

Chapter 2 **Current Law**

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INTRODUCTION

- 2.1 The law of abortion¹ in Victoria is unclear. The government is considering whether new legislation, rather than a judge's ruling about the meaning of a criminal offence drawn from a 19th century British statute, should determine the lawfulness of abortion in Victoria. The terms of reference indicate a desire to modernise the law by decriminalising abortion performed by a medical practitioner and by clarifying the circumstances in which an abortion may lawfully be performed.
- 2.2 In this chapter we describe how our current law has evolved and indicate where it lacks clarity. We also describe the current law in other parts of Australia and in countries with similar legal systems. Finally, we provide a brief overview of related areas of law, such as those dealing with consent to medical treatment and substituted consent for people who lack the capacity to consent to their own treatment.
- 2.3 Laws that make abortion a serious criminal offence have been in operation since Victoria became a self-governing colony.² Those laws did not set out the circumstances in which an abortion was lawful. It has been left to the judiciary, in Victoria and elsewhere,³ to describe the circumstances in which an abortion may lawfully be performed. This happened in the late 1960s when the Victorian government of the day chose not to respond to calls for abortion law reform⁴ and when several medical practitioners were charged with performing unlawful abortions.⁵
- 2.4 During the trial of one of those doctors, the presiding Supreme Court judge, Justice Menhennitt, directed the jury about the circumstances in which an abortion was lawful.⁶ That ruling effectively changed the law in Victoria. Since that time, successive governments have permitted the 'Menhennitt rules' to become the law of abortion in Victoria by taking no action to repeal or revise the relevant provisions in the *Crimes Act 1958*. That law, which is similar to the law in many other parts of Australia,⁷ has been strongly criticised. Cica encapsulated many of those criticisms when she wrote:

*The law governing abortion in Australia has been shown to be inadequate in many ways. It 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.*⁸

- 2.5 The relevant provisions in the *Crimes Act* have not been considered by the Victorian Supreme Court since the 'Menhennitt rules' were formulated nearly 40 years ago. The rules have been considered and developed, however, by courts in other states which have similar laws to those in Victoria. Because of these developments, and the passage of time since the Menhennitt ruling, it is not possible to describe the current state of Victorian abortion law with reasonable precision. It appears that no one has been charged with performing an unlawful abortion in Victoria for 21 years.⁹

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

- 2.6 The *Charter of Human Rights and Responsibilities Act 2006* establishes a legislative framework for the protection and promotion of human rights in Victoria; however, the Charter does not affect current and future Victorian law on abortion and child destruction. This encompasses both the express terms of any statute and any judicial interpretation of statute law.¹⁰

CRIMES ACT PROVISIONS

- 2.7 There are three sections in the *Crimes Act* concerning abortion. They are sections 65 and 66, which are concerned solely with abortion, and section 10, which governs both late abortion and assaults upon pregnant women. Because these sections contain complex legal language, they are not easy to understand. Section 65 prohibits unlawful termination of pregnancy at any stage during the pregnancy. Section 66 prohibits supply of an instrument or substance knowing it will be used to unlawfully terminate a pregnancy. Section 10 prohibits unlawful

termination of a pregnancy during childbirth and in the later stages of her pregnancy. Section 10 also governs assaults on pregnant women during the later stages of pregnancy which result in damage to a fetus.

2.8 Section 65, which is headed 'Abortion', states:

*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).*

2.9 The Act does not say when it is unlawful to act in this manner. It has been left to the courts to describe the circumstances in which intentional termination of pregnancy is unlawful and, as a result, to specify when it is lawful to have an abortion.

2.10 Offences under section 65 are treated very seriously, as is demonstrated by the maximum penalty of 10 years imprisonment. Other offences with a similar maximum penalty include: causing injury; threats to kill; indecent assault; assault with intent to rape; and indecent acts with a child under 16 years.¹¹

2.11 Section 66 of the Crimes Act, which is headed 'Supplying or procuring anything to be employed in abortion', states:

Whosoever unlawfully supplies or procures any poison or other noxious thing or 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).

2.12 This section makes it a criminal offence to knowingly assist another person who intends to bring about a miscarriage in a woman (whether she is actually pregnant or not) by unlawfully supplying any poisonous substance, or instrument, or other means. While this section has not been interpreted by a Victorian court, it is highly likely that the word 'unlawfully' has the same meaning in section 66 as it does in section 65.

2.13 Versions of sections 65 and 66 have formed part of the Victorian criminal law since 1864.¹² Both sections are based on provisions in a 19th century English statute.¹³ There have been no changes of substance to these Victorian statutory provisions since they were first enacted over 140 years ago.

2.14 Section 10 of the Crimes Act, which is headed 'Offence of child destruction', states:

(1) *Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act unlawfully causes such child to die before it has an existence independent of its mother shall be guilty of the indictable offence of child destruction, and shall be liable on conviction thereof to level 4 imprisonment (15 years maximum).*

(2) *For the purposes of this section evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be **prima facie** proof that she was at that time pregnant of a child capable of being born alive.*

(3) *Where upon the trial of any person for the murder or manslaughter of any child or for **infanticide** or for any offence under section sixty-five of this Act the jury are satisfied that the person charged is not guilty of murder manslaughter or infanticide or of any offence under the said section sixty-five (as the case may be) but are satisfied that he is guilty of the indictable offence of child destruction, the jury may find him guilty of that indictable offence and he shall be liable to punishment accordingly.*

(4) *Where upon the trial of any person for the indictable offence of child destruction the jury are satisfied that the person charged is not guilty of that indictable offence but are satisfied that he is guilty of an offence under section sixty-five of this Act the jury may find him guilty of that offence and he shall be liable to punishment accordingly.*

- 1 By 'abortion' we mean an intentional termination of pregnancy brought about by the act of any person and by any means.
- 2 While the first Victorian statute was not enacted until 1864, English abortion statutes were applicable in Victoria (as the Port Phillip District of NSW) after the passage in England of the *Australian Courts Act 1828* s 24. See Kerry Petersen, *Abortion Regimes* (1993) 191; Robyn Gregory, *Corrupt Cops, Crooked Docs, Prevaricating Pollies and 'Mad Radicals': A History of Abortion Law Reform in Victoria, 1959–1974* (Unpublished PhD Thesis, RMIT University, 2005) 67. Applicable English statutes included the *Miscarriage of Women Act 1803* (known as *Lord Ellenborough's Act*), *Lord Lansdowne's Act 1828*, *Offences Against the Person Act 1828*; *Offences Against the Person Act 1861*. See Talina Drabsch, *Abortion and the Law in New South Wales* (2005) 14–15
- 3 Judicial interpretations of statutory provisions describe the circumstances in which abortions may be lawfully performed in NSW and Queensland. A similar situation existed in the UK until the Abortion Act in 1967. The law in these Australian states, and the UK, is discussed later in this chapter.
- 4 Gregory (2005) above n 2, 143–48.
- 5 Between 1961 and 1969, 16 charges were laid against doctors for abortion and about 11 charges were laid against backyard abortionists; see *ibid* 149.
- 6 *R v Davidson* [1969] VR 667.
- 7 The Victorian law is broadly similar to NSW, Queensland, and Tasmania.
- 8 Natasha Cica, 'The Inadequacies of Australian Abortion Law' (1991) 5 *Australian Journal of Family Law* 37, 66.
- 9 The last prosecution occurred in 1987. On 2 June 1987 a magistrate dismissed 11 charges of unlawfully procuring a miscarriage against a specialist, Dr Ian McGoldrick: 'McGoldrick cleared on 11 abortion counts' *The Age* (Melbourne) 3 June 1987, 3
- 10 Section 48 of the Charter expressly provides that 'nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2'.
- 11 *Crimes Act 1958* ss 18, 20, 39, 40, 47.
- 12 *Criminal Law and Practice Statute 1864* s 55.
- 13 Sections 58 and 59 in *Offences Against the Person Act 1861* (24 & 25 Vict, c 100, s 2). These offences are traceable back to a statute enacted in 1803 which is commonly known as *Lord Ellenborough's Act* (43 Geo III, c 58, s 1). There is a short history of the law of abortion in Victoria in Louis Waller: Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37. A history of abortion policy may also be found in Appendix A.



- 2.15 This section makes it a criminal offence for a person who intends to destroy the life of an unborn child capable of being **born alive** to unlawfully use any means to achieve this result. Section 10(2) creates the rebuttable presumption, for the purposes of this offence, that a woman who is at least 28 weeks pregnant is carrying an unborn child capable of being born alive. However, this does not preclude a finding, on the facts of a particular case, that a woman who has been pregnant for less than 28 weeks is carrying a child capable of being born alive.¹⁴
- 2.16 Section 10 overlaps with section 65, which covers the entire period of a woman's pregnancy. Sections 10(3) and (4) provide for alternative verdicts. Section 10(3) permits a jury to find a person guilty of child destruction when the person has been charged with murder, manslaughter or infanticide. Section 10(4) permits a jury to find a person guilty of the offence of unlawful abortion under section 65 when the person has been charged with child destruction.
- 2.17 Offences under section 10 are particularly serious, as is demonstrated by the maximum penalty of 15 years imprisonment. Other offences with a similar maximum penalty include: extortion with threat to kill; performing female genital mutilation; and causing a person to provide commercial sexual services (sexual servitude).¹⁵
- 2.18 Section 10 of the Crimes Act, which has been part of Victorian law since 1949,¹⁶ was drawn from an English statute enacted in 1929.¹⁷ The offence of child destruction was originally created in England to deal with lethal acts intentionally performed during childbirth where there was doubt about whether the child was born alive. Rather than having to establish live birth to convict a person of murder, manslaughter or infanticide, the offence of child destruction can be alternatively charged in cases of doubt.
- 2.19 While it does not appear to have been the intention of those people who prepared the initial English legislation,¹⁸ unlawfully terminating a pregnancy when a woman is carrying a child capable of being born alive falls within the ambit of both section 65 and section 10 of the Victorian Act.¹⁹ This overlap has been recognised in England²⁰ and it was rectified by legislative amendment in 1990.²¹ Section 10 has not been used in Victoria to deal with acts performed during childbirth, or for late abortion. It has been used, however, in cases involving attacks on women in the later stages of pregnancy with intent to harm the fetus.²²
- 2.20 The English statute has always contained a proviso that the offence of child destruction was not committed when an act was done in good faith with the intention of saving the life of the mother. When the offence of child destruction first became part of Victorian law in 1949, the English proviso was omitted and replaced by the word 'unlawfully'. This was a legislative attempt to ensure that Victorian medical practitioners, and courts, were granted more responsibility for determining the circumstances in which the destruction of a fetus during childbirth, or a late abortion, could be lawfully performed. It was also done to minimise the risk that the allowance for saving the life of the mother might be relied upon inappropriately.²³

MENHENNITT RULES

- 2.21 The word 'unlawfully' has not been defined in sections 10, 65 and 66 of the Crimes Act; its meaning has been left to the courts. While only section 65 has been considered by a Victorian court, it is highly likely that the word 'unlawfully' has the same meaning in section 66. While it is unlikely that the word has the same meaning when used in section 10, it is difficult to predict how a court would define 'unlawfully' if a case arose under that section.²⁴
- 2.22 The 1969 Menhennitt ruling was made during the trial of Dr Charles Davidson, who had been charged with several counts of unlawfully using an instrument with intent to procure the miscarriage of a woman.²⁵ The Menhennitt ruling in *R v Davidson* is an exercise in statutory interpretation rather than a statement about the **common law** of abortion. Justice Menhennitt was interpreting the word 'unlawfully' in a particular statutory context. To do so he looked at both the meaning given to the word by Justice Macnaghten in an earlier English case, *R v Bourne*,²⁶ when interpreting the similarly worded English statute,²⁷ and to common law principles that can assist when giving meaning to criminal law statutes.²⁸ *R v Bourne* was a case in which a leading medical specialist terminated the pregnancy of a 14-year-old girl who had been gang-raped by soldiers.

2.23 Justice Menhennitt began his ruling by setting out the circumstances in which a ‘therapeutic abortion’ would be lawful. He invoked the common law principle of necessity to reach the conclusion that a ‘therapeutic abortion’ was lawful. Although Justice Menhennitt did not expressly stipulate that only a medical practitioner could perform a therapeutic abortion, it seems clear by his use of the term ‘therapeutic’ that his remarks were limited to abortions performed by medical practitioners. He said a therapeutic abortion is lawful in the following circumstances:

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

2.24 A doctor, therefore, must honestly believe two things on reasonable grounds for an abortion to be lawful.²⁹ These are usually referred to as the elements of *necessity* and *proportionality*. First, the doctor must believe that termination of a pregnancy is *necessary* to preserve her from serious danger to her life, or to her ‘physical or mental health’. The terms ‘physical health’ and ‘mental health’ were not defined but the ruling contains the qualification that the danger to the woman’s health must extend beyond ‘the normal dangers of pregnancy and childbirth’. Secondly, the doctor must believe termination of the pregnancy to be a *proportionate* response to the serious danger faced by the woman.

2.25 Justice Menhennitt did not indicate what matters should be taken into account by a doctor when determining whether termination of a woman’s pregnancy was necessary to preserve her from serious danger to her life, or to her physical and mental health. Nor did he suggest any means by which a doctor may determine whether termination was a proportionate response to the woman’s particular circumstances.

2.26 According to Justice Menhennitt, an abortion was unlawful under section 65 of the Crimes Act when it did not fall within his description of the circumstances in which a therapeutic abortion was lawful. He set out the matters the prosecution must prove to satisfy a jury that an abortion was unlawful:³⁰

Accordingly, to establish that the use of an instrument with intent to procure a miscarriage was unlawful, the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.

2.27 This statement of the law is complex. The prosecution is required to prove one of two negative propositions to establish the mental element of the crime of abortion. The prosecution must prove beyond reasonable doubt that the accused person did not honestly believe on reasonable grounds that either:

- *it was necessary to terminate the women’s pregnancy to preserve her from serious danger³¹ to her life or to her physical or mental health; or*
- *terminating the woman’s pregnancy was a proportionate response to the need to preserve her from serious danger to her life or to her physical or mental health.*

2.28 The ruling made by Justice Menhennitt in *R v Davidson* has not been considered by a Victorian appellate court, or by the High Court of Australia. The commission is unaware of any Victorian Supreme Court judgment in which the Menhennitt rules have been considered, although a County Court judge accepted and applied them in 1972.³²

14 See, eg, *C v S* [1988] 1 QB 135; *Rance v Mid-Downs Health Authority* [1991] 1 QB 587.

15 *Crimes Act 1958* ss 27, 32, 60AB(2).

16 The *Crimes Act 1949* inserted this provision into the *Crimes Act 1928*.

17 *Infant Life Preservation Act 1929* (19 & 20 Geo 5, c 34).

18 See *R v Bourne* [1939] 1 KB 687, 691. Her Majesty’s Stationery Office, *Select Committee on the Infant Life (Preservation) Bill [HL] Special Report with Evidence*, House of Lords: Session 1986–1987 (1987); Her Majesty’s Stationery Office, *Report of the Select Committee on the Infant Life (Preservation) Bill [HL] with Evidence*, House of Lords: Session 1987–1988 (1988).

19 See, eg, *C v S* [1988] 1 QB 135 and *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, which were cases involving the equivalent provision in the UK *Infant Life Preservation Act 1929*. The offence of child destruction is discussed in more detail in Chapter 12.

20 See, eg, Ian Kennedy and Andrew Grubb, *Medical Law: Text with Materials* (2nd ed, 1994) 869, 878; P Skegg, *Law, Ethics, and Medicine: Studies in Medical Law* (1988) 5.

21 A provision was added to the *Abortion Act 1967* to clarify that the offence of child destruction could not be committed by a registered medical practitioner performing an abortion in accordance with the provisions of the Act: *Abortion Act* s 5(1), substituted by *Human Fertilisation and Embryology Act 1990* s 37(4).

22 Information provided by the Office of Public Prosecutions, 7 September 2007.

23 Section 10 is considered in more detail in Chapter 7.

24 See Chapter 7.

25 *R v Davidson* [1969] VR 667.

26 [1939] 1 KB 687; [1938] 3 All ER 615.

27 *Offences Against the Person Act 1861* s 58 (24 & 25 Vict, c 100).

28 Justice Menhennitt relied upon the common law principle of necessity: [1969] VR 667, 671.

29 While the doctor must hold the necessary beliefs on reasonable grounds, Menhennitt J emphasised that the test is subjective and not objective: *R v Davidson* [1969] VR 667, 672.

30 The physical elements of the offence are separate matters (eg that the accused person used an instrument with the intent to terminate a pregnancy).

31 As noted, the ‘serious danger’ must extend beyond the normal dangers associated with pregnancy and childbirth: *R v Davidson* [1969] VR 667, 672.

32 *R v Heath* (Unreported, County Court, Judge Southwell, 1972) in Waller (1987) above n 13, 44.



- 2.29 The Menhennitt rules do not provide the Victorian community with a clear statement about when an abortion is permissible because they were not designed for that purpose. The rules were designed for use by lawyers and jurors when the state of mind of a doctor charged with performing an unlawful abortion was a contested issue in a criminal trial.

INTERSTATE DEVELOPMENT OF THE MENHENNITT RULES

- 2.30 The Menhennitt rules have been considered in several NSW cases. While the decisions and rulings in those cases do not bind a Victorian court, it is highly likely that they would be persuasive, especially because sections 82 and 83 of the NSW *Crimes Act 1958* contain essentially the same wording as section 65 of the Victorian *Crimes Act*.³³ A majority of the High Court appeared to accept the correctness of these NSW cases in a recent decision.³⁴
- 2.31 In 1972, in *R v Wald*,³⁵ a judge of what is now the NSW District Court³⁶ followed, and elaborated upon, the Menhennitt ruling.³⁷ Judge Levine stated:

*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 at the very time she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of pregnancy, if uninterrupted. In either case such a conscientious belief on reasonable grounds would have to be negatived before an offence under s 83 of the Act could be proved.*³⁸

- 2.32 The practical effect of Judge Levine's ruling is that it identifies matters that a doctor may properly consider when determining whether that doctor holds the requisite beliefs about necessity and proportionality to lawfully terminate a pregnancy. These matters include the economic and social impact of continuing with a pregnancy. It also identifies a time period which may be taken into account by the medical practitioner when formulating those beliefs.
- 2.33 The statements made by Judge Levine in *R v Wald* have been approved by NSW courts in subsequent cases.³⁹ The most important is *CES v Superclinics (Australia) Pty Ltd* in which all three members of the NSW Court of Appeal accepted that *Wald* contained a correct statement of the law in NSW.⁴⁰ The question of the lawfulness of an abortion arose indirectly in *Superclinics*, which was an action in negligence by a woman (*CES*) against a medical practice for failure to diagnose her pregnancy. The plaintiff claimed that she would have terminated the pregnancy if the defendants had informed her she was pregnant. The trial judge dismissed the plaintiff's claim because he held that it would not have been lawful for her to have had an abortion at the time she consulted the defendants for medical advice.
- 2.34 When considering the circumstances in which an abortion was lawful, the trial judge⁴¹ and two of the three members of the NSW Court of Appeal⁴² accepted the correctness of *Wald* without any elaboration. Acting Chief Justice Kirby also accepted the correctness of the *Wald* test but referred to 'one anomaly in the test to which I must draw attention'. He stated:

*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.⁴³

- 2.35 The decision of the NSW Court of Appeal in *Superclinics* was appealed to the High Court but the case was settled before the court's determination.⁴⁴ However, the High Court referred to the decision in *Superclinics* with apparent approval in the 2006 case *Harriton v Stephens*.⁴⁵ That case was a so-called 'wrongful life' action in negligence. Justice Crennan made passing reference to the abortion law in NSW and referred to the judgment of Acting Chief Justice Kirby in *Superclinics* with apparent approval.⁴⁶ Three of the other members of the High Court expressly agreed with the judgment of Justice Crennan,⁴⁷ and Justice Hayne made a similar passing reference to abortion law in NSW.⁴⁸ The other two members of the court, Justices Kirby and Callinan, decided the case without reference to abortion law.
- 2.36 Consequently, it is arguable, but by no means settled beyond doubt, that a majority of the High Court has endorsed Justice Kirby's comments in *Superclinics*. Justice Kirby approved the *Wald* test and extended it so that the medical practitioner may take into account dangers to the woman's health both during and after the pregnancy. It is likely, but not certain, that if a Victorian court were called upon to interpret section 65 of the Crimes Act it would adopt the Menhennitt rules as developed by Judge Levine in *Wald* and by Justice Kirby in *Superclinics*.

ABORTION LAW IN OTHER AUSTRALIAN JURISDICTIONS

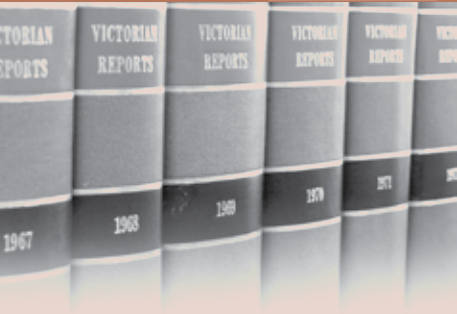
NEW SOUTH WALES

- 2.37 The provisions in the NSW Crimes Act that deal specifically with abortion are effectively the same as those in Victoria except that the offence of child destruction has never been part of NSW law.⁴⁹
- 2.38 A medical practitioner was recently convicted in NSW of the offence of unlawful abortion. In that case, *R v Sood*, Justice Simpson accepted that the statements made by Judge Levine in *Wald* and developed by Justice Kirby in *Superclinics* were a correct statement of the law.⁵⁰ The trial judge found Dr Sood guilty of unlawful abortion because the jury accepted that she could not have formed the requisite beliefs about necessity and proportionality for the abortion to be lawful because there was no conversation, or other form of communication, between the doctor and her patient which would have allowed her to form these beliefs.⁵¹ Dr Sood, who was subsequently deregistered as a medical practitioner,⁵² received a non-custodial sentence.⁵³

QUEENSLAND

- 2.39 The law in Queensland is broadly similar to the current Victorian law. Abortion is a criminal offence for the person performing the abortion, the woman undergoing the abortion, and anyone knowingly supplying drugs or implements for an abortion.⁵⁴ However, the *Criminal Code 1899* also provides a statutory defence: if the abortion was for the preservation of the mother's life, performed in good faith, with reasonable care and skill, and was reasonable having regard to the patient's state at the time and all the circumstances of the case.⁵⁵
- 2.40 The ruling of Judge McGuire in *R v Bayliss and Cullen* confirmed that the Menhennitt ruling applies in Queensland;⁵⁶ however, Judge McGuire excluded consideration of the social and economic effects of continuing with the pregnancy, which had been permitted in NSW following the decision in *R v Wald*.⁵⁷ This ruling was affirmed by a single judge of the Supreme Court in *Veivers v Connolly*: a civil case.⁵⁸ There have been no prosecutions of doctors for abortion offences since 1986.⁵⁹
- 2.41 The offence of child destruction exists in Queensland but the wording is different to the Victorian offence. The Criminal Code provides that it is a crime to prevent a child from being born alive 'when a woman is about to be delivered of a child'.⁶⁰ It is also an offence to unlawfully assault a pregnant woman and destroy the life of, or cause grievous bodily harm or transmit a serious disease to, a child 'before its birth'.⁶¹

- 33 The NSW Act deals separately with a woman taking steps to unlawfully procure her own miscarriage: s 82 and with a third person unlawfully taking those steps: s 83.
- 34 *Harriton v Stephens* (2006) 80 ALJR 791.
- 35 (1971) 3 DCR (NSW) 25.
- 36 Then called the Quarter Sessions.
- 37 Judge Levine expressly approved of the decision in *R v Davidson* before making the quoted remarks: (1971) 3 DCR (NSW) 25, 29.
- 38 (1971) 3 DCR (NSW) 25, 29.
- 39 See *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47; *R v Sood* (Ruling No 3) [2006] NSWSC 762.
- 40 (1995) 38 NSWLR 47.
- 41 Newman J.
- 42 Priestley and Meagher JJA.
- 43 (1995) 38 NSWLR 47, 60.
- 44 Loane Skene, *Law & Medical Practice: Rights, Duties, Claims & Defences* (2nd ed, 2004) 352.
- 45 (2006) 80 ALJR 791.
- 46 (2006) 80 ALJR 791, 838 [246].
- 47 Gleeson CJ, Gummow and Heydon JJ.
- 48 (2006) 80 ALJR 791, 827 [177].
- 49 *Crimes Act 1958* (NSW), ss 82–84.
- 50 *R v Sood* (Ruling No 3) [2006] NSWSC 762, [30]–[42].
- 51 *R v Sood* [2006] NSWSC 1141, [23]–[25].
- 52 In *Re Suman Sood* (2006) No 774 of 2005 New South Wales Medical Tribunal decision <www.nswmb.org.au/system/files/f10f20/o585/SOOD.pdf> at 12 February 2008.
- 53 *R v Sood* [2006] NSWSC 1141.
- 54 *Criminal Code 1899* (Qld) ss 224–226. The maximum penalties are 14 years imprisonment for a person performing a termination, 7 years for a woman having a termination, and 3 years for supplying drugs or instruments.
- 55 *Criminal Code 1899* (Qld) s 282.
- 56 *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8.
- 57 *R v Wald* [1971] 3 DCR (NSW) 25.
- 58 *Veivers v Connolly* [1995] 2 Qd R 326.
- 59 Parliament of Australia Parliamentary Library, *Abortion Law in Australia*, Research Paper 1 1998–99 (31 August 1998) 24. A search of reports since 1998 reveals no prosecutions.
- 60 *Criminal Code 1899* (Qld) s 313(1).
- 61 *Criminal Code 1899* (Qld) s 313(2).



SOUTH AUSTRALIA

2.42 While the law in South Australia is similar to current Victorian law, there are important points of difference. The South Australian law is based upon the UK *Abortion Act 1967*. Even though unlawful abortion is a criminal offence, there is specific provision in the legislation for therapeutic abortion. Section 82A of the *Criminal Law Consolidation Act 1935* provides that an abortion is lawful when two medical practitioners form the opinion that either:

- *continuing the pregnancy would involve greater risk of injury to the physical or mental health of the woman, or involve greater risk to the life of the woman than termination; or*
- *there is a substantial risk that the child, if born would suffer from such physical or mental abnormality as to be seriously handicapped.*⁶²

When determining the risk to the woman’s life, physical or mental health by continuing with a pregnancy, practitioners may take into account ‘the pregnant woman’s actual or reasonably foreseeable environment’.⁶³ The terms ‘physical or mental abnormalities’ and ‘seriously handicapped’ have not been defined. In situations of urgency, where ‘the termination is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman’, the opinion of only one medical practitioner is required for the abortion to be lawful.⁶⁴

- 2.43 Abortions must be carried out in a hospital or a prescribed facility.⁶⁵ A woman must have resided in South Australia for a minimum of two months for the abortion to be lawful unless the grounds relied upon are fetal abnormality, or immediate threat to the life or the health of the woman.⁶⁶
- 2.44 South Australia has a complex ‘child destruction’ provision within its abortion laws. The first of the grounds for lawful abortion—risk to the life or health of the woman—does not apply when a woman is pregnant with ‘a child capable of being born alive’, unless the abortion was performed to save the mother’s life.⁶⁷ For the purposes of that provision, there is a rebuttable presumption that a pregnancy of 28 weeks or more is **prima facie** proof that the child is capable of being born alive.⁶⁸
- 2.45 It remains a crime punishable by imprisonment for life for any person to perform an abortion unless the procedure is a therapeutic abortion authorised by law. This includes a woman performing her own abortion.⁶⁹ Procurement or supply of instruments or substances, knowing that these will be used for an unlawful abortion, carries a penalty of up to three years imprisonment.⁷⁰
- 2.46 No person is under a duty to participate in an abortion procedure when they have a **conscientious objection**, unless such treatment is necessary to save the life of the woman or prevent grave injury to her physical or mental health.⁷¹

NORTHERN TERRITORY

- 2.47 Northern Territory legislation sets out the circumstances in which abortion is lawful and unlawful. The offences of abortion and of supplying things for the purpose of procuring an abortion remain within the *Criminal Code Act*.⁷² However, the circumstances in which an abortion is lawful are now set out in the *Medical Services Act*.⁷³ Abortions performed outside the provisions of the Medical Services Act are a criminal offence.⁷⁴
- 2.48 The Medical Services Act provides that therapeutic abortion is lawful in some circumstances. Different rules apply to different gestation periods. Abortion is permissible up to 14 weeks gestation if two medical practitioners believe that continuing with the pregnancy would cause greater harm to a woman’s mental or physical health than abortion, or if the child would be ‘seriously handicapped because of physical or mental abnormalities’.⁷⁵ These terms are not defined. Abortion is lawful up to 23 weeks gestation if a medical practitioner believes that it is immediately necessary to prevent serious harm to a woman’s physical or mental health.⁷⁶ Abortion is also lawful at any time if a medical practitioner believes that it should be performed

for the sole purpose of preserving a woman's life.⁷⁷ In all circumstances, therapeutic abortion is lawful only when appropriate consent has been given and the treatment is carried out in good faith and with professional care.⁷⁸

- 2.49 There is an offence of killing an unborn child in the Criminal Code Act. This offence may be committed when a 'woman or girl is about to be delivered of a child' and any person prevents the child from being born alive.⁷⁹

WESTERN AUSTRALIA

- 2.50 Western Australian abortion law was reformed in 1998.⁸⁰ The reforms followed a review of the *Health Act 1911* and the *Criminal Code Act Compilation Act 1913*, that was precipitated by the arrest and charge for unlawful abortion of two doctors in early 1998.⁸¹ The legislative changes in Western Australia were subject to review three years after coming into effect⁸² and the report was completed in 2002.⁸³

- 2.51 Abortion is a criminal offence in Western Australia unless authorised by section 334 of the Health Act.⁸⁴ It is lawful for a medical practitioner to perform an abortion up to 20 weeks gestation in the following circumstances:

- *the woman has given informed consent; or*
- *the woman 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 is causing serious danger to the woman's physical or mental health.*⁸⁵

'Informed consent' is defined at some length in the legislation and specific provisions apply to women under 16 years of age.⁸⁶ The procedure must be carried out by a medical practitioner 'in good faith and with reasonable care and skill'.⁸⁷

- 2.52 Abortion beyond 20 weeks is lawful when two medical practitioners drawn from a statutory panel of six agree that the mother or the fetus has a 'severe medical condition' that justifies the procedure.⁸⁸ The term 'severe medical condition' is not defined. Women cannot appeal the decision of the medical panel.⁸⁹ Abortions must be performed in an approved facility.⁹⁰ The Health Act stipulates that no person or institution is under a duty to participate in the performance of an abortion.⁹¹ A **notification scheme** applies for all abortions.⁹²

- 2.53 The consequences of performing an unlawful abortion are different depending upon whether the person performing the procedure is a medical practitioner. Medical practitioners face a maximum penalty of \$50 000.⁹³ A person who is not a medical practitioner is liable to five years imprisonment.⁹⁴

- 2.54 A general statutory defence applies to the crime of unlawful abortion. A person is not criminally responsible for administering surgical or medical treatment to a person for their benefit, or to an unborn child for the preservation of the mother's life, if the administration of the treatment is reasonable. The test is an inclusive one, 'having regard to the patient's state at the time and to all the circumstances of the case'. The procedure must also be undertaken in good faith and with reasonable care and skill.⁹⁵

- 62 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a).
- 63 *Criminal Law Consolidation Act 1935* (SA) s 82A(3).
- 64 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(b).
- 65 *Criminal Law Consolidation Act 1935* (SA) s 82A(1).
- 66 *Criminal Law Consolidation Act 1935* (SA) s 82A(2).
- 67 *Criminal Law Consolidation Act 1935* (SA) s 82A(7).
- 68 *Criminal Law Consolidation Act 1935* (SA) s 82A(7),(8).
- 69 *Criminal Law Consolidation Act 1935* (SA) s 81.
- 70 *Criminal Law Consolidation Act 1935* (SA) s 82.
- 71 *Criminal Law Consolidation Act 1935* (SA) ss 82A(5)–(6).
- 72 *Criminal Code Act* (NT) ss 208B, 208C.
- 73 The law was reformed in 2006; see *Medical Services Act* (NT) s 11.
- 74 *Criminal Code Act* (NT) ss 208B, 208C. In both cases the maximum penalty is 7 years imprisonment.
- 75 *Medical Services Act* (NT) s 11(1).
- 76 *Medical Services Act* (NT) s 11(3).
- 77 *Medical Services Act* (NT) s 11(4).
- 78 *Medical Services Act* (NT) ss 11(4), (5), (7).
- 79 *Criminal Code Act* (NT) s 170.
- 80 *Amendment (Abortion) Act 1998* (WA).
- 81 The prosecutions were withdrawn, see Skene (2004) above n 44, 349.
- 82 *Amendment (Abortion) Act 1998* (WA) s 8.
- 83 See *Acts Amendment (Abortion) Act 1998 Review Steering Committee [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* (2002).
- 84 *Criminal Code Act Compilation Act 1913* (WA) s 199.
- 85 *Health Act 1911* (WA) s 334(3).
- 86 *Health Act 1911* (WA) ss 334(5), 334(8)–(11).
- 87 *Criminal Code Act Compilation Act 1913* (WA) s 199(1)(a).
- 88 *Health Act 1911* (WA) s 334(7).
- 89 *Acts Amendment (Abortion) Act 1998 Review Steering Committee [Western Australia]* (2002) above n 83, 33.
- 90 Both the panel of six medical practitioners and the approval of the medical facilities are made by the Minister for Health for the purposes of s 334(7).
- 91 *Health Act 1911* (WA) s 334(2).
- 92 *Health Act 1911* (WA) ss 335, 335(5) (b).
- 93 *Criminal Code Act Compilation Act 1913* (WA) s 199(2).
- 94 *Criminal Code Act Compilation Act 1913* (WA) s 199(3).
- 95 *Criminal Code Act Compilation Act 1913* (WA) s 259.

- 2.55 There is an offence of killing an unborn child in the Criminal Code Act which has the same wording as the equivalent provision in the Northern Territory. This offence may be committed when a 'woman or girl is about to be delivered of a child' and any person prevents the child from being born alive.⁹⁶

TASMANIA

- 2.56 While unlawful abortion is a criminal offence in Tasmania, the *Criminal Code Act 1924* provides that therapeutic abortion is legally justified in some circumstances.⁹⁷ The Tasmanian Criminal Code was amended in 2001 to clarify the circumstances in which a therapeutic abortion would be lawful.⁹⁸
- 2.57 Abortion is permissible when two medical practitioners certify that continuation of the pregnancy would involve greater risk of injury to the woman's physical or mental health than abortion, and when the woman gives informed consent. 'Informed consent' is defined as: consent given by a woman after she has received counselling from her doctor about the medical risks associated with abortion or continuation of the pregnancy, and a referral to counselling about 'other matters relating to termination of pregnancy and carrying a pregnancy to term'.⁹⁹
- 2.58 The Criminal Code contains an offence of causing the death of a child before birth. The offence occurs when a person 'causes the death of a child which has not become a human being in such a manner that he would have been guilty of murder if such child had been born alive'.¹⁰⁰ There is a statutory exception that applies when the death is caused by actions taken in good faith to preserve the mother's life before or during childbirth.¹⁰¹

AUSTRALIAN CAPITAL TERRITORY

- 2.59 Abortion law was reformed in the ACT in 2002. The *Crimes (Abolition of Offence of Abortion) Act 2002* repealed the statutory and **common law offences** of abortion in the ACT thereby decriminalising abortion.¹⁰²
- 2.60 Abortion is treated by law in the same way as any other medical procedure, subject to Part 6 of the *ACT Health Act 1993*, which now regulates the practice. The Act defines abortion as 'causing a woman's miscarriage by administering a drug; or using an instrument; or any other means'.¹⁰³ Only a doctor may carry out an abortion.¹⁰⁴ A person must not carry out an abortion except in an approved medical facility, or part of a medical facility.¹⁰⁵ No person is under a duty to perform an abortion. People are also entitled to refuse to assist in carrying out the procedure.¹⁰⁶ A woman seeking or receiving an abortion faces no legal sanction.
- 2.61 There is an offence of child destruction in the ACT *Crimes Act 1990*.¹⁰⁷ It applies when a person unlawfully prevents a child from being born alive, or contributes to the child's death 'by any act or omission occurring in relation to a childbirth'. The word 'unlawfully' is not defined. There is an allied offence of intentionally or recklessly causing grievous bodily harm to a child, before it is born alive, during childbirth.¹⁰⁸

COMMON LAW

- 2.62 Abortion has been regulated by statute in Victoria since 1864 and in England since 1803.¹⁰⁹ While some abortions were made unlawful by the common law before the creation of the statutory offences, the extent to which abortion was prohibited before 1803 is unclear.
- 2.63 It appears that abortion after '**quickening**'¹¹⁰ was a common law offence.¹¹¹ In the most recent English judicial consideration of the law of abortion, Justice Munby stated:

*Four features of the common law may be noted: first, that the common law envisaged the commission of offences by both the woman carrying the 'child' and others who took action resulting in its death; secondly, that those offences (constituting only 'mispriison' or 'misdemesnor' and not felony) were not capital; thirdly, that no offence could be committed unless and until there was a 'child'; and, fourthly, that for this purpose there had to be 'quickening'.*¹¹²

2.64 It is strongly arguable that any common law offences in Victoria have been swept aside by the enactment of sections 10, 65 and 66 of the Crimes Act.; however, it may be open to a judge to find that the common law offence was revived by the repeal of the Crimes Act provisions unless legislation made it clear that this was not the intention of parliament. As there is so much uncertainty surrounding the scope of the old common law offence of procuring an abortion, it would be prudent to stipulate that it has been abolished and cannot be revived. The commission has therefore included such a provision in each of its models for reform.¹¹³

ABORTION LAW OVERSEAS

UNITED KINGDOM

2.65 The legal regulation of abortion in the UK is complex. Abortion is governed by the *Abortion Act 1967* and by two criminal law statutes.¹¹⁴ Criminal law prohibitions apply to any abortion that is not performed in compliance with the Abortion Act. Abortion is lawful when two medical practitioners have the same opinion in relation to at least one of the following matters:

- *that the pregnancy has not exceeded its twenty-fourth week¹¹⁵ 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*
- *that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or*
- *that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or*
- *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.¹¹⁶*

The last three grounds apply regardless of gestational age.

2.66 The terms 'physical or mental abnormalities' and 'seriously handicapped' are not defined. When dealing with the grounds involving risk to the physical or mental health of a pregnant woman, medical practitioners may consider a 'woman's actual or reasonably foreseeable environment'.¹¹⁷ That term is not defined. A medical practitioner must perform the procedure in a hospital.¹¹⁸ In cases where an abortion is 'immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman', the opinion of a second medical practitioner is not

- 96 *Criminal Code Act Compilation Act 1913* (WA) s 290.
- 97 *Criminal Code Act 1924* (Tas) ss 134–135, 164.
- 98 *Criminal Code Amendment Act (No 2) 2001* (Tas).
- 99 *Criminal Code Act 1924* (Tas) s 164(9).
- 100 *Criminal Code Act 1924* (Tas) s 165(1).
- 101 *Criminal Code Act 1924* (Tas) s 165(2).
- 102 The *Health Regulations (Maternal Health Information) Act 1998* (ACT), which compelled certain information to be provided to women seeking a termination, was also repealed in 2002. The *Termination of Pregnancy Act 1978* (ACT) had previously been repealed in 1992.
- 103 *Health Act 1993* (ACT) s 80.
- 104 *Health Act 1993* (ACT) s 81. The maximum penalty for someone other than a doctor performing an abortion is five years imprisonment.
- 105 *Health Act 1993* (ACT) s 82. The maximum penalty for performing an abortion elsewhere is 50 penalty units, imprisonment for six months, or both.
- 106 *Health Act 1993* (ACT) s 84.
- 107 *Crimes Act 1900* (ACT) s 42.
- 108 *Crimes Act 1900* (ACT) s 43.
- 109 See Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, 39–40.
- 110 This is defined to mean 'the moment in pregnancy at which the first movements of the fetus are felt by the mother, usually in the fourth or fifth month': *Butterworths Medical Dictionary* (2nd ed, 1978) 1424–5.
- 111 Waller (1987) above n 13, 37–40.
- 112 *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610, [83].
- 113 See Chapter 6.
- 114 *Offences Against the Person Act 1861* (UK) ss 58, 59; *Infant Life (Preservation) Act 1929* (UK) ss 1, 2. There is further complexity in the law as there is inconsistency between countries. The Abortion Act applies in England, Scotland and Wales, but does not apply in Northern Ireland. The Infant Life Preservation Act only applies in England and Wales and the Offences Against the Person Act applies in England, Wales and Northern Ireland. See House of Commons, Science and Technology Committee, *Scientific Developments Relating to the Abortion Act 1967: Twelfth Report of Session 2006–07: Volume 1* HC 1045–1 (2007); D Capper, 'The Condition of Abortion Law in Northern Ireland' (2003) 54(3) *Northern Ireland Legal Quarterly* 320.

115 The 24-week upper gestational limit was introduced by an amendment to the Abortion Act by the *Human Fertilisation and Embryology Act 1990* (UK) s 37(1). The *Births Deaths and Registrations Act 1953* (UK) requires all stillborn children to be registered if born without signs of life after 24 weeks. See *Births and Deaths Registration Act 1953* (UK) s 41.

116 *Abortion Act 1967* (UK) s 1(1).

117 *Abortion Act 1967* (UK) s 1(2).

118 *Abortion Act 1967* (UK) s 1(3). A medical practitioner is not required to perform an abortion within a hospital should it be immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health. See *Abortion Act 1967* (UK) s 1(4).

necessary.¹¹⁹ A doctor is not required to participate in any abortion procedure if he or she has a conscientious objection, unless it is required to save the life of the pregnant woman or prevent grave permanent injury to her physical or mental health.¹²⁰

- 2.67 An abortion that is not performed within the requirements of the Abortion Act is a criminal offence. Two separate, but overlapping, statutes—the *Offences Against the Person Act 1861* and the *Infant Life (Preservation) Act 1929*—govern unlawful abortions. The Offences Against the Person Act deals with all unlawful abortions, while the Infant Life (Preservation) Act deals with late abortions and acts of feticide during childbirth.
- 2.68 Section 58 of the Offences Against the Person Act makes it an offence to ‘unlawfully procure a miscarriage’ by administering ‘any poison or other noxious thing’ or using any instrument ‘with intent to procure the miscarriage of any woman’.¹²¹ While the term ‘miscarriage’ is not defined, it has been held that the ‘pill’, the ‘morning-after pill’ and intrauterine devices are not **abortifacient** substances that cause a ‘miscarriage’.¹²² This offence may be committed by a pregnant woman and by a third party.
- 2.69 It is also an offence to ‘unlawfully’ supply an instrument, poison or other noxious thing knowing it is to be used to procure an abortion.¹²³ The meaning of the word ‘unlawfully’ was originally determined by case law, most notably *R v Bourne*,¹²⁴ however, the case law is no longer applicable because section 5(2) of the Abortion Act now provides that any abortion not in accordance with that Act is unlawful.
- 2.70 The Infant Life (Preservation) Act makes it an offence to ‘destroy the life of a child capable of being born alive’ unless the act which caused the death of the child was done in good faith to preserve the life of the mother.¹²⁵ If a woman has been pregnant for 28 weeks or more, the child is presumed to be capable of being born alive.¹²⁶ The law was changed in 1990 to make it clear that this criminal offence is subject to the provisions in the Abortion Act.¹²⁷ Section 5(1) of the Abortion Act now provides that a medical practitioner who performs an abortion in accordance with that Act does not commit an offence under the Infant Life (Preservation) Act.
- 2.71 Aspects of UK abortion law have recently been reviewed by a parliamentary committee. In 2007, the House of Commons Science and Technology Committee released its report *Scientific Developments Relating to the Abortion Act 1967*. The terms of reference asked the committee to gather scientific and medical evidence from witnesses about the 24-week upper time limit on abortions in some circumstances. The committee considered developments in medical interventions and examined evidence concerning fetal viability. It focused on neonatal survival rates and fetal viability, fetal consciousness and pain, and the reasons why women present for late abortions. The committee recommended no change to the upper gestation limit of 24 weeks that applies in some circumstances.

NEW ZEALAND

- 2.72 The law governing abortion in New Zealand is similar to the law in the UK. The *Crimes Act 1961* not only prohibits unlawful abortion but also sets out the grounds upon which a doctor may perform a lawful abortion.¹²⁸ The *Contraception, Sterilisation and Abortion Act 1977* sets out the procedures medical practitioners must follow when authorising an abortion.¹²⁹
- 2.73 The law draws a distinction between abortions performed before and after 20 weeks gestation. An abortion is lawful before 20 weeks gestation if two medical practitioners believe:¹³⁰
- *That the continuance of the pregnancy would result in serious danger to the life, or to the physical or mental health, of the woman; or*¹³¹
 - *That there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped;*¹³² or
 - *That the pregnancy is the result of incestuous sexual intercourse; or*
 - *That the woman or girl is severely subnormal within the meaning of section 138(2) of this Act.*

An abortion is only lawful after 20 weeks gestation if two medical practitioners believe the abortion is necessary to save the life of the woman, or to prevent serious permanent injury to her physical or mental health.¹³³

- 2.74 Abortions cannot be lawfully performed unless authorised by two medical practitioners,¹³⁴ one of whom must be a practising obstetrician and gynaecologist.¹³⁵ Facilities in which abortions are performed must be licensed.¹³⁶ A doctor can lawfully refuse to perform an abortion on the grounds of conscience but has an obligation to refer the woman for assessment when requested.¹³⁷

CANADA

- 2.75 Abortion is not separately regulated by law in Canada. In 1988 the Canadian Supreme Court held that the provisions in the Criminal Code which prohibited abortion were invalid because they were in conflict with the 'right to life, liberty and security of the person' enshrined in the *Canadian Charter of Rights and Freedoms*.¹³⁸ At the time, section 251 of the Canadian Criminal Code made abortion a criminal offence punishable by life imprisonment. However, it provided an exception when a hospital's therapeutic abortion committee accepted a medical practitioner's opinion that continuation of a woman's pregnancy would endanger her life or health.

- 2.76 The Canadian Supreme Court struck down these provisions because they failed to conform with principles of fundamental justice contained in the Charter. The court found the abortion committee requirement to be arbitrary and incapable of being applied in a fair and consistent manner across the country; it was therefore unconstitutional.¹³⁹

- 2.77 Chief Justice Dickson stated:

At the most basic physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense.

- 2.78 Since this decision in *Morgentaler* 20 years ago, no legislation has been passed which separately regulates abortion consistent with the *Canadian Charter of Rights and Freedoms*.¹⁴⁰ Consequently, abortion has been regulated in Canada since 1988 by the body of law that governs all other medical procedures.

UNITED STATES

- 2.79 Abortion is regulated by a combination of federal and state law in the United States (US). While criminal law and health law are primarily state matters, there have been many US Supreme Court decisions about abortion over the past 35 years. These have concerned the extent to which a woman's right to terminate her pregnancy is protected by the right to privacy in the Bill of Rights and, conversely, the extent to which state law may regulate abortion without infringing that right.

- 2.80 In the well-known case of *Roe v Wade*,¹⁴¹ the Supreme Court decided that the right to privacy, drawn from the 'due process' clause in the US Constitution's 14th amendment, allowed a woman to have an abortion in the early stages of her pregnancy without state interference. The court held that the reach of this privacy protection diminishes as the pregnancy progresses, thereby permitting some legislative regulation of late abortions. The principles to be drawn from *Roe v Wade* were described in a subsequent case:

It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a

- 119 *Abortion Act 1967* (UK) s 1(4).
 120 *Abortion Act 1967* (UK) s 4(1), (2).
 121 Section 65 of the Victorian Crimes Act is based upon this provision.
 122 *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC; [2002] 2 FLR 146; [2002] 2 FCR 193.
 123 *Offences Against the Person Act 1861* (UK) s 59. Section 66 of the Victorian Crimes Act is based upon this provision.
 124 [1939] 1 KB 687; [1938] 3 All ER 615.
 125 *Infant Life (Preservation) Act 1929* (UK) s 1.
 126 *Infant Life (Preservation) Act 1929* (UK) s 2.
 127 *Human Fertilisation and Embryology Act 1990* (UK) s 37(4).
 128 *Crimes Act 1961* (NZ) ss 183, 186, 187A.
 129 *Contraception, Sterilisation and Abortion Act 1977* (NZ) ss 32, 33.
 130 *Crimes Act 1961* (NZ) s 187A(1).
 131 When determining whether continuance of the pregnancy would result in serious danger to the life or to the physical or mental health of the woman, the medical practitioners may take into account 'the age of the woman or girl concerned is near the beginning or the end of the usual child-bearing years' or whether there are 'reasonable grounds for believing that the pregnancy is the result of sexual violation': *Crimes Act 1961* (NZ) s 187A(2).
 132 The key terms are not defined.
 133 *Crimes Act 1961* (NZ) s 187A(3).
 134 *Contraception, Sterilisation and Abortion Act 1977* (NZ) s 29. Doctors apply for a licence through the Abortion Supervisory Committee, a committee established under s 10.
 135 *Contraception, Sterilisation and Abortion Act 1977* (NZ) s 32(2)(b)(i).
 136 *Contraception, Sterilisation and Abortion Act 1977* (NZ) s 21.
 137 *Contraception, Sterilisation and Abortion Act 1977* (NZ) s 46.
 138 *R v Morgentaler* [1988] 1 SCR 30.
 139 The increased risk to the woman due to delay caused by committee approval, and needing four physicians, meant that abortion would be unavailable in almost 25% of Canadian hospitals: Dickson CJ.
 140 The Canadian Government introduced a less restrictive bill to re-criminalise abortion post *Morgentaler* (Bill C-43) which was passed by the Commons but defeated in the Senate on a tied vote in 1991. The former provisions remain on the statute books but are not operative having been struck down by the Supreme Court.
 141 410 US 113 (1973).

woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.¹⁴²

Subsequent cases have dealt with the extent to which the state may impose preconditions upon access to abortion services and regulate abortion procedures without violating the *Roe v Wade* principles.¹⁴³

- 2.81 The regulation of abortion differs markedly from state to state in the US. Some states impose strict criminal prohibitions upon abortion after fetal viability, while others legislatively affirm a woman's qualified right to obtain an abortion. Many have a two-staged approach. Abortion is regulated in the same way as any other medical procedure in the earlier stages of pregnancy but then a line is drawn. In New York abortion is not regulated before 24 weeks gestation; in California it is before viability. In the later stages of pregnancy there must be threats to the life or health of the woman for abortion to be lawful in both states.
- 2.82 In other states the dividing line for the two-staged approach to regulation is drawn much earlier. In Texas, for example, abortions after 16 weeks gestation cannot be performed unless the woman has received a substantial amount of information, including coloured pictures of a fetus at various stages throughout a pregnancy. An abortion cannot be performed in Texas after viability unless it is necessary to prevent the death or substantial risk of serious impairment to the physical or mental health of the woman, or the fetus has a severe and irreversible abnormality.

RELATED LEGAL ISSUES

CONSENT TO TREATMENT

- 2.83 As abortion is performed as a medical or surgical procedure, it is appropriate to describe briefly the current law concerning consent to treatment by adults, young people and people unable to provide their own consent because of disability.
- 2.84 The common law governs consent to treatment by both adults and children in Victoria. There is also a statutory scheme which regulates consent to medical treatment by adults who do not have the capacity to provide consent. Master of the Rolls Lord Donaldson has provided a concise statement of the common law requirements for consent to treatment by an adult:

The law requires that an adult patient who is mentally and physically capable of exercising a choice must consent if medical treatment of him [sic] is to be lawful, although the consent need not be in writing and may sometimes be inferred from the patient's conduct in the context of the surrounding circumstances. Treating him without his consent or despite a refusal of consent will constitute the civil wrong of trespass to the person and may constitute a crime ...

The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that capacity, but it is a presumption which can be rebutted. This is not a question of the degree of intelligence or education of the adult concerned. However a small minority of the population lack the necessary mental capacity due to mental illness or retarded development ... This is a permanent or at least a long term state. Others who would normally have that capacity may be deprived of it or have it reduced by reason of temporary factors, such as unconsciousness or confusion or other effects of shock, severe fatigue, pain or drugs being used in their treatment.¹⁴⁴

- 2.85 In Victoria the *Guardianship and Administration Act 1986* establishes a **substitute decision-making** regime for people who lack capacity to provide consent. It operates when an adult person with a short- or long-term disability is unable to make a broad range of decisions, and there is a need for another person to have the lawful authority to make those decisions. This includes decisions about medical treatment. In most instances, a person referred to in the legislation as the 'person responsible' is permitted to make medical treatment decisions.¹⁴⁵ That person may be a guardian, a primary carer, or a close relative of the person who is unable to make the decision.¹⁴⁶

- 2.86 There are some medical decisions that cannot be made by the person responsible. These decisions concern a 'special procedure', which is defined in the legislation as including 'termination of pregnancy'.¹⁴⁷ Consent for a special procedure is valid only when given by the Victorian Civil and Administrative Tribunal (VCAT).¹⁴⁸ VCAT may give its consent to a special procedure only when it is satisfied that: the person concerned is incapable of giving consent; that capacity is unlikely to return within a reasonable time; and when the procedure would be in the person's best interests.¹⁴⁹ The Public Advocate, who is sometimes appointed to assist VCAT in applications for consent to a special procedure, has published detailed practice guidelines to assist those involved.¹⁵⁰
- 2.87 There is no fixed age at which a child or young person may consent to his or her own medical treatment under the common law. A case-by-case determination is made about whether a young person possesses sufficient intellectual capacity and emotional maturity to consent to a particular treatment. This rule, which was first devised by the House of Lords in *Gillick v West Norfolk AHA*,¹⁵¹ has been endorsed by the High Court. In *Marion's case*, Justice McHugh stated:
- Until recently, it was doubtful whether at common law a minor could validly consent to the carrying out of a medical procedure. It is now established that if a minor has the requisite capacity, he or she may do so. A minor has that capacity where he or she possesses sufficient intellectual capacity and emotional maturity to understand the nature and consequences of the procedure to be performed. Consequently, if a minor lacks the intellectual capacity and emotional maturity required to understand the nature and consequences of a medical procedure, his or her agreement to the carrying out of that procedure will be of no effect.*¹⁵²
- 2.88 The common law permits parents to give consent when a child or young person lacks the capacity to do so and the treatment is in their best interests. Justice McHugh explained the operation of the law in *Marion's case*:
- [T]he common law would be socially unacceptable and deserving of condemnation if its doctrines led to the result that, in the absence of an emergency, the carrying out of an ordinary medical procedure on a minor constituted an assault whenever the minor lacked the capacity to consent to the procedure. Consequently, the common law has conferred power upon a parent who has the lawful custody of a minor to give a lawful consent to the carrying out of medical procedures on that minor ...*
- A parent has no authority ... to consent to medical treatment unless it can be seen objectively that the treatment is for the welfare of the child. If a parent purports to give consent to treatment which is not for the welfare of the child, the consent is of no effect. A person who acts on such 'consent' is guilty of assaulting the child if the treatment involves any physical interference with the child. Moreover, the parent's authority is at an end when the child gains sufficient intellectual and emotional maturity to make an informed decision on the matter in question.*¹⁵³
- 2.89 In some states the common law rules have been augmented by legislation. This legislation permits young people above a particular age to consent to their own medical treatment and allows for the consent of one parent when young people are below a particular age. In NSW, for example, young people aged 14 years and over are presumed to be capable of consenting to medical treatment. Consent provided by the parent of a young person who is under 16 years of age is also presumed to be a valid consent.¹⁵⁴ There are no such legislative provisions in Victoria, so the common law tests apply.
- 2.90 The law governing consent to medical treatment by adults, children, young people, and people who do not have the capacity to provide their own consent because of disability is clear and appears to operate well in practice. The commission believes there is no demonstrated need to consider any changes to this body of law in the context of abortion law reform.¹⁵⁵

142 *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 846 (1992).

143 *Roe* established a trimester approach, whereby the State's interest becomes more compelling the further the pregnancy advances. It also held that in matters of bodily integrity the court must have a high degree of scrutiny. See also *Planned Parenthood of South Eastern Pennsylvania v Casey* 505 US 833 (1992), *Stenberg, Attorney-General of Nebraska, et al v Carhart* 530 US 914 (2000); *Gonzales, Attorney General v Carhart et al* 550 US ___(2007). All of the relevant cases are discussed in Graham Gee, 'Regulating Abortion in the United States after *Gonzales v Carhart*' (2007) 70 (6) *Modern Law Review* 979.

144 *In re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782, 787, 796.

145 *Guardianship and Administration Act* 1986 s 39(1)(b).

146 *Guardianship and Administration Act* 1986 s 37.

147 *Guardianship and Administration Act* 1986 s 3.

148 *Guardianship and Administration Act* 1986 s 39(1)(a).

149 *Guardianship and Administration Act* 1986 s 42E.

150 Office of the Public Advocate, *OPA Practice Guidelines Special Procedures* (2005) Office of the Public Advocate <www.publicadvocate.vic.gov.au> at 21 February 2008.

151 [1986] AC 112.

152 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, 311.

153 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, 311–312, 316.

154 *Minors (Property and Contracts) Act* 1970 (NSW) s 49. This body of law is being reviewed by the NSW Law Reform Commission.

155 See Chapter 8.

