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RECENT DEVELOPMENTS IN AUSTRALIAN ABORTION LAW: TASMANIA AND THE AUSTRALIAN CAPITAL TERRITORY

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This article follows on from a previous article, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion', published in (2001) 27(2) Monash University Law Review.

The predominant aim of the 2001 article was to provide an up-to-date statement of the law with regard to abortion in each Australian jurisdiction. However, since that article was published there have been significant legislative developments in Tasmania and the Australian Capital Territory relating to abortion, with the consequence that the 2001 article no longer completely satisfies this goal.

This present article aims to satisfy this goal by providing an up-to-date statement of the law with regard to abortion in the jurisdictions of Tasmania and the Australian Capital Territory. In doing so, comparisons are made with abortion laws in other Australian jurisdictions, and adopting the perspective of the 2001 article, inquiry is also made as to the effect of the recent legislation on the criminality of abortion, and the influence it has upon a woman's right to abortion.

I INTRODUCTION

In the 2001 edition of this Review can be found the article 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion'.¹ The predominant objective of that article was professed to be 'to provide a comprehensive and *up-to-date* statement of the law with regard to abortion in every jurisdiction in Australia.'² However, since the article was published, there have been some further legislative developments in Tasmania and the ACT. As a consequence, the 2001 article now appears incomplete.

This present article seeks to rectify this defect, so that read together, this article and the previous article satisfy the goal of providing a comprehensive and up-to-date statement of Australian abortion law. The previous article states the law in the jurisdictions of New South Wales, the Northern Territory, Queensland, South

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¹ Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27(2) *Monash University Law Review* 229.

² *Ibid* 229 (emphasis added).

Australia, Victoria, and Western Australia, while this article will deal with the recent developments in Tasmania and the ACT.³

The new legislation in both jurisdictions will be critically canvassed, and where appropriate, subject to comparative analysis. Adopting the perspective of the previous article, inquiry will also be made as to the effect of the legislation on the criminality of abortion, and the influence it has upon a woman's right to abortion. Clearly, both issues are inextricably linked, as one cannot have a right to a crime.

As will be seen, the legislation in Tasmania and the ACT provide useful points of comparison for these questions. The Tasmanian legislation looks backward, defining abortion as a crime and denying women the right to abortion, while the ACT has embarked upon novel reform, effectively removing abortion from the ambit of the criminal law, and as a consequence moving towards a recognition of a woman's right to abortion. Following this path of progression, this article will first discuss the Tasmanian developments before analysing the ACT regime.⁴

II TASMANIA AND THE 2001 AMENDMENTS

A Background to the 2001 Amendments

At the turn of the 21st century, abortion was a criminal offence in every jurisdiction in Australia. The legislation that dealt with abortion was to be found in each jurisdiction's criminal statutes.⁵ Such legislation was modelled (to varying degrees) on ss 58 and 59 of the United Kingdom's *Offences Against the Person Act 1861*.⁶ This legislation defined the act of 'unlawfully' procuring a 'miscarriage' as a felony punishable with lengthy imprisonment.

Under the 1861 Act, if a miscarriage had been unlawfully procured, or an attempt at such had been made, the woman, any third party who assisted her, and any supplier of abortifacients utilised therein, could all be charged. The maximum penalty for the crime was 'penal servitude for life.'⁷ This severe legislation was echoed in the criminal statutes of the Australian jurisdictions. Indeed, in some jurisdictions the statutory provisions on abortion were, and remain, practically identical to this ancient and draconian United Kingdom legislation.⁸

³ In common with the previous article, this article does not seek to examine abortion practice in detail, but rather focuses almost exclusively on the law. For discussions on the practice of abortion see National Health and Medical Research Council, *An Information Paper on Termination of Pregnancy in Australia* (1996) 3-22; Lyndall Ryan, Margie Ripper and Barbara Buttfield, *We Women Decide: Women's Experience of Seeking Abortion in Queensland, South Australia and Tasmania 1985-1992* (1994) 15-28; and Kerry Petersen, *Abortion Regimes* (1993).

⁴ This article will not study the politics that underlie the legislation, only the enacted law itself. For a discussion of the politics involved in reforming abortion law see Karen Coleman, 'The Politics of Abortion in Australia: Freedom, Church, and State' (1988) 29 *Feminist Review* 75. Also see the description of the role of the Women's Electoral Lobby in the recent legislative reforms: (2003) Women's Electoral Lobby (WEL) Australia Inc <<http://www.wel.org.au>> at 7 April 2003.

⁵ In West Australia and the ACT, there also existed provisions on abortion outside the criminal statutes, but the fundamental law with regard to abortion was still found in the criminal statutes in both jurisdictions.

⁶ 24 & 25 Vict, c 100, ss 58-9.

⁷ *Offences Against the Person Act 1861*(UK) c 100, s 58.

⁸ See, eg, the relevant NSW and Victorian legislation: *Crimes Act 1900* (NSW) ss 82-4; *Crimes Act 1958* (Vic) ss 65-6.

Fortunately for Australian women seeking abortion services, throughout the later half of the 20th century each Australian jurisdiction, with the exception of Tasmania, embarked upon abortion law reform, either through judicial initiative or through legislative amendment. Although abortion remained a serious crime, these reforms expressly recognised that some abortions could be lawful, and sought to clarify the circumstances under which an abortion would be considered to be lawful.

In Victoria, New South Wales and Queensland, such clarification was provided by the judiciary,⁹ whereas in South Australia, the Northern Territory and Western Australia, the legislature took the lead in this respect.¹⁰ In the Australian Capital Territory, a combination of both judicial and legislative actions were brought to bear on that jurisdiction's abortion law.¹¹

A discussion of all of these various reforms has been previously dealt with¹² and will not be repeated here unless relevant to the jurisdictions presently under scrutiny. For present purposes, it will suffice to say that by the turn of the 21st century, each Australian jurisdiction had embarked upon a mode of abortion law reform, so that clarification of the law had been achieved to some extent. That is, this had occurred in every jurisdiction except Tasmania. At the turn of the 21st century Tasmania had yet to provide any judicial or legislative clarification of its abortion law.

Tasmanian abortion law was to be found in ss 134 and 135 of the *Criminal Code Act 1924* (Tas); legislation derivative of ss 58 and 59 of the UK 1861 Act. Sections 134 and 135 stated as follows:

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

(2) Any person who, with intent to procure the miscarriage of a woman, whether she be pregnant or not, unlawfully administers to her, or causes her to take, any poison or other noxious thing, or with such intent unlawfully uses any instrument or other means whatsoever, is guilty of a crime.

135. Any person who unlawfully supplies to or procures for any other person anything whatever, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of a woman, whether she is or is not pregnant, is guilty of a crime.

⁹ See respectively *R v Davidson* [1969] VR 667; *R v Wald* [1971] 3 DCR (NSW) 25; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8. The legal situation in NSW has changed since *R v Wald* (albeit in a minor way) as a consequence of the Court of Appeal decision of *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 ('*Superclinics*'). It would not be unreasonable to assume that *Superclinics* would be followed in both Victoria and Queensland.

¹⁰ See respectively *Criminal Law Consolidation Act 1935* (SA) s 82A; *Criminal Code Act 1983* (NT) s 174; and *Criminal Code Act 1913* (WA) s 199, amended by *Acts Amendment (Abortion) Act 1998* (WA).

¹¹ Such developments will be detailed later in the article.

¹² For a detailed discussion of these reforms see Rankin, above n 1.

Although there had been no legislative or judicial explanation of these provisions, it had been assumed, given the similarity of the relevant legislation in Tasmania and Queensland, that Tasmanian courts would follow the lead of Queensland courts¹³ and allow lawful abortions according to the criteria set out in *R v Davidson*.¹⁴ Accordingly, it was assumed that an abortion would be lawful in Tasmania if performed by a medical practitioner, with an honest belief on reasonable grounds that the operation was necessary to preserve the woman concerned from a 'serious danger to her life or physical or mental health (not being merely the normal dangers of pregnancy and childbirth)'.¹⁵ However, this was by no means certain, and the Tasmanian situation with respect to abortion law was still largely a mystery at the end of the 20th century.

This all changed in December 2001, when the Tasmanian Parliament passed the *Criminal Code Amendment Act (No 2) 2001* (Tas), which sought to clarify the circumstances under which an abortion would be deemed to be lawful. This Act came into effect upon receiving the royal assent on 24 December 2001.

B A New Regime or the Same Old Story?

The significant provisions of the 2001 Act are ss 4 and 5. Section 5 seeks to alleviate the concerns of the Tasmanian medical profession. The profession had, by and large, refused to perform abortions by late 2001 because of a perceived uncertainty as to whether or not they would be acting illegally in providing abortion services.¹⁶ This state of affairs was the impetus for the calling of Parliament out of session and the passing of the Act.¹⁷

The concerns of the medical profession with regard to the possible laying of charges under the old law are effectively removed by s 5, which states:

No prosecution lies against any person in relation to a termination of pregnancy performed before the commencement of this Act by a registered medical practitioner at a public hospital or private medical establishment.

This retrospective pardon for medical practitioners is accompanied by major amendments to Tasmanian abortion law. Section 4 enacts such amendments, which were incorporated directly into the *Criminal Code Act 1924* (Tas).¹⁸

¹³ Ibid 230, 242.

¹⁴ [1969] VR 667. This Victorian Supreme Court decision was followed in the District Court of Queensland in *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Repts 8. See also *K v T* (1983) Qd R 396.

¹⁵ *R v Davidson* [1969] VR 667, 672. This decision has been expanded upon by the subsequent decisions in *R v Wald* [1971] 3 DCR (NSW) 25; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Repts 8; *Superclinics* (1995) 38 NSWLR 47, but the basic principle remains the same.

¹⁶ See M Paire, 'Abortion Reform Celebrated', *Mercury News* (Tasmania), 22 December 2001, 4; Editorial, 'Abortion Law Clarified in Tasmania (Round Up: Law and Policy)' (2002) 10 *Reproductive Health Matters* 199; Jenny Ejlak, *Inkwel*, (2003) Women's Electoral Lobby (WEL) Australia Inc <<http://www.wel.org.au/inkwel/ink0204/tasab.htm>> at 7 April 2003.

¹⁷ See Ejlak, above n 16. This site also provides an interesting description of the politics involved in WEL's campaign for reform.

¹⁸ See *Criminal Code Amendment Act (No 2) 2001* (Tas) s 4, which states: 'The amendments effected by this section have been incorporated into the authorised version of the *Criminal Code Act 1924*'.

Under the new law abortion remains a serious crime, due to the continued existence of ss 134 and 135 of the *Criminal Code Act 1924* (Tas). The 2001 amendments affected these sections, but only in minor syntactical ways. Specifically, the phrase 'whether she be pregnant or not' was deleted from s 134(2), and the phrase 'whether she is or is not pregnant' was deleted from s 135.

This change achieves very little as the deleted phrases were largely superfluous. That is, the addition of the phrase 'whether she be pregnant or not', after the term 'woman', adds nothing to s 134(2). Put simply, the definition of 'woman' includes a pregnant woman as well as a non-pregnant woman; one does not cease to be a woman merely by becoming pregnant. Thus, deleting the phrase from s 134(2) (and the equivalent phrase from s 135) achieves nothing of significance. Furthermore, the sections essentially create offences of attempts, and an intention to procure a miscarriage is an intention to procure a miscarriage, whether or not the woman is pregnant, so specifying this was redundant in the first place.

The significant amendments to the law are to be found in the newly created s 164 of the *Criminal Code Act 1924* (Tas). This section, titled 'Medical termination of pregnancy', outlines what constitutes a 'legally justified' termination of pregnancy. Section 164(1) makes it clear that a 'legally justified' termination of pregnancy is not a crime.

As to what constitutes 'legally justified', the new section is a curious blend of the South Australian and Western Australian legislation dealing with abortion. Section 164(2) states that an abortion is legally justified if:

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

An abortion must therefore satisfy two tests in order to be deemed to be legally justified: (1) a balancing of risks test; and (2) an informed consent test. The risks test is a South Australian innovation, and the informed consent test is adopted from Western Australia. Indeed, s 164(2)(a) effectively duplicates the balancing of risks formula found in s 82A(1)(a)(i) of the South Australian Act,¹⁹ while s 164(2)(b) reproduces the informed consent model created by the recent Western Australian amendments.²⁰ This failure by the Tasmanian Parliament to adopt a novel approach to abortion law reform is regrettable, as it ultimately results in repeating the mistakes of others, rather than learning from them, and thereby

¹⁹ The 'South Australian Act' referred to is the *Criminal Law Consolidation Act 1935* (SA).

²⁰ The 'Western Australian amendments' refers to the *Criminal Code Act 1913* (WA) s 199, amended by the *Acts Amendment (Abortion) Act 1998* (WA), which also provides for amendments to the *Health Act 1911* (WA).

constitutes a lost opportunity to embark upon progressive reform. Indeed, the level of borrowing from the legislation in the other 'reform'²¹ jurisdictions is so great that it is appropriate to discuss the 2001 Tasmanian amendments by reference to the legislation which it emulates.

III A COMPARATIVE ANALYSIS

A The South Australian Influence

Looking first at the South Australian influenced s 164(2)(a), there do exist minor differences between the Tasmanian legislation and the 'parent' South Australian legislation. For instance, s 82A(1)(a)(i) of the South Australian Act also refers to a 'greater risk, to the life of the pregnant woman', a phrase omitted from the Tasmanian s 164(2)(a), which only provides for health risks. However, this distinction is not important as the inclusion of a life risk is redundant when health risks are included. That is, a risk to one's life is clearly also a risk to one's health.

The South Australian legislation also differs in that it allows for a lawful termination on the grounds of foetal abnormality,²² while the Tasmanian legislation is silent on this issue. However, this is not overly significant because the fact of foetal abnormality would certainly constitute a factor that the requisite two medical practitioners may consider in coming to a determination as to the risk to the pregnant woman's mental health.

As to what other factors the two medical practitioners may refer in coming to their conclusion concerning the relevant risk, the Tasmanian legislation follows the South Australian legislation by granting the medical practitioners a wide discretion in this respect. Indeed, the Tasmanian legislation allows the medical practitioners to cast an even wider net than the South Australian legislation,²³ permitting them to 'take account of any matter which they consider to be relevant' in assessing the risk to the pregnant woman's health.²⁴ Furthermore, unlike the South Australian legislation, there is no express onus upon the Tasmanian medical profession to act in 'good faith' in coming to a decision as to the lawfulness of a particular abortion.

When combined with the absence of any guidance by the law as to the degree of risk of injury required, Tasmanian law thus effectively frees the Tasmanian medical profession from external scrutiny with respect to determining the relevant health risks under s 164(2)(a). This effectively grants the Tasmanian medical profession quasi-judicial status, as the Tasmanian government has

²¹ I use this term to describe those jurisdictions that have amended the original legislation dealing with abortion.

²² See *Criminal Law Consolidation Act 1935 (SA)* s 82A(1)(a)(ii). For a discussion of the analogous UK provisions see D Morgan, 'Abortion: The Unexamined Ground' [1990] *Criminal Law Review* 687.

²³ The South Australian Act allows the medical practitioners to take account of the pregnant woman's 'actual or reasonably foreseeable environment' - see *Criminal Law Consolidation Act 1935 (SA)* s 82A(3).

²⁴ *Criminal Code Act 1924 (Tas)* s 164(3).

thereby delegated the role of deciding upon the legality of an abortion to the Tasmanian medical profession.

The medical profession thus become the 'legal gatekeepers' with regard to abortion law.²⁵ This is unfortunate for two reasons: (1) the medical profession is not necessarily qualified to play such a quasi-judicial role;²⁶ and (2) it effectively excludes a women's right to abortion.²⁷

In common with South Australian law, under Tasmanian law the only 'right' granted is to the medical profession to decide whether or not an abortion is lawful, and to perform the abortion under certain conditions.²⁸ Judging from decisions in other jurisdictions, it is likely that the Tasmanian judiciary will be reluctant to question the medical profession in making any decision as to the lawfulness of an abortion.²⁹ Unfortunately, this means that the medical profession may 'impose on to women their own views of when abortion is permissible.'³⁰

As to the conditions under which lawful abortions may be performed in Tasmania, such conditions are even more relaxed than in South Australia. Specifically, there is no requirement in Tasmania to perform the abortion in a 'prescribed hospital', nor are there any residency or reporting requirements,³¹ which are conditions contained in the South Australian legislation.³²

On the other hand, the Tasmanian legislation is more restrictive than the South Australian legislation in that at least one of the medical practitioners making the relevant determination must specialise in obstetrics or gynaecology.³³ This serves

²⁵ See Kerry Petersen, 'Abortion: Medicalisation and Legal Gatekeeping' (2000) 7 *Journal of Law and Medicine* 267, 269-71. Also see Regina Graycar and Jenny Morgan, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law: A Note on *CES v Superclinics (Aust) Pty Ltd*' (1996) 18 *Sydney Law Review* 323, 333.

²⁶ See John Keown, *Abortion, Doctors, and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803-1982* (1988) 50-80.

²⁷ See Petersen, above n 25, 271; Lynda Crowley-Cyr, 'A Century of Remodelling: The Law of Abortion in Review' (2000) 7 *Journal of Law and Medicine* 252, 257-8; Susanne Davies, 'Captives of their Bodies: Women, Law and Punishment, 1880's-1980's' in Diane Kirby (ed), *Sex, Power, and Justice: Historical Perspectives of Law in Australia* (1995) 99, 109; Sheila McLean, 'Women: Rights, and Reproduction', in Sheila McLean (ed), *Legal Issues in Human Reproduction* (1989) 213, 227; Kathleen McDonnell, *Not an Easy Choice: A Feminist Re-examines Abortion* (1984) 126-30; and Linda Clarke, 'Abortion: A Rights Issue?' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (1989) 155, 163-6.

²⁸ In common with all other Australian jurisdictions, Tasmanian law also grants members of the medical profession the 'right' to refuse to participate in any way in an abortion (see *Criminal Code Act 1924* (Tas) s 164(7)). Fortunately, this allowance for a conscientious objection does not extend to cases where 'treatment ... is necessary to save the life of a pregnant woman or to prevent her immediate serious physical injury' (*Criminal Code Act 1924* (Tas) s 164(8)).

²⁹ See *Paton v British Advisory Service Trustees* [1979] 1 QB 276, 281; *Reg v Smith (John)* [1973] 1 WLR 1510, 1512 (Scarman LJ); *K v T* [1983] Qd R 396, 398 - comments made in these cases are evidence of the judiciary's extreme reluctance to question the medical profession with respect to any such decision.

³⁰ Clarke, above n 27, 166.

³¹ However, in common with the law in South Australian, in Tasmania the two medical practitioners must certify in writing that they believe the continuance of the pregnancy poses a greater risk of injury to the health of the pregnant woman than if the pregnancy were terminated; see *Criminal Code Act 1924* (Tas) s 164(2)(a), which may produce an analogous result to the South Australian reporting requirements.

³² See *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a) for the 'prescribed hospital' condition, and *Criminal Law Consolidation Act 1935* (SA) s 82A(2) for the residency requirements.

³³ *Criminal Code Act 1924* (Tas) s 164(5).

to delay the process of accessing abortion services in Tasmania. Fortunately for Tasmanian women seeking abortion, the Tasmanian restriction in this respect does not go as far as the Northern Territory legislation, which requires an obstetrician or gynaecologist to perform the abortion.³⁴ In Tasmania, any registered medical practitioner may lawfully perform an abortion.³⁵

At this stage, it must be emphasised that, like all Australian jurisdictions, it is *only* medical practitioners that may lawfully perform abortions in Tasmania. The law in Tasmania expressly and unambiguously provides for a medical monopoly with regard to the practice of abortion.³⁶ In common with all Australian jurisdictions, Tasmanian abortion law provides for the medicalisation of abortion.

However, despite the apparent intention of the Tasmanian Parliament to create a medical monopoly in this respect, it could nonetheless be argued that s 51(1) of the *Criminal Code Act 1924* (Tas) constitutes a fundamental ability for non-medical practitioners to perform operations, and that this could extend to abortions. This section allows a non-medical practitioner to perform a 'surgical operation' 'in good faith and with reasonable care and skill' when the operation is 'reasonable, having regard to all the circumstances', and provided the operation is performed with the consent and for the 'benefit' of the woman concerned.³⁷ Similarly, it appears by virtue of s 165(2) of the *Criminal Code Act 1924* (Tas), that if a woman's life is threatened by the continuance of her pregnancy, then anyone acting in good faith for the preservation of her life may terminate her pregnancy by any means available.³⁸

Neither s 51(1) nor s 165(2) were affected by the 2001 amendments, which means that these sections, which seem to provide further statutory defences to the crime of abortion, may yet have significant implications for abortion law and practice in Tasmania. Indeed, further reform might be achieved by certain individuals (eg qualified nurses or midwives) performing abortions, thereby encouraging prosecution, and subsequently attempting to avail themselves of these statutory defences.³⁹ It remains to be seen how Tasmanian courts would react to ss 51(1) and 165(2) being used in this manner, however it should be noted that the first major abortion decision of the 20th century, that of *R v Bourne*⁴⁰ (the decision that first made it clear that it was possible to perform a lawful abortion), was the result of just such a test case.

³⁴ *Criminal Code Act 1983* (NT) s 174(1)(a).

³⁵ *Criminal Code Act 1924* (Tas) s 164(6).

³⁶ See *Criminal Code Act 1924* (Tas) s 164(6), which states: 'A legally justified termination can only be performed by a registered medical practitioner'.

³⁷ The full text of *Criminal Code Act 1924* (Tas) s 51(1) is as follows: 'It is lawful for a person to perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances'.

³⁸ The full text of *Criminal Code Act 1924* (Tas) s 165(2) is as follows: 'No one commits a crime who by any means employed in good faith for the preservation of its mother's life causes the death of any such child before or during its birth'.

³⁹ A means of possible reform unavailable in South Australia, which has no similar statutory defences to *Criminal Code Act 1924* (Tas) ss 51(1), 165(2).

⁴⁰ [1939] 1 KB 687.

B The Western Australian Influence

Turning to the informed consent requirement created by s 164(2)(b), in defining the phrase 'informed consent', Tasmania replicates the Western Australian model. The Tasmanian s 164(9) defines informed consent as follows:

'informed consent' means consent given by a woman where -
 (a) a registered medical practitioner has provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term; and
 (b) a registered medical practitioner has referred her to counselling about other matters relating to termination of pregnancy and carrying a pregnancy to term;
 'woman' means any female person of any age.

Sections 164(9)(a) and (b) are almost identical to ss 334(5)(a) and (b) of the *Health Act 1911* (WA). The only significant difference between the Tasmanian and Western Australian 'informed consent' provisions is that the Tasmanian legislation is less restrictive, in that the medical practitioner providing the relevant counselling and referrals may also perform the abortion, whereas in Western Australia s/he may not do so.⁴¹ In addition, in Western Australia the medical practitioner must also inform the woman concerned 'that appropriate and adequate counselling will be available to her should she wish it upon termination of pregnancy or after carrying the pregnancy to term',⁴² whereas no such future obligation is placed upon Tasmanian medical practitioners.

The Tasmanian provisions are also less restrictive than the Western Australian parent legislation with respect to the fact that there are no further restrictions in Tasmania concerning performing an abortion upon a woman under 16 years of age, whereas in Western Australia additional restrictions are placed upon this practice.⁴³ Furthermore, in Western Australia there exist extra restrictions on the practice of abortion that arise when an abortion is to be performed on a woman who is more than 20 weeks pregnant,⁴⁴ whereas in Tasmania there exists no stated time limit for lawful abortions; although one may reasonably assume that viability is the cut-off point in this respect.⁴⁵

However, notwithstanding the fact that the Tasmanian 'informed consent' provisions viewed in isolation appear less restrictive than the parent provisions in Western Australia, it must be recognised that the overall result of the 2001 amendments is that the law in Tasmania is far more restrictive than it is in Western Australia. In Western Australia, the test for a lawful abortion is informed

⁴¹ See *Health Act 1911* (WA) s 334(6).

⁴² *Health Act 1911* (WA) s 334(5)(c).

⁴³ See *Health Act 1911* (WA) ss 334(8), (9). Also see *Criminal Code Act 1983* (NT) s 174(4)(b) for similar restrictions with regard to women under the age of 16 in the Northern Territory.

⁴⁴ See *Health Act 1911* (WA) s 334(7).

⁴⁵ There is no specific provision expressly stating this, but it may be implied from the law in other jurisdictions, common law decisions (eg *C v S* [1987] 1 All ER 1230; *Rance v Mid-Downs Health Authority* [1991] 1 QB 587), and by virtue of *Criminal Code Act 1924* (Tas) s 166(2). This issue of viability being the cut-off point for lawful abortions will be discussed in further detail below.

consent;⁴⁶ there is no additional requirement that two medical practitioners must certify in writing that they have applied the appropriate balancing of risks formula to the situation.

IV A LOST OPPORTUNITY FOR PROGRESSIVE REFORM

The result of incorporating elements of *both* the South Australian and Western Australian legislation is a more restrictive abortion regime than exists in either of these other 'reform' jurisdictions. Tasmanian abortion law is more restrictive than Western Australian abortion law because it requires the certification of two medical practitioners with regard to the balancing of risks involved, and it is more restrictive than South Australian abortion law because it also requires the provision of counselling according to the informed consent criteria.⁴⁷

One may nonetheless conclude that the Tasmanian amendments should be tentatively welcomed, if only because they have resulted in some clarification of the law, and thus provided enough legal certainty to the Tasmanian medical profession so that they may resume providing abortion services. However, the fact that the 2001 amendments create, or rather maintain, a restrictive abortion regime should not be overlooked.⁴⁸

It is also of concern that there remains uncertainty as to how the new law sits with the old statutory defences contained within ss 51(1) and 165(2). In particular, one may reasonably question whether, and if so in what way, the common law decisions of the eastern states remain applicable to Tasmania. That is, the defences offered by ss 51(1) and 165(2) appear to illicit the applicability of these decisions, as occurred with regard to similar provisions in Queensland.⁴⁹

However, the most important point to recognise in coming to a conclusion as to the overall worth of the 2001 amendments, is that the 2001 Tasmanian amendments have not changed the *fundamental* character of abortion law in that

⁴⁶ It should be noted that there exist other grounds for performing lawful abortions in West Australia (see *Health Act 1911* (WA) s 334 (b)-(d)). However given that informed consent is a legitimate ground in itself (see *Health Act 1911* (WA) s 334 (a)), the use of these other grounds is minimal.

⁴⁷ It should be noted however that medical practitioners throughout Australia are legally required to provide information and advice concerning any proposed medical procedure. Consequently, the provision of advice concerning the medical risks of abortion must be provided irrespective of whether or not the relevant abortion law demands it. For example, the main provider of abortion services in South Australia, the Pregnancy Advisory Centre, has adopted a policy of providing counselling along similar lines to the counselling described under s 164(9) of the Tasmanian Act, despite any legislative demand to do so.

⁴⁸ Similar conclusions are made by WEL, which summed up the 2001 amendments as follows: 'there is now greater legal clarity, although no greater access to the service for women', Ejlak, above n 16.

⁴⁹ See *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, in which it was held that the equivalent Queensland provision (*Criminal Code Act 1899* (Qld) s 282), provided the means by which the court could follow the decisions of *R v Davidson* [1969] VR 667 and *R v Wald* [1971] 3 DCR (NSW) 25. Of course, it should be noted that the Tasmanian ss 51(1) and 165(2) are far more likely to be read down in relation to abortion, given that Tasmania has adopted specific abortion law. In addition, a court may say that 'reasonable' in s 51(1) has to be read in light of other law, specifically current Tasmanian abortion law.

state. Although medical practitioners may now lawfully perform abortions under the provisions of s 164, abortion remains a crime; a medical monopoly of the practice is preserved; and there continues to be a failure to recognise a woman's right to abortion.

This unfortunate state of affairs is a result of the fact that the 2001 amendments merely rehash previous reforms in South Australia and Western Australia, neither of which frame the abortion decision in terms of a woman's right. Following the lead of these jurisdictions, the 2001 Tasmanian amendments merely provide for the medicalisation of abortion. Consequently, under Tasmanian law the abortion decision is now clearly in medical hands, and the only 'rights' with regard to abortion are possessed and exercised by the medical profession. Moreover, if a woman seeks to terminate her pregnancy outside the controls of the medical profession, she can still be charged with the serious crime of procuring her own abortion.⁵⁰ As the Women's Electoral Lobby state: '[t]he key issue is that legally, doctors decide whether a woman can have an abortion - women do not have control over the decision.'⁵¹ In this sense, the benefit to the Tasmanian medical profession has come at the expense of Tasmanian women, as Tasmanian abortion law serves to deny women any rights with regard to abortion.

The failure of the Tasmanian Parliament to provide innovation on the issue is therefore cause for deep regret. The Tasmanian Parliament, sitting at the beginning of the 21st century, had a golden opportunity to embark upon progressive reform that focused on the rights of the pregnant woman concerned. Showing a lack of insight and initiative, the Tasmanian Parliament instead chose to look backward and simply copy the mistakes of others.

The present state of Tasmanian abortion law is therefore no cause for celebration, and indeed before the ink is dry on the 2001 amendments there should be a campaign for further reform of the law. A campaign focused not upon who may lawfully perform abortions, but rather upon addressing the human rights violations that occur as a result of denying women the right to make their own reproductive choices.⁵² Such a campaign must necessarily have as its central platform the removal of abortion from Tasmania's Criminal Code, because so long as abortion remains a crime, it can never be a right.

⁵⁰ See *Criminal Code Act 1924* (Tas) s 134(1).

⁵¹ Above n 16.

⁵² For discussions of the various human rights violations that occur as a result of maintaining restrictive abortion laws see Ellen Willis, 'Abortion: Is a Woman a Person?', in Ann Snitow, Christine Stansell and Sharon Thompson (eds), *Desire: The Politics of Sexuality* (1984) 92, 92-6; C Neff, 'Woman, Womb, and Bodily Integrity' (1991) 3 *Yale Journal of Law and Feminism* 327, 337; Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (1984) 374-5, 378, 387; Katherine Kolbert, 'A Reproductive Rights Agenda for the 1990's' (1989) 1 *Yale Journal of Law and Feminism* 3, 3; Frances Olsen, 'Unravelling Compromise', in Patricia Smith (ed), *Feminist Jurisprudence* (1993) 335, 340.

V THE ACT IN 2002: LIGHTING THE WAY

This last point leads to a discussion of the ACT reforms of 2002. As a consequence of these reforms the ACT has moved towards the recognition of a woman's right to abortion, and as a result now possesses the most liberal abortion law in the country.⁵³ Ironically, the last time the ACT Parliament decided to legislate on the subject of abortion in 1998, the resulting regime could be described as the most reactionary in Australia.⁵⁴ Fortunately, the ACT has now come full circle, and the notable result of the 2002 reforms is that the ACT is the first Australian jurisdiction to approach the holy grail of abortion law reform; the removal of abortion from the realm of the criminal law. The significance of this achievement cannot be overstated, and the consequent new abortion regime in the ACT is cause for celebration. The ACT Parliament is to be commended for lighting the way for all Australian jurisdictions.

To adequately illuminate the achievement of the ACT Parliament in this respect, it is necessary to briefly outline the legal situation that existed in the ACT prior to the 2002 reforms.⁵⁵

Background to 2002

In common with the jurisdictions of New South Wales, Queensland, and Victoria, the abortion provisions in the *Crimes Act 1900* (ACT) prior to 2002 were copied from ss 58 and 59 of the *Offences Against the Person Act 1861* (UK).⁵⁶ Under ss 44, 45, and 46 of the *Crimes Act 1900* (ACT) abortion was defined as a serious crime, with severe penalties.⁵⁷ However, it was generally believed that the New South Wales decisions⁵⁸ were applicable to the ACT,⁵⁹ and hence the practice of abortion in the ACT functioned under this belief, resulting in relatively easy access to abortion services.⁶⁰

This situation of relative stability was unbalanced in 1998 by the passing of the *Health Regulation (Maternal Health Information) Act 1998* (ACT).⁶¹ The main purposes of this Act were professed to be 'to ensure that adequate and balanced medical advice and information are given to a woman who is considering an

⁵³ Prior to 2002, one could say that West Australian abortion law could lay claim to this title - see Rankin, above n 1, 247; Alison Duxbury and Christopher Ward, 'The International Law Implications of Australian Abortion Law' (2000) 23 *University of New South Wales Law Journal* 1, 5; Lisa Teasdale, 'Confronting the Fear of Being "Caught": Discourses on Abortion in Western Australia' (1999) 22 *University of New South Wales Law Journal* 60, 71; Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make* (1998) 98.

⁵⁴ See Rankin, above n 1, 251.

⁵⁵ A more detailed analysis of the pre-2002 ACT situation can be found in Rankin, above n 1, 249-51.

⁵⁶ To be more precise, they were copied from the NSW provisions, which in turn were copied from the 1861 UK Act.

⁵⁷ Note: prior to 2002 the relevant sections were ss 42-4. From January 2002 they became ss 44-46 (but remained otherwise unchanged). On 9 September 2002, the new s 44 was substituted for the old ss 44-6, and on 9 December 2002, s 44 expired altogether.

⁵⁸ See *R v Wald* [1971] 3 DCR (NSW) 25; *Superclinics* (1995) 38 NSWLR 47.

⁵⁹ See Rankin, above n 1, 249.

⁶⁰ See National Health and Medical Research Council, above n 3, 5-6.

⁶¹ For a discussion of the initial Bill see Duxbury and Ward, above n 53, 3-4.

abortion',⁶² and 'to ensure that a decision by a woman to proceed or not to proceed with an abortion is carefully considered.'⁶³ The legislation demanded that a medical practitioner 'properly, appropriately and adequately' provide a woman contemplating an abortion with advice concerning medical risks⁶⁴ and foetal development.⁶⁵ The medical practitioner was also obliged to offer the woman referral to counselling.⁶⁶ A statement certifying that the requisite information and advice had been provided would then have to be completed prior to an abortion being performed.⁶⁷

Much of the information and advice to be provided was similar to that demanded by the informed consent provisions in Western Australia, and since 2001, in Tasmania. However, the issue of addressing foetal development was a controversial innovation, as the legislation made it mandatory for medical practitioners to provide women seeking an abortion with a pamphlet containing information concerning this,⁶⁸ which might include pictures of fetuses at different stages of gestation.⁶⁹ The original pamphlet did not contain such pictures, but an attempt was made to create such a pamphlet by the use of the regulatory power conferred by the Act,⁷⁰ resulting in the *Maternal Health Information Regulations 1999* (ACT), which was cause for concern for some time.⁷¹

Other aspects of the 1998 Act that were alarming were the conscientious objector clauses, which allowed individuals to not only refuse to participate in abortions,⁷² but also to refuse to provide advice and/or counselling concerning abortion,⁷³ and most worrying, to refuse to refer a patient to someone who would provide the advice, counselling, and/or service desired.⁷⁴ Given the religious and moral connotations abortion has for some people in our society, it would seem reasonable to permit such individuals to decline to participate in abortions.⁷⁵ However, to allow such individuals to refuse to refer their patients to people who could actually treat them is clearly 'inconsistent with a medical practitioner's ethical and legal obligations to properly advise his/her patient.'⁷⁶

⁶² *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 3(a).

⁶³ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 3(b).

⁶⁴ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(a)(i)-(iii).

⁶⁵ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(a)(iv).

⁶⁶ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(b)(i) and (ii).

⁶⁷ See *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 7. Such conditions were not required to be met if the person performing the operation 'honestly believes that a medical emergency exists involving the woman' - *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 7(2). The term 'medical emergency' was defined under the Act as a medical condition that 'makes it necessary to perform an abortion to avert substantial impairment of a major bodily function of the woman and does not allow reasonable time to comply' with the requirements of the Act - *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 5.

⁶⁸ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8(1)(c), (d), (e).

⁶⁹ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 14(4).

⁷⁰ See *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 16.

⁷¹ See Rankin, above n 1, 250.

⁷² *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(a).

⁷³ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(b).

⁷⁴ *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 12(c).

⁷⁵ Of course, that is unless the woman's life is under threat, in which case such a refusal would be unreasonable and unethical.

⁷⁶ Rankin, above n 1, 251.

Curiously, the 1998 Act purported to have no effect on the lawfulness of abortions in the ACT,⁷⁷ but this is nonsense, as not only did it have a clear effect on practice,⁷⁸ but it also prescribed criminal sanctions for contravention of certain provisions.⁷⁹ Regardless of legal effect, the 1998 Act restricted access to abortion services and served to delay the process of obtaining an abortion,⁸⁰ with consequent health risks to the woman concerned.⁸¹ To repeat my previous conclusion concerning the overall result of the 1998 Act:

(1) it serve[d] to discourage medical practitioners from referring women for abortion; (2) it act[ed] as a disincentive for medical practitioners to perform abortions; (3) it serve[d] to delay the process of obtaining an abortion, thereby increasing the maternal health risks of the procedure; and (4) it [sought] to remove any autonomy that the woman concerned may have had under the previous regime.⁸²

In other words, the 1998 Act was 'a clear victory for the anti-choice movement'.⁸³ Fortunately, this state of affairs did not last long, and the winds of change soon began to blow through the ACT Parliament.

VI A CHANGE IN THE AIR?

The repeal process began in late 2001, with the Executive issuing the *Maternal Health Information Regulations Repeal 2001* (ACT), which repealed the 1999 Regulations that had attempted to incorporate foetal pictures into the requisite pamphlet. Although a commendable step in itself, the truly significant reform was to occur in 2002, with the passing of the *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT).

⁷⁷ The Act specifically states that 'the lawfulness or unlawfulness of an abortion ... is not affected by either the compliance by any person or the failure by any person to comply with a provision of this Act' - see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 4. See also paragraph two of the preamble to the *Health Regulation (Maternal Health Information) Act 1998* (ACT).

⁷⁸ Rankin, above n 1, 251.

⁷⁹ See, eg. *Health Regulation (Maternal Health Information) Act 1998* (ACT) ss 6(1), 6(2), which prescribe imprisonment as the penalty for failure to obey that section.

⁸⁰ This delay factor was exacerbated by the fact that once all the information, advice, relevant pamphlets, and offers of referrals have been given, the woman and the medical practitioner concerned must make a joint declaration to that effect, stating the date and time (see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 9). The woman must then wait not less than 72 hours after signing this declaration before presenting herself at an approved facility and she must then provide her consent (again in writing, stating date and time) to the procedure before it may be performed (see *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 10).

⁸¹ Ie, the later an abortion is performed, the more dangerous it is. See Stanley Henshaw and Jennifer Van Vort, 'Abortion Services in the United States, 1991 and 1992' (1994) 26 *Family Planning Perspectives* 100-6; Christopher Tietze and Stanley Henshaw, *Induced Abortion: A World Review* (1986) 97; *Report of the Working Party to Examine the Adequacy of Existing Services for the Termination of Pregnancy in South Australia*, South Australian Health Commission, Adelaide, May 1986, 75-6; J Miller, 'Medical Abortion in South Australia: A Critical Assessment of Early Complications' (1973) 1 *Medical Journal of Australia* 825-30; John Lynxwiler and Michele Wilson, 'A Case Study of Race Differences Among Late Abortion Patients' (1994) 21 *Women and Health* 43, 44.

⁸² Rankin, above n 1, 251.

⁸³ *Ibid* 248.

This Act substituted the old abortion ss 44-46 with a new s 44, titled 'Abortion - abolition of common law offence', which stated as follows:

44. (1) Any rule of common law that creates an offence in relation to procuring a woman's miscarriage is abrogated.

(2) This section expires 3 months after it commences.

(3) This section is a law to which the *Legislation Act 2001*, section 88 applies.

The substitution of the above s 44 effectively repeals the ancient abortion provisions to be found in ss 44, 45 and 46, while s 44(1) abolishes any common law offence of abortion that might otherwise apply in the ACT. The combined effect of ss 44(2) and 44(3) is that since 9 December 2002, the above s 44 no longer sits in the *Crimes Act 1900* (ACT),⁸⁴ but continues to have effect by virtue of ss 88(1) and 88(2) of the *Legislation Act 2001* (ACT). As it presently stands, the *Crimes Act 1900* (ACT) makes no mention of ss 44 to 46, and jumps from s 43 to s 47.

The removal of abortion from the realm of the criminal law has always been the predominant objective of the pro-choice movement. After so much campaigning and toil towards that goal, it seems somewhat strange that it could be achieved so easily.⁸⁵ Nonetheless, there it is: in one step the provisions of the *Crimes Act 1900* (ACT) maintaining abortion as an offence are swept aside, and a further guarantee is enacted under s 44(1) so that over-zealous prosecutors can have no recourse to the common law. Simple, but very effective. As mentioned earlier, from a pro-choice or women-centred perspective, this achievement is grand in scale, which perhaps explains why it seems slightly hollow that victory may be secured so simply: in essence the 2002 Act provides that all offences with respect to abortion are expunged from the *Crimes Act 1900* (ACT) and the traditional criminal law.

However, in the legal sphere rarely is anything quite that simple. Although abortion is no longer expressly mentioned in the *Crimes Act 1900* (ACT) as a result of (the now expired) s 44, there remain offences within the *Crimes Act 1900* (ACT) that may affect the legality of some abortions. In particular, s 42 (and to a lesser extent s 43) appears to retain an influence on the upper time limit for legal abortions. Section 42 creates the offence of 'child destruction',⁸⁶ which operates 'in relation to a childbirth before the child is born alive'.⁸⁷ Although at first glance the use of the phrase 'in relation to a childbirth before the child is born alive' suggests that the section operates outside the parameters of abortion, closer scrutiny reveals that some methods of extremely late abortions might be construed as involving 'childbirth'. Such abortions may therefore be unlawful

⁸⁴ Ie, the new s 44 was inserted into the *Crimes Act 1900* (ACT) on the notification date of 9 September 2002, and so expired three months hence, as provided for by s 44(2).

⁸⁵ By this I mean 'easy' from a legal, rather than a political, perspective.

⁸⁶ *Crimes Act 1900* (ACT) s 43 deals with the offence of inflicting grievous bodily harm upon a child.

⁸⁷ A similar phrase can be found in *Crimes Act 1900* (ACT) s 43.

under s 42. As a result, s 42 may operate to define an upper time limit for lawful abortions.

As to the exact cut-off point for lawful abortions I would suggest that s 42 implies that the upper time limit for lawful abortions in the ACT is viability. That is, the use of the phrase 'in relation to a childbirth before the child is born alive' implies that s 42 only operates with respect to an unborn child that is capable of being born alive. This conclusion is reinforced by the fact that it accords with the law in other jurisdictions that continue to maintain an offence of child destruction.⁸⁸ The phrase 'child capable of being born alive' has been held to have substantially the same meaning as 'viable'.⁸⁹ Thus, it is reasonable to infer that s 42 only operates with respect to a viable child. Consequently, one may draw the conclusion that viability appears to be the upper time limit for lawful abortions in the ACT.

Of course, deciding that viability is the cut-off point for lawful abortions is not particularly precise as 'viability' is a shifting standard, which changes with advances in medical technology and practice.⁹⁰ In 1969, the South Australian Parliament considered that viability occurred at 28 weeks,⁹¹ whereas in recent decisions various courts have held that a child at 26 weeks is viable.⁹² At the other end of the spectrum, a Queensland court has held that a child at 21 weeks is not viable.⁹³ Thus, it may be said that viability is currently reached sometime between 22 and 26 weeks,⁹⁴ and certainly no later than 28 weeks gestation.⁹⁵ This accords with current practice, as most abortion service providers in Australia do not provide abortions if the woman is over 22 weeks pregnant.⁹⁶ This is the case even in jurisdictions that expressly provide for a 28 week limit.⁹⁷ The practical rationale for such decisions is the fact that abortions performed after the second trimester are far more dangerous.⁹⁸

⁸⁸ For example, see *Crimes Act 1958* (Vic) s 10, which limits the offence of child destruction to 'a child capable of being born alive'. Also see *Criminal Law Consolidation Act 1935* (SA) s 82A(7).

⁸⁹ See *C v S* [1987] 1 All ER 1230, 1240-3; and *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 621-2.

⁹⁰ Courts have recognised this fact, deciding that although a child may not have been viable until 28 weeks gestation in 1929 (the year in which the relevant UK legislation was enacted), it was highly likely that viability would be reached much sooner in the late 20th century - see *C v S* [1987] 1 All ER 1230, 1240.

⁹¹ See *Criminal Law Consolidation Act 1935* (SA) s 82A(8).

⁹² See, eg, *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 616-17.

⁹³ See *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, 40.

⁹⁴ This legal conclusion is backed up by medical evidence. For example, Mason makes the point that 22 weeks is the earliest point at which viability could be said to be reached as it is the earliest point at which a child could breathe. See J K Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (1990) 104.

⁹⁵ Indeed, no Australian jurisdiction allows lawful abortions beyond 28 weeks, unless it is a case of medical emergency whereby the mother's life is in danger or her health is seriously threatened by the continuance of the pregnancy.

⁹⁶ See Pregnancy Advisory Centre, Mark J Rankin, and Natasha Cica, 'Law and Practice of Abortion in Australia', in Pregnancy Advisory Centre (ed), *Information Pack for Students and Health Workers Interested in Abortion* (1999) 3, 3-7.

⁹⁷ For example, the Pregnancy Advisory Centre, which performs most abortions in South Australia, has a policy of only performing abortions up until 20 weeks, despite the fact that the South Australian legislation allows lawful abortions up until 28 weeks of pregnancy.

⁹⁸ See National Health and Medical Research Council, above n 3, 13.

However, a desire to be rid of an unwanted pregnancy is hardly satisfied by reference to such concerns. Indeed, given the torture of an unwanted pregnancy, there exists a strong argument in favour of allowing abortions at any stage of pregnancy.⁹⁹ It would, I imagine, seem quite absurd to a woman seeking an abortion to be told that she cannot legally obtain one as she is 22 weeks pregnant, but if she had approached the abortion service provider when she was only 21 weeks pregnant, she would no longer be pregnant. Such advice would be devastating.

Unfortunately for women who find themselves in this position, to suggest that the law should be further reformed, so as to allow abortions on demand at any stage of pregnancy, would be political suicide, as many members of our society would have a strong stance against such action (whether logically justified or not), and the anti-choice movement would probably take the opportunity to erode reforms already achieved. Thus, although abortions in the ACT are (probably) only lawful until viability, and therefore the purist may say that the ultimate goal of total legalisation is yet to be achieved, it is a flaw within the system that those of us who advocate choice will just have to live with for the time being. Furthermore, it should not, in any meaningful way, take away from the achievement of the ACT Parliament in passing the 2002 legislation which (with the viability exception discussed immediately above), removes abortion from the realm of the criminal law.

The 2002 Act that provided for the abolition of the offence of abortion was followed with the repeal of the 1998 Act regulating the medical profession.¹⁰⁰ This was achieved by the passing of the *Health Regulation (Maternal Health Information) Repeal Act 2002* (ACT). Indeed, as the 1998 Act (although professing otherwise) clearly raised criminal issues with respect to abortion, it was necessary to repeal this Act in order to complete the legalisation process.

Of course, in repealing the 1998 Act, the ACT Parliament created a legal void with respect to abortion. This void was filled by further legislative reform, namely making amendments to the *Medical Practitioners Act 1930* (ACT), by passing the *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT), which inserted a new 'Part 4B' into the *Medical Practitioners Act 1930* (ACT).

VII THE NEW REGIME

Part 4B of the *Medical Practitioners Act 1930* (ACT), consists of ss 55A, 55B, 55C, 55D, and 55E, and provides for the medical regulation of abortion in the ACT. In common with the other legislative reforms of 2002, this medicalisation of abortion was achieved efficiently. The effect of pt 4B of the *Medical*

⁹⁹ See Laurie Nsiah-Jefferson, 'Reproductive Laws, Women of Color, and Low-Income Women' (1989) 11 *Women's Rights Law Reporter* 15, 15-30, in which she convincingly proves her point that law restricting late abortions will continue to have a particular impact on poor women and women of colour.

¹⁰⁰ Note that all of the major reform Acts were passed simultaneously, with the same notification date of 9 September 2002 (ie, Acts 24, 25 and 26 of 2002).

Practitioners Act 1930 (ACT) is that abortions in the ACT must be performed in an approved facility¹⁰¹ by a registered medical practitioner.¹⁰²

Unfortunately, this medicalisation of abortion is achieved at the cost of re-criminalising certain abortions. That is, under pt 4B a failure to perform an abortion in an approved medical facility carries a possible penalty of imprisonment for six months,¹⁰³ while a person who performs an abortion who is not a registered medical practitioner is liable to be imprisoned for five years.¹⁰⁴ Clearly, penalties of imprisonment carry definite connotations of criminality. This is both unfortunate and unnecessary.

Sections 55B and 55C of the *Medical Practitioners Act 1930* (ACT) effectively create new offences, namely: (1) performing abortions in non-approved facilities; and (2) the performance of an abortion by anyone other than a registered medical practitioner. This re-criminalisation of certain abortions is cause for concern, however like the case of viability referred to above, it is difficult to express this state of affairs as a major problem in the current political and social climate. That is, the medical profession possess a tax-payer funded monopoly with respect to the provision of a number of health services; abortion is simply no exception. It is also standard practice to label as criminal any health professionals acting outside the medical professions' monopoly; again, abortion is no exception. Put simply, the medical profession in Australia is a very successful 'profession'.¹⁰⁵ Consequently, the profession's monopoly with respect to certain services, including abortion, is likely to continue into the foreseeable future. There seems to be neither the political will, nor the social offensive, to change this state of affairs, and provided there are sufficient members of the medical profession prepared to perform abortions, the maintenance of the medical monopoly is not cause for great alarm.

The more immediate concern may be the creation of an offence with respect to abortions not performed in an approved medical facility, as approval under s 55D is granted by the Minister. Fortunately s 55D(3) makes it clear that the 'Minister must not unreasonably refuse or delay a request for approval of a medical facility', and it would appear that the only test the Minister should direct his/her mind to in reaching a decision in this respect is whether or not a medical facility is 'suitable on medical grounds for carrying out abortions'.¹⁰⁶ Auspiciously, this

¹⁰¹ See *Medical Practitioners Act 1930* (ACT) s 55C.

¹⁰² See *Medical Practitioners Act 1930* (ACT) s 55B.

¹⁰³ See *Medical Practitioners Act 1930* (ACT) s 55C.

¹⁰⁴ See *Medical Practitioners Act 1930* (ACT) s 55B. Note: under the terms of a new Bill currently before the ACT Parliament this penalty for non-medical practitioners is extended to life imprisonment. See the proposed *Crimes Amendment Bill 2002* (ACT) s 42A(2).

¹⁰⁵ Without going into unnecessary detail, I take the goal of 'professions' to be the monopoly of specific markets, and I believe that the medical profession are especially successful in this respect. For support of this view see Eliot Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (1970); Eliot Freidson, *Professional Dominance: The Social Structure of Health Care* (1970); Eliot Freidson and Judith Lorber, *Medical Men and their Work* (1972); Euan Willis, *Medical Dominance: The Division of Labour in Australian Health Care* (1989); Noel Parry and Joseph Parry, *The Rise of the Medical Profession* (1976).

¹⁰⁶ See *Medical Practitioners Act 1930* (ACT) s 55D(1).

approval process seems to be operating well, with five approvals thus far granted.¹⁰⁷

The final provision of note is s 55E, which contains the standard conscientious objector clauses, allowing people 'to refuse to assist in carrying out an abortion',¹⁰⁸ and making it clear that 'no-one is under a duty (by contract or by statutory or other legal requirement) to carry out or assist in carrying out an abortion.'¹⁰⁹ Such clauses can be criticised as inconsistent with the medical professions' oath of assistance in all cases, but as many individuals have a resistance to abortion based on religious or moral grounds there also exist strong arguments in favour of the inclusion of such clauses. This is especially the case given that such clauses do not alleviate a medical practitioner from his/her duty to provide advice, or to refer a patient to another practitioner, but are simply confined to the operation itself. Furthermore, according to the medical profession's ethical code, if the woman's life was threatened assistance would have to be provided irrespective of any such objections. Thus, all in all, the effect of these clauses is not profound, and may merely be viewed as a recognition and acceptance of the diverse views held on the subject of abortion.

In summary, it is clear from the above that the ACT is the only jurisdiction in Australia that in any meaningful way satisfies the commendable policy goals of the Women's Electoral Lobby: (1) the removal of abortion from the criminal codes; and (2) the regulation of the practice under health law.¹¹⁰ Although the process is not complete, the ACT Parliament have moved towards accepting women as full moral persons, as it has come some way to recognising (albeit incompletely) that women have 'the right to make their own decisions about their own bodies.'¹¹¹

Despite the fact that abortion is not entirely removed from the realm of the criminal law (which is essential if women are to possess a right to abortion), in that post-viability abortions; abortions not performed by a registered medical practitioner; and abortions not performed in an approved medical facility remain unlawful, it is possible to say that the ACT Parliament have achieved the most that can be realistically hoped for in contemporary Australia. With the exceptions mentioned immediately above, the ACT Parliament has removed abortion from the criminal code and from the common law, and has provided for the medical regulation of the practice. On the condition that abortions are performed pre-viability, and by registered medical practitioners in approved facilities, there now exists effective abortion-on-demand in the ACT.

Of course, this legalisation and simultaneous medicalisation of abortion does not grant any rights to women. However, in addition to providing obvious practical

¹⁰⁷ The requisite approval must be in writing and such approval is a notifiable instrument (*Medical Practitioners Act 1930* (ACT) s 55D(2)), thus one can keep track of the number of approvals.

¹⁰⁸ *Medical Practitioners Act 1930* (ACT) s 55E(2).

¹⁰⁹ *Medical Practitioners Act 1930* (ACT) s 55E(1).

¹¹⁰ See Editorial, (2003) Women's Electoral Lobby (WEL) Australia Inc <<http://www.wel.org.au/policy/00pol3.htm#Abortion>> at 7 April 2003.

¹¹¹ Rankin, above n 1, 252.

benefits, the 2002 reforms leave space for women to make their own decisions (within certain parameters) with respect to abortion, as they do not have to surmount the hurdle of the legal tests that exist in other jurisdictions. Although women in the ACT are not completely granted the power to make their own decisions about their bodies, by removing abortion from the criminal law, an essential step has been taken towards this goal.¹¹² As previously stated, 'while abortion remains a subject for Australian criminal law, it can never be a right possessed by Australian women.'¹¹³

The ACT has made headway in this respect, and the current ACT regime is the most we can presently hope for in the short-term. The 2002 reforms therefore deserve our praise, and indeed our protection. This last point requires emphasis as anti-choice advocates are unlikely to rest until the law reverts back to its draconian origins. We must therefore protect the ACT achievement and campaign for other jurisdictions to follow. The ACT Parliament has lighted the way towards abortion being a right, and has therefore taken a crucial and essential step towards the recognition of reproductive freedom; the feminist utopia. Of course, reproductive freedom remains a distant dream for Australian women, but the ACT Parliament, by virtue of the 2002 reforms, has brought that dream into sharper focus.

¹¹² See Petersen, above n 25, 271; Crowley-Cyr, above n 27, 257-8; Teresa Libesman and Vani Sripathy (eds), *Your Body Your Baby: Women's Legal Rights from Conception to Birth* (1996) 42; Natasha Cica, 'The Inadequacies of Australian Abortion Law' (1991) 5 *Australian Journal of Family Law* 37, 66; Davies, above n 27, 109; McLean, above n 27, 227; McDonnell, above n 27, 126-30.

¹¹³ Rankin, above n 1, 252.