



Research Service,
Parliamentary Library,
Department of Parliamentary Services

Current Issues Brief No. 4, 2008

ABORTION LAW REFORM BILL 2008

An examination of issues relevant to the Abortion Law Reform Bill 2008. The paper includes a summary of the Bill, and a discussion of the current legal context in Victoria, other jurisdictions of Australia and selected overseas jurisdictions. It also provides some statistics related to abortion, and some suggested sources for further information.

Parliamentary Library
Research Service
September 2008

This Current Issues Brief is part of a series of papers produced by the Library's Research Service. Current Issues Briefs seek to provide an overview of a subject area for Members, and include information on key issues related to the subject.

Parliament of Victoria

NB: Readers should note that this paper was prepared prior to the passage of the Abortion Law Reform Bill 2008 through both Houses of the Victorian Parliament. The Bill was passed through the Legislative Assembly on 12th September 2008 and passed through the Legislative Council on 10th October 2008, receiving Royal Assent on 22nd October 2008. Readers interested in the Act as passed should visit the Victorian Legislation & Parliamentary Documents website @ <http://www.dms.dpc.vic.gov.au/>.

Contents

Introduction	1
1. The Victorian Law Reform Commission Report	3
1.1 Model A	3
1.2 Model B	4
1.3 Model C	4
1.4 Recommendations	4
2. About the Bill	7
2.1 Second Reading Speech	7
2.2 The Bill	7
2.3 Views of Parliamentary Parties	9
3. The current Victorian context	13
3.1 The Crimes Act 1958	13
3.2 The Menhennitt ruling: the case of <i>R v Davidson</i>	14
3.3 Current abortion practices in Victoria	15
4. The law in other Australian jurisdictions	17
4.1 The Australian Capital Territory	17
4.2 New South Wales	18
4.3 Tasmania	19
4.4 Western Australia	20
4.5 South Australia	21
4.6 Queensland	22
4.7 The Northern Territory	23
5. Overseas jurisdictions	25
5.1 United Kingdom	25
5.2 Canada	26
5.3 New Zealand	27
5.4 United States	28
5.5 Asia	29
5.6 China	29
5.7 Singapore	29

5.8	Malaysia	30
5.9	Japan	30
5.10	Indonesia	30
6. Statistics on abortion in Australia		31
6.1	Medicare statistics	32
6.2	National perinatal statistics	33
6.3	Statistics on late terminations	34
7. Further resources		37
7.1	Victorian Law Reform Commission – Surveys of Attitudes	37
7.2	Stakeholders	37
7.3	References	40

Note

This paper is the product of a collegial effort by members of the DPS Parliamentary Library's Research Service: Greg Gardiner, Bella Lesman, Claire Higgins, Rachel Macreadie and Adam Delacorn. Some sections of this paper previously appeared in a paper on the issue of abortion published in 2007 by the Research Service under the title 'Crimes (Decriminalisation of Abortion) Bill 2007'; these sections have been updated and expanded.

Introduction

On 19 August 2008 the Government introduced the Abortion Law Reform Bill 2008 (the 'Bill') into the Legislative Assembly. In her second reading speech, the Minister for Women's Affairs, Ms. Maxine Morand, said that the legislation would 'provide Victorians with a modern legislative framework that reflects widespread community views and current clinical practice in relation to this important women's health issue'.¹ The Minister stated that the Bill 'has drawn on the comprehensive recommendations of the Victorian Law Reform Commission final report on the law of abortion...and reflects the two-staged approach based on 24 weeks gestation in the commission's model B.'² The Victorian Law Reform Commission's final report was tabled in Parliament on 29 May 2008.

In August 2007 the Premier, Mr. John Brumby, announced that the Government would seek advice from the Victorian Law Reform Commission (the 'Commission') on options for abortion law reform, and specifically on removing abortion offences from the *Crimes Act 1958* and clarifying under what circumstances abortion was legal.³ Mr. Brumby stated that 'We need to modernise and clarify our laws to achieve a balanced outcome and reflect community sentiment and existing clinical practice'.⁴ The Government provided terms of reference to the Commission the following month.

In his statement in 2007 the Premier also made mention of a Private Member's Bill on abortion law reform, which was then before the Legislative Council. The Crimes (Decriminalisation of Abortion) Bill 2007 was introduced into the Legislative Council as a Private Member's Bill by Ms Candy Broad MLC on 18 July 2007, with the overall purpose of removing unlawful abortion as an offence from the Crimes Act and abolishing any common law offences of unlawful abortion. Following the Government's announcement on 20 August, this bill was subsequently withdrawn.⁵

While unlawful abortion exists as a crime in the statutes, the judicial decision in the 1969 landmark case *R v Davidson*⁶ has meant that abortion services are available to Victorian women in certain circumstances. While the law on abortion in Australia varies across state and territory jurisdictions, the ruling in *R v Davidson* has been influential in determining Australian approaches. In a global context, the law in relation to abortion can vary profoundly from one country to another, and from one jurisdiction to another within federated states, such as the United States.

Attitudes towards abortion are often shaped by deeply held philosophical, religious or ideological beliefs and perspectives. Personal experience is also a powerful determinant of attitudes towards abortion. Belief systems and personal experiences thus provide the bases upon which people support or oppose terminations, both in terms of the morality of the procedure and the legal regime that regulates it. In the modern era, where medical practice has become subject to regulation and legal

¹ Victoria, Legislative Assembly (2008) *Debates*, Bk. 11, p. 2954.

² Victoria, Legislative Assembly (2008) *Debates*, Bk. 11, p. 2952.

³ Office of the Premier (2007) *Abortion Law to be Referred to Law Reform Commission*, Media Release, 20 August.

⁴ *ibid.*

⁵ See Victoria, Legislative Council (2007) *Debates*, Bk. 12, pp. 2480-81.

⁶ *R v Davidson* [1969] VR 667.

constraint, the procedure has been controversial. Determining an appropriate legal framework for abortion has often been contentious and at the centre of debate. In this context it is important to note that any legal framework chosen to regulate abortion will have both supporters and detractors. Given that the Bill is to be subject to a conscience vote by Members, Victorian legislators thus face a unique challenge.⁷ On the one hand, Members will be guided by their own individual beliefs, principles and experiences. On the other hand, Members will be cognizant of their role as representatives, and the various representations that have been made to them.

It is not the intention of this paper to canvass the ethical, moral and philosophical views held by individuals, interest groups and members of the community on the complex array of issues surrounding abortion. A wide literature already exists on the subject, and Members are invited to see the reference list at the rear for further reading in this area. (There have been several papers on abortion law in Australia produced by Parliamentary Libraries in recent years, which provide a valuable resource.)⁸

This paper's focus is on the Bill before the Victorian Parliament, the legal context of abortion in Australia, and some statistics on abortion. Part 1 provides a short overview of the Commission's final report and the three models for reform, while Part 2 discusses the Bill, the second reading speech and summarises the positions of the political parties.

Part 3 covers the current regulation of abortion in Victoria, including a summary of the Menhennitt ruling from the 1969 case *R v Davidson*. The legal context in all other Australian states and territories is covered in Part 4. Part 5 provides an overview of abortion law in selected overseas jurisdictions. Part 6 includes statistics on the prevalence of abortion in Victoria and Australia, while Part 7 is a guide to further information on the topic, including the Commission's surveys of attitudes, a list of stakeholders and journal articles and media reports.

⁷ See the Premier's statement in Victoria, Legislative Assembly (2008) *Debates*, Bk. 1, p. 4; Minister for Women's Affairs (2008) *Abortion Report Tabled in Parliament*, Media Release, 29 May; Victorian Nationals (2008) *Nationals Given Conscience Vote on Social Issues*, Media Release, 30 January; D. Rood and C. Nader (2008) 'Labor gives go-ahead to options on abortion vote', *The Age*, 30 May.

⁸ See N. Cica (1998) 'Abortion Law in Australia', *Research Paper No. 1*, Australian Parliamentary Library, Canberra; T. Drabsch (2005) 'Abortion and the law in New South Wales', *Briefing Paper No. 9*, NSW Parliamentary Library Research Service, Sydney; and, N. Dixon (2003) 'Abortion Law Reform: An Overview of Current Issues', *Research Brief No. 9*, Queensland Parliamentary Library, Brisbane.

1. The Victorian Law Reform Commission Report

In September 2007 the Attorney-General and Deputy Premier, Mr. Rob Hulls, asked the Commission to provide advice on options to clarify the existing law of abortion, and to remove abortion offences from the Crimes Act when performed by qualified medical practitioners. The Commission was required to report back by 28 March 2008.

The terms of reference stated that the Commission should provide the Victorian Government with options to decriminalise abortion, noting that the Government's objectives were to modernise and clarify the law and 'reflect current community standards, without altering current clinical practice'.⁹ It was stated in the terms of reference that the 'government's aim is that reform should neither expand the extent to which terminations occur, nor restrict current access to services'.¹⁰

The Commission was required to take into consideration existing practices in Victoria concerning terminations of pregnancy by medical practitioners, the existing legal principles that govern termination practices in Victoria, the Government's objectives (to clarify the law) and the legislative and regulatory arrangements in other Australian jurisdictions. Importantly, the Commission was not asked to address the question of whether decriminalisation is an appropriate policy or to make judgements about the ethical and philosophical arguments surrounding abortion. In its report however, the Commission illuminates the views of various stakeholders reflected in submissions to it and outlines some of the major philosophical arguments.¹¹

The Commission received 519 submissions and conducted 36 group and individual consultations in their review and subsequently presented three possible models for reform of abortion law. All three models decriminalise abortion, only when performed by, or under the supervision of, a qualified medical practitioner. The major difference between the three options is who can ultimately authorise an abortion, the medical practitioner or the woman, and the circumstances in which an abortion is lawful.¹²

1.1 Model A

Model A codifies the Menhennitt ruling, essentially incorporating the rules into legislation that govern the current circumstances in which an abortion is lawful.¹³ Under Model A, an abortion is lawful if it has the woman's consent, a medical practitioner has determined that the abortion is necessary because of the risk of harm to the woman if the pregnancy is not terminated, and that medical practitioner performs, or supervises the performance of, the abortion.

In determining the 'risk of harm', the Commission offers three options:

⁹ Terms of Reference in, Victorian Law Reform Commission (VLRC) (2008) *Law of Abortion: Final Report*, Victorian Law Reform Commission, Melbourne, viewed 22 August 2008, viewed at <www.lawreform.vic.gov.au>, p. 5.

¹⁰ *ibid.*

¹¹ VLRC (2008) *op. cit.*, Appendix B.

¹² Victorian Law Reform Commission (2008) *Final Abortion Report Tabled*, VLRC, Media Release, 29 May, viewed 22 August 2008, viewed at <www.lawreform.vic.gov.au>.

¹³ VLRC (2008) *op. cit.*, p. 87.

- Option 1: the abortion must be a necessary and proportionate response to the risk of harm faced by a pregnant woman.
- Option 2: restates NSW case law, which involves a description of social, economic and medical factors that may impact upon a woman's physical or mental health during pregnancy or afterward.
- Option 3: simplifies the determination of risk of harm by not expressly referring to proportionality. Unlike Options 1 and 2, which stipulate that the risk of harm to the woman must involve a *serious* danger to her life or to her physical or mental health, the third option states that the 'abortion is necessary to preserve the woman from a risk of harm to her life, or to her physical or mental health.'¹⁴

1.2 Model B

Model B, which is the model chosen by the Victorian Government in the development of the Abortion Law Reform Bill 2008, offers a two-tiered approach to the regulation of abortion that separates early and late stage abortions.¹⁵ Late abortions are defined as those where the pregnancy has exceeded 24 weeks gestation. Abortions before that gestation period are regulated in the same way as any other medical procedure and would be a private decision for a woman in consultation with her doctor; the only requirements being the woman's consent and that the procedure be performed, or supervised, by a medical practitioner. Once a pregnancy has passed 24 weeks gestation, the abortion would be lawful if one or more doctors determined that it was necessary to prevent risk of harm to the woman if the pregnancy continued (the Bill stipulates two or more doctors).

The gestational limit that divides the two stages of this model reflects current clinical practice in Victoria and is also consistent with the gestational threshold in British abortion law, as discussed in Section 5.1 of this paper.¹⁶

1.3 Model C

Model C allows for abortion to be governed by the same legal rules which regulate all other medical procedures and allows for an abortion to be lawful at any stage of a pregnancy if the woman gives her consent and if the medical practitioner considered it ethically appropriate to perform that procedure.¹⁷ Abortion would be a private decision for a woman in consultation with her doctor and her consent would provide the legal authority for an abortion when it was performed, or supervised by, a medical practitioner. It would be a criminal offence if the abortion was performed by an unqualified person in any circumstances.

1.4 Recommendations

The Commission's report notes that regardless of which of the three models for reform is chosen by the Government, several changes are required.¹⁸ These include an amendment to the Crimes Act to make it clear that destruction of a foetus caused by

¹⁴ *ibid.*, p. 88.

¹⁵ *ibid.*, p. 90.

¹⁶ *ibid.*, ch. 3.

¹⁷ *ibid.*, p. 93.

¹⁸ *ibid.*, p. 8.

assault of a pregnant woman falls within the definition of ‘serious injury’ to the woman, regardless of whether or not the woman suffers any other harm (r. 2). Furthermore, the report states that a medical practitioner who performs an unlawful abortion should be liable to a professional rather than a criminal sanction.

The Commission recommends that any new abortion laws should not contain the following: mandated information provisions (r. 4); a requirement for mandatory counselling (r. 5); a compulsory delay or cooling-off period (r. 6); restrictions on where abortion procedures may be performed (r. 7). The Commission made these recommendations because it considered the current regulations sufficient in the stated areas. Further legislation of the reporting of abortions and outcomes by public providers is not considered necessary since this is already a responsibility of public providers covered under the *Health Services (Private Hospitals and Day Procedure Centres) Regulations 2002* (r. 13). The Commission made a total of sixteen recommendations.

2. About the Bill

2.1 Second Reading Speech

In the second reading speech of 19 August 2008, Ms. Maxine Morand, the Minister for Women's Affairs, told the House that legislation which reflects 'current clinical practice and community standards' is 'long overdue'.¹⁹ She described the Bill as a 'modern legislative framework' which acknowledges that women deserve support and legal certainty in making difficult reproductive health choices.²⁰

In noting the Bill's historic significance, the Minister discussed the history of abortion law in Victoria, with particular reference to the Menhennitt ruling of 1969. The Minister pointed out that while the common law provided for 'therapeutic abortions' thereafter, the ruling did not clarify exactly when a termination of pregnancy was permissible, and the status of abortion under the Crimes Act had not been considered by the Victorian Supreme Court since. The Minister stated that rulings in other jurisdictions, such as the NSW Court of Appeal, had expanded on the matter, determining that physicians should take social and economic factors into account when assessing risks to a pregnant woman's health.

The Minister then outlined the findings of the Commission's inquiry, which had helped to inform the development of the Bill. The Minister noted that the Commission found that 'the rate of abortion is related to the rate of unplanned pregnancy, and the availability and use of contraception'.²¹ As such, the Commission had reported that a great majority of terminations occur in the early stages of pregnancy. The Minister told the House that the 24 week limit, as provided for in the Bill, is 'a common threshold for more complex cases and is reflected in current clinical practice in Victoria, Australia and overseas'.²²

2.2 The Bill

The main purposes of the Bill, as outlined in Part 1(1) are threefold:

- To reform the law relating to abortion
- To regulate health practitioners performing abortions
- To amend the *Crimes Act 1958*
 - By repealing the relevant provisions
 - By abolishing common law offences relating to abortion
 - By making it an offence for an unqualified person to perform an abortion
 - By amending the definition of serious injury to include the destruction of a foetus other than in the course of a medical procedure

¹⁹ Victoria, Legislative Assembly (2008) *Debates*, Bk. 11, p. 2951.

²⁰ *ibid.*, p. 2954, 2951.

²¹ *ibid.*, p. 2951.

²² *ibid.*

The role of registered health practitioners is detailed in Part 2 of the Bill, in relation to the termination of pregnancy and the supply or administration of relevant drugs. The essential distinction remains between a pregnancy of not more than 24 weeks and a pregnancy after 24 weeks.

Section 4 provides for a registered medical practitioner to perform an abortion on a woman who is not more than 24 weeks pregnant. In comparison, Section 5 (1) states that a registered medical practitioner may perform an abortion on a woman who is more than 24 weeks pregnant only if they reasonably believe ‘that the abortion is appropriate in all the circumstances’, and have consulted at least one other registered medical practitioner who shares this belief.

In making this determination, a registered medical practitioner must consider a range of circumstances, as outlined in Section 5(2). These include:

- a) ‘all relevant medical circumstances; and
- b) the woman’s current and future physical, psychological and social circumstances’.

Under Section 6, registered pharmacists and registered nurses who are legally authorised to supply drugs ‘may administer or supply the drug or drugs to cause an abortion in a woman who is not more than 24 weeks pregnant’.

Section 7 provides for the supply or administration of drugs after the 24 week mark: 7(1) states that a registered medical practitioner may direct in writing a registered pharmacist or registered nurse, who is employed or engaged by a hospital, to administer or supply a drug or drugs only if the medical practitioner:

- a) ‘reasonably believes that the abortion is appropriate in all the circumstances; and
- b) has consulted at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances’.

7(2) states that in making this determination, a registered medical practitioner must consider:

- a) ‘all relevant medical circumstances; and
- b) the woman’s current and future physical, psychological and social circumstances’.

Sections 7(3) and 7(4) clarify these provisions further, stating that a registered pharmacist or a registered nurse may only administer or supply a drug or drugs if they are employed or engaged by a hospital, and ‘only at the written direction of a registered medical practitioner’. Section 7(5) clarifies the meaning of ‘hospital’: i.e. a public or private hospital or day procedure centre within the meaning of the *Health Services Act 1988*.

Under Section 8(1) a registered health practitioner who is requested by a woman to advise on a proposed abortion or to ‘perform, direct, authorise or supervise’ an abortion on that woman but who conscientiously objects is obliged to:

- a) ‘inform the woman that the practitioner has a conscientious objection; and
- b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion’.

Section 8(2) however, states that Section 8(1) does not apply to a practitioner who is under a duty set out in the following two subsections: 8(3) states that regardless of any conscientious objection, a registered medical practitioner is under a duty ‘to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman’. Sub-section 8(4) states that despite any conscientious objection, a registered nurse is under a duty to assist a registered medical practitioner in the same circumstance.

Part 3 outlines the relevant amendments to the Crimes Act. These include the repeal of Subdivision (2) of Division 1 of Part 1 of the Act, and the insertion of relevant definitions into Section 15. In particular, Section 10(2) provides for a revised definition of ‘serious injury’ to be inserted into Section 15 of the Crimes Act; it states that ‘serious injury’ includes:

- a) ‘a combination of injuries; and
- b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.’

Section 11 inserts new Sections 65 and 66 into the Crimes Act, to substitute for those that are repealed under Section 9 of this Bill. These will now address abortions performed by unqualified persons and the abolition of common law offences.

In the case of Section 65, a person who is not a qualified person must not perform an abortion on another person, and to do so brings a maximum penalty of 10 years in prison. A woman who consents to or assists in the performance of an abortion on herself however, is not guilty of an offence under this section. A qualified person is defined as a registered medical practitioner, while a registered pharmacist or registered nurse is a qualified person ‘only for the purpose of performing an abortion by administering or supplying a drug or drugs’ in accordance with the Abortion Law Reform Act 2008. Section 65(4) provides relevant definitions. New Section 66 abolishes any rule of common law that makes abortion an offence.

2.3 Views of Parliamentary Parties

As the Bill will be subject to a conscience vote, the views of some Members have been canvassed in the news media. More than 50 Members have openly expressed their voting intentions; 31 in support and 23 against. Support for, and opposition to the Bill has been expressed by both Government and Opposition Members. A large number of Members are undecided or have not made their views public.

The Labor Party's policy position on abortion was included in their 2006 election platform; Section 3.38 stated that 'Labor will amend Section 65 of the Crimes Act to provide that no abortion be criminal when performed by a legally qualified medical practitioner at the request of the woman concerned'. It also noted that to be 'consistent with National ALP policy, this matter remains the subject of a conscience vote for all Members of Parliament'.²³ In commenting on the Bill's introduction to the Legislative Assembly, the Premier described abortion as 'a long-standing issue' for women, and an 'extraordinarily difficult and personal decision' which should not remain in the criminal code.²⁴ Those Government Members who support the Bill believe it is a necessary and modernising legislative reform which affirms the status quo, reflects current clinical practice and provides legal clarity.²⁵ Those Government Members who have publicly voiced their opposition to the Bill share a pro-life sentiment, and are concerned about a perceived lack of detail within the Bill itself.²⁶

The Liberal Party has not released a party statement on abortion, however leader Ted Baillieu has indicated his support for a conscience vote among party Members.²⁷ Mr Baillieu has also expressed his personal support for the Bill, stating that women 'in this day and age' should be able to exercise their reproductive choice 'without fear of unwarranted persecution, prosecution or stigma'.²⁸

National Party leader Peter Ryan MLA has given Nationals Members a conscience vote on the Bill, as part of his pledge in January this year to allow voting freedom on controversial social issues.²⁹ Mr Ryan has expressed his personal opposition to the Bill as 'a matter of principle'; he believes that while abortion is 'a matter deeply bound up with women's health... the first issue is a question of dignity of life'.³⁰ He is also concerned that the Bill will serve to increase the abortion rate in Victoria.³¹

The Greens have been vocal advocates for abortion law reform, and Victorian Greens health policy supports women making 'informed choices about their lives, education, sexual identity, health and reproduction'.³² Specifically, Victorian Greens policy supports women having access to legal abortion at any stage, with voluntary access to

²³ Australian Labor Party – Victorian Branch (2006) *Rising to the Challenges – Victorian ALP Platform 2006*, ALP Victorian Branch, Melbourne, viewed 24 July 2007,

<http://www.vic.alp.org.au/index.php?option=com_content&task=view&id=16&Itemid=9>, p. 49.

²⁴ P. Austin, D. Rood and N. Miller (2008) 'Abortion Law Win Hailed by Kirner', *The Age*, 20 August, p. 1.

²⁵ G. Mitchell and N. Higginbottom (2008) 'Abortion Bill Faces Struggle', *Herald Sun*, 22 August, p. 16; Office of the Premier (2008) *Abortion Laws to be Modernised in Victoria*, Media Release, 19 August.

²⁶ Stateline (2008) 'Victorian Parliament set to decide on new abortion and euthanasia law reforms', *ABC Television*, transcript, 22 August, viewed 25 August 2008,

<<http://www.abc.net.au/stateline/vic/content/2006/s2343956.htm>>; G. Mitchell (2008) 'Abortion Law Push Labor MP Demands Amendments', *Herald Sun*, 21 August, p. 9.

²⁷ D. Rood and C. Nadar (2008) 'Labor Gives Go-Ahead to Options on Abortion Vote', *The Age*, 30 May. See also: E. Whinnett and A. Gardiner (2007) 'Conscience Vote on Abortion Law', *Herald Sun*, July 18.

²⁸ C. Best and K. Bradford (2008) 'Financial Hardship Reason for Abortion Under New Laws', *AAP*, 19 August.

²⁹ D. Rood and C. Nadar (2008) op. cit.; Victorian Nationals (2008) *Nationals Given Conscience Vote on Social Issues*, Media Release, 30 January.

³⁰ D. Rood (2008) 'Politicians on both sides part ways over Abortion', *The Age*, 21 August, p. 8.

³¹ *ibid.*

³² Victorian Greens (2008) *Abortion Law Reform Bill 2008*, Victorian Greens Briefing Paper, p. 1.

counselling ‘on the medical and personal issues involved’.³³ Colleen Hartland, MLC for Western Metropolitan, has argued that the 24 week gestation period is too restrictive and ‘an extra burden’ to the difficulties faced by women and their families.³⁴ The three Greens Members in the Upper House have not yet indicated how they will vote on the Bill, but have stated that their individual moral positions accord with party policy. Both Hartland and her colleague Greg Barber have publicly expressed their disappointment that the Government opted for Model B rather than the more liberal Model C, which ‘puts the decision in the hands of women at any stage of the pregnancy’.³⁵

Independent MLA Craig Ingram has also indicated that he will vote for the Bill. The *Herald Sun* reported on 22 August that Mr Ingram had surveyed his Gippsland East constituents, and 80 per cent of respondents expressed support for decriminalisation.³⁶

The Democratic Labor Party’s Peter Kavanagh, MLC for Western Victoria, has been a prominent opponent of abortion law reform. He believes ‘there has been a hate campaign against the foetus’, and he proposes an alternative system in which unwanted babies are adopted out to infertile couples and the birth mother retains some contact with the child.³⁷ Mr Kavanagh is also in favour of mandatory cooling off periods and counselling for women seeking abortions.³⁸

³³ *ibid.*

³⁴ Victorian Greens (2008) *Abortion Legislation Lacks Certainty*, Media Release, 19 August.

³⁵ Victorian Greens (2008) *Abortion Law Reform Bill 2008*, op. cit., p. 2; and, G. Mitchell and N. Higginbottom (2008) op. cit.

³⁶ G. Mitchell and N. Higginbottom (2008) op. cit.

³⁷ M. Fyfe (2008) ‘New Order in the House’, *The Sunday Age*, 24 August, p. 15.

³⁸ *ibid.*

3. The current Victorian context

Unlawful abortion is a criminal offence according to Victoria's criminal statutes, however it has been left up to the courts to decide in what circumstances an abortion might be lawful. The legislative provisions and their interpretations in the landmark case *R v Davidson* are detailed below.

3.1 The Crimes Act 1958

Sections 65 and 66 of the Victorian Crimes Act prohibit unlawful abortion. They read as follows:

65 Abortion

Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of an indictable offence, and shall be liable to level 5 imprisonment (10 years maximum).

66 Supplying or procuring anything to be employed in abortion

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).

The lawfulness of abortion is also affected by the crime of 'child destruction', detailed in Section 10 of the Crimes Act. This offence effectively prohibits late-term abortions (in Victoria deemed to be at or after 28 weeks gestation as per Section 10 (2) below), unless, as noted by Cica, the termination is performed in good faith with the sole intention of preserving the mother's life.³⁹ The Act prohibits child destruction as follows:

10 Offence of child destruction

(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 a 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.

³⁹ Cica states that 'The Victorian provision does not explicitly refer to the exception for acts done in good faith for the sole purpose of preserving the mother's life. It instead specifies that the destruction must be performed 'unlawfully' to constitute a crime. Arguably, the word 'unlawfully' in the Victorian provision implicitly incorporates the exception for acting in good faith to preserve the mother's life.' (at endnote 172). For full details see Cica (1998) op. cit.

3.2 The Menhennitt ruling: the case of *R v Davidson*

In 1969, a case was heard in the Supreme Court of Victoria which was to have a profound effect on the future understanding of when an abortion is or is not legal in Victoria, as well as other states. Dr Ken Davidson, a Melbourne doctor, was charged under s. 65 of the Crimes Act with ‘four counts of unlawfully using an instrument or other means with intent to procure the miscarriage of a woman and one count of conspiring unlawfully to procure the miscarriage of a woman’.⁴⁰ Referring to Section 65 in his judgement, Justice Clifford Menhennitt noted that ‘The use of the word “unlawfully” in the section implies that in certain circumstances the use of an instrument or other means to procure a miscarriage may be lawful. The word “unlawfully” is nowhere statutorily defined’.⁴¹ Menhennitt J argued that ‘necessity is the appropriate principle to apply to determine whether a therapeutic abortion is lawful or unlawful within the meaning of s. 65’, and concluded that an abortion could be legal if it was both ‘necessary’ and ‘proportionate’. He opined that:

...for therapeutic abortion to be lawful I think that the accused must have honestly believed on reasonable grounds that the act done by him was necessary to preserve the woman from some serious danger. As to this element of danger, it appears to me in principle that it should not be confined to danger to life but should apply equally to danger to physical or mental health provided it is a serious danger not being merely the normal dangers of pregnancy and childbirth.⁴²

Menhennitt J thus provided a reasonably broad scope of contexts which could be judged as ‘dangerous’; an abortion may be legal not only if the mother’s life was in danger, but also if her physical or mental health was at risk. This was the first time in Australia that both physical and mental health risks were considered as grounds for a legal abortion. Abortion on demand, however, where the woman simply did not wish to continue the pregnancy, was not lawful according to Menhennitt J’s decision. He summed up the relevant law in relation to ‘unlawfulness’ as follows:

For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.⁴³

On 3 June 1969, the jury acquitted Dr Davidson on all five charges. Since this case, there have been a number of occasions on which the meaning of unlawful abortion could have been re-examined, however this has not happened, and Menhennitt J’s judgement continues to represent the legal status of abortion in Victoria. Judges presiding over abortion cases in other states of Australia have subsequently relied on the Menhennitt ruling in their interpretation of the legality of abortion in certain circumstances.

⁴⁰ *R v Davidson* [1969] VR 667.

⁴¹ *R v Davidson* [1969] VR 668.

⁴² *R v Davidson* [1969] VR 671.

⁴³ *R v Davidson* [1969] VR 672.

3.3 Current abortion practices in Victoria

Dr Bertram Wainer, together with his wife Jo, opened Australia's first 'openly operating abortion clinic', the Fertility Control Clinic, in Melbourne in 1972.⁴⁴ There are now numerous abortion providers in Victoria, although most are concentrated in metropolitan Melbourne. Providers are a mixture of public hospitals (which perform approximately one quarter of all abortions in Victoria) and private clinics.⁴⁵ Services differ in the fees they charge, which also may be dependent on the stage the pregnancy is at, and have a variety of criteria for referral.

Abortion services, like other health services, are regulated through various Acts and Regulations under the administration of the Department of Human Services and ultimately the Minister for Health. Such Acts and Regulations include the *Health Act 1958*, the *Medical Practice Act 1994*, the *Health Services Act 1998*, the *Health Professions Regulation Act 2005* and the *Health Services (Private Hospitals and Day Procedure Centres) Regulations 2002*. One of the purposes of the *Health Professions Regulation Act 2005* is to 'protect the public by providing for the registration of health practitioners and a common system of investigations into the professional conduct, professional performance and ability to practise of registered health practitioners'; thus those performing abortions must comply with these professional standards.

As far as regulating the conduct of the actual abortion procedures, it appears that individual providers and professional bodies are generally responsible for developing their own clinical practice guidelines. In some instances a committee may be consulted before certain procedures, particularly in cases of later-term abortions.⁴⁶ The Royal Australian and New Zealand College of Obstetricians and Gynaecologists has developed a 'resource for health professionals' on pregnancy terminations: the document covers methods of pregnancy termination and long-term risks associated with terminations, amongst other things. It can be found at the following website: <<http://www.ranzcog.edu.au/womenshealth/termination-of-pregnancy.shtml>>.

In situations where the medical practitioner may be in some doubt as to the legality of conducting a termination procedure, medical defence organisations may give verbal and written legal advice to their members on a case by case basis. The major medical defence organisations operating in Victoria typically provide their members with a 24 hour medico-legal telephone advice and support service. The Australian Medical Association, whilst supporting the removal of abortion from criminal statutes, does not provide written guidelines or advise medical practitioners individually on the legal aspects of abortion. For further information on clinical practices in Victoria see the Commission's final report.⁴⁷

⁴⁴ J. Wainer (ed.) (2006) *Lost: illegal abortion stories*, Carlton, Melbourne University Press, p. 17.

⁴⁵ K. Rice (2005) *Abortion Issues Paper*, Melbourne, Women's Health Victoria, p. 6.

⁴⁶ L. Skene (2007) 'Legal limits: the abortion laws must be changed', *The Age*, 29 July, p. 17.

⁴⁷ VLRC (2008) op. cit., ch. 3.

4. The law in other Australian jurisdictions

The table below summarises the relevant legislation that applies in each jurisdiction of Australia. Further details on each legislative regime follow in this section. The offence of ‘child destruction’ (or ‘killing unborn child’) in each jurisdiction is also referred to, as this can affect the lawfulness of late-term abortions.

State/Territory	Principal legislation	Section(s)
ACT	<i>Health Act 1993</i> <i>Crimes Act 1900</i>	80-84 42
NSW	<i>Crimes Act 1900</i>	82-84
Tasmania	<i>Criminal Code Act 1924</i>	134-135, 164, 165
WA	<i>Criminal Code Compilation Act 1913</i> <i>Health Act 1911</i>	199, 259, 290 334
SA	<i>Criminal Law Consolidation Act 1935</i>	81-82, 82A
NT	<i>Criminal Code Act 1983 (2008)</i> <i>Medical Services Act 1982 (2006)</i>	208A-208C, 170 11
Queensland	<i>Criminal Code Act 1899</i>	224-226, 282, 313
Victoria	<i>Crimes Act 1958</i>	65-66

4.1 The Australian Capital Territory

In 2002, the *Crimes (Abolition of Offence of Abortion) Act 2002* removed the statutory and common law offences of abortion in the ACT.⁴⁸ Provisions relating to abortion are now found exclusively in the *Health Act 1993* (Part 6), which provides that:

- ‘abortion’ means causing a woman’s miscarriage by administering a drug, using an instrument or any other means;
- only a doctor may carry out an abortion;
- the abortion must be carried out in an approved medical facility; and
- a person is entitled to refuse to carry out or assist in carrying out an abortion.

As is the case in most other jurisdictions, the offence of ‘child destruction’ (or the related offence of ‘killing unborn child’) remains on the criminal statutes. The *Crimes Act 1900* (s. 42) provides that:

‘A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to a childbirth and before the child is born alive-

- (a) prevents the child from being born alive; or
- (b) contributes to the child’s death;

is guilty of an offence punishable, on conviction, by imprisonment for 15 years’.

⁴⁸ The removal of abortion from the criminal statutes was regarded by proponents as a milestone in Australia, and as explained by Rankin, is the ‘predominant objective of the pro-choice movement’, see M. Rankin (2003) ‘Recent developments in Australian abortion law: Tasmania and the Australian Capital Territory’, *Monash University Law Review*, vol. 29, no. 2, p. 330.

4.2 New South Wales

In New South Wales, Sections 82 to 84 of the *Crimes Act 1900* deal with ‘attempts to procure abortion’ in a similar manner to provisions in the Victorian Crimes Act. Section 82 prohibits a woman unlawfully administering a drug to herself or using an instrument with the intent to procure a miscarriage; Section 83 prohibits someone else unlawfully administering a drug or using an instrument with intent to procure a miscarriage; and 84 provides for punishment of those who unlawfully provide drugs or instruments with the knowledge that they will be used unlawfully to procure a miscarriage.

The term ‘unlawfully’ is important in this context; the Act does not define when an abortion is or isn’t lawful, so as in Victoria, the distinction has been determined in case law. In 1971, five people were charged with unlawfully procuring miscarriages of women in contravention of Section 83 of the Crimes Act. The people charged were the surgeon, the anaesthetist, the orderly, the person who referred the patients and the owner of the premises. In the subsequent case before the courts, *R v Wald*, District Court Judge Levine noted that as was the case in the Menhennitt ruling, the ‘use of the word “unlawful” envisages circumstances in which the act must be lawful’.⁴⁹

Relying on the Menhennitt case, Levine DCJ ruled that if a woman gave her consent to a qualified medical practitioner to terminate her pregnancy, such an abortion would be legal so long as the person performing the termination honestly believed that the termination was necessary to preserve the woman’s mental and physical health, and that the danger of the operation was not out of proportion to the dangers that would result if the child were carried to term. Levine DCJ also noted that the belief that the termination was necessary could be based on economic, social or medical grounds, thus expanding the reasons for which a threat to mental or physical health could be justified. In this particular case, the five people accused were acquitted.

In one case in 1995 known as the *Superclinics* case the Levine ruling was re-interpreted and applied in a restrictive way, however this result was overturned on appeal. In ruling on the appeal, Kirby A-CJ liberalised the original Levine ruling, as noted by Cica:

The Kirby ruling does not confine permissible abortion to cases where a serious danger to the woman’s health would arise during the pregnancy, but additionally allows consideration of threats to her health that might arise after the child’s birth. The Kirby ruling also indicates that it would be very difficult to establish in court that a medical practitioner lacked the requisite honest and reasonable belief that an abortion was justified to avert a serious danger to a woman’s health.⁵⁰

As the Commission reports, a medical practitioner was convicted in NSW of the offence of unlawful abortion in 2006.⁵¹ In *R v Sood* Simpson J accepted that the statements made by Levine and Kirby in *Wald* and *Superclinics* respectively, were

⁴⁹ T. Drabsch (2005) ‘Abortion and the law in New South Wales’, *Briefing Paper No. 9*, NSW Parliamentary Library Research Service, Sydney, viewed 25 August 2008, <<http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/4B0EC8DB3B4A730DCA2570610021AA58>>, p. 20.

⁵⁰ Cica (1998), op. cit.

⁵¹ VLRC (2008) op. cit., p. 21.

correct at law. However, the jury accepted that the requisite beliefs about necessity and proportionality for the abortion to be lawful had not been formed because there was no communication between the doctor and her patient.⁵²

NSW is the only state not to have a ‘child destruction’ or related offence which applies when the foetus is in utero.⁵³

4.3 Tasmania

Sections 134 and 135 of the Tasmanian *Criminal Code Act 1924* prohibit unlawful abortion in Tasmania. Section 134 is similar to the provisions in the NSW *Crimes Act*: it is a crime for a woman to unlawfully procure her own abortion by intentionally administering a poison or using an instrument, and it is also a crime for any other person to unlawfully administer a poison or use an instrument with intent to procure a woman to miscarry. Section 135 covers the charge of aiding an intended abortion, that is, unlawfully supplying any material knowing it is to be used to procure a miscarriage is a crime.

In 2001, the Tasmanian Parliament passed the *Criminal Code Amendment Act (No 2) 2001*, ‘which sought to clarify the circumstances under which an abortion would be deemed to be lawful’.⁵⁴ The Act was in response to the fact that by 2001 the medical profession in Tasmania had virtually stopped performing abortions due to uncertainty about their legality, and Tasmanian women were travelling to Melbourne clinics in order to terminate their pregnancies. The then Health Minister, the Hon. Judy Jackson MHA, introduced the amending Bill as a Private Member’s Bill to create certainty about when abortions can be legally performed. The Bill was subject to a conscience vote, and was passed by both houses on 20 December 2001.

The *Criminal Code Amendment Act (No 2) 2001* inserted a new section (s. 164) into the Criminal Code. This allows for the legal termination of a pregnancy if:

- 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
- the woman has given informed consent unless it is impracticable for her to do so.

There are further conditions listed in the section: at least one of the assessing registered medical practitioners must be a specialist in obstetrics or gynaecology; the termination must be performed by a registered medical practitioner; no person is obliged to participate in performing a termination if they have a conscientious objection (unless the treatment is necessary to save the pregnant woman from serious or fatal physical injury). The section also defines ‘informed consent’, and details requirements if a woman is unable to give such consent. Informed consent is defined as consent where: a medical practitioner has provided a woman with counselling as to

⁵² See *ibid*; *R v Sood (Ruling 3)* [2006] NSWSC 762, [30]-[42]; and, *R v Sood* [2006] NSWSC 1141, [23]-[25].

⁵³ However, the NSW Crimes Act 1900 (s.4(1)) was amended in 2005 to expand the definition of ‘grievous bodily harm’ to include the destruction of the foetus of a pregnant woman, other than in the course of a medical procedure, and whether or not the woman suffers any other harm.

⁵⁴ Rankin (2003) *op. cit.*, p. 319.

the medical risks of termination and carrying a pregnancy to term; and, where a medical practitioner has referred a woman to counselling about other matters related to termination of pregnancy and carrying a pregnancy to term.

The Criminal Code also contains a section on 'Causing death of child before birth' (s. 165). This section makes it a crime for anybody to cause 'the death of a child which has not become a human being in such a manner that he would have been guilty of murder if such a child had been born alive', except where the person is acting in good faith to preserve the mother's life. There is, however, no guidance as to the stage of pregnancy to which the section applies.

4.4 Western Australia

The Criminal Code and the *Health Act 1911* deal with abortions in Western Australia. Section 199 of the Criminal Code states that it is unlawful to perform an abortion unless:

- the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and
- the performance of the abortion is justified under Section 334 of the *Health Act 1911*.

The penalty for performing an unlawful abortion is \$50,000.

In 1998 the state's abortion laws were reviewed following the charging of two doctors with carrying out an illegal abortion. As in Tasmania, abortion services virtually ceased and women were advised to travel interstate. In response, a Private Member's Bill was introduced into the Legislative Council by Cheryl Davenport MLC (ALP). The Bill was to remove abortion from the Criminal Code and amend the *Health Act 1911*, thus presenting abortion as a health issue rather than one of criminality. As Dixon reports, Ms Davenport argued in her second reading speech that 'women who choose termination need to have access to legal, safe, clean and professional services and access to counselling without fear of the law'.⁵⁵ Another government Bill was also introduced, which 'sought to leave abortion in the Criminal Code but provide four situations when an abortion would be lawful'.⁵⁶ The resulting legislation was the *Acts Amendment (Abortion) Act 1998*, which at the time was considered a comparatively liberal piece of legislation.

The *Acts Amendment (Abortion) Act 1998* repealed Sections 199, 200 and 201 of the Criminal Code and inserted s. 199 as detailed above, as well as s. 259 – a section dealing with surgical and medical treatment of a person or unborn child. The Amendment Act also inserted a new section into the *Health Act 1911*. This section (s. 334) provides that the performance of an abortion is justified for the purposes of s. 199(1) of the Criminal Code if and only if one of the following four conditions is satisfied:

- the woman concerned has given informed consent; or

⁵⁵ N. Dixon (2003) 'Abortion Law Reform: An Overview of Current Issues', *Research Brief No. 9*, Queensland Parliamentary Library, Brisbane, viewed 25 August 2008, <<http://www.parliament.qld.gov.au/view/publications/documents/research/ResearchBriefs/2003/200309.pdf>>, p. 28.

⁵⁶ *ibid.*, p. 26.

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

‘Informed consent’ is also required in all circumstances, except in the latter two circumstances where it is impracticable for informed consent to be given. It is also noted that no person or institution is obliged to participate in the performance of an abortion.

Informed consent is defined in s. 334(5) as consent given freely by a woman where: a medical practitioner has provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term; a medical practitioner has offered her the opportunity of referral to counselling about matters relating to termination of pregnancy and carrying a pregnancy to term; and, a medical practitioner has informed her 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.

The section also stipulates conditions that must be met if at least 20 weeks of the woman’s pregnancy have been completed. In this instance the abortion is not justified unless:

- two medical practitioners who are members of a panel of at least 6 medical practitioners appointed by the Minister for the purposes of this section have agreed that the mother, or the unborn child, has a severe medical condition that, in the clinical judgment of those 2 medical practitioners, justifies the procedure; and
- the abortion is performed in a facility approved by the Minister.

The section also deals with the case of a ‘dependent minor’ (under 16 years of age) seeking an abortion.

An equivalent crime to child destruction is contained in s. 290 of the Criminal Code under the heading ‘Killing unborn child’. This section refers to the killing of a child ‘when a woman is about to be delivered of a child’, and carries a penalty of life imprisonment.

4.5 South Australia

In South Australia, unlawful abortion is prohibited under Sections 81 and 82 of the *Criminal Law Consolidation Act 1935*. The sections are similar to those in other criminal statutes: it is an offence for a woman to unlawfully procure her own miscarriage; for someone to unlawfully procure a miscarriage in another; or for a person to unlawfully supply poisons or instruments knowing they are intended to procure the miscarriage of a woman.

In 1969, a new section (s. 82A - Medical termination of a pregnancy) was added so that abortions could be legally performed in some circumstances. A person will not be guilty of an offence if the termination is performed by a legally qualified medical

practitioner, after two such practitioners have examined the woman and are of the opinion that:

- (a) to continue the pregnancy would involve a greater risk to the woman's life or her mental or physical health (actual or reasonably foreseeable) than if the pregnancy were terminated, or
- (b) there is significant risk that a child carried to term would suffer such physical or mental abnormalities so as to be severely handicapped.

There are additional restrictions in the section: the termination must be performed in an approved hospital; the woman seeking the termination must have resided in South Australia for at least two months; and no person is under a duty to participate in an abortion procedure if they have a conscientious objection. Further regulations, such as reporting requirements of doctors and hospitals, are prescribed in the *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulations 1996*.

Sections 82A(7) and (8) provide that intentionally causing the death of a child capable of being born alive (defined as being of 28 weeks or more of pregnancy) is a crime if not done in good faith solely for preserving the life of the mother.

4.6 Queensland

Abortion is a criminal offence under Sections 224 to 226 of the *Criminal Code Act 1899*. It is a crime for a woman to unlawfully procure her own miscarriage, for another person to unlawfully procure the miscarriage of a woman, or for any person to unlawfully supply drugs or instruments knowing they are to be used to unlawfully procure a miscarriage. However, s. 282 on surgical operations provides a statutory defence to the charge of unlawful abortion. It states that:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

Technically therefore, all abortions are illegal in Queensland except if they are performed for the preservation of the mother's life. However, in a research paper prepared by the Queensland Parliamentary Library, Dixon reports that 'it appears to have been accepted that the Menhennitt ruling in *R v Davidson* applies to allow termination where the medical practitioner honestly and reasonably believes it is necessary to preserve the woman from a serious danger to her life or her physical or mental health (beyond the normal dangers of pregnancy and childbirth)'.⁵⁷ The Menhennitt ruling was used, for example, by McGuire J in the case *R v Bayliss and Cullen* (1986), when two qualified medical practitioners were acquitted of charges that they had breached Section 224 of the Criminal Code in their running of an abortion clinic. Judge McGuire 'saw the decision in *Davidson* as applying to the law in Queensland, that is, an abortion would be lawful where necessary to preserve the woman from a serious danger to her life or physical or mental health'.⁵⁸

⁵⁷ Dixon (2003) op. cit., p. 12.

⁵⁸ Drabsch (2005) op. cit., p. 27.

The Criminal Code also contains an offence of ‘Killing unborn child’ (s. 313). Similar to the provision in the WA Criminal Code, a person is deemed to have committed a crime if, ‘when a female is about to be delivered of child’, that person prevents the child from being born alive ‘by any act or omission of such a nature that, if the child had been born alive and had then died, the person would be deemed to have unlawfully killed the child’. The offence carries a penalty of life imprisonment.

4.7 The Northern Territory

The *Criminal Code Act* and the *Medical Services Act* deal with abortion in the Northern Territory. Under the *Criminal Code Act* it is an offence for a person to:

- procure an abortion for a woman by means of a ‘drug’ or by using ‘an instrument or other thing’ (s. 208B); or
- supply, or obtain, a ‘drug’ or ‘an instrument or other thing’ to a woman in the knowledge that it is ‘intended to be used with the intention of procuring the woman’s miscarriage’ (s. 208C).

Both offences are punishable by a maximum penalty of imprisonment for 7 years.

However, Section 11 of the *Medical Services Act*, defines the circumstances in which it is lawful for a medical practitioner to terminate a woman’s pregnancy (Sections 208B and 208C of the *Criminal Code Act* contain cross-references to Section 11):

- where she has been pregnant for not more than 14 weeks and both the practitioner and a second medical practitioner are of the opinion that:
 - continuing the pregnancy would involve greater risk to her life, or of harm to her physical or mental health, than if the pregnancy were terminated; or
 - there is a ‘substantial risk’ that a child born from the pregnancy would be ‘seriously handicapped because of physical or mental abnormalities’ (in either case, the treatment must occur in a hospital and, unless it is not reasonably practicable in the circumstances, at least one of the medical practitioners required to form the opinion must be a gynaecologist or obstetrician); or
- where she has been pregnant for not more than 23 weeks and the medical practitioner is of the opinion that ‘termination of the pregnancy is immediately necessary to prevent serious harm to her physical or mental health’; or
- where the treatment is given ‘for the sole purpose of preserving her life’.

The consent of a parent or guardian is required where the woman is under 16 years of age. A person does not have a duty to terminate, or assist in terminating, a pregnancy if she or he has a conscientious objection to doing so.

Lawful medical termination was previously governed by s. 174 of the *Criminal Code Act*. In 2006 that provision was repealed and effectively transferred to the *Medical Services Act* as Section 11. In his second reading speech, the Northern Territory Attorney-General explained the reason for the amendment as the removal of ‘the historical anomaly of a non-criminal matter being located in the Criminal Code’.⁵⁹

⁵⁹ Dr Toyne, Minister for Justice and Attorney General, Second Reading Speech on the Medical Services Amendment Bill and Criminal Reform Amendment Bill (No 2), see Northern Territory,

Although the offence provisions were retained in the *Criminal Code Act*, under the 2006 amendments they were moved from a division of Part VI that deals with murder and related offences to a new abortion-specific division.⁶⁰

Section 170 of the Criminal Code also contains an offence of ‘Killing unborn child’. As in Western Australia and Queensland, a person is guilty of a crime if, ‘when a woman or girl is about to be delivered of a child’, that person ‘prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child’. The maximum penalty is life imprisonment.

Legislative Assembly (2006) *Debates*, Tenth Assembly, First Session, 31 August 2006, Parliamentary Record No: 9, viewed 25 August 2008.

⁶⁰ That is, from division 3 of Part VI (Offences Against the Person and Related Matters) (former ss. 172 and 173) to new division 8.

5. Overseas jurisdictions

5.1 United Kingdom

Abortion was illegal in the UK under the *Offences Against the Person Act 1861* ss. 58-59, and the *Infant Life (Preservation) Act 1929*. The former covers all unlawful abortions, while the latter deals with late term abortions and feticide. When passed in 1929 the *Infant Life (Preservation) Act* did provide protection from prosecution if an abortion was carried out in good faith for the purpose only of preserving the life of the mother. The 1938 ‘Bourne Ruling’ in the case of *R v. Bourne* followed an abortion performed on a girl who had been raped. This ruling provided a precedent for psychological and other extenuating circumstances to fall under the the definition of ‘preserving the life of the mother’.

In 1967 David Steel MP introduced a Private Member’s Bill, which came into effect as the *Abortion Act* on 27 April 1968 legalising abortion under certain conditions.⁶¹ The *Abortion Act 1967* was amended by Section 37 of the *Human Fertilisation and Embryology Act 1990* inserting an upper time limit of 24 weeks up to which abortion would be lawful. The provisions of the law are as follows (s. 1(1)):

‘Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

- (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
- (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.’

There is no time limit in relation to sub-sections (b) – (d).⁶²

The 1938 ‘Bourne Ruling’ provided guidance to medical practitioners in the UK up to the *Abortion Act 1967*, and was influential in Australia up to the Menhennitt ruling in 1969.⁶³ Changes to the *Infant Life (Preservation) Act* and the *Abortion Act* in 1990 make it clear that a medical practitioner who performs an abortion under the latter Act is not committing an offence under the former.

⁶¹ See UK National Archives (2008) ‘Survey of Abortion Patients for the Committee on the Working of the Abortion Act’, viewed 27 August 2008,

<<http://www.ndad.nationalarchives.gov.uk/CRDA/32/detail.html>>.

⁶² See UK Department of Health (2008) ‘Public Health’, viewed 27 August 2008,

<http://www.dh.gov.uk/en/Publichealth/Healthimprovement/Sexualhealth/FAQ/DH_072615#_2>;

VLRC (2008) op. cit., p. 25.

⁶³ See Dixon (2003) op. cit., p. 7.

In 2007, for women resident in England and Wales the total number of abortions was 198,500, compared with 193,700 in 2006, a rise of 2.5 per cent. Ninety per cent of abortions were carried out at under 13 weeks gestation, while 70 per cent were carried out at under 10 weeks. 1,900 abortions (1 per cent) were carried out under ground 'E', ie., that there was a risk that the child would be born handicapped.⁶⁴

5.2 Canada

In 1988 the Supreme Court of Canada, in *R v Morgentaler*, found that the provisions in the Criminal Code (s. 251) concerning abortion conflicted with the *Canadian Charter of Rights and Freedoms* (s. 7) which provides 'the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. Hence, Section 251 was ruled to be unconstitutional and therefore invalid. Elaborating on this ruling, Chief Justice Dixon stated that 'Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense'.⁶⁵

No abortion law has since been passed in Canada and legislation is left to individual provinces. All of Canada's provinces, with the exception of New Brunswick and Quebec, fully fund abortions under the *Canada Health Act*.⁶⁶

Prior to 1969 abortion law fell under the *Criminal Code 1892*. While there was a general prohibition of abortion, it was implicit that an abortion could be performed if the continuation of the pregnancy endangered the woman's life.⁶⁷ Following Government reviews in 1967 and 1969 the Criminal Code (s. 251) was amended to clarify the law regarding abortion. The amendment explicitly allowed an abortion when the pregnancy endangered the woman's life and the following restrictions were met;

- (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
- (b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
- (c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

⁶⁴ See UK Department of Health (2008) 'Publications Statistics', viewed 27 August 2008, <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_085508>.

⁶⁵ VLRC (2008) op. cit., p. 27; see also, Drabsch (2005) op. cit., pp. 39-40.

⁶⁶ Abortion Rights Coalition of Canada (2007) *History and Politics of Clinic Funding*, Vancouver, ARCC, p. 1.

⁶⁷ United Nations Department of Economic and Social Affairs (2002) *Abortion Policies: A Global Review*, New York, UN, p. 84.

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

According to Dixon, abortions are readily available in Canadian hospitals in major cities up to 20 weeks gestation, but the gestational limit does vary according to the facility in which the procedure occurs.⁶⁸

According to Canada's National Statistics Agency, there were 97,254 induced abortions conducted in hospitals and clinics across Canada in 2005.⁶⁹

5.3 New Zealand

Abortion was criminalised in New Zealand in 1866 by the United Kingdom's *Offences Against the Person Act 1861*. Provisions in the *Criminal Code Act 1893* and the *Crimes Act 1908* made abortion illegal except when it was conducted 'in good faith' and when the woman's life was deemed to be at risk. Amendments to the *Crimes Act 1961* (ss. 182-187A) made further legislation regarding the grounds on which an abortion can be legally carried out. The amendment stipulates that an abortion may be legally performed before 20 weeks gestation providing one of the following conditions are met;

- (a) That the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl; or
- (aa) That there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or
- (b) That the pregnancy is the result of [incestuous] sexual intercourse... ; or
- (c) That the pregnancy is the result of sexual intercourse that constitutes an offence against Section 131 (1) of this Act; or
- (d) That the woman or girl is severely subnormal within the meaning of Section 138(2) of this Act.

After 20 weeks, an abortion is only permitted if two medical practitioners agree that it is to save the woman's life or to prevent permanent physical or mental injury. There are also provisions for exceptional circumstances regarding age and also for sexual violation.

A Royal Commission of Inquiry was ordered in 1975, resulting in the *Contraception, Sterilisation and Abortion Act 1977* being passed which effectively legislated how and where abortions may be carried out. Section 18 of the Act states that when a pregnancy is under 12 weeks the abortion can be carried out in a licensed clinic; when the pregnancy is over 12 weeks the abortion must be carried out in a licensed hospital. The abortion must be authorised by two certifying consultants. The Act also established the Abortion Supervisory Committee consisting of three members who oversee the operation of abortion law, manage the licensing of clinics, and report to Parliament annually.⁷⁰ In April 2003, in a case initiated by the Abortion Supervisory Committee, Justice Durie clarified Section 18 of the *Contraception, Sterilisation and*

⁶⁸ Dixon (2003) op. cit., p. 42.

⁶⁹ See Statistics Canada (2008) 'Induced abortions by provinces and territories of report', viewed 27 August 2008, <<http://www40.statcan.ca/101/cst01/health40a.htm?sdi=abortions>>.

⁷⁰ See Drabsch (2005) op. cit., pp. 41-42.

Abortion Act making it optional for women to stay in a medical facility between taking the two Mifepristone tablets (48 hours apart).⁷¹ It was also deemed to be optional for them to stay in a hospital until the foetus is expelled.⁷² An amendment to the *Care of Children Act 2004* (s. 38) enables female children, of any age, to have an abortion and also to refuse an abortion. Section 38 of the Act states that;

- (1) If given by a female child (of whatever age), the following have the same effect as if she were of full age:
 - (a) a consent to the carrying out on her of any medical or surgical procedure for the purpose of terminating her pregnancy by a person professionally qualified to carry it out; and
 - (b) a refusal to consent to the carrying out on her of any procedure of that kind.

There were 18,380 abortions performed in New Zealand in 2007, compared with 17,930 in 2006 and 18,510 in 2003. The general abortion rate was 20.1 abortions per 1,000 women aged 15–44 years in 2007.⁷³

5.4 United States

In the United States the Supreme Court decision in *Roe v Wade* in 1973 made abortion legal. The decision was based in constitutional law, specifically that state laws prohibiting abortion violated the due process clause of the 14th Amendment of the US Constitution. The Court held that this provision protected a right to privacy, and thus the autonomy of a woman in the early stages of pregnancy. However, the Court also determined that the right to privacy diminished as the pregnancy developed. The Court thus affirmed a right of women to have an abortion before fetal viability, while also affirming states' rights in restricting abortion after viability. According to Dixon, the practical effect of *Roe v Wade* for US women is that abortion on request is legal in the first trimester, may be restricted in the second trimester related to the health of the woman, and can be regulated or even proscribed in the third trimester, except where necessary for the preservation of the life or health of the woman.⁷⁴

There is a significant variation in the laws relating to abortion across the states. Some states prohibit abortion in the third trimester unless necessary to preserve the woman's life, while others affirm a woman's right to abortion with qualifications. A number require women to undergo counselling or a waiting period before the procedure can go ahead, while others have adopted a two-stage approach based on viability. There is no uniformity regarding the time limit for viability.⁷⁵

⁷¹ M. Sparrow (2004) 'A Woman's Choice', *Australian and New Zealand Journal of Obstetrics and Gynaecology*, vol. 44, iss. 2, p. 88. Mifepristone is a synthetic steroid compound which can be used as an abortifacient in the first two months of pregnancy.

⁷² *ibid.*, p. 88.

⁷³ Statistics New Zealand (2008) 'Abortions: Year ended December 2007', viewed 27 August 2008, <<http://www.stats.govt.nz/products-and-services/hot-off-the-press/abortion-statistics/abortions-year-ended-dec07-hotp.htm>>.

⁷⁴ Dixon (2003) *op. cit.*, p. 39. See also VLRC (2008) *op. cit.*, pp. 27-28.

⁷⁵ See VLRC (2008) *op. cit.*, pp. 27-28; Dixon (2003) *op. cit.*, pp. 39-40; Drabsch (2005) *op. cit.*, pp. 44-49.

According to the US Department of Health and Human Services, in 2004 839,226 legal induced abortions were reported from 49 reporting areas, which represents a 1.1 per cent decrease from the 848,163 abortions reported for 2003. In 2004, the abortion rate was 16 per 1,000 women aged 15–44 years of age, the same rate since 2000.⁷⁶

5.5 Asia

In 2002 the United Nations Department of Economic and Social Affairs completed a country-by-country examination of national policies concerning abortion. Comparable information is presented in the report, titled *Abortion Policies: A Global Review*, for all state members of the United Nations and non-member states.⁷⁷ Listed below is a brief exposition of the current status of abortion law in some Asian countries, drawn from the report's country profiles.

5.6 China

Under the *Criminal Code 1979* of China there are no laws to prohibit abortion when consent is given. Abortion services are provided by the government as a public service and 14 days of paid sick leave is granted for a first-trimester abortion or 30 days if the pregnancy is terminated after the first trimester. The government permits abortions to be performed up to six months gestation. China's law and attitude towards abortion is directly connected to its family planning policies, which were inaugurated in the late 1970s. China's one child policy is pursued through a combination of education, free contraception, and economic incentives and disincentives.

5.7 Singapore

Abortion law in Singapore was based on British law up until 1969. This law was replaced in 1974 by the *Abortion Act* (s. 312-316) which states that 'a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered physician acting on the request of a pregnant woman and with her written consent during the first 24 weeks of pregnancy'. Beyond 24 weeks abortions are only permitted in cases where continuing with pregnancy is a serious risk to the mental or physical health of the woman. In 1987, the regulations issued under the Act were amended to introduce mandatory counselling prior to and following the performance of an abortion. Pregnant women are also required to observe a twenty-four hour waiting period after counselling until the abortion is performed, unless there is a risk to the health of the woman. In contrast to China, the Singaporean government has been concerned with low fertility rates. In addition to changed regulations the government introduced a series of incentives to boost the fertility rate.

⁷⁶ United States Department of Health and Human Services (2008) 'Reproductive Health: Data and Statistics', Centers for Disease Control and Protection, viewed 28 August 2008, <http://www.cdc.gov/reproductivehealth/data_stats/index.htm#Abortion>.

⁷⁷ United Nations Department of Economic and Social Affairs (2002) *Abortion Policies: A Global Review*, New York, UN, viewed 27 August 2008, <<http://www.un.org/esa/population/publications/abortion/profiles.htm>>.

5.8 Malaysia

Up until 1989 the *Penal Code* (s. 312) of Malaysia made abortion legal only when the life of the pregnant woman was at risk. In 1989 this section was amended to allow abortions to be carried out when, in the opinion of a medical practitioner, the continuance of the pregnancy was a greater risk to the woman's physical or mental health than the termination.

5.9 Japan

Up until 1991 abortions were allowed up to 23 weeks of gestation. However, the Minister of Health and Welfare issued a notice in 1991 effectively lowering the time frame to 22 weeks in order to reflect advances in the care for premature new borns. Japanese law designates viability as the limit for all abortions. Under Japanese law, an abortion must be carried out within a registered medical facility and by a physician designated by a local medical association. There are several pieces of legislation pertaining to abortion, some of which date back as far as 1880, and since the 1950s the law had permitted abortion on a relatively wide set of grounds, including socio-economic ones. Today it is commonly accepted that abortion is a decision between the pregnant woman and her physician providing the pregnancy is within 22 weeks.

5.10 Indonesia

Under the *Indonesian Criminal Code 1918* there was a general prohibition on abortion with no exceptions. In the 1970s, the medical profession, on the advice of the Chief Justice of the High Court, determined that abortion could take place in order to preserve a woman's life or health. The abortion law was reformed in 1992 with the passage of the *Health Law 23/1992*. This law allows for lawful abortion on the basis of the preservation of the woman's life. Due to the restrictive nature of Indonesia's laws it is believed that many women obtain abortions through the services of a *dukun*, a traditional healer. However, accurate data on the number of abortions of any kind performed in Indonesia is not readily available.

6. Statistics on abortion in Australia

A research brief produced by the Commonwealth Parliamentary Library Research Unit on the collection of abortion statistics in Australia, in February of 2005 concluded that:

Currently, it is impossible to accurately quantify the number of abortions which take place in Australia. This is because there is no national data collection on abortion, there is no uniform method of data collection, collation or publication across the states and territories, and the data sources that are available all have several significant limitations.⁷⁸

Among the states, only South Australia and Western Australia legally require the notification of induced abortions; South Australia via *Criminal Law Consolidation (Medical Termination of Pregnancy) Regulation 1996* and Western Australia via *Section 335 (5) (b) and (d) of the Health Act 1911 (Part XIII)*.⁷⁹

Two national health data sets which include data on induced abortions are the Health Insurance Commission's Medicare statistics and the National Hospital Morbidity Database (NHMD) compiled by the Australian Institute of Health and Welfare.⁸⁰

Victorian Abortion Statistics

According to a spokeswoman at the Victorian Department of Human Services, Victoria does not collate data specifically relating to abortions. While the Victorian Admitted Episodes Data Set (VAED) collects morbidity data on all admitted patients from Victorian public and private acute hospitals, in common with the Medicare data, abortion numbers are counted from procedures which also apply to other gynaecological conditions which may not even be related to pregnancy. The VAED data is not publicly available.⁸¹

6.1 Medicare statistics

Medicare Australia statistics are based on a compilation of Medicare Item number 35643 - evacuation of the gravid uterus by curettage or suction curettage, and Medicare Item number 16525 - management of second trimester labour, with or without induction, for intrauterine foetal death, gross foetal abnormality or life threatening maternal disease. The statistics therefore include procedures other than abortions, such as miscarriages.

As can be seen in Table 1 below, for Medicare item number 35643, it is not possible to extract statistics for Victoria separately from Tasmania, using the publicly accessible Medicare statistics.

⁷⁸ A. Pratt et. al (2005) 'How many abortions are there in Australia? A discussion of abortion statistics, their limitations, and options for improved statistical collection', *Research Brief*, no.9, 2004-05, Parliamentary Library, Canberra, viewed 27 July 2007, <<http://www.aph.gov.au/library/pubs/rb/2004-05/05rb09.htm>>.

⁷⁹ P. Laws et.al (2006) *Australia's mothers and babies 2004*, AIHW National Perinatal Statistics Unit, Sydney, pp. 48-49.

⁸⁰ Defined as termination of a pregnancy through a medical or surgical intervention.

⁸¹ Personal communication, Department of Human Services, 27 July 2007.

Table 1: Medicare Procedure no. 35643 (2007)

	State					Total
	NSW/ACT	VIC/TAS	QLD	SA/NT	WA	
Item 35643	29,685	18,380	15,104	917	7,871	71,957

Table 2: Medicare Procedure no. 16525 (2007)

	NSW	VIC	QLD	SA	WA	TAS	ACT	NT	Total
Item 16525	242	286	113	57	49	27	15	5	794

Table 3: Medicare Procedure no. 35643 for Vic/Tas (1997 - 2007)

	VIC/TAS	VIC/TAS	VIC/TAS
	1997	2007	% change 1997 - 2007
Item 35643	19,946	18,380	-7.9

Limitations of the Medicare data include the following:

- Using the publicly available Medicare statistics, it is not possible to disaggregate Victorian statistics from Tasmanian, for Medicare Item no. 35643;
- As has already been discussed, the Medicare data includes procedures other than abortions in the statistics;
- The Medicare data counts private patients in public or private hospitals who claim a Medicare rebate, but excludes public patients in public hospitals as they do not require a Medicare rebate;
- It also excludes women who undergo termination procedures in private clinics who do not claim a Medicare rebate; and
- It also excludes terminations conducted after 24 weeks. This is because 'the procedures used under MBS items 35643 and 16525 are only practical for abortions performed in the first or second trimesters of pregnancy, and Medicare does not provide specific funding for abortions conducted after 24 weeks of pregnancy'.⁸²

6.2 National perinatal statistics

The National Perinatal Statistics Unit (NPSU) is a collaborating unit of the Australian Institute of Health and Welfare (AIHW). In 2005 it attempted to overcome the limitations of the Medicare data to estimate the number of induced abortions in Australia, by developing a methodology of combining it with the National Hospital Morbidity Database.

The National Hospital Morbidity Database (NHMD) is compiled by the Australian Institute of Health and Welfare from data supplied by the state and territory health authorities. Its classification coding system is able to differentiate between spontaneous abortions (miscarriage) and induced abortions/pregnancy separations.⁸³

⁸² A. Pratt et. al (2005) op. cit., p. 6.

⁸³ *ibid.* The NPSU uses the NHMD to extract data on females with: a principal or additional diagnosis of ICD-10-AM code *O04.5–O04.9 Medical abortion, complete or unspecified*; and an abortion-related ICD-10-AM procedure code. For a detailed explanation of the code methodology See Chapter 2 in N. Grayson et. al (2005) *Use of routinely collected national data sets for reporting on induced abortion in Australia*, AIHW National Perinatal Statistics Unit, Sydney.

Bearing in mind the limitations of the Medicare statistics, the NPSU opted to add non-hospital services in the Medicare data (MBS item 35643 - evacuation of the contents of the gravid uterus by curettage or suction curettage) to the number of separations (i.e. an episode of care for an admitted patient) in the NHMD data.⁸⁴ It makes the assumption that services for MBS item 35643 that are provided out-of-hospital are only for induced abortion.

In estimating induced abortion numbers in Australia, the NPSU also attempts to overcome the exclusion from Medicare data for private patients who receive induced abortion services but who do not claim a Medicare benefit, by adding 13.1 per cent to the number of non-hospital Medicare services reported in the Medicare data.⁸⁵

Table 4: Estimated number of induced abortions by state and territory of service provider (2004)

	NSW	Vic	Qld	WA(a)	SA(a)	Tas	ACT	NT	Total
Est. no. of induced abortions(b)	30,606	20,474	12,456	7,901	4,905	n.p.	n.p.	973	79,448
Rate per 1,000 women (age-standardised)(c)	21.4	18.8	14.8	18.4	15.9	n.p.	n.p.	20.5	18.4
Est. no. of induced abortions adjusted for patients who do not claim Medicare(d)	33,518	20,688	12,456	8,275	4,905	n.p.	n.p.	973	83,210
Rate per 1,000 women (age-standardised)(c)	23.4	19.0	14.8	19.3	15.9	n.p.	n.p.	20.5	19.3

Notes:

(a) Induced abortions performed in WA and SA are required to be notified.

(b) For induced abortions carried out in Qld, SA and the NT the data include separations with a diagnosis of O04.5–O04.9 Medical abortion, complete or unspecified and an abortion-related procedure reported to the NHMD.

For induced abortions carried out in NSW, Vic, Tas and the ACT, the data include separations with a diagnosis of O04.5–O04.9 Medical abortion, complete or unspecified and an abortion-related procedure reported to the NHMD (30 separations with a diagnosis of O06.5– O06.9 Unspecified abortion, complete or unspecified from a private free-standing day hospital facility(ies) in Victoria were also included) plus non-hospital Medicare services for MBS-item 35643 Evacuation of the contents of the gravid uterus by curettage or suction curettage reported in the Medicare data.

Source: Laws, P., N. Grayson & E. A. Sullivan (2006) *Australia's mothers and babies 2004*, Perinatal Statistics Series no 18 AIHW cat. no. PER34. Sydney: AIHW National Perinatal Statistics Unit. p.49.

⁸⁴ They are able to obtain disaggregated data for Victoria for Item no. 35643, provided directly from the Medicare Branch of the Federal Department of Health and Aging.

⁸⁵ Based on a survey conducted by the Australian Research Centre in Sex, Health and Society (La Trobe University) between November 2002 and June 2003 which found that 13.1% of women who had abortions in Victoria either did not have a Medicare card or did not intend to use their card to claim a rebate, and a further 20.7% were undecided about submitting a claim. See Nickson et. al, (2005) 'Intention to claim a Medicare rebate among women receiving private Victorian pregnancy termination services', *Australian and NZ Journal of Public Health*, vol. 28, iss. 2, pp. 120-3.

For induced abortions carried out in WA the age-specific rates of induced abortion calculated for the other states and territories were applied to the female population of Western Australia as at 30 June 2004.

- (c) Directly age-standardised. The Australian female population aged 15–44 years for 30 June 2001 was used as the population for which expected rates were calculated. The Australian Bureau of Statistics population estimates for 30 June 2004 for females were used for the observed rates.
- (d) For induced abortions carried out in NSW, Vic, Tas and the ACT the number of non-hospital Medicare services for MBS-item 35643 Evacuation of the contents of the gravid uterus by curettage or suction curettage reported in the Medicare data was increased by 13.1% to adjust for patients who do not claim Medicare.

The NPSU makes the following caveats:

- The number of induced abortions may be over estimated because it includes separations where it was not specified that the Medical abortion was complete;
- ‘The number of induced abortions may be under enumerated because of the exclusion of a relatively small number of separations with a diagnosis of *O05 Other abortion* or *O06 Unspecified abortion* and the possible non-use of codes *O04.5–O04.9 Medical abortion, complete or unspecified* for cases with gestation of more than 20 weeks’;⁸⁶
- The number of induced abortions may be under estimated for Victoria because the coverage of private hospitals in Victoria is incomplete in the NHMD.

Nevertheless they state that ‘their criteria were validated using data from the abortion notifications data collections in South Australia and Western Australia and found to be satisfactory for enumeration of induced abortion in the NHMD’.⁸⁷

As we can see from Table 4, the NPSU estimated the number of induced abortions in Victoria in 2004 as 20,688, a rate of 19.0 per 1,000 women in the 15-44 standardised age cohort.

6.3 Statistics on late terminations

In Victoria, the Consultative Council on Obstetric and Paediatric Mortality and Morbidity (CCOPMM) is the advisory body to the Minister for Health on maternal, perinatal and paediatric deaths and provides data on terminations equal to and later than 20 weeks gestation. Terminations of pregnancy that occurs at or beyond 20 weeks gestation are recorded as births and perinatal deaths. Terminations may be for congenital abnormality (CA) or for maternal psychosocial indications (PS).⁸⁸

The following table shows terminations of pregnancy at or beyond 20 weeks gestation conducted in Victoria over the period 2001 to 2006, disaggregating the data for congenital abnormalities (CA) and for maternal psychosocial indications (PS).

⁸⁶ N. Grayson et. al (2005) op. cit., p. xiii.

⁸⁷ *ibid.*

⁸⁸ Maternal psychosocial indications include terminations of pregnancy undertaken for any other indication than congenital abnormality. See, Perinatal Society of Australia and New Zealand, (date unknown) *PSANZ Perinatal Mortality Audit Guideline; Section 7: Perinatal Mortality Classifications*, p.124., viewed August 1 2007, <<http://www.psanz.org.au/>>.

Table 5: Trends in late terminations of pregnancy (≥ 20 wks gestation) in Victoria (2001–2006)

	2001		2002		2003		2004		2005		2006	
	CA	PS	CA	PS	CA	PS	CA	PS	CA	PS	CA	PS
Gestation:												
20–22 weeks	80	18	74	18	87	25	101	86	105	67	122	52
23–27 weeks	21	27	23	42	25	76	26	104	23	108	22	98
≥ 28 weeks	5	-	6	-	4	2	3	7	1	4	4	-
Unknown	-	-	-	-	-	-	-	-	-	1	-	-
Maternal age:												
<20 years	2	19	2	22	1	40	4	76	4	58	6	50
20–24 years	19	12	11	19	15	30	16	56	13	61	26	41
25–29 years	29	11	29	8	36	13	36	28	29	26	34	23
30–34 years	28	2	37	8	39	9	37	19	40	18	48	18
35–39 years	25	1	23	1	18	7	27	11	28	6	27	7
≥ 40 years	3	-	1	2	7	4	8	3	13	8	7	10
Unknown	-	-	-	-	-	-	2	4	2	3	-	1
Reside:												
Victoria	102	27	99	32	110	50	115	105	120	76	140	60
Interstate	4	18	4	23	6	49	15	82	9	86	6	70
Overseas	-	-	-	5	-	4	-	9	-	18	1	20
Unknown	-	-	-	-	-	-	-	1	-	-	1	-
Hospital:												
Public	93	1	90	1	94	-	103	-	79	2	113	-
Private hospital/clinic	13	44	13	59	22	103	27	197	50	178	35	150
Subtotal	106	45	103	60	116	103	130	197	129	180	148	150
TOTAL	151		163		219		327		309		298	

Source: Consultative Council on Obstetric and Paediatric Mortality and Morbidity (2008) *Annual Report for the Year 2006, incorporating the 45th Survey of Perinatal Deaths in Victoria*, CCOPMM, Melbourne, p. 13.

As Table 5 shows, in 2006 there were 298 late terminations of pregnancy in Victoria, comprised of 148 terminations due to congenital abnormalities, and 150 terminations due to maternal psychosocial indications.

7. Further resources

7.1 Victorian Law Reform Commission – Surveys of Attitudes

The Victorian Law Reform Commission appointed Professor David Studdert, Federation Fellow at the University of Melbourne, to analyse five studies of ‘rigorous measurement’ of Australians’ attitudes to abortion. They were: the Australian Survey of Social Attitudes (AuSSA), the Australian Election Study, the Southern Cross Bioethics Institute Survey (SCBIS), the Australian Federation of Right to Life Associations Survey and the Mary Stopes International Survey.

Professor Studdert discussed the limitations with some of the surveys and noted that available data was therefore ‘not particularly strong’. He concluded however, that ‘the available evidence generally supported the following conclusions:

- A majority of Australians support a woman’s right to choose whether to have an abortion;
- A subset of those supporters regard the right as capable of limitation, with restriction of choice based on factors such as gestational age and women’s reasons for seeking the abortion. However, there is insufficient evidence to estimate the size of that subset; and
- Several socio-demographic characteristics are associated with positive (and negative) views of abortion. For example, there is less support for abortion among persons with religious beliefs than among persons without religious beliefs; nonetheless, even among persons with religious beliefs, supporters remain in the majority’.⁸⁹

7.2 Stakeholders

The Commission received 519 submissions and conducted 36 group and individual consultations in their review. The bulk of submissions was opposed to decriminalisation and ‘tended to be very short or simply stated their opposition to decriminalisation on moral or religious grounds’.⁹⁰

According to the Commission’s report, professional, community, health and disability bodies tended to make submissions in support of decriminalisation of abortion, whereas ‘faith based’ bodies tended to oppose it (there were of course dissenting views among the faith based bodies). Nevertheless, there was a continuum of views, with some of the religious bodies listed below calling for a strengthening of abortion law rather than decriminalisation, whereas many of the organisations listed below in support of decriminalisation support a Model C decriminalisation scenario, rather than the more restrictive Model B presented by the Bill.

The following are meant to be indicative rather than all-encompassing lists.⁹¹

⁸⁹ VLRC (2008) op. cit., p. 68.

⁹⁰ *ibid.*, p. 72.

⁹¹ The organisations listed under supporting decriminalisation and opposing decriminalisation have either been referred to in the Commission’s Report, or have advertised their position on a website. See for example the Coalition Against Decriminalisation of Abortion website and Women’s Health

Organisations which support decriminalisation:

Association for the Legal Right to Abortion (ALRA)
Association for the Legal Right to Abortion in Victoria
Australian Federation of University Women - Victoria
Australian Institute for Primary Care
Australian Medical Association (AMA)
Australian Nursing Federation (Vic Branch)
Centre Against Sexual Assault Forum
Centre for Adolescent Health, Royal Children's Hospital
Doctors Reform Society (Victoria)
Doctors Reform Society of Australia
Domestic Violence Resource Centre
Eastern Domestic Violence Outreach Service Inc
Emily's List Victoria
FamilyCare
Fertility Control Clinic
Geelong Trades Hall Council
Gippsland Women's Health Service (GWHS)
Health Issues Centre
HealthWest
Humanist Society of Victoria
Key Centre for Women's Health in Society, Melbourne School of Population Health,
University of Melbourne
Law Institute of Victoria
Liberty Victoria
Marie Stopes International
Multicultural Centre for Women's Health
Paediatric State Committee
Pro Choice Victoria
Public Health Association of Australia
Public Health Association of Australia (Vic Branch)
Public Health Association of Australia, Women's Health Special Interest Group
Queen Victoria Women's Centre
Reproductive Choice Australia
Royal Australasian College of Physicians
The Royal Women's Hospital
Union of Australian Women (Victoria)
Victorian Council of Social Services
Victorian Women and Mental Health Network
Victorian Women Lawyers
Victorian Women with Disabilities Network

Victoria, viewed 27 August 2008, < <http://www.cadoa.org/>> and
<<http://www.whv.org.au/topical/abortion.htm>>.

Victorian Women's Trust
WIRE – Women's Information
Women's Domestic Violence Crisis Service
Women's Electoral Lobby
Women's Health East (WHE)
Women's Health Goulburn North East (WHGNE)
Women's Health Grampians (WHG)
Women's Health in the North (WHIN)
Women's Health in the South East (WHISE)
Women's Health Loddon Mallee (WHLM)
Women's Health Victoria
Women's Health West (WHW)
Women's Legal Service
Youth Affairs Council of Victoria
YWCA Victoria

Organisations which oppose decriminalisation:

Coalition Against Decriminalisation of Abortion:

Apostolic Church, Victoria
Australian Christian Lobby
Australian Family Association
Australian Heart Ministries
Bairnsdale Baptist Church
Berwick Church of Christ
BMC Ministries
Catch the Fire Ministries
Catholic Archdiocese of Melbourne
The Catholic Women's League of Victoria & Wagga Wagga Inc
Christ Church Newport
Christian Community Church
Christian Traders
Church and Nation Committee, Presbyterian Church of Victoria
Crossover Community Centre
Crossway Baptist Church
Culture Watch
Encounter AOG Church, Craigieburn
Endeavour Forum
Ethiopian Zion Church
Family Council of Victoria
Fatherhood Foundation
Festival of Light Australia
Fire and Rain Christian Centre
God Reigns Community Church

Hillside Christian Fellowship
Hope of Glory
Hunter Valley Christian Life Centre
Jesus House Ministries
Joseph Publishing and Media
Kenneth Copeland Ministries
Kids of Gold
Langwarrin Christian Reformed Church
Lilydale Community Church
Lutheran Church of Australia
Mens Prayer Australia
Monbulk Christian Church
Multicultural Church in Footscray
Olive Branch Fellowship Inc.
Options Plus Care
Pro Life Victoria
Rain & Fire Christian Centre
Reach Community Church
Reformation Ministries
Resource Christian Music
Right to Life Australia
Romanian Christian Pentecostal Church
Salt Shakers
South Eastern Christian Centre
Southland Christian Centre
Western Plains Christian Fellowship
World Federation of Doctors Who Respect Human Life (Queensland Branch)

7.3 References

Books, journal articles and reports

- Australian Labor Party – Victorian Branch (2006) *Rising to the Challenges – Victorian ALP Platform 2006*, ALP Victorian Branch, Melbourne.
- Abortion Rights Coalition of Canada (2007) *History and Politics of Clinic Funding*, Vancouver, ARCC.
- Cica, N. (1998) 'Abortion law in Australia', *Research Paper No. 1*, Parliamentary Library, Canberra, viewed 25 August 2008, <<http://www.aph.gov.au/library/pubs/rp/1998-99/99rp01.htm>>.
- de Crespigny, L. & J. Savulescu (2004) 'Abortion: time to clarify Australia's confusing laws', *Medical Journal of Australia*, vol. 181, no. 4, pp.201-203.
- Consultative Council on Obstetric and Paediatric Mortality and Morbidity (2008) *Annual Report for the Year 2006, incorporating the 45th Survey of Perinatal Deaths in Victoria*, CCOPMM, Melbourne.
- Dixon, N. (2003) 'Abortion Reform: An Overview of Current Issues', *Research Paper No. 9*, Queensland Parliamentary Library, Brisbane, viewed 25 August

2008,

<<http://www.parliament.qld.gov.au/view/publications/documents/research/ResearchBriefs/2003/200309.pdf>>.

- Drabsch, T. (2005) 'Abortion and the law in NSW', *Briefing Paper No. 9*, NSW Parliamentary Library Research Service, Sydney, viewed 25 August 2008, <<http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/4B0EC8DB3B4A730DCA2570610021AA58>>.
- Grayson, N., J. Hargreaves & E. Sullivan (2005) *Use of routinely collected national data sets for reporting on induced abortion in Australia*, AIHW National Perinatal Statistics Unit, Sydney.
- Laws, P., N. Grayson & E. A. Sullivan (2006) *Australia's mothers and babies 2004*, Perinatal Statistics Series no 18 AIHW cat. no. PER34. Sydney: AIHW National Perinatal Statistics Unit.
- Nickson C., A. Smith & J. Shelley (2005) 'Intention to claim a Medicare rebate among women receiving private Victorian pregnancy termination services', *Australian and NZ Journal of Public Health*, vol. 28, iss. 2, pp. 120-23.
- Nickson, C., A. Smith & J. Shelley (2006) 'Travel undertaken by women accessing private Victorian pregnancy termination services', *Australian and New Zealand Journal of Public Health*, vol. 30, no. 4, pp. 329-333.
- Perinatal Society of Australia and New Zealand, (date unknown) *PSANZ Perinatal Mortality Audit Guideline; Section 7: Perinatal Mortality Classifications*, p. 124., viewed August 1 2007, <<http://www.psanz.org.au/>>.
- Petersen, K. (2005) 'Abortion in Australia: a legal misconception', *Australian Health Review*, vol. 29, no. 2, pp. 142-145.
- Pratt, A., A. Biggs & L. Buckmaster (2005) 'How many abortions are there in Australia? A discussion of abortion statistics, their limitations, and options for improved statistical collection', *Research Brief No.9*, 2004-05, Parliamentary Library, Canberra, viewed 27 July 2007, <<http://www.aph.gov.au/library/pubs/rb/2004-05/05rb09.htm>>.
- Rankin, M. (2003) 'Recent developments in Australian abortion law: Tasmania and the Australian Capital Territory', *Monash University Law Review*, vol. 29, no. 2, pp.316-335.
- Rice, K. (2005) *Abortion Issues Paper*, Melbourne, Women's Health Victoria, viewed 30 July 2007, <<http://www.whv.org.au/Articles/Abortion-issues-paper.pdf>>.
- Rice, K. & M. Beaumont (2005) 'Issues in the current abortion debate', *Health Issues*, iss. 84, pp.26-29.
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists (2005) *Termination of Pregnancy: a resource for health professionals*, East Melbourne, RANZCOG, viewed 30 July 2007, <<http://www.ranzcog.edu.au/womenshealth/termination-of-pregnancy.shtml>>.
- Statistics Canada (2008) 'Induced abortions by provinces and territories of report', viewed 27 August 2008, <<http://www40.statcan.ca/101/cst01/health40a.htm?sdi=abortions>>.
- Statistics New Zealand (2008) 'Abortions: Year ended December 2007', viewed 27 August 2008, <<http://www.stats.govt.nz/products-and-services/hot-off-the-press/abortion-statistics/abortions-year-ended-dec07-hotp.htm>>.
- Siedlecky, S. (2005) 'The abortion issue all over again', *New Doctor*, November, pp. 16-21.

- Sparrow, M. (2004) 'A Woman's Choice', *Australian and New Zealand Journal of Obstetrics and Gynaecology*, vol. 44, iss. 2, p. 88.
- Stateline (2008) 'Victorian Parliament set to decide on new abortion and euthanasia law reforms', *ABC Television*, transcript, 22 August, viewed 25 August 2008, <<http://www.abc.net.au/stateline/vic/content/2006/s2343956.htm>>.
- UK Department of Health (2008) 'Public Health', viewed 27 August 2008, <http://www.dh.gov.uk/en/Publichealth/Healthimprovement/Sexualhealth/FAQ/DH_072615#_2>.
- UK Department of Health (2008) 'Publications Statistics', viewed 27 August 2008, <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_085508>.
- UK National Archives (2008) 'Survey of Abortion Patients for the Committee on the Working of the Abortion Act', viewed 27 August 2008, <<http://www.ndad.nationalarchives.gov.uk/CRDA/32/detail.html>>.
- United Nations Department of Economic and Social Affairs (2002) *Abortion Policies: A Global Review*, UN, New York.
- United States Department of Health and Human Services (2008) 'Reproductive Health: Data and Statistics', Centers for Disease Control and Protection, viewed 28 August 2008, <http://www.cdc.gov/reproductivehealth/data_stats/index.htm#Abortion>.
- Victorian Greens (2008) *Abortion Law Reform Bill 2008*, Victorian Greens Briefing Paper.
- Victorian Law Reform Commission (VLRC) (2008) *Law of Abortion: Final Report*, Victorian Law Reform Commission, Melbourne.
- Wainer, J. (ed.) (2006) *Lost: illegal abortion stories*, Carlton, Melbourne University Press.

Newspaper reports

- Austin, P., D. Rood and N. Miller (2008) 'Abortion Law Win Hailed by Kirner', *The Age*, 20 August, p. 1.
- Best, C. and K. Bradford (2008) 'Financial Hardship Reason for Abortion Under New Laws', *AAP*, 19 August.
- Fyfe, M. (2008) 'New Order in the House', *The Sunday Age*, 24 August, p. 15.
- Mitchell, G. (2008) 'Abortion Law Push Labor MP Demands Amendments', *Herald Sun*, 21 August, p. 9.
- Mitchell, G. and N. Higginbottom (2008) 'Abortion Bill Faces Struggle', *Herald Sun*, 22 August, p. 16.
- Morand, M. (2008) 'Legal Reality for Female Choice', *Herald Sun*, 22 August, p. 36.
- Rood, D. (2008) 'Politicians on both sides part ways over Abortion', *The Age*, 21 August, p. 8.
- Rood, D. and C. Nadar (2008) 'Labor Gives Go-Ahead to Options on Abortion Vote', *The Age*, 30 May.
- Skene, L. (2007) 'Legal limits: the abortion laws must be changed', *The Age*, 29 July, p.17.
- Whinnett, E. and A. Gardiner (2007) 'Conscience Vote on Abortion Law', *Herald Sun*, 18 July.

Media Releases

- Minister for Women's Affairs (2008) *Abortion Report Tabled in Parliament*, Media Release, 29 May.
- Office of the Premier (2008) *Abortion Laws to be Modernised in Victoria*, Media Release, 19 August.
- Office of the Premier (2007) *Abortion Law to be Referred to Law Reform Commission*, Media Release, 20 August.
- Victorian Greens (2008) *Abortion Legislation Lacks Certainty*, Media Release, 19 August.
- Victorian Law Reform Commission (2008) *Final Abortion Report Tabled*, VLRC, Media Release, 29 May.
- Victorian Nationals (2008) *Nationals Given Conscience Vote on Social Issues*, Media Release, 30 January.

© 2008 Library, Department of Parliamentary Services, Parliament of Victoria

Except to the extent of the uses permitted under the Copyright Act 1968, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by Members of the Victorian Parliament in the course of their official duties.

Research Service

This paper has been prepared by the Research Service for use by Members of the Victorian Parliament. The Service prepares briefings and publications for Parliament in response to Members, and in anticipation of the requirements, undertaking research in areas of contemporary concern to the Victorian legislature. While it is intended that all information provided is accurate, it does not represent professional legal opinion.

Research publications present current information as at the time of printing. They should not be considered as complete guides to the particular subject or legislation covered. The views expressed are those of the author(s).

Enquiries

Enquiries should be addressed to:

Dr Greg Gardiner
Senior Research Officer
Victorian Parliamentary Library
Parliament House
Spring St, Melbourne
Victoria 3002

T: (03) 9651 8640

F: (03) 9654 1339

Information about Research Publications is available on the Internet at:

<http://www.parliament.vic.gov.au>