al, above n 7, p 10.

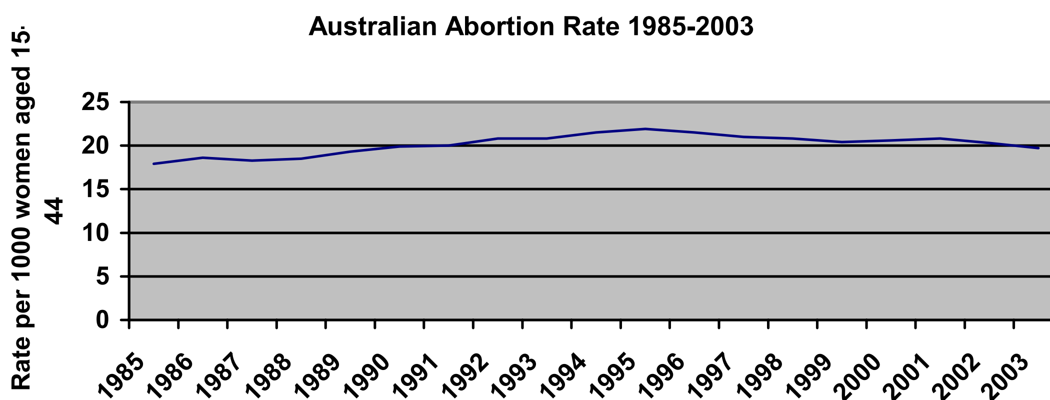
22 Chan A, Scott J, Nguyen A and Green P, *Pregnancy Outcome in South Australia 2002*, Pregnancy Outcome Unit, Department of Human Services, Adelaide, November 2003, p 39.

23 Pratt et al, above n 7, p 10.

24 Chan A and Sage L, 'Estimating Australia's abortion rates 1985-2003', *Medical Journal of Australia*, 182(9) May 2005, p 449.

25 Ibid, p 450.

26 Chan et al, above n 22, p 40.



Source: Chan A and Sage L, 'Estimating Australia's abortion rates 1985-2003', *Medical Journal of Australia*, 182(9) May 2005, p 449.

The number of abortions per age group varies. The following table indicates that in Western Australia more than half of the abortions performed each year between 1998 and 2001 involved women between the ages of 20 and 29, with the next most common group being women aged 30 and over. Less than 20% of terminations involved teenagers.

Induced abortions in Western Australia 1998-2001 (% in age group)

Date	Less than 20 years	20-29 years	Greater than or equal to 30 years	Total
Jul-Dec 1998	18.7	53.1	28.2	4116
Jan-Jun 1999	17.9	52.8	29.3	4147
Jul-Dec 1999	18.4	52.7	28.8	4071
Jan-Jun 2000	17.6	53.8	28.5	4101
Jul-Dec 2000	17.5	51.5	31.0	4223
Jan-Jun 2001	19.3	50.0	30.8	4152
Jul-Dec 2001	19.1	51.1	29.8	4214

Source: *Report to the Minister for Health on the review of provisions of the Health Act 1911 and the Criminal Code relating to abortion as introduced by the Acts Amendment (Abortion) Act 1998*, 17 June 2002, p 68. www.health.wa.gov.au Accessed 24/5/05.

Whilst the proportion of abortions involving teenagers might be small, the percentage of teenage pregnancies ending with an abortion is double that of the population as whole. According to Chan et al, the number of teenage abortions has exceeded the number of teenage births every year since 1995.[27] In South Australia in 2002, 56% of known teenage pregnancies were aborted compared to 23% of known pregnancies for all ages.[28]

Some women have more than one abortion in their lifetime. The study by Chan et al found that 39% of women who had an abortion in 2002 had previously undergone a termination.[29] The figure for teenagers was 19%.

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27 Ibid, p viii.

28 Ibid.

29 Ibid, p 44.

A number of pregnancies are terminated because of a known or suspected abnormality of the foetus. Chan et al found that, in South Australia, 2.1% of abortions were for suspected or identified abnormalities of the foetus (115 cases).[30] 93% of these cases involved specified foetal or chromosomal abnormalities.

Doctors, hospitals and laboratories in NSW are required to notify birth defects that are detected during pregnancy, at birth, or up to the age of one year in accordance with the *Public Health Act 1991*.[31] An average of 250 to 300 terminations of pregnancy of less than 20 weeks gestation were reported to the NSW Birth Defects Register each year between 1998 and 2002. 71% were associated with a chromosomal abnormality of which Down Syndrome was the most common and 14% were associated with a neural tube defect.[32]

The risk associated with a termination generally increases with the duration of the pregnancy. Chan et al found that 92% of terminations in South Australia were conducted in the first 14 weeks of pregnancy and vacuum aspiration was the method used in 90% of cases.[33] Most abortions are conducted without any complications. Only 0.4% of women who had an abortion in South Australia in 2002 experienced such complications as sepsis, intra-operative or post-operative haemorrhage, and perforation of or trauma to the body of the uterus.[34]

The Australian Reproductive Health Alliance, Sexual Health and Family Planning Australia, Marie Stopes International and Children by Choice believe that the high abortion rate in Australia is due to contraceptive failure and a lack of knowledge about contraceptive options.[35] It is thought that between half to two-thirds of women who seek a termination were using contraception at the time they fell pregnant.[36] Cica suggests that the concern with maternal health in Australian abortion law intimates that society is most protective of the foetus when it is wanted and the mother is capable of caring for it after its birth.[37] She argues that:

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30 Ibid, p 43.

31 NSW Department of Health, Centre for Epidemiology and Research, 'New South Wales Mothers and Babies 2003', *NSW Public Health Bulletin Supplement*, 15(S-5), December 2004, p 79.

32 Ibid, p 82.

33 Chan et al, above n 22, p 43.

34 Ibid.

35 Australian Reproductive Health Alliance et al, 'Sexual and reproductive health organisations respond to abortion debate', *Media Release*, 22/3/04.

36 Healey, above n 5, p 42.

37 Cica N, 'The inadequacies of Australian abortion law', *Australian Journal of Family Law*, 5(1) March 1991, p 59.

> Abortion might be more effectively discouraged by providing better education programmes on human sexuality and relationships, including contraceptive advice. A change in our society's approach to childcare would also be desirable. Redefining parenthood as a valued occupation undertaken by men and/or women, with adequate community support services, could reduce the need to abort foetuses.[38]

1.3 Overview of the pro-choice/pro-life positions

Those who are 'pro-choice' or supporters of abortion believe that the choice of whether to continue with a pregnancy should be a decision for the woman concerned and her doctor. They stress that there is a difference between a foetus and a baby, and the rights of the foetus should not override those of the pregnant woman. On the other hand, those who are 'pro-life' or opponents of abortion stress the sanctity of human life from the moment of conception and therefore deem abortion to be the taking of life.

Cannold has highlighted some of the grey areas that exist between the positions of pro-life versus pro-choice.[39] She interviewed 45 women with various stances on abortion and found that some pro-life women relax their views when it comes to victims of rape or incest. Similarly, she discovered that some pro-choice women set boundaries in terms of the circumstances they find abortion to be acceptable. For example, some of the women interviewed by Cannold were less tolerant of the notion of abortion late in the pregnancy.

The 1996/97 International Social Science Surveys Australia measured attitudes towards abortion in Australia. It found that there has been a decline away from both extremes in the abortion debate since 1984.[40] Australians are generally more liberal in their attitudes toward abortion than in most other countries.[41] The important social differences between those who support and those who oppose abortion, both in Australia and internationally, include church attendance, religious belief, Catholicism, and attitudes towards pre-marital sex.[42]

The following table summarises some of the results of the 1996/97 International Social Science Surveys Australia. It shows that 96% of Australians believe that abortion should definitely or probably be allowed where the woman's own health is seriously endangered by the pregnancy, 93% support its availability where the woman is pregnant as a result of rape, and 89% are in favour of abortion being permitted where there is a strong chance of a serious defect in the baby.

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38 Ibid, p 60.

39 Cannold L, *The Abortion Myth: Feminism, Morality and the Hard Choices Women Make*, Allen & Unwin, Sydney, 1998.

40 Kelley J and Evans M, 'Attitudes toward abortion: Australia in comparative perspective', *Australian Social Monitor*, 2(4) October 1999, p 86.

41 Ibid, p 87.

42 Ibid, p 88.

Attitudes toward circumstances in which a legal abortion should be allowed 1996/97 (%)

Circumstances	Definitely should be allowed	Probably should be allowed	Probably should not be allowed	Definitely should not be allowed
Strong chance of a serious defect in the baby.	55	34	7	5
Woman's own health is seriously endangered by the pregnancy.	64	32	2	1
Woman became pregnant as a result of rape.	68	25	5	3
Family has a very low income and cannot afford any more children.	30	39	21	11
Woman is married and does not want any more children.	27	38	22	13
Woman is not married and does not want to marry the man.	29	39	20	12
Parents wanted a child of the other sex.	6	9	37	48

Source: Kelley J and Evans M, 'Attitudes toward abortion: Australia in comparative perspective', *Australian Social Monitor*, 2(4) October 1999, pp 83-90.

Kelley and Evans found that:

> many people do not see abortion as an 'all or nothing' issue, but rather as a basically undesirable event which must be balanced against the undesirability of the birth. It seems that most Australians hold that forcing someone to raise an unwanted child is worse than allowing abortion.[43]

1.4 Competing rights or interests

The issue of abortion is often debated in terms of the various rights or interests involved. These include the rights or interests of the: pregnant woman; foetus; biological father; and medical staff. These rights, if they exist, may obviously conflict at times.

1.4.1 Reproductive rights

Paragraph 95 of the Beijing Platform for Action (United Nations Fourth World Conference on Women, Beijing, China – September 1995) provides that reproductive rights:

> rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.

Similarly, article 16(1)(e) of the *Convention on the Elimination of All Forms of Discrimination Against Women* provides that States are to ensure that men and women have:

43 Ibid, p 85.

> The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

Some people argue that the decision of whether to proceed with a pregnancy belongs solely to the woman involved, not the medical profession, politicians or anyone else, as it is part of the woman's right to bodily integrity. The right to privacy has been seen to encompass abortion, such as in the US Supreme Court decision of *Roe v Wade* (see section 5.5.1 for a discussion of this decision). Various commentators equate access to abortion services with the right to choose.[44] Some are critical of the extent to which abortion is dominated by the medical profession.[45] For example, abortions are generally only lawful if performed by a medical practitioner and, in a number of jurisdictions, only if two or more doctors agree that an abortion is appropriate in the circumstances.

The abortion debate has been complicated in some ways by the advent of medical technology. Some have used the existence of equipment that allows 3D imaging of the foetus to further the argument that the foetus should be seen as separate to the mother. On the other hand, the furthering of scientific knowledge has enabled medical staff to test the foetus for any abnormalities, which some see as empowering the pregnant woman in her decision to continue or terminate the pregnancy.

1.4.2 Foetal rights

One of the major questions in the abortion debate is at what point someone is said to become a human being. The abortion debate frequently centres on whether the foetus should or should not have the right to life. Most right to life groups argue that life begins from the moment of conception. However, Graycar and Morgan are critical of the use of the term 'foetal rights', as it elevates the status of the foetus over the woman carrying the child.[46] The issue has become more complicated as medical developments enable the foetus to survive outside the mother's womb from an increasingly early point in time.

The right to life is enshrined in a number of international instruments. However, the extent to which this right extends to a foetus is questionable. Article 6(1) of the *International Covenant on Civil and Political Rights* stipulates that:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The UN *Convention on the Rights of the Child* entered into force on 2 September 1990 (and

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44 Graycar R and Morgan J, *The Hidden Gender of Law*, 2nd ed, Federation Press, 2002, p 199.

45 See, for example, Albury R, *The Politics of Reproduction: Beyond the Slogans*, Allen & Unwin, St Leonards, 1999.

46 Graycar and Morgan, above n 44, p 199.

for Australia on 16 January 1991). Its preamble states, amongst other things:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

The 1959 *Declaration of the Rights of the Child* is attached as a Schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Fleming and Hains argue that whilst it is therefore part of Australian municipal law, the legal rights to which it gives rise are debatable.[47] Duxbury and Ward have noted that international law may impact on Australian abortion law: in the way it is interpreted; via the scrutiny of Australian laws by international bodies through the Optional Protocol to the International Covenant on Civil and Political Rights; or by the reporting requirements of treaties ratified by Australia.[48] They argue that the effect of the preamble to the *Declaration on the Rights of the Child* together with the statement of the working group 'is that states may extend their definition of a child to the foetus, but this cannot be seen as an obligation under either customary international law or treaty law'.[49] Duxbury and Ward conclude that:

> It would appear that international law, like Australian law, protects the child from the moment of birth, but without an express provision to the contrary, it does not provide the foetus with an absolute right to life.[50]

1.4.3 Rights of the biological father

The biological father essentially has no right to prevent the abortion of a foetus. The courts have dealt with this issue on a number of occasions, including in *Attorney-General (Qld) (ex rel Kerr) v T*.[51] This case involved Mr Kerr seeking an injunction to prevent a woman pregnant with his child having an abortion. He claimed the injunction on the basis that it was necessary to prevent a breach of the criminal law. He also argued that the unborn child is a person whose life will be protected by the Supreme Court in its delegated role as *parens patriae*.[52] Gibbs CJ held that it was not justifiable to assume that the woman would be found guilty of a criminal offence if she proceeded to have an abortion. He also agreed with the judgment of Sir George Baker P in *Paton v BPAS Trustees*[53] that a foetus does not

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47 Fleming J and Hains M, 'What rights, if any, do the unborn have under international law?', *Australian Bar Review*, 16(2) November 1997, p 184.

48 Duxbury A and Ward C, 'The international law implications of Australian abortion law', *University of New South Wales Law Journal*, 23(2) 2000, p 8.

49 Ibid, p 18.

50 Ibid, p 20.

51 (1983) 46 ALR 275

52 'Parens patriae' is 'a common law doctrine by which the Sovereign has an obligation for the welfare of children and "lunatics"': *Butterworths Legal Dictionary* (2nd ed) (1998) p 324.

53 [1979] 1 QB 276 at 279

have a right of its own until it is born and has a separate existence from the mother. In any event, Gibbs CJ stressed:

> even if this view were wrong, I would not consider it a proper exercise of discretion to grant an injunction in the present case. As I have already said, to do so would be to act on the assumption that the respondent proposes to commit a serious crime, when the determination of that issue has been left by the law to a jury.[54]

He continued:

> There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be overstepped if an injunction were to be granted in the present case.[55]

1.4.4 Rights of the medical staff

The 1977 Royal Commission on Human Relationships recommended that doctors, nurses and other staff should not be required to take part in an abortion against their will.[56] Many jurisdictions make express provision for the right of medical staff to refuse to conduct or participate in the termination of a pregnancy where they object to the procedure on grounds of conscience. For example, such provisions operate in Western Australia, the Northern Territory and the Australian Capital Territory.

54 At 277.

55 At 277.

56 Royal Commission on Human Relationships, above n 6, p 159.

2 THE HISTORY OF ABORTION AND THE LAW

This section considers the development of abortion law in the United Kingdom. It is relevant for a number of reasons, not least of which is its role as the foundation of the sections of the various Crimes Acts and Criminal Codes in Australia that deal or previously dealt with abortion.

There are various opinions as to whether the common law prohibited abortion.[57] According to Gavigan, abortion early in the pregnancy was historically not an offence.[58] However, Keown believes that 'the weight of available authority supports the view that the common law prohibited abortion, at the latest, after the fetus had become "quick" or "animated"'.[59]

Sir Edward Coke wrote:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body and she is delivered of a dead childe, this a great misprison, and no murder.[60]

The notion of quickening (when the foetus is first felt to move in the uterus) has traditionally been important, as it was believed that at this time the foetus was infused with a soul.[61] According to Sir William Blackstone:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, kills it in her womb; or, if any one beat her, whereby the child dies in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. The modern law does not look upon this offence in quite so atrocious a light 'regarding it' merely as a heinous misdemeanour.[62]

Blackstone later explained:

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57 Keown J, *Abortion, Doctors and the Law*, Cambridge University Press, Cambridge, 1988, p 3.

58 Gavigan S, 'The criminal sanction as it relates to human reproduction: the genesis of the statutory prohibition of abortion', in Bennett B (ed) *Abortion*, Ashgate Dartmouth, Aldershot, 2004, p 289.

59 Keown, above n 57, p 3.

60 Quoted in Judges D, *Hard Choices, Lost Voices: How the Abortion Conflict has Divided America, Distorted Constitutional Rights, and Damaged the Courts*, Ivan R Dee, Chicago, 1993, p 92.

61 Gavigan, above n 58, p 290.

62 Kerr R, *The Commentaries on the Laws of England of Sir William Blackstone (adapted to the present state of the law)*, 4th ed, volume 1, John Murray, London, 1876, p 101.

> To kill a child in its mothers womb, is now no murder, but a great misprision: but if the child be born alive, and dies by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.[63]

Prior to 1803 the ecclesiastical courts generally dealt with abortion, with punishment taking the form of penances.[64] Nevertheless, from the 17th century onwards, there was an increasing exercise of royal jurisdiction over abortion.[65] There are few references to prosecutions for the procuring of an abortion before 1803, perhaps due in part to the difficulty of proving an offence given the limitations of medicine at the time.[66] Keown suggests that there may subsequently have been a de facto freedom to abort unwanted pregnancies.[67]

The *Miscarriage of Women Act 1803*, commonly known as Lord Ellenborough's Act, contained the first statutory prohibition of abortion. The Act created two felonies relating to the abortion of a foetus at any stage of the pregnancy. The concept of 'quickening' determined whether the more serious offence applied. Section 1 made it a capital offence for a person to unlawfully administer any noxious and destructive substance or thing with the intent to procure the miscarriage of a woman 'quick' with child. It was a felony under section 2 to procure the miscarriage of a woman not being, or not being proved to be quick with child.[68] Only section 2 made it an offence to attempt to procure a miscarriage with an instrument. However, it was uncertain whether it was an offence under the Act for a woman to attempt to procure her own miscarriage.[69]

Lord Lansdowne's Act of 1828 extended the prohibition of attempting to procure a miscarriage with any instrument to include the stage after quickening as well as before.[70] The 1837 *Offences Against the Person Act* ended the death penalty in relation to abortion and abolished the distinction based on quickening. Section 6 of the Act stated:

> whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the

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63 Ibid, p 198.

64 Royal Commission on Human Relationships, above n 6, p 135.

65 Keown, above n 57, p 5.

66 Gavigan, above n 58, p 297.

67 Keown, above n 57, p 11.

68 Gavigan, above n 58, p 302.

69 Ibid, p 302.

70 Keown, above n 57, p 26.

> discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.[71]

A major revision of the law occurred with the *Offences Against the Person Act 1861*. The Act rendered unlawful abortion a felony and clarified that it was an offence for a woman to procure her own miscarriage. According to section 58:

> Every woman being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony.[72]

It was also an offence to obtain or supply the means of procuring a miscarriage, with the knowledge that they were to be used for this purpose.[73]

Further changes came with the *Infant Life (Preservation) Act 1929*. This Act permitted the termination of a viable foetus if it was deemed necessary to save the mother's life.[74] One of the major decisions in relation to abortion came before the High Court 10 years later in the matter of *R v Bourne* [1939] 1 KB 687.

The judgment in *R v Bourne* recognised that the termination of a pregnancy may in some circumstances be lawful. The case concerned a 14 year old girl who had become pregnant after being violently raped by a group of soldiers. Dr Bourne subsequently performed an abortion, with the consent of the girl's parents, at St Mary's Hospital. It was the opinion of Dr Bourne that the continuance of the pregnancy would probably cause serious injury to the girl.

Macnaghten J stressed a number of factors that distinguished this particular case from the more usual ones that came before the courts:

> A man of the highest skill, openly, in one of our great hospitals, performs the operation. Whether it was legal or illegal you will have to determine, but he performs the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the

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71 Quoted in Keown, above n 57, p 27.

72 Royal Commission on Human Relationships, above n 6, p 135.

73 Keown, above n 57, p 27.

74 Petersen K, 'Abortion laws: comparative and feminist perspectives in Australia, England and the United States', in Bennett B (ed) *Abortion*, Ashgate/Dartmouth, Aldershot, 2004, p 318.

> performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it…. has nothing to do with the ordinary case of procuring abortion to which I have already referred. In those cases the operation is performed by a person of no skill, with no medical qualifications, and there is no pretence that it is done for the preservation of the mother's life.[75]

Macnaghten J stressed that the law regarding abortion was not without limit and that the fact that a woman desires a termination is not sufficient justification for it: 'that is not the law: the desire of a woman to be relieved of her pregnancy is no justification at all for performing the operation'.[76] He interpreted the statutory requirements as follows:

> I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.

Dr Bourne was subsequently found not guilty.

Crowley-Cyr has considered the impact of historical factors on the development of the law relating to abortion. She highlights how the abhorrence associated with abortion intensified following the Second World War due to the decline in the number of men. Abortion had already come under attack in the interwar period:

> The more independent working-class woman who emerged from World War I challenged traditional gender roles and demanded greater control over fertility and reproduction. This, together with a 9 per cent decline in male population under the age of 45, brought the practice of abortion under governmental attack. The government was concerned with increasing a depleted population. It was at this time that the medical profession recognised the new scientific challenge to the concept of 'quickening' and decided to distance itself from abortion in favour of contraceptive methods that would be employed before fertilisation had occurred.[77]

The next major development of abortion law occurred with the *Abortion Act 1967*. The *Abortion Act 1967* determined that medical practitioners were to be involved with the decision making process in relation to abortion, as well as being responsible for carrying out the procedure. Keown has argued that from the 1800s to 1967 a central concern of the medical profession was self-interest in relation to the development of abortion law.[78] This self-interest is seen as encompassing a desire to be free from control, as well as an attempt

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75 At 690 and 691.

76 At 693.

77 Crowley-Cyr, above n 1, p 256.

78 Keown, above n 57, p 159.

to prevent those without medical qualifications intruding upon its sphere of influence. However, the control exercised by the medical profession lessened the need for 'backyard abortionists' and improved the safety of the procedure. The Act specified the grounds for the lawful termination of a pregnancy, as set out below:[79]

> Medical termination of pregnancy
>
> (1) Subject to the provisions of this section a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith –
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
>
> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> (2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.
>
> (3) …any treatment for the termination of pregnancy must be carried out in a hospital vested in the Minister of Health… or in a place for the time being approved.

Accordingly, a termination would be lawful if two medical practitioners believed that the pregnancy involved greater risk to the life, physical or mental health of the woman or her existing children than if the pregnancy were terminated. Termination was also permissible if there was a substantial risk that the child would be seriously handicapped when born.

Much of the law on abortion in Australia was originally modelled on the 1861 Act. However, South Australia and the Northern Territory subsequently enacted reforms that were based on the 1967 Act. Statutory exemptions to the offence of abortion also applied in some jurisdictions.

The law on abortion in Australia has become more moderate with time, with statutes in Victoria, NSW and Queensland being interpreted liberally by the courts. Recent years have also seen the reform of some of the laws in various states and territories such as Western Australia, Tasmania and the Australian Capital Territory, as the vagueness of some of the previous provisions led to doubts about the legality of the provision of abortion services.

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79 Royal Commission on Human Relationships, above n 6, p 136.

The ACT is the only jurisdiction in Australia where abortion has been completely removed from the criminal statutes. However, following reforms in 1998, abortion is primarily a health issue in Western Australia.

The law in the states and territories of Australia is discussed in greater detail in sections three and four of this paper.

3 THE LAW IN NEW SOUTH WALES

3.1 Crimes Act 1900

Sections 82 to 84 of the *Crimes Act 1900* (NSW) deal with attempts to procure abortion. The relevant sections are set out below:

> Section 82 – Administering drugs etc to herself by woman with child
>
> Whosoever, being a woman with child, unlawfully administers to herself 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.
>
> Section 83 – Administering drugs etc to woman with intent
>
> 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.
>
> Section 84 – Procuring drugs etc
>
> Whosoever unlawfully supplies or procures 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, whether with child or not, shall be liable to imprisonment for five years.

These sections are based on the law in the UK, as it existed prior to the *Abortion Act 1967*.

Until recently, no one had been prosecuted under sections 82 to 84 of the *Crimes Act* for more than 20 years. However, the *Sydney Morning Herald* reported in August 2005 that a doctor had appeared at Liverpool Local Court charged with manslaughter and the administration of a drug with intent to procure a miscarriage.[80] The matter appears to have arisen over an alleged late-term abortion and has yet to be finalised.

3.2 Interpretation

3.2.1 R v Wald

The NSW judicial system had the opportunity to pronounce its interpretation of what constitutes a lawful abortion in *R v Wald* [1971] 3 DCR (NSW) 25. The case concerned the trial of five people who had been charged with unlawfully using an instrument with intent to procure the miscarriage of women contrary to section 83 of the *Crimes Act 1900*, conspiring to commit the said offence, and aiding and abetting the commission of that

[80] 'Doctors charged with killing foetus', *Sydney Morning Herald*, 9/8/05, p 1.

offence. Those charged included the surgeon, the anaesthetist, the orderly, the person who referred the patients, and the owner of the premises.

The Victorian courts had considered the issues associated with the offence of unlawful abortion a couple of years earlier in the decision of *R v Davidson* [1969] VR 667 (see section 4.4.1 for a discussion of this case). Menhennit J had held that an abortion would be lawful where it was necessary to preserve the woman from a serious danger to her life or her physical or mental health, provided it was not out of proportion to the danger to be averted. Like Menhennit J in *Davidson*, Levine DCJ noted that use of the word 'unlawful' envisages circumstances in which the act must be lawful. He accepted the principle applied in *Davidson* and held that if operations to terminate pregnancies were skilfully performed by qualified medical practitioners with the woman's consent, the operation would be lawful provided the accused:

> 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.[81]

He continued:

> In my view it would be for the jury to decide whether there existed in the case of each woman *any economic, social or medical ground or reason* which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health. It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not 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 ground would have to be negatived before an offence under s 83 could be proved.[82] [emphasis added]

Wald therefore expanded the relevant grounds that may cause a serious threat to the physical or mental health of the woman to include social and economic factors. The accused were subsequently acquitted.

3.2.2 Statements by the NSW Attorney-General

Some confusion as to the legal position remained following the decision of *Wald*. The NSW Attorney-General, the Hon Kenneth McCaw MP, accordingly issued a statement

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81 At 29.

82 At 29.

outlining the law in 1974. The statement clarified that the law provides that:[83]

- an abortion performed by an unqualified person, whatever be the circumstances, is punishable by penal servitude for 10 years;
- there is no offence where a duly qualified medical practitioner terminates a pregnancy in the bona fide belief that the continuation of the pregnancy places the woman's life or health in greater jeopardy than its termination;
- where no such bona fide belief exists, the medical practitioner is also liable to penal servitude for 10 years.

A statement was also made two years later on 2 March 1976, by the Attorney-General, the Hon John Maddison MP:

> First, we are dealing with a statement of law only in relation to duly qualified and registered medical practitioners because they stand in a category quite apart from unqualified persons. For a termination of pregnancy to be lawful the medical practitioner must have had an honest belief, based upon reasonable grounds, that the operation was necessary to preserve the woman concerned from serious danger to her life or to her physical or mental health and not merely from the normal dangers of pregnancy and childbirth – that is, that if the operation is not performed and the pregnancy is not terminated a serious danger is present as to her life or her physical or mental health. In the circumstances the practitioner must determine that the operation is not out of proportion to the danger that he seeks to avert by terminating the pregnancy.[84]

3.2.3 CES v Superclinics (Australia) Pty Ltd

The issue of abortion again came before the NSW courts more than 20 years later. However, this time the matter concerned a civil claim for wrongful birth as opposed to a criminal trial. The case of *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 involved a claim for the loss of the opportunity to terminate a pregnancy due to the repeated failure of a number of doctors to diagnose the pregnancy. The female plaintiff had attended Superclinics on a number of occasions from 27 November 1986 due to a concern that she was pregnant. According to the woman, her visits to the clinic took place as follows:

- On 27 November 1986, the woman attended Superclinics and expressed her concern to Dr Nafte that she was pregnant. According to her recollection, she indicated her desire to have a termination if she was pregnant. No pregnancy test was conducted.

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83 Quoted in Royal Commission on Human Relationships, above n 6, p 138.

84 Maddison J, *NSWPD*, 2/3/76, p 3797.

- She returned one week later on 1 December 1986. Dr Nafte took a blood test which showed a false negative.

- On 30 December 1986 she attended the clinic and saw Dr Nafte. No pregnancy test was completed.

- She returned on 6 January 1987, on which occasion she was attended by Dr Cattley. No pregnancy test was conducted.

- On 23 January 1987 she saw Dr Baker and had another blood test. The test returned positive but the results were incorrectly reported to the woman as negative.

The woman consulted her GP on 24 March 1987. The GP referred her for an ultrasound, where it was revealed that she was 19.5 weeks pregnant. It was accordingly too late to safely perform an abortion and she subsequently gave birth to a daughter on 30 August 1987.

The woman claimed that the respondents had breached the duty of care owed to her by their failure to detect and correctly diagnose the pregnancy. She claimed damages for the pain and suffering linked to having to bear and give birth to a child. Damages for economic loss were also claimed in relation to her confinement and the cost of rearing a child. The respondents argued, inter alia, that the potential illegality of a proposed termination of pregnancy provided a defence to any recovery for the alleged breaches of duty. The trial judge, Newman J, concluded that a proposed termination would have been unlawful under sections 82 and 83 of the *Crimes Act* and the claim was subsequently defeated.

On appeal to the NSW Supreme Court, Kirby A-CJ considered the decision of *R v Wald* and noted:

> The test espoused by Levine DCJ seems to assert that the danger being posed to the woman's mental health may not necessarily arise at the time of consultation with the medical practitioner, but that a practitioner's honest belief may go to a reasonable expectation that that danger may arise 'at some time *during the currency of the pregnancy, if uninterrupted*' (emphasis added). 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.[85]

85 At 60.

According to Kirby A-CJ, the relevant factors for determining whether the pregnancy constituted a threat to the physical or mental health of the mother included the social and economic circumstances that would apply subsequent to the birth of the child. Kirby A-CJ disagreed with the approach of Newman J and concluded that:

> The respondents did not lead in evidence any expert opinion from which it could have been found that a medical practitioner, faced with facts of the first appellant's case, could *not* have formed the honest and reasonable belief that continuance with the pregnancy would have posed a serious danger to the mental health of the first appellant, either during the pregnancy or after the birth of the child.[86]

In any event, Kirby A-CJ found that, even if a termination of the pregnancy was unlawful, the woman could not have been found to be an accomplice to it. Priestley JA made a similar finding.

Kirby A-CJ also made a number of comments regarding the notion that the arrival of a child is always considered a blessing:

> It is quite inappropriate for a court to declare that a child, initially unwanted, and whose birth was caused by the negligence of a medical practitioner, should always be regarded for all purposes as a blessing, whatever the facts of the particular case. Similarly it is unconvincing (at least to me) that to deny recovery for the undoubted economic loss that accrues would demean the sanctity of human life, whatever the circumstances of the case. The inadequacy of such reasoning is highlighted by the fact that the parents themselves have already, in a case such as the present, assessed the situation. They concluded that the child would, in fact, be a greater burden than a desired 'blessing'. This conclusion was manifested by the steps taken, or the desires expressed, to secure a termination of the pregnancy at a time when this could have been safely done. The widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing…. Particularly given the modern realities of sexual conduct and birth control, and the real possibilities of obtaining a termination of an unwanted pregnancy, as described in this case by Dr Weisberg, the Court should not embrace the fiction that an unwanted but healthy child must always be considered a blessing, and one the benefits of whose birth necessarily outweighs the financial detriment caused.[87]

Both Kirby A-CJ and Priestley JA upheld the appeal and ordered a new trial. However, Meagher JA dissented, stressing that, in his opinion, sections 82 and 83 of the *Crimes Act* made abortion illegal. Whilst he acknowledged that as a result of the decision in *Wald* 'there is an apparent and unstated exception in cases where an abortion is necessary to

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86 At 66.

87 At 73 and 74.

preserve the mother's health', he believed it had no application to the present case.[88]

The High Court granted special leave to appeal but the case was settled. Therefore, the opportunity for an authoritative ruling on abortion law was missed.

3.3 Parliamentary bills and motions

There have been a number of attempts by members of NSW Parliament to introduce legislation of which the purpose has usually been to limit the availability of abortion in NSW. This section includes some examples of such attempts.

3.3.1 Infant Life Preservation Bill 1976

Kevin Harrold MP introduced the Infant Life Preservation Bill into the Legislative Assembly on 2 March 1976. The aim of the bill was 'to protect the inviolability of all human life and to ensue that the civil rights of foetal life are guaranteed and protected by the state'.[89] The bill proposed to introduce the following conditions to be met for an abortion to be lawful:[90]

1. The abortion must be carried out in a public hospital or in a registered private hospital.

2. Two legally qualified medical practitioners must certify on oath that the abortion is necessary to prevent the death of the mother.

3. The doctor performing the abortion must be able to prove that he acted in good faith and only for the purpose of preventing the death of the mother.

4. The abortion and any complications must be duly registered.

The bill proceeded to the second reading debate but subsequently lapsed.

3.3.2 Bignold abortion motion

One of the parliamentary interests of the Hon Marie Bignold MLC in the 1980s was the moral and legal aspect of abortion. On 2 June 1988, the Hon Marie Bignold moved a successful motion in the Legislative Council:[91]

(1) That this House affirms –

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88 At 85.

89 Harrold K, *NSWPD*, 2/3/76, p 3794.

90 Ibid.

91 Bignold M, *NSWPD*, 2/6/88, p 1253.

(a) the principle of the sanctity of life as being the supreme principle in respect of human beings;

(b) this principle applies with equal force and validity to the unborn child; and

(c) this principle should be recognised and guaranteed by law.

(2) That this House condemns –

(a) the widespread practice of abortion on demand with an estimated 40,000 deaths of unborn children annually in New South Wales; and

(b) the public funding of this practice.

(3) That this House calls upon the law enforcement agencies to fully and properly enforce the existing law contained in sections 82-85 of the Crimes Act 1900 to eliminate the practice of abortion on demand.

(4) That this House calls upon the Government to examine the adequacy of the existing law to protect the unborn child and to take positive action to supplement any deficiency found in the existing law for the protection of the unborn child.

The result of the motion was 20 votes each way with the President of the Legislative Council subsequently casting his vote with the ayes.[92]

3.3.3 Procurement of Miscarriage Limitation Bill 1991

On 22 August 1991, the Rev the Hon Fred Nile MLC introduced the Procurement of Miscarriage Limitation Bill in the Legislative Council.[93] Mr Guy Yeomans had originally introduced the bill in the Legislative Assembly but it did not proceed to a vote. The object of the Nile bill was to restrict abortions to public hospitals and prohibit them being carried out in abortion clinics of private hospitals. The bill was not passed by the Legislative Council.

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92 *NSWPD*, 2/6/88, p 1336.

93 *NSWPD*, 22/8/91, p 408.

4 THE LAW IN AUSTRALIA

State	Legislation	Sections	Some relevant cases
NSW	*Crimes Act 1900*	82-84	▪ *R v Wald* [1971] 3 DCR (NSW) 25 ▪ *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47
QLD	*Criminal Code*	224-226, 282	▪ *R v Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8 ▪ *Veivers v Connolly* [1995] 2 Qd R 326
SA	*Criminal Law Consolidation Act 1935*	81-82A	
TAS	*Criminal Code*	134-135, 164-165	
VIC	*Crimes Act 1958*	65-66	▪ *R v Davidson* [1969] VR 667
WA	*Criminal Code* *Health Act 1911*	199 334	
ACT	*Health Act 1993*	30A-30E	
NT	*Criminal Code*	172-174	

4.1 Queensland

The relevant statutory provisions regarding the law on abortion in Queensland may be found in sections 224 to 226 of the *Criminal Code*.

> Section 224 – Attempts to procure abortion
>
> Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.
>
> Section 225 – The like by women with child
>
> Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for 7 years.
>
> Section 226 – Supplying drugs or instruments to procure abortion
>
> Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.

The *Criminal Code* provides a separate statutory defence in section 282, which states:

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's

> benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

Therefore section 282 may be used as a defence to a charge of unlawful abortion.

4.1.1 R v Bayliss and Cullen

R v Bayliss and Cullen (1986) 9 Qld Lawyer Reps 8 was a Queensland case in which two qualified medical practitioners were charged with unlawfully using force with the intent to procure a miscarriage in breach of section 224 of the *Criminal Code*. Judge McGuire noted the two-fold purpose of the prohibition in section 224:

> Clearly one purpose is to protect the life, or the potential for life, of an unborn child, but I think the second purpose must also have been to protect the mother, having regard to the grave dangers, which until comparatively recent times, were attendant upon induced abortions.[94]

He saw the decision in *Davidson* as applying to the law in Queensland, that is, an abortion would be lawful where necessary to preserve the woman from a serious danger to her life or physical or mental health. Nonetheless, Judge McGuire was careful to stress:

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

4.1.2 Veivers v Connolly

Vievers v Connolly [1995] 2 Qd R 326 was a Queensland civil case that arose from a claim for negligence in relation to the birth of a child on 13 April 1976. The child was born with congenital rubella embryopathy and was gravely handicapped, being profoundly deaf, almost blind, extremely retarded, and suffering from sensory deficiencies as well as other major physical difficulties. The plaintiff claimed that the defendant had negligently failed to carry out a proper course of blood testing to determine whether she had rubella. The plaintiff claimed that the defendant would have advised her regarding the possibility of termination, which she probably would have pursued.

The case considered the issue of whether the pregnancy could lawfully have been terminated as well as the likelihood that the termination would have taken place. De Jersey J noted that section 282 of the *Criminal Code* authorised an operation upon an unborn child to preserve the mother's life. This had been interpreted as including an operation necessary to prevent a serious danger to the mother's mental health that would otherwise be involved should the pregnancy continue. According to de Jersey J:

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94 At 9.

> the plain 'serious risk' to the first plaintiff's mental health crystallised with the birth of the terribly disabled child. The evidence given by the doctors provides ample warrant for the conclusion that continuing with this pregnancy did expose the first plaintiff to serious danger to her mental health. It is true that this risk, as I said, in a sense 'crystallised' with the birth; but the birth was the natural consequence of the pregnancy, and I would therefore reason that continuing with a pregnancy which would so likely result in the birth of a severely affected rubella baby, entailed a serious danger to the first plaintiff's mental health, albeit a danger which would not fully afflict her in a practical sense until after the birth.[95]

De Jersey J accepted the evidence of a psychiatrist that the termination of the pregnancy would have been justified in this situation due to the grave risk presented to the mental health of the mother. The plaintiff successfully established negligence as 'a termination would probably have been offered, duly certificated and consented to, and carried through'.[96]

4.2 South Australia

Sections 81 to 82A of the *Criminal Law Consolidation Act 1935* set out the requirements relevant to abortion:

> Section 81 – Attempts to procure abortion
>
> (1) Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be guilty of an offence and liable to be imprisoned for life.
>
> (2) Any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be guilty of an offence and liable to be imprisoned for life.
>
> Section 82 – Procuring drugs etc to cause abortion
>
> Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years.

However, section 82A provides that a pregnancy may be terminated in a prescribed hospital

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95 At 329.

96 At 330.

by a legally qualified medical practitioner where two medical practitioners are of the opinion:

> that the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated; or that there is a substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped.

The woman's actual or reasonably foreseeable environment may be taken into account when evaluating the risk of injury to her physical or mental health. A termination is also permissible where a medical practitioner is of the opinion that it is immediately necessary to save the life, or prevent grave injury to the physical or mental health, of the pregnant woman. It is assumed that a child is capable of being born alive if the woman has been pregnant for at least 28 weeks. Therefore, an abortion must be carried out within 28 weeks of the pregnancy for it to be lawful.

The law in South Australia has a two months residential requirement. Health staff with a conscientious objection to the procedure may refuse to participate in the performance of an abortion.

4.3 Tasmania

Sections 134 and 135 of the *Criminal Code* (Tas) prohibit the unlawful termination of a pregnancy:

Section 134 – Abortion

(1) Any woman who, being pregnant, unlawfully administers to herself, with intent to procure her own miscarriage, any poison or other noxious thing or with such intent unlawfully uses any instrument or other means whatsoever, is guilty of a crime.

(2) Any person who, with intent to procure the miscarriage of a woman, unlawfully administers to her, or causes her to take, any poison or other noxious thing, or with such intent unlawfully uses any instrument or other means whatsoever, is guilty of a crime.

Charge: Administering poison [*or* using means] to procure abortion.

Section 135 – Aiding in intended abortion

Any person who unlawfully supplies to or procures for any other person anything whatever, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of a woman, is guilty of a crime.

Charge: Aiding in intended abortion.

Section 165 of the *Criminal Code* provides that it is a crime for a person to cause the death of a child which has not become a human being in such a manner that he would have been guilty of murder if the child had been born alive. However, it is not a crime to cause the death of a child before or during its birth where it is for the preservation of the mother's life.

Section 164 establishes that the termination of a pregnancy is legally justified if two medical practitioners have certified that the continuance of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman (taking into account any relevant matters) than if the pregnancy were terminated and the woman has provided informed consent. Staff members are free to decline to participate in an abortion where they have a conscientious objection.

Changes were made to the abortion provisions of the *Criminal Code* in 2001. The amendments were formulated in response to the refusal of medical practitioners, nurses and other staff to terminate pregnancies in Tasmania after a complaint to the Royal Hobart Hospital cast doubt over the legality of abortion. Women in Tasmania who sought an abortion were accordingly required to travel to Melbourne for the procedure.

The *Criminal Code Amendment Act (No 2) 2001* sought 'to clarify the law relating to the practice that currently exists in Tasmania, and to place the decision to terminate a pregnancy firmly in the hands of the woman and her doctor'.[97] The then Minister for Health and Human Services, the Hon Judith Jackson, noted that the law relating to abortion had never been tested in Tasmania, with no prosecutions under sections 134 and 135 in 76 years. Section 164 was subsequently inserted into the *Criminal Code* to ensure that certain actions regarding the termination of pregnancies are not criminal.

4.4 Victoria

Sections 65 and 66 of the *Crimes Act 1958* state:

> Section 65 – Abortion
>
> Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of an indictable offence, and shall be liable to level 5 imprisonment (10 years maximum).
>
> Section 66 – Supplying or procuring anything to be employed in abortion
>
> Whosoever unlawfully supplies or procures any poison or other noxious thing or

[97] Jackson J, *TPD(HA)*, 19/12/01.

> any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether with child or not, shall be guilty of an indictable offence, and shall be liable to level 6 imprisonment (5 years maximum).

4.4.1 R v Davidson

The issue of what constitutes a lawful abortion came before the Victorian courts in the late 1960s. In the case of *R v Davidson* [1969] VR 667, Charles Davidson, a doctor, had been charged with four counts of unlawfully using an instrument or other means with intent to procure the miscarriage of a woman and one count of conspiring unlawfully to procure the miscarriage of a woman.

Menhennit J noted that 'the use of the word 'unlawfully' in the section implies that in certain circumstances the use of an instrument or other means to procure a miscarriage may be lawful'.[98] He deemed necessity to be the appropriate principle to apply to determine the lawfulness of an abortion. The principle of necessity concerns elements of necessity and proportion and was described by Menhennit J as:

> An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.[99]

Menhennit J ultimately held that:

> For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of a 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.[100]

The jury subsequently found Davidson not guilty on each of the counts.

4.5 Western Australia

According to section 199 of the *Criminal Code*, an abortion is not lawful unless it is performed by a medical practitioner, and it is justified under section 334 of the *Health Act*.

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98 At 668.

99 Stephen quoted by Menhennit J at 670.

100 At 672.

Section 334 stipulates that the abortion of a pregnancy up to 20 weeks is only justified if:

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

A woman must have given her informed consent in each of these situations, unless it is impracticable for her to do so in cases where there is a serious danger to her physical or mental health. To satisfy the requirement of informed consent, a medical practitioner must have counselled the woman about the risks of terminating and continuing the pregnancy, as well as offering a referral for further counselling.

Terminations after 20 weeks are only justifiable if performed in an approved facility and:

> two medical practitioners who are members of a panel of at least six medical practitioners appointed by the Minister for the purposes of this section have agreed that the mother, or the unborn child, has a severe medical condition that, in the clinical judgment of those two medical practitioners, justifies the procedure.[101]

A dependant minor under the age of 16 is required to inform a custodial parent/guardian that an abortion is being considered and the parent/guardian is to have the opportunity to participate in the counselling process and in consultations with the medical practitioner. However, minors are able to apply to the Children's Court for an exemption from this requirement.

Section 259 of the *Criminal Code* provides a defence for unlawful abortion:

> Section 259 – Surgical and medical treatment
>
> A person is not criminally responsible for administering, in good faith and with reasonable care and skill, surgical or medical treatment –
>
> (a) to another person for that other person's benefit; or
>
> (b) to an unborn child for the preservation of the mother's life,
>
> if the administration of the treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

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101 Section 334(7) *Health Act 1911*

The *Acts Amendment (Abortion) Act 1998* altered the abortion laws in Western Australia in 1998. Amongst other things, the amending Act inserted section 334 into the *Health Act*. The Act was a response to a review of the state's abortion laws following Drs Victor Chan and Hoh Peng being charged in February 1998 with carrying out an abortion, the first time in 30 years such arrests had been made.[102]

Section 335 of the *Health Act* established an abortion notification system. Between May 1998 and June 2002, there were 29,000 abortions, an average of 8,300 a year.[103] There were 107 post 20 week abortions between May 1998 and June 2002.[104]

A 2002 review of the new abortion laws concluded that 'the abortion legislation is generally working in the manner in which Parliament intended'.[105] It also noted that there had been no prosecutions for the unlawful performance of an abortion since 1998 and that no charges had been laid in that period under the *Criminal Code*. A person or institution is not under a duty to participate in the performance of an abortion in Western Australia.

4.6 Australian Capital Territory

The ACT is the only state or territory in Australia where abortion has been completely removed from the criminal statutes. Part 5A of the *Health Act 1993* regulates abortion in the ACT. Abortions must be carried out by doctors in approved medical facilities.[106] However, a person is entitled to refuse to assist in carrying out an abortion as no one is under a duty to carry out or assist with an abortion.[107]

4.7 Northern Territory

Sections 172 and 173 of the *Criminal Code* provide:

> Section 172 – Procuring abortion
>
> Subject to section 174, any person who, with the intention of procuring the miscarriage of a woman or girl, whether or not the woman or girl is pregnant, administers to her, or causes to be taken by her, a poison or other noxious thing, or

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102 Western Australia, *Report to the Minister for Health on the review of provisions of the Health Act 1911 and the Criminal Code relating to abortion as introduced by the Acts Amendment (Abortion) Act 1998*, 17 June 2002, p 5. www.health.wa.gov.au Accessed 24/5/05; Duxbury and Ward, above n 48, p 1.

103 Western Australia, above n 102, p 35.

104 Ibid, p 33.

105 Ibid, p 12.

106 Sections 30B and 30C.

107 Section 30E.

> uses an instrument or other means is guilty of a crime and is liable to imprisonment for 7 years.
>
> Section 173 – Supplying drugs, &c., to cause abortion
>
> Subject to section 174, any person who unlawfully supplies or obtains a poison or other noxious thing, or instrument or other thing, knowing that it is intended to be used or employed with the intention of procuring the miscarriage of a woman or girl, whether or not the woman or girl is pregnant, is guilty of a crime and is liable to imprisonment for 7 years.

Section 174 sets out the circumstances in which an abortion may lawfully be carried out. A gynaecologist or obstetrician may conduct an abortion on a woman up to 14 weeks pregnant in hospital provided that two medical practitioners are of the opinion that:

> the continuance of the pregnancy would involve greater risk to her life or greater risk of injury to her physical or mental health than if the pregnancy were terminated; or there is a substantial risk that, if the pregnancy were not terminated and the child were to be born, the child would have or suffer from such physical or mental abnormalities as to be seriously handicapped.[108]

An abortion may be conducted on a woman up to 23 weeks where the medical practitioner believes that 'termination of the pregnancy is immediately necessary to prevent grave injury to her physical or mental health'. It is also lawful for an abortion to be performed where it is for the sole purpose of preserving the woman's life.

The consent of an authorised person is required for a minor under the age of 16. Persons who have a conscientious objection to abortion are not under a duty to procure or assist with an abortion.

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[108] Section 174(a)(i) and (ii).

5 ABORTION REGULATION THROUGHOUT THE WORLD

5.1 Statistical overview

According to the US Center for Reproductive Rights, abortion is prohibited for any reason or is only allowed for the purpose of saving the woman's life for 26% of the world's population.[109] However, 41% of the world's population may utilise abortion services without any restriction as to the reason. Whilst Australia is one of the more liberal countries in terms of its position on abortion, more than 40% of the world's population are subject to less restrictive abortion laws. More than two-thirds of the European Member States of the World Health Organisation permit abortion on request, with an even greater proportion allowing it for economic and social reasons and in cases of foetal impairment.[110]

The Center for Reproductive Rights summarised the world's abortion laws as shown in the table on the following page.

[109] Center for Reproductive Rights, 'The World's Abortion Laws', www.reproductiverights.org Accessed 15/6/05.

[110] Lazdane G, 'Abortion in Europe: ten years after Cairo', *Entre Nous*, no 59, 2005, p 4.

Abortion laws throughout the world

(note: countries also permit abortion on the grounds specified in the columns to the left)

Prohibited altogether or permitted only to save the woman's life		To preserve physical health	To preserve mental health	Socioeconomic grounds	Without restriction as to reason	
Afghanistan	Malta	Argentina	Algeria	Australia	Albania	Norway
Andorra	Marshall Islands	Bahamas	Botswana	Barbados	Armenia	Romania
Angola	Mauritania	Benin	Gambia	Belize	Austria	Russian Fed
Antigua and Barbuda	Mauritius	Bolivia	Ghana	Cyprus	Azerbaijan	Serbia and Montenegro
Bangladesh	Mexico	Burkina Faso	Hong Kong	Fiji	Bahrain	Singapore
Bhutan	Micronesia	Burundi	Israel	Finland	Belarus	Slovak Rep
Brazil	Monaco	Cameroon	Jamaica	Great Britain	Belgium	Slovenia
Brunei Darussalam	Myanmar	Chad	Liberia	Iceland	Bosnia-Herzegovina	South Africa
Central African Rep	Nicaragua	Comoros	Malaysia	India	Bulgaria	Sweden
Chile	Niger	Costa Rica	Namibia	Japan	Cambodia	Switzerland
Colombia	Nigeria	Djibouti	Nauru	Luxembourg	Canada	Tajikistan
Congo (Brazzaville)	Oman	Ecuador	New Zealand	Saint Vincent and Grenadines	Cape Verde	Tunisia
Côte d'Ivoire	Palau	Equatorial Guinea	Northern Ireland	Taiwan	China	Turkey
Dem Rep of Congo	Panama	Eritrea	Portugal	Zambia	Croatia	Turkmenistan
Dominica	Papua New Guinea	Ethiopia	Saint Kitts and Nevis		Cuba	Ukraine
Dominican Republic	Paraguay	Grenada	Samoa		Czech Rep	United States
Egypt	Philippines	Guinea	Seychelles		Dem People's Rep of Korea	Uzbekistan
El Salvador	San Marino	Jordan	Sierra Leone		Denmark	Vietnam
Gabon	Sao Tome and Principe	Kuwait	Spain		Estonia	
Guatemala	Senegal	Liechtenstein	Trinidad and Tobago		France	
Guinea-Bissau	Soloman Islands	Maldives			Fmr Yugoslav Rep	
Haiti	Somalia	Morocco			Macedonia	
Honduras	Sri Lanka	Mozambique			Georgia	
Indonesia	Sudan	Pakistan			Germany	
Iran	Suriname	Peru			Greece	
Iraq	Swaziland	Poland			Guyana	
Ireland	Syria	Qatar			Hungary	
Kenya	Tanzania	Rep of Korea			Italy	
Kiribati	Togo	Rwanda			Kazakhstan	
Laos	Tonga	Saudi Arabia			Kyrgyzstan	
Lebanon	Tuvalu	Saint Lucia			Latvia	
Lesotho	Uganda	Thailand			Lithuania	
Libya	United Arab Emirates	Uruguay			Moldova	
Madagascar	Venezuela	Vanuatu			Mongolia	
Malawi	West Ban and Gaza Strip	Zimbabwe			Nepal	
Mali	Yemen				Netherlands	

Source: Center for Reproductive Rights, 'The World's Abortion Laws', www.reproductiverights.org Accessed 15/6/05

The actual rate of abortion can vary significantly between countries. The following table compares the abortion rate for a number of western industrialised states:

Abortion rates and abortion proportions in some developed countries, 2002

Country	Abortion rate per 1000 women aged 15-44 years	Abortion proportions per 100 livebirths and abortions
Germany	7.7	15.2
The Netherlands	8.7	12.7
Finland	10.9	16.4
Norway	14.8	19.6
Canada	15.4 (2000)	24.2 (2001)
England and Wales	16.1	22.8
Sweden	19.6	25.8
Australia	19.7 (2003 estimated)	25.5 (2002 estimated)
New Zealand	21.0 (2003)	24.8 (2003)
United States	21.3 (2000)	24.5 (2000)

Source: Chan A and Sage L, 'Estimating Australia's abortion rates 1985-2003', *Medical Journal of Australia*, 182(9) May 2005, p 450.

Whilst the rate of abortion in Australia is lower than in New Zealand or the United States, it is higher than in England and Wales and Canada. It is noteworthy that many of the countries in the table with lower abortion rates have more liberal abortion laws than Australia. For example, Germany and the Netherlands.

The regulation of abortion has evolved in various ways, with many of the restrictions that previously applied in some countries being eased. According to the Center for Reproductive Rights, these countries have liberalised their abortion law in the following ways since 1995:

Country	Year	Law post change
Albania	1996	Abortion is legal without restriction as to reason during the first 12 weeks of pregnancy.
Benin	2003	Abortion is legal to save a woman's life and protect her health and in cases of rape, incest and fetal impairment.
Burkina Faso	1996	Abortion is permitted to save a woman's life and protect her health and in cases of rape, incest, and severe fetal impairment.
Cambodia	1997	Abortion is permitted without restriction as to reason during the first 14 weeks of pregnancy.
Chad	2002	Abortion is legal to save a woman's life and protect her health, as well as in cases of fetal impairment.
Ethiopia	2004	Abortion is permitted to save a woman's life and protect her health, as well as in cases of rape, incest, or fetal impairment. It is also permitted when a woman is a minor or physically or mentally injured or disabled.
Guinea	2000	Abortion is permitted to save a woman's life and protect her health, as well as in cases of rape, incest, or fetal impairment.
Mali	2002	Abortion is now legal to save a woman's life and in cases of rape and incest.
Nepal	2002	Abortion is legal without restriction as to reason during the first 12 weeks of pregnancy and thereafter on specific grounds.
South Africa	1996	Abortion is legal without restriction as to reason during the first 12 weeks of pregnancy, and thereafter on numerous grounds.
Switzerland	2002	Abortion is legal without restriction as to reason during the first 12 weeks of pregnancy and thereafter on specific grounds.

Source: Center for Reproductive Rights, *Abortion and the Law: Ten Years of Reform*, Briefing Paper, February 2005, p 2. Available from www.reproductiverights.org Accessed 15/6/05.

5.2 Canada

Prior to the 1988 decision of *R v Morgentaler* [1988] 1 SCR 30, the law relating to abortion could be found in the *Criminal Code*. However, the Supreme Court of Canada struck down the abortion law as unconstitutional in *Morgentaler*. The case involved three medical practitioners who were charged with conspiring with intent to procure abortions contrary to sections 423(1)(d) and 251(1) of the *Criminal Code*.

Section 251 of the *Criminal Code* stated:

> (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
>
> (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (3) …
>
> (4) Subsections (1) and (2) do not apply to

(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner.

Drs Morgentaler, Smoling and Scott had set up a clinic to perform abortions on women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital (required by section 251(4) of the *Criminal Code*). The doctors had also made public statements questioning the wisdom of the Canadian abortion laws and asserting that a woman has an unfettered right to choose whether abortion is appropriate in her circumstances.

A motion was entered that section 251 of the *Criminal Code* was ultra vires the Canadian Parliament as it infringed sections 2, 7 and 12 of the Charter of Rights and Freedoms. The trial judge dismissed the motion and an appeal to the Ontario Court of Appeal was unsuccessful. The jury acquitted the defendants leading the Crown to appeal to the Ontario Court of Appeal. The Court of Appeal allowed the appeal, set aside the acquittal and ordered a new trial. The matter then came before the Supreme Court of Canada.

Section 1 of the Canadian Charter of Rights and Freedoms states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Dickson CJ and Lamer J (reasons delivered by Dickson CJ) stressed that the delays caused

by section 251 created a clear risk of damage to the physical well-being of a woman as well as threatening her psychological integrity.[111] Dickson CJ stressed:

> Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.

They viewed section 251 as 'a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria'.[112] They also noted that a number of hospitals failed to satisfy the procedural requirements of section 251, as some hospitals did not have a medical staff of at least four physicians. Hospitals could avoid the provision of abortion services in various ways, as they were not under an obligation to establish a therapeutic abortion committee even if they satisfied the procedural requirements. The Court referred to the 1976 findings of the Badgley Committee that only 20% of hospitals in Canada had established a therapeutic abortion committee. This factor increased the difficulty of some women who wished to access abortion services. Dickson CJ and Lamer J subsequently concluded that:

> section 251 of the Criminal Code infringes the right to security of the person of many pregnant women. The procedures and administrative structures established in the section to provide for therapeutic abortions do not comply with the principles of fundamental justice. Section 7 of the Charter is infringed and that infringement cannot be saved under s 1.[113]

Beetz and Estey JJ (reasons delivered by Beetz J) reached a similar conclusion but for different reasons which included:[114]

- Parliament recognised in section 251 of the Criminal Code that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when the 'continuation of the pregnancy of such female person would or would be likely to endanger her life or health'.

- 'Security of the person' includes a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction.

- The procedural requirements of section 251 of the Criminal Code significantly delay pregnant women's access to medical treatment resulting in an additional

111 At para 28.

112 At para 33.

113 At para 62.

114 At para 68.

danger to their health, thereby depriving them of their right to security of the person.

- This deprivation does not accord with the principles of fundamental justice. Some of the procedural requirements of section 251 are manifestly unfair in that they are unnecessary and result in additional risks to the health of pregnant women.

- The primary objective of section 251 is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. Section 251 does not constitute a reasonable limit to the security of the person.

The Supreme Court allowed the appeal and restored the acquittals. Section 251 of the *Criminal Code* was held to infringe or deny the rights and freedoms guaranteed by section 7 of the Canadian Charter of Rights and Freedoms, and this infringement was not justified by section 1 of the Charter. The regulation of abortion is now a matter for the provinces given their jurisdiction over health.[115]

5.3 New Zealand

The statutory law relating to abortion in New Zealand is located in the *Contraception, Sterilisation and Abortion Act 1977* [116] and the *Crimes Act 1961* [117]. Abortion is defined in section 2 of the *Contraception, Sterilisation and Abortion Act* as:

> a medical or surgical procedure carried out or to be carried out for the purpose of procuring – (a) the destruction or death of an embryo or fetus after implantation; or (b) the premature expulsion or removal of an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus believed to be viable or removing a fetus that has died.

An abortion is not to be performed unless it is authorised by two certifying consultants and must be performed in a licensed institution.[118] Records of abortions must be forwarded to the Supervisory Committee.[119]

It is an offence under section 182 of the *Crimes Act* to cause 'the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being' except where it is to preserve the life of the mother. It is also an offence to unlawfully procure an abortion or to unlawfully supply the means of procuring an abortion. However, if the pregnancy is less than 20 weeks it is not unlawful to

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115 Crowley-Cyr, above n 1, p 261.

116 Sections 10 to 46.

117 Sections 182 to 187A.

118 Sections 29 and 37.

119 Section 45 *Contraception, Sterilisation and Abortion Act 1977*.

procure an abortion where:

- the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or physical or mental health of the woman; or
- there is a substantial risk that the child would be so physically or mentally abnormal as to be seriously handicapped; or
- the pregnancy is the result of incest or the person is a dependent family member under the age of 18; or
- the woman or girl is considered to be severely subnormal.

The *Crimes Act* also provides some guidance as to factors that may be taken into account when determining whether the continuance of the pregnancy would result in serious danger to the life, or physical or mental health of the woman. These factors include: whether her age is near the beginning or end of usual childbearing years; or there are reasonable grounds for believing the pregnancy is the result of sexual violation.[120] The abortion of a pregnancy of more than 20 weeks' gestation is permitted where it is necessary to save the life of the mother or to prevent serious permanent injury to her physical or mental health.

There were 18,511 induced abortions registered in New Zealand in 2003.[121] In 1994 there were 12,835.[122] Medical practitioners, nurses or other staff are not obliged to perform or assist in an abortion where they object to the procedure on grounds of conscience.[123]

5.4 United Kingdom

Section 37 of the *Human Fertilisation and Embryology Act 1990* amended section 1(1) of the *Abortion Act 1967* to provide new grounds for the lawful medical termination of pregnancy. These grounds include, where it is the opinion, formed in good faith, of two medical practitioners:

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical

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120 Section 187A(2).

121 Statistics New Zealand, 'Abortion – graph detail', www.stats.govt.nz Accessed 14/6/05.

122 New Zealand, House of Representatives, Justice and Law Reform Committee, *Inquiry into the Abortion Supervisory Committee: Report*, 1996, p 28.

123 Section 46 *Contraception, Sterilisation and Abortion Act 1977*.

or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Abortion is available up to 24 weeks of a pregnancy. It is only available in exceptional circumstances after that time. In Great Britain, 90% of abortions are conducted prior to 13 weeks and 98% before 20 weeks.[124] 22% of all registered pregnancies were terminated in England and Wales in 2001, of which 85% were terminated within the first 12 weeks.[125] According to the Royal College of Obstetricians and Gynaecologists:

> Induced abortion is one of the most commonly performed gynaecological procedures in Great Britain. Around 180,000 terminations are performed annually in England and Wales and around 12,000 in Scotland. At least a third of British women will have had an abortion by the time they reach the age of 45.[126]

Less than 1% of all registered terminations in England and Wales in 2001 were because of foetal abnormality.[127] However, this figure may not be an accurate representation of the true number as a foetus delivered between the age of 16 and 22 weeks will show signs of life and may therefore be registered as a neonatal death.[128]

A foetus does not have any legal rights or interests in English law.[129] Nor may a father challenge a lawful abortion. Petersen summarised the situation in England as follows:

> The level of public controversy in England has been relatively minimal and legal abortion is accepted as part of the health system. It must be remembered, however, that the early criminal statutes are still on the books and there is no right to abortion. The medicalisation of abortion gives medical practitioners moral agency over abortion in England.[130]

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124 Royal College of Obstetricians and Gynaecologists, *About Abortion Care: What You Need to Know*, RCOG, September 2004, p 2. www.rcog.org.uk Accessed 10/6/04.

125 Wicks E, Wyldes M and Kilby M, 'Late termination of pregnancy for fetal abnormality: medical and legal perspectives', *Medical Law Review*, 12(3) Autumn 2004, p 285.

126 Royal College of Obstetricians and Gynaecologists, 'Abortion and breast cancer', *Media release*, 11/8/00.

127 Wicks et al, above n 125, p 285.

128 Ibid.

129 Ibid, p 289.

130 Petersen, above n 74, p 323.

5.5 United States of America

5.5.1 Roe v Wade

The constitutionality of Texan criminal abortion legislation came before the US Supreme Court in *Roe v Wade*[131] in the early 1970s. The Court handed down its decision on 22 January 1973. It concerned a class action brought by Ms Roe, a pregnant single woman, who was unable to obtain a legal abortion in Texas because the continuation of the pregnancy was not seen as threatening her life. She claimed that the Texan laws were unconstitutionally vague and abridged her right to personal privacy.

Procuring or attempting an abortion was prohibited in Texas unless it was on medical advice for the purpose of saving the mother's life. The Court noted that abortions were of a hazardous nature at the time most criminal abortion laws were enacted. However, modern medical techniques had altered this situation. At the time of the Court's decision, the mortality rates for early legal abortions were as low or lower than the rates for normal childbirth.

The Due Process Clause of the Fourteenth Amendment was deemed to protect the right to privacy against state action. The Court concluded that 'the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation'.[132] The State was seen to have a legitimate interest in protecting the health of the pregnant woman and the potentiality of human life. Whilst the court did not see a need to resolve the issue of when life begins, it found that the word 'person' as used in the Fourteenth Amendment does not include the unborn.[133] The Court therefore held (at 164):

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

    (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

    (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

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131 410 US 113 (1973)

132 At 154.

133 At 158.

(c) For the stage subsequent to vitality, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Abortion became widely available after this decision, with women considered to have the right to an abortion in the first trimester.[134] Attempts have been made to limit the impact of *Roe v Wade* by regulating the procedure by which an abortion is obtained. For example, some states require minors to obtain parental consent to the procedure, and/or refuse to recognise a constitutional right to government funding for abortion. Some of these attempts have been successful. State legislatures have enacted 380 measures seen as restricting the availability of abortion since 1995.[135]

Abortion law post-Roe has been described as 'confusing and uncertain'.[136] According to one commentator, the approach of the US Supreme Court to abortion has moved through four distinct phases since the decision in *Roe*:[137]

1. *Roe* dominated the initial stage in which the constitutional right to abortion was explicitly recognised.

2. State laws that regulated abortion began to be challenged with the Supreme Court elaborating the 'contours' of the right to abortion.

3. In the third phase, the Supreme Court reversed the trend of expanding rights and began to authorise a greater range of restrictive state regulation.

4. In the most recent stage, a narrow majority of the court remains committed to the central holding of *Roe* but the test in relation to the constitutionality of the regulation of previability abortion has been revised.

5.5.2 Planned Parenthood of Southeastern Pennsylvania v Casey

An example of an attempt to restrict the circumstances in which an abortion is available is the case of *Planned Parenthood of Southeastern Pennsylvania v Casey*[138]. The US Supreme Court considered the *Pennsylvania Abortion Control Act 1982* and reached its decision on 29 June 1992. The *Pennsylvania Abortion Control Act* imposed the following requirements on a woman seeking an abortion:

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134 Petersen, above n 74, p 328.

135 Center for Reproductive Rights, www.reproductiverights.org Accessed 15/6/05.

136 *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992) at 945 (per Rehnquist CJ, White, Scalia and Thomas JJ).

137 Judges, above n 60, pp 109-110.

138 505 US 833 (1992)

- At least 24 hours prior to an abortion, the woman must be informed of the nature of the procedure, the health risks associated with abortion and childbirth, the probable gestational age of the foetus, and of the availability of certain printed materials.

- The informed consent of one parent or a guardian is required for a minor to obtain an abortion. A judicial bypass procedure is available.

- The spousal notification requirement obliges a married woman to sign a statement that she has notified her husband of her intention to obtain an abortion, unless an exception applies to the situation.

- A medical emergency, where the immediate abortion of the pregnancy is necessary to avert the death or the serious risk of substantial and irreversible impairment of a major bodily function, excuses compliance with the requirements.

- Facilities providing abortions are subject to a number of reporting requirements.

The Court reaffirmed the following aspects of the decision in *Roe v Wade*:[139]

1. Its recognition of the rights of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.

2. Its confirmation of the State's power to restrict abortions after foetal viability so long as the law contains an exception where the pregnancy endangers the woman's life or health.

3. The principle that the State has a legitimate interest in protecting the health of the woman and the life of the foetus that may become a child.

The Court also highlighted the potential ramifications of a decision to overturn *Roe* as 'an entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions'.[140]

Nonetheless, O'Connor, Kennedy and Souter JJ rejected the trimester framework established in *Roe*:

> Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favour of continuing the pregnancy to full

139 At 846 (per O'Connor, Kennedy and Souter JJ)

140 At 860 (per O'Connor, Kennedy and Souter JJ).

> term, and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.[141]

The trimester framework was seen as undervaluing the State's interest in the potential life of the foetus. These judges preferred the application of the undue burden standard to determine whether provisions were constitutional, as the right upheld in *Roe* 'protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy' but is not an unqualified constitutional right to an abortion.[142] An 'undue burden' is:

> the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus… the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.[143]

However, a State cannot prohibit a woman from making the decision to terminate a pregnancy prior to viability.

O'Connor, Kennedy and Souter JJ subsequently applied the undue burden standard to the *Abortion Control Act*. None of the provisions were found to be unduly burdensome, with the exception of the spousal notification requirement, which was accordingly deemed to be unconstitutional. They stressed the need to consider the group for whom the law is a restriction rather than those for whom it is irrelevant:

> The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.[144]

In contrast, the informed consent requirement was seen as facilitating the 'wise exercise' of the right to decide to terminate a pregnancy.[145]

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141 At 872.

142 At 874.

143 At 877.

144 At 893.

145 At 887.

5.5.3 The current legal and political climate

Petersen has compared the legal climate in the US to that in Victoria (Australia) and England.[146] Whilst changes to abortion law in England and Victoria have been gradual in contrast to the dramatic transformation in the US, abortion is publicly subsidised and available in private clinics in these places. Petersen believes that *Roe v Wade* polarised opinion in the US, to the detriment of the accessibility of abortion:

> In the United States, on the other hand, where a formal *albeit* qualified right to abortion was fashioned by the Supreme Court, public funding is greatly restricted, state legislatures continually pass restrictive regulations and abortions are becoming less accessible – particularly to indigent women.[147]

This interpretation of the impact of *Roe* on abortion law is similar to that expressed by Scalia J in *Planned Parenthood v Casey*:

> Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level, where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before Roe v Wade was decided.[148]

A recent controversial issue in the US has been attempts to ban the performance of 'partial birth' abortions. The US Supreme Court struck down a ban on partial birth abortions in Nebraska in 2000 in its decision in *Stenberg v Carhart*[149]. The Nebraskan law at the heart of the case prohibited partial birth abortions, defined as 'an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery'. The only exception was if it was necessary to 'save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself'. The term 'partial birth abortion' is usually associated with a method of abortion used after 16 weeks which involves removing the foetus feet first from the uterus through the cervix intact (the dilation and extraction method). The 'dilation and extraction' method is one of two types of procedures known as 'intact dilation and evacuation', which is itself a version of the broader 'dilation and evacuation' method most commonly used in abortions in the second trimester of pregnancy (12 to 24 weeks). The 'dilation and extraction' method is used in a minority of abortions, as approximately 90% of abortions performed in the US take place before 12 weeks gestation, and 10% between 12 and 24 weeks.

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146 Petersen, above n 74, p 314.

147 Ibid.

148 At 995.

149 530 US 914 (2000)

The US Supreme Court deemed the Nebraskan law unconstitutional. It was seen as imposing an undue burden on the right of a woman to choose an abortion, as the ability to choose a dilation and evacuation abortion was limited. The Court was critical of the lack of any exception to preserve the health of the mother, as a State cannot subject women's health to significant risks from the pregnancy itself nor from forcing them to use riskier methods of abortion. The law was seen as causing those who perform the dilation and evacuation abortion method to fear prosecution, conviction and imprisonment as the terms used in the Nebraskan statute did not adequately distinguish between 'dilation and evacuation' and 'dilation and extraction'. In reaching its decision, the Court applied the principles in *Roe v Wade* and *Planned Parenthood v Casey* (discussed in sections 5.5.1 and 5.5.2 respectively).

Stenberg v Carhart was not the end of the partial birth abortion controversy. The *Partial Birth Abortion Ban Act of 2003*, ensuring a federal ban of partial birth terminations, was subsequently passed, with President Bush signing it into law on 5 November 2003. A lawsuit has since been filed by Dr Carhart to stop the ban from taking effect.[150] Three federal district courts declared the Act unconstitutional in 2004. However, the US Government appealed to the US Court of Appeals for the Eighth Circuit, which declared the Act to be unconstitutional on 8 July 2005. The US Government may file a petition for a Supreme Court review or request a rehearing before the full Eighth Circuit.

150 For information on the federal ban of partial-birth abortions see Center for Reproductive Rights, 'Federal Abortion Ban', www.crlp.org Accessed 22/6/05.

6 CURRENT DEBATES

This section provides a brief overview of some controversial aspects of the current abortion debate. It identifies some of the issues with the present law on abortion, and examines whether abortion is best characterised as a health or criminal matter. The issues concerning the use of emergency contraception and RU486 (the abortion pill) are highlighted. The concerns surrounding late term abortions are examined, as is the use of 'bubble zone' legislation overseas.

6.1 Some of the weaknesses of the current law

Numerous observers have expressed their dissatisfaction with abortion law in Australia, irrespective of their stance on abortion. Some commentators believe that the law is too liberal whilst others argue that it is not strict enough.

In 1991, Cica identified the following as weaknesses of Australian abortion law:[151]

- *The law differs between jurisdictions resulting in greater pressure on those jurisdictions with more liberal laws.*

  This enables people to avoid the law in their home state. It can also have a discriminatory impact on women of different social and economic backgrounds. For example, some women may not be able to afford the cost of travel nor have the ability to take time off work to travel to another jurisdiction for an abortion. This situation recently occurred in 2001 when Tasmanian women were required to travel to Melbourne to obtain an abortion after doctors refused to perform terminations due to the uncertainty of the law. The availability of abortion services or lack thereof can also result in women travelling large distances to obtain an abortion. This may be due to large waiting lists for some services or the lack of facilities for women who reside in rural or remote areas.

- *The law is uncertain.*

  There is a lack of case law, and what case law does exist 'lacks weight as judicial precedent'. For example, the major abortion case in NSW is *Wald*, a decision of a single judge in the District Court.

- *There is a gap between the letter and practice of the law.*

  According to Cica, 'there is a disparity between situations where according to the law an abortion would (or probably would) be lawful, and situations where such an abortion is actually available to a woman seeking termination of her pregnancy'. This gap has existed for a number of decades. The 1977 Royal Commission on Human Relationships noted that there were concerns in the 1970s that the law was ineffective in terms of preventing abortion, as well as being disregarded and

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151 Cica, above n 37, pp 45-51.

impossible to apply.[152] Cica argues that prosecution for unlawful abortion effectively ceased in the early 1970s. However, the threat of prosecution did surface in Western Australia and Tasmania in the late 1990s despite years of non-prosecution, stimulating reform of the relevant law in those jurisdictions. It has also been reported that a NSW doctor has recently appeared before the Liverpool Local Court charged with manslaughter and administering a drug with intent to procure a miscarriage (see section 3.1).

- *The concepts of abortion law are based on the state of medical knowledge as it existed in the nineteenth and early twentieth century.*

  The means of procuring a miscarriage have changed. The care of premature babies has also improved. This has influenced the time in which a child is capable of being born alive, thus affecting the relationship between the laws on abortion and child destruction.

Cica concluded that the law governing abortion in Australia:

> is inconsistent, uncertain and unenforced. It does not adequately deal with issues posed by advances in medical technology. It fulfils no coherent guiding policy. Its priorities are not clear concerning the position of the foetus, the father, the pregnant woman and the medical profession in the abortion debate. It does not address the social and ethical dimensions of the problems posed by abortion.[153]

6.2 Is abortion a criminal or health issue?

Another debate to surface is whether abortion is best characterised as a criminal or a health issue. The curious position occupied by abortion is underlined by Albury who notes, 'In Australia, abortion has become available without being decriminalised in the sense of being removed from Crimes Acts or Criminal Codes'.[154] Teasdale has highlighted how abortion:

> continues to be the only widely practised and publicly funded medical procedure that is criminalized, yet it is one of the most common medical procedures in Australia.[155]

The Royal Commission on Human Relationships argued that abortion should be free of legal regulation when performed by a registered medical practitioner at the request of a woman.[156] According to the Royal Commission on Human Relationships, the only

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152 Royal Commission on Human Relationships, above n 6, p 143.

153 Cica, above n 37, p 65.

154 Albury, above n 45, p 114.

155 Teasdale L, 'Confronting the fear of being "caught": discourses on abortion in Western Australia', *University of New South Wales Law Journal*, 22(1) 1999, p 66.

156 This is subject to the Commission's views on the applicable time limits: Royal Commission

justification there can be for classifying an abortion as a criminal offence is if it arises from a general public concern to protect the life of the foetus.[157] It contended that:

> there seems to be no special case for the intervention of the criminal law to ensure that proper medical safeguards apply. The standards of medical practice should be sufficient to ensure that the patient's health and safety are taken care of, as in the case of any other surgical procedure, provided that the procedure is open to public scrutiny and is not performed clandestinely. Health and medical authorities have an interest in maintaining and improving the standards of health and medical care but the criminal law is not usually resorted to for this purpose.[158]

Duxbury and Ward believe that the decriminalisation of abortion would allow the quality of health care to be regulated.[159] The Australian Women's Health Network supports the location of abortion in the realm of health law. Its abortion policy states:

> Abortion should be primarily considered by legislators, policymakers and health administrators as a health and human rights issue. A woman's right to choose is in the best interests of her health.[160]
>
> All reference to abortion should be removed from the criminal laws and codes of the States and Territories of Australia. Abortion should be regulated, as are all other medical services, under the health care and medical practice legislation. There is no case for singling out the abortion procedure in any area of legislation.

Crowley-Cyr has claimed that the criminalisation of abortion indirectly discriminates against women:

> as they are the only group which is directly affected by such legislation. Therefore the conditional requirement is that pregnant women must carry the pregnancy to delivery. At least 80,000 women a year in Australia alone are having abortions and hence find themselves unable to comply with this requirement.[161]

She concludes:

> Clearly, human rights have an enormous role to play in the advancement of laws against discrimination and inequity. The application of human rights doctrine to the

on Human Relationships, above n 6, p 159.

157 Ibid, p 146.

158 Ibid.

159 Duxbury and Ward, above n 48, p 27.

160 Australian Women's Health Network, 'Australian Women's Health Network Policy – Abortion', March 2002, www.awhn.org.au Accessed 9/6/05.

161 Crowley-Cyr, above n 1, p 264.

> abortion issue presents a persuasive argument against the continued criminalisation of the procedure.[162]

Paragraph 31(c) of General Recommendation 24 of the Committee on the Elimination of all Forms of Discrimination Against Women stresses that 'when possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion'. Whilst it is not binding on Australia, it does indicate the pattern of thought at the international level and the desire for liberalisation of abortion laws.

Keown has warned of the dangers associated with the medicalisation of abortion, as it:

> raises several profound questions which are often overlooked, such as whether it really does eradicate stigma; whether social problems which underlie requests for abortion come to be classified as individual medical problems and are thereby politically defused; whether it does not encourage the surrender of personal responsibility to medical experts; and whether these experts are really qualified to make decisions about abortion.[163]

There is some evidence that there are doctors who resent the gatekeeping role they play in the provision of abortion services, as they do not believe it to be a proper part of their medical practice.[164] De Crespigny and Savulescu argue that the confusing nature of the current law on abortion in Australia also 'exposes women and their doctors to unacceptable legal risks and doctors to unacceptable professional risks'.[165]

Others have criticised the vagueness of the criminal laws in relation to abortion, arguing that the restrictions on what constitutes a lawful abortion need to be tightened. The decision of Menhennit J in *Davidson* as to the meaning of an unlawful abortion has been described as a 'loophole allowing the alarming increase in the number of abortions performed in Australia'.[166] Some fear that the decriminalisation of abortion will result in an increase in the number of abortions performed. According to Pro-Life SA:

> law has always been a great educator. A law channels behaviour, it educates, it tells the confused and the uncertain and the frightened what the community thinks is good. And if the law tells the confused, the uncertain and the frightened that abortion is good, abortion will follow.[167]

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162 Ibid, p 266.

163 Keown, above n 57, p 165.

164 National Health and Medical Research Council, *An information paper on termination of pregnancy in Australia*, Canberra, 1996, p 28.

165 De Crespigny L and Savulescu J, 'Abortion: time to clarify Australia's confusing laws', *Medical Journal of Australia*, 181(4) August 2004, p 202.

166 Pro-Life SA, 'Abortion, law and history', www.lifesa.asn.au Accessed 18/8/05.

167 Pro-Life SA, 'Abortion, law and history', www.lifesa.asn.au Accessed 18/8/05.

Queensland Right to Life depicts the decriminalisation of abortion as 'the removal of all legal protection for the nine months of life in the womb', arguing that it will result in the expansion of the abortion industry as abortion is seen as more acceptable.[168]

Nonetheless, a shift towards the location of abortion policy in health law has become apparent in recent years. Following amendments enacted in 1998, the location of the laws regarding the circumstances in which an abortion can be conducted in Western Australia shifted from the *Criminal Code* to the *Health Act 1911* (WA). Abortion has been completely decriminalised in the Australian Capital Territory, with abortion now regulated by the *Health Act 1933* (ACT).

6.3 Emergency contraception

The 'morning after' pill or emergency contraception can be used to prevent pregnancy after intercourse where no contraception was used, the contraception failed, or after sexual assault. Taking the emergency pills which contain progestogen and/or oestrogen either prevents or delays ovulation or stops a fertilised egg implanting in the uterus, but they must be taken within 72 hours of unprotected intercourse. Emergency contraception such as Postinor 2 has been available in Australia since July 2002. From 1 January 2004 onwards, Postinor 2 has been available for purchase over the counter without a prescription.[169]

Another form of emergency contraception is the insertion of an intra-uterine device (IUD) as soon as possible (up to five days) after unprotected intercourse. The IUD prevents a fertilised egg implanting in the lining of the uterus.

Some right to life groups see the use of emergency contraception as controversial as there is a possibility that in some cases the egg may already be fertilised. Emergency contraception is therefore seen as hindering the natural development of the pregnancy. In contrast, the emergency contraception policy of the Public Health Association of Australia states that:

> Hormonal emergency contraception should be available to all women to keep at home in case the need for emergency contraception ever arose, because for optimal effectiveness, EC [emergency contraception] should be commenced within 24 hours.[170]

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168 Queensland Right to Life, 'Decriminalising abortion v human life', www.qrtl.org.au Accessed 18/8/05.

169 The source for information on emergency contraception is: Victorian Government, Better Health Channel, 'Contraception – the morning after pill', www.betterhealth.vic.gov.au Accessed 21/6/05.

170 Public Health Association of Australia, ''Emergency Contraception', www.phaa.net.au Accessed 14/6/05.

6.4 The abortion pill

The use of RU486, otherwise known as mifepristone or the abortion pill, has been debated in recent years. RU486 allows for medical as opposed to surgical abortions, and is believed to be safe, effective and with few side effects.[171] It works by suppressing progesterone, the hormone that maintains the pregnancy, causing the lining of the uterus to break down. Mifepristone when used with misoprostol (a prostaglandin) results in complete expulsion of the foetus in 95% of cases without the need for subsequent surgical uterine evacuation.[172] It enables 98% of women to leave hospital within eight hours of the prostaglandin being administered. However, it is usually restricted to gestations of less than nine weeks as its efficacy declines with time.[173] The most common side effects of a medical abortion include pelvic pain, vaginal bleeding and gastrointestinal disturbance but most women return to normal activity within 24 hours.[174] RU486 is licensed for use in the United States, United Kingdom, Ireland, Norway, Finland, Denmark, France, Germany, Sweden and China.[175]

The importation of RU486 to Australia was prevented by a 1996 amendment to the *Therapeutic Goods Act*. The *Therapeutic Goods Amendment Act 1996* transferred the power to authorise the importation or registration of RU486 from the Secretary of the Department of Health to the Minister for Health.[176] RU486 is a restricted good under the *Therapeutic Goods Act* and can only be imported after approval is obtained from the Therapeutic Goods Administration and the Federal Minister for Health. It is not available in Australia at present.

Various concerns relating to the use of abortifacients like RU486 have been raised. Alison Hope of the Australian Federation of Right to Life Associations has argued that RU486: requires multiple visits to the hospital or abortion clinic; does not have a very high success rate in achieving an abortion by itself and needs to be used in conjunction with a powerful prostaglandin; and 'it can further isolate women who are often already desperate and unsupported, leaving them to undergo the abortion process and possibly face the sight of their 4-7 week old aborted child alone'. She thus concluded: 'Our society is capable of providing women who are pregnant in difficult circumstances with better, more supportive solutions than drugs such as RU-486'.[177]

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171 Saffin J, *NSWPD*, 15/11/01, p 18697.

172 Henshaw R, 'Mifepristone (RU486) and abortion', *Medical Journal of Australia*, 167(6), September 1997, p 292.

173 Ibid.

174 Ibid.

175 Lavelle P, 'No room at the inn for RU486', The Pulse – Health Matters, *ABC Online*, 18/11/04. www.abc.net.au Accessed 8/6/04.

176 Cordner S and Ettershank K, 'RU486 in Australia', *Journal of Law and Medicine*, 4(1) August 1996, p 18.

177 Australian Federation of Right to Life Associations, 'Democrat moves to reduce restrictions on RU486 condemned', *Media Release*, 1/3/01.

RU486 has been described as the 'fast abortion' with parallels drawn to other features of modern life such as 'fast food' and 'life in the fast lane'.[178] Henshaw has noted that critics of RU486 are concerned that its use will make abortions easier which could include 'easier access to safe abortion services, an easier treatment for medical and nursing staff to administer, or easier – both physically and psychologically – for the women having abortions'.[179] However, Henshaw adds that there is no evidence that the use of RU486 will increase the frequency of abortions.

A World Health Organisation sponsored trial of RU486 was conducted in Victoria in the mid 1990s.[180] 38 women who successfully used this method of abortion subsequently completed a questionnaire. The study found that satisfaction with the medical termination of pregnancy was evident, and the method facilitated a more active role for women in the process. It was also seen as being more natural and most of the women regarded the level of pain and discomfort as acceptable.

6.5 Late-term abortions

Late-term abortions can be controversial, especially as medical advances increase the likelihood of a premature baby surviving. Debate over late-term abortions is frequently tied to the issue of foetal abnormality.[181] Discussion of the merits of late-term abortions was sparked in 2000 when an abortion was carried out on an acutely suicidal woman in Victoria whose foetus suffered from skeletal dysplasia-achondroplasia (dwarfism).[182] The foetus was 31 weeks old at the time of the termination.

A 'late-term abortion' has been defined as one performed at or above 20 weeks' gestation.[183] Ellwood addresses the issue of late-term abortions from the perspective of an obstetrician.[184] He notes that for some women residing in rural and remote areas, a later diagnosis of foetal abnormality and hence the request for a late term abortion may be the result of difficulties in accessing prenatal diagnostic services. Ellwood stresses that doctors

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178 Clarke G, 'RU486 – The latest in chemical warfare', available from Pro-Life Victoria (Australia) www.prolife.org.au

179 Henshaw, above n 172, p 293.

180 Mamers P et al, 'Women's satisfaction with medical abortion with RU486', *Medical Journal of Australia*, 167(6), September 1997, pp 316-7.

181 For example, 'The great debate', *60 Minutes*, television program, Channel Nine, Sydney, 17 April 2005.

182 See, for example, De Crespigny and Savulescu, above n 165, pp 201-203; 'Hospital's "44 late abortions"', *The Australian*, 30/11/00, p 1; 'Late termination was done in good faith, says report', *Sydney Morning Herald*, 12/7/00, p 11; 'Doctors under investigation over "abortion"', *Sydney Morning Herald*, 3/7/00, p 5.

183 Ellwood, above n 11, p 139.

184 Ibid, pp 139-142.

and committees are the ones who make the decisions about late abortions. He believes that it is likely that data on late terminations would confirm 'that the numbers in the public sector are small and the indications are almost always compelling medical reasons to do with the fetal prognosis'.[185] Between 1994 and 2002, less than 2% of abortions in South Australia were performed at or subsequent to 20 weeks gestation.[186] Ellwood concludes:

> It should be acknowledged that there are often significant maternal risks associated with continuing a pregnancy in the face of certain major fetal abnormalities. If access to late terminations were limited by more restrictive abortion laws, increasing maternal morbidity arising from pregnancies with a very poor prognosis for the infant is likely – an outcome that is in no-one's best interests.[187]

In the UK, section 1(d) of the *Abortion Act 1967* provides for a legal termination of pregnancy where 'two registered medical practitioners are of the opinion, formed in good faith… that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'. No gestational limit is included in the provision. Wicks et al argue that the section is deliberately vague by using such terms as 'substantial' and 'serious' to avoid fettering the discretion of medical practitioners.[188] However, they warn:

> Medical professionals working in this area are vulnerable to legal liability in a number of contexts. These include actions for wrongful birth following a failure to advise a termination; the potential illegality of induction of labour outside the terms of the Abortion Act; and possible criminal and/or civil liability for a TOP [termination of pregnancy] resulting in a live birth.[189]

'Partial birth' abortions, a type of procedure used in the abortion of pregnancies after 16 weeks, have been the subject of much controversy in the US. It has culminated in the passage of the federal *Partial Birth Abortion Ban Act of 2003* (see section 5.5.3 for a discussion of partial birth abortions in the US). Partial birth abortions are less common in Australia. However, there have been calls for the procedure to be banned in Australia following passage of the US Act.[190]

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185 Ibid, p 141.

186 Pratt et al, above n 7, p 11.

187 Ellwood, above n 11, p 142.

188 Wicks et al, above n 125, p 292.

189 Ibid, p 305.

190 For example, Australian Federation of Right to Life Associations, 'Partial-birth abortion should be banned in Australia', *Media Release*, 6/11/03; Australian Federation of Right to Life Associations, 'Medicare funding for late abortion needs re-examination', *Media Release*, 1/11/04.

6.6 'Bubble-zones'

The use of 'bubble-zones' has emerged in a number of jurisdictions in Canada and the US in recent years to protect the staff and patients of abortion clinics from the intimidation and harassment that is a feature of some protests against abortion. A 'bubble-zone' is a defined area around an abortion clinic, and in some cases, the homes of medical practitioners working in such clinics, in which the actions and speech of a protester are limited.

An example of an operative 'bubble-zone' is in British Columbia, Canada. The preamble to the *Access to Abortion Services Act*[191] states:

> Whereas all people in British Columbia are entitled to access to health care, including abortion services; and whereas all people who use the British Columbia health care system, and who provides services for it, should be treated with courtesy and with respect for their dignity and privacy.

An access zone, which extends up to 50 metres from the boundaries of the facility, may be established for a specific abortion clinic.[192] An access zone extending 160 metres is also established by the Act for the residence of every doctor who provides abortion services and may be established for the residences of certain service providers.[193] The offices of doctors who provide abortion services are also deemed an access zone.[194]

Section 2 of the Act prohibits a person from doing any of the following whilst in an access zone:

- engaging in sidewalk interference;
- protesting;
- besetting;
- physically interfering with or attempting to interfere with a service provider, a doctor who provides abortion services or a patient;
- intimidating or attempting to intimidate a service provider, a doctor who provides abortion services or a patient.

It is also prohibited to repeatedly approach or follow another person, engage in threatening conduct, or repeatedly communicate by telephone, fax or electronic means, to dissuade the

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191 RSBC 1996, Chapter 1.

192 Section 5.

193 Section 6.

194 Section 7.

other person from providing or facilitating the provision of abortion services.[195]

In Australia, a man shot and killed the security guard at a fertility clinic in Melbourne in July 2001, although his exact motives were not known. Dean and Allanson have argued that 'bubble-zone' legislation should be introduced in Australia as it is their view that the right to freedom of speech and to protest is often privileged over the right to privacy and the right to access a health service safely and free from intimidation.[196] However, 'bubble-zone' legislation may also be seen as unnecessarily suppressing free speech, as some view it as silencing all protest, not just preventing the harassment of staff and patients. Black and Davis have argued, in relation to the legislation in British Columbia, that the use of injunctions in situations where the behaviour of protestors borders on assault or harassment is preferable to 'bubble-zone' legislation.[197] They see this as a compromise solution where the rights to protest and free speech are protected, as are the rights of the staff and patients of abortion clinics.

195 Section 4.

196 Dean R and Allanson S, 'Abortion in Australia: access versus protest', *Journal of Law and Medicine*, 11(4) May 2004, pp 510-515.

197 Black S and Davis S, 'Revisiting the bubble zone debate: Why the BCCLA should oppose bubble zone legislation', *The Democratic Commitment*, December 1999, p 5. Available from the BC Civil Liberties Association website, www.bccla.org

7 CONCLUSION

This paper has attempted to present an overview of the status of the law in New South Wales and in other Australian jurisdictions. Consideration of the position adopted by various countries reveals a tendency towards liberalisation of abortion laws worldwide. However, this is countered in some areas by attempts to increase restrictions on the availability of abortion services, such as the experience in the US. The trend in Australia has been one of decriminalisation, with the regulation of abortion being relocated to health law in some jurisdictions. The catalyst for changes to the law in Tasmania and Western Australia was the threatened prosecution of medical professionals who conducted abortions, after a history of non-prosecution.

The regulation of unlawful abortion in New South Wales may still be found in the *Crimes Act 1900*. However, prosecution of offences under sections 82 to 84 of this Act effectively ceased in the 1970s. Nonetheless, a doctor in NSW was recently charged under the *Crimes Act* and the committal hearing is expected to conclude in November 2005. NSW Health explains the legality of abortion in Australia in the following terms:

> An abortion is lawful as long as it is performed with the consent of the woman and by a qualified doctor. The doctor (or in some parts of Australia, two doctors) must have an honest belief based on reasonable grounds that the abortion is necessary to preserve the woman from serious danger to her life, or physical or mental health. The doctor considers medical, economic and social factors.[198]

The abortion debate focuses at times on particular aspects of abortion, such as recent concern with the public funding of abortions, and late-term abortions because of foetal abnormality. Nonetheless, surveys indicate that the majority of Australians continue to support the availability of abortion. The strength of the majority varies according to the particular circumstances of, and reasons for, the abortion. However, abortion and its regulation remains a controversial and complex issue.

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[198] NSW Health, *Questions Women Ask About Abortion*, NSW Health, July 2001 (Reviewed September 2004). Available from www.mhcs.health.nsw.gov.au Accessed 22/7/05.

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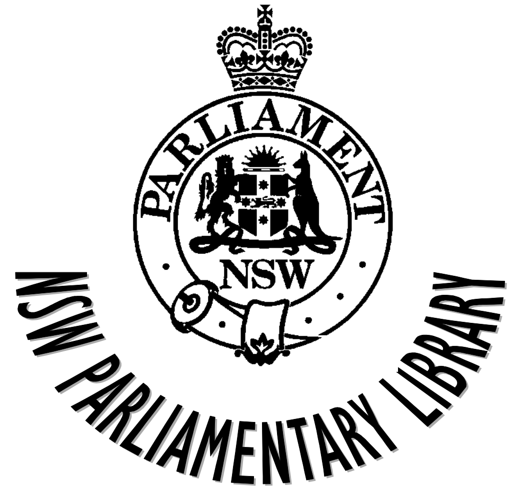

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