



Victorian
Law Reform
Commission

The Law of Abortion

Information Paper

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Victorian Law Reform Commission

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Call for Submissions

Call for Submissions

The Victorian Law Reform Commission invites your comments on this Information Paper.

How to Make a Submission

A submission should be made in writing. There is no particular form or format you need to follow, however, it would assist the commission if you address the Terms of Reference and the questions listed at the end of the paper.

Written submissions may be forwarded by:

- Mail: PO Box 4637, GPO Melbourne Vic 3001
- Email: law.reform@lawreform.vic.gov.au
- Fax: 8619 8600

Assistance in Making a Submission

- if you require an interpreter; or
- if you require some other assistance to have your views on these issues heard, please telephone the commission on 8619 8619.

Confidentiality

Submissions are public documents and may be accessed by any member of the public.

If you want your submission to remain confidential, you must clearly advise us whether:

- you want your submission to be quoted or sourced but your name not to be disclosed; or
- you do not want your submission to be quoted or sourced to you in a commission publication.

Deadline for receipt of submissions

9 November 2007

Terms of Reference

The Law Governing Termination of Pregnancy

I, Rob Hulls MP, Attorney-General for the State of Victoria, refer aspects of the law governing termination of pregnancy to the Victorian Law Reform Commission. The commission is to provide advice on options to:

1. Clarify the existing operation of the law in relation to terminations of pregnancy.
2. Remove from the *Crimes Act 1958* offences relating to terminations of pregnancy where performed by a qualified medical practitioner(s).

In providing this advice the commission should have regard to the following:

- A. Existing practices in Victoria concerning termination of pregnancy by medical practitioners.
- B. Existing legal principles that govern termination practices in Victoria.
- C. The Victorian Government's commitment to modernise and clarify the law, and reflect current community standards, without altering current clinical practice.
- D. Legislative and regulatory arrangements in other Australian jurisdictions.

The commission should report no later than 28 March 2008.

Background:

The *Crimes Act 1958* (Vic) provides that it is a criminal offence to bring about, or to attempt to bring about, or to assist a person to bring about, an unlawful termination of pregnancy. The circumstances in which termination of pregnancy is lawful has been left to judicial determination.

For many years in Victoria a woman has been able to lawfully seek a termination of her pregnancy by a medical practitioner in certain circumstances. Nearly 40 years have passed, however, since the primary Victorian case which explained the operation of the law and described the circumstances in which a termination of pregnancy would be lawful.

It is essential that the law is modernised, clear and widely understood. This reference is designed to provide the government with recommended options to have in place clear laws which reflect current clinical practice and community standards. The government's aim is that reform should neither expand the extent to which terminations occur, nor restrict current access to services.

Our Process

The terms of reference for this review are set out on page four and can be found on our website. The terms of reference ask the commission to provide advice on options to:

- clarify the operation of the current law in relation to termination of pregnancy
- decriminalise terminations performed by qualified medical practitioners.

The commission is to have regard to: current practices concerning termination of pregnancy by medical practitioners; the existing law in Victoria and other Australian jurisdictions; the government's commitment to modernise and clarify the law; and reflect current community standards without altering current clinical practice.

The review is to be completed by 28 March 2008. The commission is committed to inclusive law reform processes and, though it will necessarily take place over a short period of time, will undertake broad consultation on the issues raised by this review.

From October 2007 the commission will meet with medical practitioners, health service providers, churches and faith groups, decriminalisation proponents and opponents, legal practitioners, medical ethicists and academics.

An expert medical panel will be established in October for the commission to consult on current clinical practice.

To allow time for the commission to consider submissions before deciding on recommendations, submissions about legislative options for decriminalisation must be provided before 9 November 2007. Submissions can be made by post, email or telephone.

The purpose of this paper is to set out the law in Victoria and laws in other Australian states and territories to provide comparison. As the commission is to report to government on 28 March 2008, it is not possible to produce a consultation paper or options paper for this review. However, we intend this paper to provide sufficient information about the current law to inform people who wish to make submissions.

THE LAW OF ABORTION

1. Introduction

1.1 The law of abortion¹ in Victoria is unclear.

1.2 While the *Crimes Act 1958* prohibits 'unlawful' abortion, this was interpreted during a criminal trial in 1969 to mean that an abortion may be lawfully performed in some circumstances. That ruling, made by Justice Menhennit in *R v Davidson*,² was widely accepted as an accurate statement of the law concerning abortion at the time it was made. The ruling appears to have guided clinical practice in Victoria for many years.

1.3 The relevant provisions in the *Crimes Act* have not been considered by the Victorian Supreme Court since the 'Menhennit 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 the Victoria. Because of these developments, and the passage of time since the Menhennit ruling, it is not possible to clearly and accurately describe the current state of Victorian law concerning abortion.

1.4 The data concerning the prevalence of abortion is also unclear. Some leading academic commentators suggest that more than 100 000 abortions are performed in Australia each year.³ However, 'it is impossible to accurately quantify the number of abortions which take place in Australia'.⁴ This is due to significant limitations of existing data sources.⁵ For example, Medicare data may be both under and over inclusive.⁶

2. Crimes Act Provisions

2.1 There are two specific sections in the *Crimes Act* concerning abortion and one concerning 'child destruction'. These sections contain complex legal language and are not easy to understand. The three sections regulate different activities and different stages of a woman's pregnancy. In summary, section 65 prohibits unlawful termination

¹ By 'abortion' we mean an intentional termination of a pregnancy brought about by the act of any person and by any means.

² [1969] VR 667. The statement of the law in that case has become widely known as the Menhennit rules'.

³ See eg L Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (2nd ed, 2004) 349.

⁴ Angela Pratt, Amanda Biggs and Luke Buckmaster, *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) 2.

⁵ Data sources include Medicare statistics produced by the Health Insurance Commission, hospital separations data and extrapolations from South Australian data. Hospital separations data refers to the number of episodes of care given to inpatients—this is available from the Australian Institute of Health and Welfare. Extrapolations are made from South Australian data because comprehensive data on terminations is collected in that state. However, using this as a basis of extrapolation is problematic as both the law and practice of termination of pregnancy may differ between jurisdictions.

⁶ The Medicare item numbers used capture a broader range of procedures than terminations, including those associated with miscarriage. To complicate matters further, different Medicare codes are used depending upon the stage of pregnancy. Medicare statistics refer only to procedures for which a rebate has been claimed.

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 woman's pregnancy. Section 10 prohibits unlawful termination of a woman's pregnancy during childbirth and in the later stages of her pregnancy. This is discussed later in the paper.

Abortion Offences

2.2 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).

2.3 The Act does not describe the circumstances in which it is *unlawful* to act in this manner. It has been left to the courts when interpreting the section to describe the circumstances in which intentional termination of pregnancy is *unlawful*.

2.4 Offences under section 65 are treated very seriously, 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.⁷

2.5 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).

2.6 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.

2.7 Versions of both sections 65 and 66 have formed part of the Victorian criminal law since 1864.⁸ Both sections are based on provisions in a nineteenth-century English statute.⁹ There have been no changes of substance to Victoria's statutory provisions

⁷ *Crimes Act 1958* ss 18, 20, 39, 40, 47.

⁸ *Criminal Law and Practice Statute 1864* s 55.

⁹ Sections 58 and 59 in *Offences Against the Person Act 1861* (24 & 25 Vict, c 100, s 2). These offences are traceable, in turn, back to a statute enacted in 1803 which is 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 an article by a former Law Reform

since they were first enacted over 140 years ago. There are broadly similar provisions in New South Wales (NSW), Queensland and South Australia.

3. Menhennit Rules

3.1 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, and there are very few cases to consider. 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' in a case that arose under that section.¹⁰

3.2 In all of the relevant cases in Victoria and elsewhere, judges have attempted to define 'unlawfully' by first describing lawful conduct. The touchstone for determining whether a person's conduct is lawful is his or her state of mind, or belief, at the time the conduct occurred. The reasoning of the courts has been that if the conduct does not fall within the description of lawful conduct, it is then unlawful conduct prohibited by the relevant section of the Crimes Act.¹¹

3.3 In 1969 a Victorian Supreme Court judge, Justice Menhennit, delivered a ruling on the meaning of the word 'unlawfully' in section 65 of the Crimes Act. The ruling was made during the trial of a medical practitioner, Dr Charles Davidson, who had been charged with a number of counts of unlawfully using an instrument with intent to procure the miscarriage of a woman.¹² Justice Menhennit based his ruling on one made in a similar context in an English case in 1938. In that case a leading medical specialist terminated the pregnancy of a 14-year-old girl who had been gang-raped by a number of soldiers.¹³

3.4 The Menhennit ruling is not a statement about the common law of abortion but an exercise in statutory interpretation. Justice Menhennit was interpreting the word 'unlawfully' in a particular statutory context. To do so, he looked at both the meaning given to the word by an English judge when interpreting the relevant English statute and to common law principles that can assist when giving meaning to criminal law statutes.

3.5 Justice Menhennit began his ruling by setting out the circumstances in which a 'therapeutic abortion' would be lawful. He did not expressly stipulate that only a medical practitioner could perform a therapeutic abortion, though 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

Commissioner, Professor Louis Waller: Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash Law Review* 37.

¹⁰ See [3.11].

¹¹ It is necessary, of course, to prove the other elements of the offence in question.

¹² *R v Davidson* [1969] VR 667.

¹³ *R v Bourne* [1939] 1 KB 687.

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.

3.6 A doctor must therefore honestly believe two things on reasonable grounds for an abortion to be lawful. These are usually referred to as the elements of *necessity* and *proportionality*. First, the doctor must believe that termination of a woman's 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'.

3.7 Secondly, the doctor must believe termination of the pregnancy to be a *proportionate* response to the serious danger faced by the woman. Justice Menhennit did not indicate what 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 for a doctor to determine whether termination was a proportionate response to the woman's particular circumstances.

3.8 According to Justice Menhennit, an abortion that did not fall within his description of the circumstances in which a therapeutic abortion was lawful was unlawful under section 65 of the Crimes Act. He set out the matters the prosecution must prove to satisfy a jury that an abortion was unlawful:¹⁴

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.

3.9 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 either that:

- it was necessary to terminate the woman's pregnancy to preserve her from serious danger 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.

¹⁴ The other elements of the offence are separate matters (eg that the accused person used an instrument with the intent to terminate a woman's pregnancy).

As noted, the 'serious danger' must extend beyond the normal dangers associated with pregnancy and childbirth.

3.10 The rulings made by Justice Menhennit in *R v Davidson* have 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 Menhennit rules have been considered. The Menhennit rules were accepted and applied by a County Court judge in 1972.¹⁵

Offence of Child Destruction

3.11 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.

3.12 This section makes it a criminal offence for a person to intend to destroy the life of an unborn child capable of being born alive by *unlawfully* using any means to achieve this result. Section 10(2) of the Crimes Act creates the rebuttable presumption, for the purposes of an offence under section 10(1) that a woman who has been pregnant for 28 weeks or more is carrying a 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.¹⁶

¹⁵ *R v Heath* (Unreported, County Court, Judge Southwell, February 1972) in Waller (1987) above n 9, 44.

¹⁶ See eg *C v S* [1988] 1 QB 135; *Rance v Mid-Downs Health Authority* [1991] 1 QB 587.

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.

3.13 Offences under section 10 are particularly serious, 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).¹⁷

3.14 Section 10 of the Crimes Act, which has been part of Victorian law since 1949,¹⁸ was drawn from an English statute enacted in 1929.¹⁹ 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 in order to convict a person of murder, manslaughter or infanticide, the offence of child destruction can be alternatively charged in cases of doubt.

3.15 While it does not appear to have been the intention of those people who prepared the initial English legislation,²⁰ 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.²¹ This overlap has been recognised in England²² and it was rectified by legislative amendment in 1991.²³ Section 10 has not been used in Victoria to deal with acts performed during childbirth, or for 'late-term' abortion. It has been used, however, in cases involving attacks on women in the later stages of pregnancy with intent to harm the foetus.²⁴

3.16 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 foetus during childbirth, or a late-term 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.²⁵

¹⁷ *Crimes Act 1958* ss 27, 32, 60AB(2).

¹⁸ The *Crimes Act 1949* inserted this provision into the *Crimes Act 1928*.

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

²⁰ See *R v Bourne* [1939] 1 KB 687, 691.

²¹ 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*.

²² See eg. I Kennedy and A Grubb, *Medical Law: Text with Materials* (2nd ed, 1994) 869, 878; PDG Skegg, *Law, Ethics and Medicine: Studies in Medical Law* (revised ed, 1988) 5.

²³ 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 a termination of pregnancy in accordance with the provisions of the Act: *Abortion Act 1967* s 5(1), substituted by *Human Fertilisation and Embryology Act 1990* s 37(4).

²⁴ Information provided by the Office of Public Prosecutions, 7 September 2007.

²⁵ See Victoria, *Parliamentary Debates*, Legislative Council, 11 May 1949, 1252–1253 (Archibald Fraser); Waller (1987) above n 9, 41.

3.17 The meaning of the word 'unlawfully' in section 10 of the Crimes Act has not been considered by a Victorian court. It is unlikely, however, that the word has precisely the same meaning in that section as it does in the Menhennit rules. This is because 'potential life' is not one of the factors which must be considered when determining whether conduct is 'unlawful' for the purposes of sections 65 and 66,²⁶ but it is a factor which may arise for consideration when construing the word unlawful for the purposes of section 10. The elements of necessity and proportionality in the Menhennit rules are directed towards the interests of the woman alone. These are beliefs which must be honestly held by a medical practitioner on reasonable grounds for the conduct otherwise prohibited by sections 65 and 66 to be lawful.

3.18 Section 10 seems concerned, however, with the interests of a potential life as well as those of a pregnant woman, unless there is a risk to the woman's life. In those circumstances it is highly unlikely that foetal interests would have to be considered for an act of termination to be lawful. When the risk to the woman falls short of death, however, it appears the medical practitioner must determine whether termination is a necessary and proportionate response to the health risk faced by the woman and consider the interests of a foetus that has a potential life, before termination of the foetus would be lawful. This is a balancing task of extraordinary complexity, especially in the absence any guidance from a court about how to weigh the competing considerations.

4. Common Law

4.1 Abortion has been regulated by statute in Victoria since 1864 and in England since 1803.²⁷ While it seems clear that some abortions were rendered unlawful by the common law before the creation of the statutory offences, the extent to which the common law prohibited abortion is unclear.

4.2 It appears that late-term abortion—terminating a pregnancy after 'quickening'²⁸—was a common law offence.²⁹ It is strongly arguable that any common law offences have been swept aside by the enactment of sections 10, 65 and 66 of the Crimes Act. However, if changes were made to the relevant provisions in the Crimes Act it is possible that a court could find that the common law offence had been revived unless legislation made it clear that this was not the intention of parliament.

26 The rationale for these statutory offences may have changed over time. Professor Waller has written that the legislative intention of the original UK statute of 1803 was 'to protect women from being forced to undergo abortions'. He states that by 1861 the UK legislation 'deals with abortion from the standpoint of protecting the foetus rather than the mother, and of doing so on moral grounds': Waller (1987) above n 9, 40. When describing the same UK law almost a century later Professor Glanville Williams wrote: 'The chief evil of an abortion is no longer thought to be the loss of the unborn child, but the injury done to the mother by the unskilled abortionist': G Williams, *The Sanctity of Life and the Criminal Law* (1958) 146.

27 See Waller (1987) above n 9, 39–40.

28 This is defined to mean 'the moment in pregnancy at which the first movements of the foetus are felt by the mother, usually in the fourth or fifth month': *Butterworths Medical Dictionary* (2nd ed, 1978) 1424–5.

29 Waller (1987) above n 9, 37–40.

5. Human Rights Charter

5.1 The *Charter of Human Rights and Responsibilities Act 2006* established a legislative framework for the protection and promotion of human rights in Victoria. The charter includes a series of rights based largely upon the *International Covenant on Civil and Political Rights 1966*. Australia ratified this treaty in 1980.

5.2 Some people take the view that termination of pregnancy raises human rights, including the right to life, privacy and security of the person.³⁰ 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.³¹

6. Other Australian Jurisdictions

New South Wales

6.1 There have been a number of NSW cases which have considered the meaning of that state's laws regulating abortion. While the decisions and rulings in those cases do not bind a Victorian court, it is highly likely they would be persuasive. Sections 82 and 83 of the NSW *Crimes Act 1958* contain essentially the same wording as section 65 of the Victorian Crimes Act,³² and a majority of the High Court appeared to approve these NSW cases in a recent decision.³³

6.2 In 1972, in *R v Wald*,³⁴ the Chief Judge of what is now the NSW District Court³⁵ followed, and elaborated upon, the ruling given by Justice Menhennit in *Davidson*:

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 negated before an offence under s 83 of the Act could be proved.

6.3 A difficulty with the *Wald* comments is that they are expressed as a negative. While they relate to what the prosecution must prove to establish that the accused medical practitioner did not hold the belief which rendered the act of terminating a

³⁰ *Charter of Human Rights and Responsibilities Act 2006* ss 9, 13, 21.

³¹ 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'.

³² 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.

³³ *Harriton v Stephens* (2006) 80 ALJR 791.

³⁴ (1971) 3 DCR (NSW) 25.

³⁵ Then called the Quarter Sessions.

woman's pregnancy lawful, they also provide information about what may be taken into account when determining whether an abortion is lawful. The practical effect of Chief Judge Levine's ruling is that it identifies matters that a medical practitioner may properly consider when determining whether he or she holds the requisite belief about the matters of necessity and proportionality to lawfully terminate a woman's pregnancy. It also identifies a time period which may be taken into account by the medical practitioner when formulating that belief.

6.4 Justice Michael Kirby pointed out in a later case that: 'The *Wald* test ... allows a consideration of the economic demands on the pregnant woman and the social circumstances affecting her health when considering the necessity and proportionality of a termination ... [and] 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*"'.³⁶

6.5 The statements made by Chief Judge Levine in *R v Wald* have been approved by NSW courts in subsequent cases.³⁷ The most important case 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 relevant law in NSW.³⁸ 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 she was pregnant. The plaintiff claimed she would have terminated the pregnancy if the defendants had informed her she was pregnant when she consulted them for medical advice. The trial judge dismissed the plaintiff's claim because he held that it would not have been lawful for her to have had her pregnancy terminated at the time she consulted the defendants for medical advice.

6.6 When considering the circumstances in which an abortion was lawful, the trial judge³⁹ and two of the three members of the NSW Court of Appeal⁴⁰ 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

³⁶ *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 60.

³⁷ 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.

³⁸ (1995) 38 NSWLR 47.

³⁹ Newman J.

⁴⁰ Priestley and Meagher JJA.

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.⁴¹

6.7 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.⁴² However, the High Court referred to the decision in *Superclinics* with apparent approval in the 2006 case *Harriton v Stephens*.⁴³ That case was a so-called 'wrongful life' action in negligence. Justice Crennan made passing reference to the law concerning termination of pregnancy in NSW and referred to the judgment of Acting Chief Justice Kirby in *Superclinics* with apparent approval.⁴⁴ Three of the other members of the High Court expressly agreed with the judgment of Justice Crennan⁴⁵ and Justice Hayne made a similar passing reference to the law concerning termination of pregnancy in NSW.⁴⁶ The other two members of the court, Justices Kirby and Callinan, decided the case without reference to the law concerning termination of pregnancy.

6.8 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 the medical practitioner may take into account dangers to the woman's health both during and after the pregnancy.

Queensland

6.9 In Queensland, unlawful termination of a pregnancy is a criminal offence for the person performing the termination, the woman undergoing the termination, and anyone knowingly supplying drugs or implements for a termination.⁴⁷ However, the Criminal Code also provides a statutory defence if the termination 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.⁴⁸

6.10 The ruling of Judge McGuire in *R v Bayliss and Cullen* confirmed that the Menhennit ruling applies in Queensland.⁴⁹ 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*.⁵⁰ This ruling was

⁴¹ (1995) 38 NSWLR 47, 60.

⁴² Skene (2004) above n 3, 352.

⁴³ (2006) 80 ALJR 791.

⁴⁴ (2006) 80 ALJR 791, 838 [246].

⁴⁵ Gleeson CJ, Gummow and Heydon JJ.

⁴⁶ (2006) 80 ALJR 791, 827 [177].

⁴⁷ *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.

⁴⁸ *Criminal Code 1899* (Qld) s 282.

⁴⁹ *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Rep 8.

⁵⁰ *R v Wald* [1971] 3 DCR (NSW) 25.

affirmed by a single judge of the Supreme Court in *Veivers v Connolly*: a civil case.⁵¹ There have been no prosecutions of doctors for abortion offences since 1986.⁵²

6.11 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'.⁵³ It is also an offence to unlawfully assault a pregnant woman and destroy the life of, cause grievous bodily harm or transmit a serious disease to a child 'before its birth'.⁵⁴

South Australia

6.12 Medical termination of pregnancy in South Australia is regulated by section 82A, *Criminal Law Consolidation Act 1935*. This requires two qualified medical practitioners to personally examine the woman and then be of 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.⁵⁵

6.13 When determining the risk to the woman's life, physical or mental health, the practitioners may take into account both actual and reasonably foreseeable factors.⁵⁶

6.14 Terminations of pregnancy must be carried out in a hospital or a prescribed facility.⁵⁷ If the grounds used to justify the termination are 'greater risk to life, physical or mental health than continuing with the pregnancy' a woman must have resided in South Australia for a minimum of two months for the termination to be lawful.⁵⁸

6.15 South Australia has an offence of destroying 'the life of a child capable of being born alive' contained within the provisions about medical termination of pregnancy. For the purposes of that section, 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.⁵⁹ However, in South Australia a termination will be lawful if the procedure is carried out in good faith and for the purposes of saving the mother's life.⁶⁰

6.16 It remains a crime punishable by imprisonment for life for a person other than a qualified medical practitioner to perform an abortion. This includes a woman self-

⁵¹ *Veivers v Connolly* [1995] 2 Qd R 326.

⁵² 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.

⁵³ *Criminal Code 1899* (Qld) s 313(1).

⁵⁴ *Criminal Code 1899* (Qld) s 313(2).

⁵⁵ *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a).

⁵⁶ *Criminal Law Consolidation Act 1935* (SA) s 82A(3).

⁵⁷ *Criminal Law Consolidation Act 1935* (SA) s 82A(1).

⁵⁸ *Criminal Law Consolidation Act 1935* (SA) s 82A(2).

⁵⁹ *Criminal Law Consolidation Act 1935* (SA) s 82A(7), (8).

⁶⁰ *Criminal Law Consolidation Act 1935* (SA) s 82A(7).

administering an abortion.⁶¹ Procurement or supply of instruments or substances, knowing that these will be used for an unlawful termination carries a penalty of up to three years imprisonment.⁶²

6.17 No person is under a duty to participate in a termination procedure when they have a conscientious objection unless such treatment is necessary to save the life of the woman, or to prevent grave injury to her physical or mental health.⁶³

Northern Territory

6.18 The Northern Territory reformed its abortion laws in 2006 by redrafting the relevant statutory provisions concerning the circumstances in which abortion was lawful and unlawful. While the offences of procuring abortion and supplying things for the purpose of procuring an abortion are still included in the *Criminal Code*,⁶⁴ the circumstances in which an abortion is lawful are set out in the *Medical Services Act*.⁶⁵

6.19 The *Medical Services Act* provides for medical termination in some circumstances if appropriate consent has been given, and the treatment is carried out in good faith and with professional care.⁶⁶ Termination is permissible up to 14 weeks if continuing with the pregnancy would cause greater harm to a woman's mental or physical health than termination, or if the child would be seriously handicapped.⁶⁷ Termination up to 23 weeks is lawful if immediately necessary to prevent serious harm to a woman's physical or mental health.⁶⁸

6.20 Abortions performed outside the provisions of the *Medical Services Act* are still a crime, as is supplying instruments or drugs for such an abortion.⁶⁹ The offence of killing an unborn child also remains. It applies when a 'woman or girl is about to be delivered of a child'.⁷⁰

7. Recent Australian Reforms

Western Australia

7.1 The law on termination of pregnancy in Western Australia was reformed in 1998.⁷¹ This followed a review of the *Health Act 1911* and the Criminal Code, precipitated by the arrest of two medical practitioners in early 1998 who were charged with performing an unlawful abortion.⁷²

⁶¹ *Criminal Law Consolidation Act 1935* (SA) s 81.

⁶² *Criminal Law Consolidation Act 1935* (SA) s 82.

⁶³ *Criminal Law Consolidation Act 1935* (SA) s 82A(5), (6).

⁶⁴ *Criminal Code Act* (NT) ss 208B, 208C.

⁶⁵ *Medical Services Act* (NT) s 11.

⁶⁶ *Medical Services Act* (NT) s 11(4), (5), (7).

⁶⁷ *Medical Services Act* (NT) s 11(1).

⁶⁸ *Medical Services Act* (NT) s 11(3).

⁶⁹ *Criminal Code Act* (NT) ss 208B, 208C. In both cases the maximum penalty is seven years imprisonment.

⁷⁰ *Criminal Code Act* (NT) s 170.

⁷¹ *Acts Amendment (Abortion) Act 1998* (WA).

⁷² The prosecutions were withdrawn, see Skene (2004) above n 3, 349.

7.2 An abortion is unlawful in Western Australia unless it is justified under section 334 of the Health Act.⁷³ The procedure must be carried out 'in good faith and with reasonable care and skill'.⁷⁴

7.3 It is now lawful for a medical practitioner to perform a termination of pregnancy up to 20 weeks as long as one of four conditions is met:

- 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.⁷⁵

7.4 The meaning of informed consent is detailed in the legislation, and specific consent provisions apply for women less than 16 years of age.⁷⁶

7.5 For pregnancies beyond 20 weeks, two medical practitioners drawn from a panel of six must agree that the mother or the foetus has a severe medical condition that justifies the procedure.⁷⁷ Women cannot appeal the decision of the medical panel.⁷⁸ The abortion must be performed in an approved facility.⁷⁹ In common with the Australian Capital Territory (ACT) legislation, no person or institution is under a duty to perform an abortion in Western Australia.⁸⁰

7.6 A notification scheme applies for all terminations, with specific notification duties applying to medical practitioners regarding delivery after the twentieth week of pregnancy.⁸¹

7.7 There continues to be a defence for unlawful abortion in Western Australia. 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.⁸²

7.8 The legal consequences for unlawfully performing an abortion are different depending upon whether the person performing the procedure is a medical practitioner

⁷³ *Criminal Code* (WA) s 199; *Health Act 1911* (WA) s 334.

⁷⁴ *Criminal Code* (WA) s 199(1)(a).

⁷⁵ *Health Act 1911* (WA) s 334(3).

⁷⁶ *Health Act 1911* (WA) s 334(5), (8)–(11).

⁷⁷ *Health Act 1911* (WA) s 334(7).

⁷⁸ The Acts Amendment (Abortion) Act 1998 Review Steering Committee, *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) 33.

⁷⁹ 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).

⁸⁰ *Health Act 1911* (WA) s 334(2).

⁸¹ *Health Act 1911* (WA) s 335.

⁸² *Criminal Code* (WA) s 259.

or not. Medical practitioners face a penalty of \$50 000.⁸³ A person who is not a medical practitioner is liable to five years imprisonment.⁸⁴

7.9 Child destruction remains as the separate offence of killing an unborn child. It applies in circumstances when a 'woman is about to be delivered of a child'.⁸⁵ The penalty for the offence is imprisonment for life.

7.10 The legislative changes undertaken in Western Australia were subject to review three years after coming into effect.⁸⁶ The report was completed in 2002.⁸⁷

Tasmania

7.11 Tasmania's offence provisions are similar to Queensland's.⁸⁸ The Tasmanian Criminal Code was amended in 2001 to clarify the circumstances in which a medical termination would be lawful.⁸⁹ Medical terminations are now lawful if the woman has provided informed consent, and two medical practitioners certify that continuation of the pregnancy would involve greater risk of injury to the woman's physical or mental health than termination. No doctors have been prosecuted under the provision, nor had any doctor in the previous 76 years under the former provisions.⁹⁰

7.12 The Criminal Code contains the offence of 'causing the death of a child before birth'. This applies 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'.⁹¹ If the death is caused by actions taken in good faith to preserve the mother's life before or during childbirth there is no offence.⁹²

Australian Capital Territory

7.13 Abortion was decriminalised in the ACT with the enactment of the *Crimes (Abolition of Offence of Abortion) Act 2002*. This legislation repealed the statutory and common law offences of abortion in the ACT.⁹³

7.14 Part 6 of the ACT *Health Act 1993* now regulates termination of pregnancy. The Act defines abortion as 'causing a woman's miscarriage by administering a drug; or using an instrument; or any other means'.⁹⁴

⁸³ *Criminal Code (WA)* s 199(2).

⁸⁴ *Criminal Code (WA)* s 199(3).

⁸⁵ *Criminal Code (WA)* s 290.

⁸⁶ *Acts Amendment (Abortion) Act 1998 (WA)* s 8.

⁸⁷ See The Acts Amendment (Abortion) Act 1998 Review Steering Committee (2002) above n 78.

⁸⁸ *Criminal Code (Tas)* ss 134,135.

⁸⁹ *Criminal Code Amendment Act (No 2) 2001 (Tas)*.

⁹⁰ NSW Parliamentary Library Research Service, *Abortion and the Law in New South Wales*, Briefing Paper No 9/05 (31 August 1998) 97.

⁹¹ *Criminal Code (Tas)* s 165(1).

⁹² *Criminal Code (Tas)* s 165(2).

⁹³ 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.

⁹⁴ *Health Act 1993 (ACT)* s 80.

7.15 In the ACT, only a doctor may carry out an abortion.⁹⁵ A person must not carry out an abortion except in an approved medical facility, or part of a medical facility.⁹⁶ No person is under a duty to perform an abortion. People are also entitled to refuse to assist in carrying out the procedure.⁹⁷

7.16 A woman seeking or receiving a termination of pregnancy faces no legal sanction. There is no restriction on abortion because of medical, social or other reasons.

7.17 The offence of child destruction remains under section 42 of the ACT *Crimes Act 1990*, with a penalty of 15 years imprisonment. It applies when a person unlawfully prevents a child from being born alive or contributes to the child's death. The offence relates to childbirth and applies before the child is born alive. 'Unlawfully' is not defined.

Where to From Here

The commission will use submissions, information obtained from consultations, and research to begin developing legislative options in November and will begin writing the report at the same time. The report is to be provided to government on 28 March 2008. The Attorney-General has 14 sitting days of parliament to table the report in parliament. Once the report is tabled, it is up to the government to decide how it wishes to proceed.

⁹⁵ *Health Act 1993* (ACT) s 81. The maximum penalty for someone other than a doctor performing an abortion is five years imprisonment.

⁹⁶ *Health Act 1993* (ACT) s 82. The maximum penalty for performing an abortion elsewhere is 50 penalty units, imprisonment for six months or both.

⁹⁷ *Health Act 1993* (ACT) s 84.

Discussion Questions

This paper has described the laws in other parts of Australia. The questions below explore in more detail your views on specific features of those laws.

1. What ethical and legal principles should inform the law of abortion in Victoria?
2. What should be the policy objectives of any law of abortion? Are these currently met in Victoria?
3. What factors should be taken into account in deciding if a termination is lawful?
 - Consent of the pregnant woman?
 - Threat to the life of the pregnant woman?
 - Her physical and mental health?
 - Social and economic factors when considering the physical and mental health of the woman?
 - Other factors?
4. South Australian legislation includes specific grounds for termination if the foetus is at risk of 'serious handicap'. How should this issue be considered in Victoria?
5. In some jurisdictions, legislation contains different conditions for lawful termination, depending on the stage of the pregnancy. What are the advantages and disadvantages of this approach? Should Victoria take this approach?
6. If a staged approach is taken, on what basis do you determine a point in time in the pregnancy?
7. What should be the role of the medical practitioner in deciding whether a termination is lawful and can proceed?
 - Should these decisions be made by one or more practitioners?
 - What sort of practitioners? GPs? Obstetricians and gynaecologists?
 - Should the practitioner be required to notify the health department or similar body that the procedure has taken place?
8. Who should have the final say in deciding if a termination will take place?
9. Should access to lawful termination be conditional upon attendance at counselling and information sessions? If so, what sort of counselling and information?
10. Should the law state that a medical practitioner has no duty to perform or assist a termination unless a woman's life is at risk?
11. Does the offence of child destruction need to be changed in any way? If so, how?
12. Having considered the questions above, what are the key elements you would like to see in any new law of abortion in Victoria?
13. Is there anything else you would like to tell us?