ARTICLES

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USING THE COMMONWEALTH SEX DISCRIMINATION ACT AND s109 OF THE CONSTITUTION TO CHALLENGE STATE ABORTION LAWS

INTRODUCTION

THE Commonwealth *Sex Discrimination Act* 1984 (SDA) prohibits discrimination on grounds of sex, marital status, pregnancy and family responsibilities. Complaints are referred to the Sex Discrimination Commissioner who has the power to inquire and conciliate.[1] Unresolved complaints are heard by the Human Rights and Equal Opportunity Commission (HREOC).[2] The SDA provides for a range of declarations to be made if the complainant is successful, including declarations that: the unlawful conduct should not be repeated; actions should be taken to redress the complainant's loss; and compensation should be paid.[3] Determinations by HREOC can only be enforced by the Federal Court.[4]

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1 Section 52.
2 Section 57.
3 Section 81.
4 Section 83A.

Proceedings through HREOC are relatively cheap and settlements are confidential.[5] However, a complaint under the SDA does not address broad-based, structural discrimination. Rather, it concerns specific conduct of individual actors.[6] In particular, sexually discriminatory laws cannot be challenged in HREOC.[7]

There is a means, however, by which a Commonwealth legislative right to equality can be used to challenge discriminatory laws. It can be used in conjunction with s109 of the Commonwealth Constitution. Section 109 provides that, when a State law is inconsistent with a law of the Commonwealth, the State law is invalid to the extent of the inconsistency. Therefore, so long as a federal equality law continues to exist, discriminatory State laws which are inconsistent with it are invalid. This way of utilising a legislative right to equality cannot provide a means to challenge Commonwealth laws but it provides an important avenue of redress with respect to State laws.

Such an action would not be brought in HREOC; it is a Constitutional action and would be heard in a Supreme Court or, possibly, the High Court.[8] The remedy would be a declaration that the challenged State law is invalid to the extent of its inconsistency with the Commonwealth law. Constitutional litigation is generally far more lengthy and costly than complaints brought in HREOC,[9] but there are major advantages to this kind of litigation. Indeed, so far as State laws are concerned, a challenge based on s109 has the same effect as would be the case if the Constitution contained an express equality guarantee: in both cases, the State law can be declared invalid. In the ordinary course of things this would lead to legislative amendment by the State Parliament or a reading down of the legislation by courts.

Further, such litigation has the effect of thrusting into the constitutional arena the right to equality. It has the potential to raise far greater public debate than does a determination by

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5 It is to be noted that amendment bills which propose changes to the powers and functions of HREOC have been introduced in the Commonwealth Parliament. If enacted, the laws would eliminate the powers in HREOC to hear complaints. The Commission would retain the power to inquire and conciliate only. If the complaint were not resolved an application could be made to the Federal Court. See the Human Rights Legislation Amendment Bill 1997 clauses 32-46PS, 83-116; and the Human Rights Legislation Amendment Bill (No 2) 1998 Part 5. This will increase the costs of complaints where conciliation is not successful. Legal or financial assistance for proceedings in the Federal Court would be at the discretion of the Attorney General (clause 46PR).

6 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69 Part II, 1994) pp55-56.

7 The question of validity of State laws can be raised in HREOC but the Commission does not have jurisdiction to decide the matter. See eg *MW, DD, TA and AB v The Royal Women's Hospital* (1997) EOC 92-886 at 77,192.

8 *Judiciary Act* 1903 (Cth) s30.

9 Although in superior court litigation actions for declaration are relatively simple: Aronson & Franklin, *Review of Administrative Action* (Law Book Company, Sydney 1987) pp460-468.

a commission that specific conduct was discriminatory. The colossal contemporary example of just this form of "constitutional" equality litigation is, of course, that which protected native title in *Mabo v Queensland (No 1)*[10] and *Mabo v Queensland (No 2).*[11] In those cases it was held that, with s109 of the Constitution, s10 of the *Racial Discrimination Act* 1975 (Cth) (RDA) had the effect of invalidating a racially discriminatory State law.

With rare exceptions the SDA has not been considered to be a Commonwealth equality law such that it can, along with s109 of the Constitution, function in this way to invalidate discriminatory State laws.[12] In reality the SDA is a weak tool; a patchwork of exemptions, providing no general protection against sex discrimination. It is cast in narrower terms than the RDA, for example. A far more comprehensive commitment to women's equality in the form of an express guarantee of "equality in law" is needed.[13] However, this article argues that the features of the SDA which are obstacles to "s109 challenges" to State laws do not entirely account for the dearth of litigation. It proceeds from the observation that issues which have been characterised as matters of discrimination against women in academic and social commentary have not become subjects of this sort of litigation.

The paper is divided into three Parts. Part I considers two aspects of s109 and the SDA. First, the paper outlines, very briefly, the one case in which the SDA and s109 have been used to challenge a discriminatory State law. Second, there is a discussion of factors which are, or may have been perceived to be, barriers to these actions. They are: (1) the SDA applies to specific areas of public life only; (2) the SDA contains numerous exemptions; (3) the SDA prohibits discriminatory *conduct* not discriminatory *laws*; (4) cases suggest that most challenges based on inconsistency with a federal anti-discrimination law deal with "direct", rather than "indirect", discrimination in the State law; and (5) the lack of access to resources. It is concluded that there are significant limitations on the range of State laws which could be challenged because of the severe limitations on the scope of the SDA and the lack of resources. However, none of the barriers prevent a "s109 challenge" to some State laws.

Part II, the major part of the paper, looks at abortion laws and the SDA. An argument is made that the criminal laws of abortion, in all States except Western Australia, are discriminatory within the meaning of the SDA and are therefore invalid under s109 of the Constitution. The discussion does not attempt to be comprehensive but is designed to show that such an action based on the SDA and s109 *is* arguable. The two most contentious issues in the argument concern (1) the meaning of "disadvantage" in s5(2) of the SDA: do State abortion laws "disadvantage", or are they likely to "disadvantage",

10 (1988) 166 CLR 186.
11 (1992) 175 CLR 1.
12 There is only one reported case: *Pearce v South Australian Health Commission* (1996) 66 SASR 486.
13 See Australian Law Reform Commission, *Equality Before the Law: Women's Equality* Chs 4-6.

women? And (2) whether States could establish the defence of "reasonableness" in s7B of the SDA. It is argued that they could not.

Part III concludes the paper.

PART I - THE SDA AND S109 OF THE CONSTITUTION

1. A Case Example: *Pearce v South Australian Health Commission*

In *Pearce v South Australian Health Commission*[14] the full court of the South Australian Supreme Court held that s13 of the *Reproductive Technology Act* 1988 (SA) (RTA) was inconsistent with ss6 and 22 of the SDA and was therefore invalid by virtue of s109 of the Constitution.

Section 13 of the RTA provided that only married couples[15] were eligible for assisted conception procedures. Gail Pearce was refused a service because she was unmarried by this definition. Sections 6 and 22 of the SDA make it unlawful to discriminate on grounds of marital status in the provision of services. In an extremely short judgment the full court declared s13 of the South Australian Act to be invalid. After earlier making a passing reference to Gibbs CJ's notion of "direct conflict" in *University of Wollongong v Metwally*[16] Williams J (with whom Bollen and Millhouse JJ agreed) said:

> When the provisions of the *Sex Discrimination Act* and the *Reproductive Technology Act* are examined side by side it is immediately apparent that there is direct inconsistency between the two sets of legislation. The licensing condition required by s13(3)(b) prohibits the application of IVF ... except to married couples - including those in certain de facto relationships. By virtue of the mandatory licensing condition the IVF service is not available to a single person who has not been cohabiting as set out in s13(4). In such circumstances a person in the position of the plaintiff is treated less favourably under the *Reproductive Technology Act* than a person of a different marital status. This is the very situation which is prohibited by s22(1) of the *Sex Discrimination Act* having regard to s6(1) thereof. In summary, the South Australian Act only allows a licensed service to be provided by the imposition of a condition which (in its statutory terms) is expressly prohibited by the Commonwealth legislation. It is not surprising that none of the parties to these proceedings - nor the Attorney General - sought to resist the conclusion

14 (1996) 66 SASR 486.
15 Defined to include those in a de facto marriage of a certain duration.
16 (1984) 158 CLR 447 at 455-456.

> that there was a collision between the two pieces of legislation such as to amount to inconsistency within s109 of the Constitution.[17]

No other reasons were given.[18]

This is the only reported case in which the SDA has been used to strike down a sexually discriminatory State law. The next section explores the reasons for the dearth of cases by examining the barriers to such litigation.

2. Real and Apparent Barriers to the Use of s109 with the SDA

2.1. The Sex Discrimination Act Applies to Specific Areas of Public Life Only

The SDA makes discrimination unlawful only if it occurs in specific areas of public activity. These are: paid work; education; goods, services and facilities; accommodation; land transactions; clubs; and the administration of Commonwealth laws and programmes.[19] The areas have the potential to be interpreted widely, especially that of "services".[20] However, the restriction on the scope of the SDA is significant, especially as there are many instances of sex discrimination in the "private" sphere.[21]

Insofar as the SDA is limited in this way, the range of State laws which could be challenged because of their inconsistency with the SDA is correspondingly limited. For example, industrial laws which simply fail to include unpaid work in the home within industrial protections do not come within the SDA. However, this restriction on its scope, serious though it is,[22] does not bear on the question whether the SDA is capable of forming the basis of a "s109 challenge" to a discriminatory State law. That is (subject to the discussions which follow), if a State law deals with conduct which does in fact come within one of the public activities - for example in the field of education, land transactions or services - then the question whether it is inconsistent with the SDA clearly can arise.

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17 (1996) 66 SASR 486 at 490-491.

18 The South Australian Parliament has not amended s13 of the RTA. However, the South Australian Council on Reproductive Technology has issued two memoranda to reproductive technology service providers advising of the *Pearce* decision and requiring compliance with it.

19 Sections 14-26. This scheme differs from that in, eg, the *Racial Discrimination Act* 1975 (Cth) (RDA), s9 of which prohibits discrimination generally without regard to specific areas of life.

20 See *IW v City of Perth* (1997) 146 ALR 696; and Tarrant, "The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?" (1996) 26 *UWA L Rev* 190.

21 Australian Law Reform Commission, *Equality Before the Law: Justice for Women* Part 1, p38. Discrimination occurs in the "private" sphere of the family, eg with respect to activity excluded from the concept of "work", because it is unpaid and, in the case of violence against women, often occurring in the home.

22 At pp38, 41-42 and Ch 3 generally.

2.2. Exemptions

An original provision of the SDA effectively precluded challenges to State laws. Section 40(1)(a) exempted acts done in direct compliance with another Act. However, the section included a sunset clause so its provisions were spent two years after enactment.[23] Nevertheless, numerous other exemptions remain.

Division 4 of Part II of the SDA lists a series of exemptions. These include: where sex is a "genuine occupational qualification";[24] where a man is denied benefits relating to pregnancy and childbirth;[25] with respect to a service the nature of which is such that it can be provided to one sex only;[26] with respect to standards of accommodation for employees where the difference is not unreasonable;[27] residential care of children;[28] charities;[29] religious bodies;[30] voluntary bodies;[31] acts done in direct compliance with a court order or a series of specified Commonwealth Acts;[32] insurance benefits if reliance is placed on actuarial tables;[33] certain aspects of superannuation funds;[34] competitive sport;[35] and combat duties.[36] HREOC can also grant exemptions to specific applicants.[37]

The Crown in right of the State is exempt from the provisions dealing with paid work, sexual harassment, and clubs,[38] and State instrumentalities are exempt from the first two of these categories.[39]

A further, "invisible" exemption is the reservation claimed by the Australian government when ratifying the international convention which the SDA implements, the Convention on

23 Section 40(2).
24 Section 30.
25 Section 31.
26 Section 32.
27 Section 34.
28 Section 35.
29 Section 36.
30 Sections 37, 38.
31 Section 39.
32 Section 40. The Commonwealth Acts include the *Income Tax Assessment Act* 1936 and the *Social Security Act* 1947. The *Social Security Act* has been re-enacted as the *Social Security Act* 1991. The exemption from the SDA remains.
33 Section 41.
34 Sections 41A and 41B.
35 Section 42. Administration of those sports is excluded by s42(2).
36 Section 43.
37 Sections 44-47.
38 Sections 12, 14-20, 25, 28A-28L.
39 Section 13.

the Elimination of all Forms of Discrimination Against Women (CEDAW). The government did not accept the obligation in CEDAW to provide paid maternity leave.[40]

Thus, the SDA is riddled with exemptions. However, again, if a State law does not come within the exemptions contained in Division 4 and elsewhere the question of that law's inconsistency with the SDA can arise. Extremely severe though these exemptions are, they affect the scope of the SDA not its *capacity* to form the basis of a challenge to State laws.

2.3. The SDA Prohibits Discriminatory Conduct *not Discriminatory* Laws

The potential of the SDA to form the basis of a challenge to discriminatory State laws has been largely ignored. This is so in the Australian Law Reform Commission's Report No 69, *Equality Before the Law: Women's Equality*. Indeed, although there is no discussion of this potential,[41] the Commission reports: "[The SDA] is unable to challenge directly gender bias or systemic discrimination in the content of law. ... It cannot strike down ... laws."[42] This assumption appears to be based on the fact that the SDA does not expressly prohibit discriminatory laws and provides no general guarantee of equality in or before the law.[43]

It is true that by its own force the SDA cannot affect State laws. This is unlike the RDA, s10 of which prohibits laws of the Commonwealth, States and Territories which are racially discriminatory.[44] All challenges to racially discriminatory State laws have turned on this section.[45]

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40 United Nations Homepage: gopher://.un.org/oo/ga/cedaw/CEDAWSP2.EN. A reservation was also made with respect to non-discrimination in combat duties but this is in the text of the SDA (s43).

41 This form of litigation is discussed by the Australian Law Reform Commission in *Equality Before the Law: Women's Equality* but only in relation to the proposed Commonwealth *Equality Act* which would provide an express, general guarantee of sex equality in law. See Australian Law Reform Commission, *Equality Before the Law: Women's Equality* pp77-78, 84.

42 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* p56.

43 At 56, and Ch 4 generally.

44 Section 10 of the RDA provides: "If, by reason of ... a law of the Commonwealth or of a State or Territory, persons of a particular race, ... do not enjoy a right that is enjoyed by persons of another race, ... then, notwithstanding anything in that law, a person of the first-mentioned race, ... shall, by force of this section, enjoy that right to the same extent as persons of that other race."

45 *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373. See also, eg, *The Aboriginal Legal Rights Movement Inc v South Australia (No 2)* (1995) 64 SASR 558; *Glass v State of New South Wales* (1994) 52 FCR 336; *New South Wales Aboriginal Land Council v Worimi Local Aboriginal Land Council* (1994) 84 LGERA 188.

It is also true, as has been shown, that the SDA is severely limited in scope. This means that the number of State laws which deal with conduct within the SDA will be limited. But to say that the SDA is *incapable* of affecting State laws ignores s109 of the Commonwealth Constitution. If *conduct* pursuant to a State law is directly inconsistent with a standard of conduct required by a Commonwealth law, s109 of the Constitution operates to invalidate the State law. Thus, the absence of a provision equivalent to s10 of the RDA should not be taken to preclude the use of the SDA, in conjunction with s109 of the Constitution, as a basis for challenging discriminatory State laws.

This apparently straightforward reasoning underlay the decision in *Pearce*. Without detailed discussion, the full court of the South Australian Supreme Court, as explained, held that the "conduct" provisions in ss6 and 22 of the SDA (making discrimination in the provision of services on grounds of marital status unlawful) operated, in conjunction with s109 of the Constitution, to invalidate a discriminatory State law.

This would be the end of the matter, and *Pearce* an unequivocal indication that the SDA can be the basis of a "s109 challenge", but for an issue considered by the High Court in the case of *Gerhardy v Brown*[46] in 1985. Although *Gerhardy* was a race discrimination case, it also dealt with the broader issue of the distinction between certain kinds of *conduct* and *laws* in federal anti-discrimination legislation. To date commentators in the sex discrimination area have not focussed on this case.[47] However, the issue raised may inform the reluctance to view the SDA as capable of affecting State laws.

In *Gerhardy* the High Court dealt with the operation of s9(1) of the RDA. That section makes it unlawful for a "person to do any act involving a distinction ... based on race ... which has the purpose or effect of nullifying" the equal enjoyment of a human right. The terms are different from those in the SDA[48] but it is relevantly the same in that it prohibits discriminatory conduct and does not (unlike s10 of the RDA) expressly prohibit discriminatory laws.

The State law under consideration was s19 of the *Pitjantjatjara Land Rights Act* 1981 (SA). This section made it an offence for a non-Pitjantjatjara person to be on Pitjantjatjara

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46 (1985) 159 CLR 70.

47 But see comments in *MW, DD, TA and AB v The Royal Women's Hospital* (1997) EOC 92-886 at 77,192-77,193. The comments concerned the uncontentious aspect of *Gerhardy*, that a State Parliament's action in passing a discriminatory bill cannot be said to be the discriminatory "act" for the purposes of federal anti-discrimination law.

48 Section 5 of the SDA is typical. There, discrimination is defined as : "(1) ... a person ... discriminates against another person ... on the ground of sex ... if, by reason of : (a) the sex of the aggrieved person ... the discriminator treats the aggrieved person less favourably than [s/he] treats ... a person of the opposite sex." And "(2) ... a person ... discriminates against another person ... on the ground of sex ... if the discriminator imposes ... a condition ... that has or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person."

land. For present purposes the question that arose in the case was whether the act of prosecuting such an offence was discriminatory under s9 of the RDA, and therefore whether s19 of the State Act was invalid under s109 of the Constitution. That is, does non-discretionary conduct pursuant to a discriminatory State law come within the meaning of "discrimination" in s9?

Four judges considered the question. Gibbs CJ and Mason J held that s9 of the RDA does not apply in these circumstances, in which the actor, having statutory authority to act in only one way, acts in accordance with the authority.[49] Brennan and Deane JJ, on the other hand, held that mandatory acts done pursuant to a discriminatory law, as well as discretionary acts, do come within the scope of s9. Brennan J said: "A State law cannot validly authorize the doing of an act if the doing of that act is prohibited by s9 of the RDA."[50]

Although the question of the scope of s9 of the RDA has been considered by subsequent courts,[51] it has not been resolved. The reason for this is simple. The RDA contains another section (s10) which deals specifically with laws. It may be argued that, since the RDA's scheme includes one section dealing expressly with laws, the preceding section should be confined to conduct. The SDA does not include this dual scheme and so the provisions dealing expressly with conduct should be understood to include laws as well. This conclusion is supported by the fact that, as explained, an original provision in the SDA exempting all acts done "in direct compliance" with another Act was spent by a sunset clause two years after enactment, suggesting that that section, and nothing more, precluded challenges to laws.[52]

However, the contrary argument could also be made. Parliament could have included a provision dealing with laws if its intention was that they should be affected. Allowing non-discretionary conduct pursuant to State laws to come within the meaning of discriminatory conduct in the SDA could be said to be simply a backdoor way of targeting State laws when this was not Parliament's intention.

However, it is submitted that, if this "non-discretionary conduct" question should be asked in the area of sex discrimination, then, as a matter of well established principle, Brennan

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49 (1985) 159 CLR 70 at 81-82 per Gibbs CJ, at 93-94 per Mason J.

50 At 121.

51 Three judges in *Mabo (No 1)* (1988) 166 CLR 186 at 197, 204, 242 (per Mason CJ, Wilson J and Dawson J, respectively) appear to follow Gibbs CJ and Mason J's view in *Gerhardy*; four leave the question undecided. The plaintiffs in *WA v Commonwealth* relied on s9 (as well as s10) of the RDA but the High Court found it unnecessary to decide the s9 question. No other court has aired the issue fully but in *The Aboriginal Legal Rights Movement Inc v South Australia (No 2)* at 561 Doyle CJ, in obiter dicta, expressed support for the Gibbs CJ/Mason J view that State laws conferring non-discretionary powers do not come within s9 of the RDA.

52 Sections 40(1)(a) and 40(2).

and Deane JJ's view in *Gerhardy*, which is implicit in *Pearce*, must be correct. The contrary view is based on an assumption that the determination of discrimination not only requires consideration of the actor's intention but is affected by where the *source of that actor's intention* lies - something akin to motive.

It is generally accepted that intention to discriminate is not a requirement of unlawful discrimination.[53] So long as a distinction is drawn according to the relevant characteristic of the complainant (and the other elements of the section are established) the act is unlawful. However, even if intention were said to be required for discrimination, a person exercising a non-discretionary power could be said to have the relevant intention. It is clear that they make the distinction prohibited by the terms of the federal law, and could even be said to have the intention to discriminate, because they are *required* to have that purpose. It is only the source of the intention, or the reason for making the distinction (the terms of the State law), which is peculiar to the circumstances.

In this way, the view of Gibbs CJ and Mason J in *Gerhardy* can be seen, when examined, to be a retreat not just into a concept of intention but into something like the "motive" of an actor as an element of discrimination. Nowhere else in anti-discrimination law is this suggested.

Thus, it is submitted that, contrary to views sometimes expressed, the SDA *is* capable of forming the basis of a challenge to discriminatory State laws. The concern first raised in *Gerhardy,* that non-discretionary conduct pursuant to a State law cannot be considered discrimination, may in part explain the reluctance to view the SDA in this way. However, if so, it is submitted that the obstacle is unreal. The view of Brennan and Deane JJ in *Gerhardy*, which underlies the decision in *Pearce*, is to be preferred.

2.4. State Laws: Direct and Indirect Discrimination

It is difficult to draw conclusions about the nature of "s109 challenges" to discriminatory State laws from cases because the number is extremely small. However, if anything can be gleaned, it is that litigants are more ready to bring such an action where the prohibited distinction in the State law is express or "direct", as opposed to indirect. It is the former kind of sex, or race, discrimination which has been successfully challenged in all cases so far.[54]

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53 *Reddrop v Boehringer Ingelheim Pty Ltd* (1984) EOC 92-031 at 75,569; *Waters v Public Transport Corporation* [1991-1992] 173 CLR 349 at 359 per Mason CJ and Gaudron J, at 383 per Deane J. Intention is clearly irrelevant in "indirect discrimination". The question has only arisen with respect to "direct discrimination". See section 2.4. below for the distinction between direct and indirect discrimination.

54 *Pearce*; *Mabo (No 1)* (the *Queensland Coast Islands Declaratory Act* 1985 (Qld) purported expressly to extinguish native title in Queensland); *WA v Commonwealth* (the *Land (Titles and Traditional Uses)* Act 1993 (WA) purported expressly to extinguish native title in Western Australia). *Croome v Tasmania* (1997) 142 ALR 397 was not a discrimination

As with other human rights legislation, the SDA prohibits two kinds of discrimination: direct and indirect. Direct discrimination involves the doing of a conscious act which draws a prohibited distinction, for example on the basis of sex. Indirect discrimination involves the imposition of a rule which, though neutral on its face, has a disproportionate impact on a person because of their sex.

If indirect discrimination in laws is not readily perceived as being in breach of other legislation, this may act as a barrier to using s109 with the SDA. Today it is more often indirect than direct discrimination in laws which affects women.[55] Express distinctions are rare.

However, there is no reason why indirect discrimination in a State law cannot form the basis of a constitutional challenge to its validity. It is one of two forms of discrimination defined in the SDA. Moreover, the High Court has affirmed the relevance of indirect discrimination in the context of s109 litigation by emphasising the need to assess the practical impact of a law in determining whether it is discriminatory rather than simply looking at its form.[56] The Court in *Pearce* recognised indirect sex discrimination as an alternative basis for the challenge to the South Australian law.[57]

Thus, the fact that a State law is neutral on its face but has a discriminatory impact on women should not preclude a "s109 challenge".

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case but a human rights case concerning privacy. The plaintiffs challenged ss122 and 123 of the *Criminal Code* (Tas), arguing they were inconsistent with the *Human Rights (Sexual Conduct) Act* 1994 (Cth) and were therefore invalid within s109 of the Constitution. Section 122 distinguished impliedly and s123 distinguished expressly between male homosexual sex and other sex. The action was discontinued after the Tasmanian Parliament repealed the laws.

55 Aust, Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* (1992) p105.

56 *Mabo (No 1)* (1988) 166 CLR 186 at 230; cf *Gerhardy*.

57 See also *Glass v State of New South Wales* (1994) 52 FCR 336. There, the *Sentencing Act* 1989 (NSW) and s439 of the *Crimes Act* 1900 (NSW) were challenged as indirectly racially discriminatory. The matter was discontinued after the Federal Court ruled it lacked jurisdiction.

2.5. Access to Resources

Litigation is costly. Until the Labor Government's initiatives following the Justice Statement in 1995[58] there was no network of women's legal services. Current funding levels make constitutional litigation extremely difficult after prioritising the demands of urgent legal advice and representations. This is made more difficult by cuts to legal aid funding because many women refused aid are turning to women's legal services. Moreover, one of the first acts of the current government was to eliminate the promise of a test-case litigation fund made by the Labor Government.[59]

Thus, possibly the most significant barrier to litigation based on the SDA and s109 has been the lack of access to resources. Nevertheless, major public interest actions have been taken through the dedication of community organisations and pro bono legal work.[60] It is to be noted, also, that s109 litigation is not necessarily pro-active. It may be needed in defence, where discriminatory State laws are prosecuted.[61]

2.6. Conclusion

There has been only one case in which the validity of a discriminatory State law has been challenged on the basis of its inconsistency with the SDA. That case was decided 12 years after the SDA was enacted. The dearth of this kind of litigation on behalf of women suggests there are barriers to its use.

Views have been expressed that the SDA is incapable of forming the basis of such a challenge, but there is no legal impediment in this regard. Section 109 of the Constitution operates to invalidate a State law to the extent that it is inconsistent with the SDA. And the line of reasoning in *Gerhardy*, which says that non-discretionary conduct pursuant to a State law cannot amount to discrimination (and therefore there is no inconsistency between the State and Commonwealth law), is unlikely to be followed. Thus, although practical impediments to litigation because of lack of resources cannot be underestimated, the SDA *is* capable of forming the basis of a challenge to State laws.

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58 Aust, Attorney General's Dept, *The Justice Statement* (1995) Ch 5: "National Women's Justice Strategy".

59 $2.9m to be made available over four years. Aust, Attorney General's Dept, *The Justice Statement* pp76, 92-93, 98.

60 See discussion in Australian Law Reform Commission, *Equality Before the Law: Women's Equality* pp117-8.

61 Eg the recent prosecutions of two doctors for performing an abortion in WA, and in the appeal from *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47. There, the High Court granted leave to intervene to two Catholic organisations wishing to argue that all abortions were unlawful. This necessitated preparation of an application for leave to intervene by women's groups. See Wainer, "Abortion Before the High Court" (1997) 8 *Aust Feminist LJ* 133. The High Court also granted leave to intervene to the Abortion Providers' Federation.

However, the scope of the SDA is besieged by limitations in two major areas. First, the coverage of the Act is severely limited by its restriction to specific areas of public life and, second, its scope is further reduced by numerous exemptions. The political compromises in its enactment were enormous.[62] This creates the impression that attempts at challenging State laws would be futile in any case because the range of challengeable laws is so small.[63]

It is submitted that the range of challengeable State laws is not as limited as the lack of litigation suggests. I have argued elsewhere that the immediacy requirement in the criminal defence of provocation is inconsistent with the SDA and therefore invalid.[64] The idea that the requirement is likely to disadvantage women because we often receive violence in contexts different from men is relatively uncontentious.[65] But it is also arguable that application of the defence comes within one of the areas of public life with which the SDA deals, ie "services".

The remainder of this article makes another argument illustrative of the SDA's potential. It is contended that most State laws on abortion are inconsistent with the SDA and therefore invalid according to s109 of the Constitution.

PART II - ABORTION AND THE SDA

1. State Laws on Abortion

In all jurisdictions in Australia procuring an unlawful abortion is an offence. The offences in each State are not dissimilar, except for that now existing in Western Australia.[66] Section 65 of the *Crimes Act* 1958 (Vic) is typical. It provides that any person who:

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62 Ronalds, *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* (Sydney: Pluto Press, 2nd ed 1991) pp14-18. And see Aust, Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* p42.

63 This appears to be the view underlying comments by the Australian Law Reform Commission, *Equality Before the Law: Justice for Women* pp43-44.

64 Tarrant, "The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?" (1996) 26 *UWA L Rev* 190. See also *IW v City of Perth* (1997) 146 ALR 696, decided since the writing of that argument.

65 Second reading speech of the Bill amending s23 of the *Crimes Act* 1900 (NSW), abolishing the immediacy requirement in provocation, Aust, Parl, *Debates* (1982) Vol 167 at 2482-86; Vol 168 at 3202-07; *R v Chhay* (1994) 72 A Crim R 1 at 11-13; Tarrant "Something is Pushing Them to the Sides of Their Own Lives: A Feminist Critique of Law and Laws" (1990) 20 *UWA L Rev* 573 at 585-590; Dobash & Dobash, *Violence Against Women: A Case Against the Patriarchy* (Open Books, London 1980) p71; Hilberman & Munson, "Sixty Battered Women" (1977) 2 *Victimology* 460. See also Australian Law Reform Commission, *Equality Before the Law: Women's Equality* pp86, 104.

66 See *Crimes Act* 1958 (Vic) s65; *Crimes Act* 1900 (NSW) ss82-83; *Criminal Law Consolidation Act* 1935 (SA) s81; *Criminal Code* (NT) s172; *Criminal Code* (Tas) s134;

> with intent to procure her own miscarriage unlawfully administers to herself any poison or ... unlawfully uses any instrument ... and whosoever with intent to procure the miscarriage of any woman ... unlawfully administers to her any poison or ... unlawfully uses any instrument ... is guilty of felony, and is liable to imprisonment ... for fifteen years.

In each jurisdiction there is a defence to the unlawful abortion offence. However, there are differences between them. The common law defence applies in Victoria, New South Wales and the ACT. Menhennit J in *R v Davidson*, formulated the defence 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.[67]

It is to be noted that the defence is available to the person performing the abortion, following the general practice of prosecuting the abortionist, rather than the woman.[68] In the later case of *R v Wald*[69] Levine J included social and economic grounds as factors relevant to a doctor's determination of a woman's physical or mental health. These cases have not been tested in an appellate criminal court.[70]

In the Queensland *Criminal Code* there is a medical defence. A surgical operation is not unlawful if performed on an unborn child for the preservation of the mother's life.[71] This defence could be interpreted narrowly such that an abortion would be unlawful unless the woman was in danger of dying. Alternatively, it could be interpreted in line with the

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Crimes Act 1900 (ACT) ss42, 43; *Criminal Code* (Qld) ss224, 225. Cf *Criminal Code* (WA) s199: abortion is a criminal offence with a maximum penalty of $50 000.

67 [1969] VR 667 at 672.

68 It may not always be the case that guilt or innocence of the woman follows that of the abortionist. See *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47 at 83 per Priestley JA.

69 (1971) 3 DCR (NSW) 25.

70 In the context of deciding whether tort damages could be recovered for negligent failure to diagnose a pregnancy, and the consequent loss of an opportunity to have an abortion, the Court of Appeal in NSW in *CES v Superclinics* (1995) 38 NSWLR 47 at 60 per Kirby ACJ, at 80 per Priestley JA, at 85 per Meagher JA apparently accepted the law in *Davidson* and *Wald*, though neither party challenged it. Kirby ACJ would have extended the time within which a danger to the woman's health could be perceived beyond the pregnancy itself: at 60.

71 *Criminal Code* (Qld) s282. A similar defence remains in the *Criminal Code* (WA) s259.

common law. The latter interpretation has been given in Queensland.[72] Again, the defence turns on the abortionist's actions and state of mind, not the woman's.

South Australia and the Northern Territory have modified the common law defence.[73] In both jurisdictions an abortion is lawful if two doctors are of the view that continuation of the pregnancy is likely to endanger the woman's health. In Western Australia an abortion is now not unlawful if done with the informed consent of the woman.[74]

Despite these laws, there have been very few prosecutions for abortions in Australia for thirty years[75] even though it is estimated that 80 000 are obtained each year.[76] It has been claimed that these procedures come within the law; that most abortions are not unlawful.[77] But it is impossible to believe that even a majority would be lawful under the most recent, restrictive interpretation of the defence.[78] The position taken here is that most abortions - certainly a very significant proportion of the estimated 80 000 per year - would be unlawful if tested and that the public "agreement" that they come within the law amounts to a social fiction. That is, many women who seek abortions are healthy. They would not, according to the views of Priestley and Meagher JJA in *CES v Superclinics,* be in serious danger of mental or physical ill health by continuing their pregnancy.[79] The *CES* case illustrates the precariousness of the assertion that all abortions are lawful in strictly legal terms. It is suggested that what amounts to a non-enforcement policy, breached occasionally and facilitated by the social fiction of lawfulness, is in place in Australia.

Given this situation, it is unrealistic to consider the terms of the abortion laws in isolation.[80] It is suggested that, for the purpose of considering the ultimate question of

72 *K v T* [1983] 1 Qd R 396 at 398; cf Colvin & Linden-Laufer, *Criminal Law in Queensland and Western Australia* (Butterworths, Sydney 1994) p461.

73 *Criminal Law Consolidation Act* 1935 (SA) s82A; *Criminal Code* (NT) s174.

74 An abortion is also justified if done with informed consent *and* "(b) the woman concerned will suffer serious personal, family or social consequences ... or (c) serious danger to the physical or mental health of the woman ... will result ... or (d) the pregnancy of the woman is causing serious danger to her physical or mental health": *Health Act* 1911 (WA) s334. It is difficult to see the point of these alternative justifications except for political appeasement. In the case of paragraphs (c) and (d) informed consent is not necessary if it is "impracticable" for the woman to give it: s334(4).

75 Prosecutions occurred in Queensland in 1985, Victoria in 1987 and Western Australia in 1998.

76 Western Australia, Chief Justice's Taskforce on Gender Bias, *Report* (1994) p195.

77 Eg "Abortion Bid Attacked", *The West Australian,* 9 February 1998, p3.

78 *CES v Superclinics* (1995) 38 NSWLR 47 at 81-84 per Priestley JA, at 85-87 per Meagher JA, and see 63-66 per Kirby A-CJ. Two of the three judges took a very restrictive view of what could constitute "serious danger" to CES's mental health and therefore avoided a finding of unlawfulness on that basis. See also section 5.1. below.

79 Meagher JA dissented but his views on what does and does not constitute damage to health cannot be ignored for future cases because the majority view did not turn on this question: at 85-86.

80 At 70 per Kirby A-CJ.

inconsistency between the SDA and State abortion laws, the effect of the non-enforcement policy should be taken into account. It is considered where relevant in the following discussion.

2. The SDA in Outline

2.1. The Complaint

Section 22 of the SDA makes it unlawful to discriminate on grounds of sex in the terms or conditions on which a service is provided. There are two aspects of s22 that need to be considered: "discrimination" and "services".

Discrimination may be direct or indirect, and for the purposes of this paper it is indirect discrimination that is important. Section 5(2) defines indirect discrimination as the imposition of:

- a condition, requirement or practice;
- which disadvantages, or is likely to disadvantage, persons of one sex.

The other aspect of s22 is "services". The meaning of services is affected by s32 which provides that services of such a nature which can only be provided to one sex are excluded from the Act.

2.2. The Defence

Section 7B of the SDA provides the respondent with a defence to a finding of discrimination. If the respondent can prove[81] the discrimination was "reasonable in the circumstances" then it is not unlawful.

For the purpose of analysis, the focus here is on the law applicable in Victoria, New South Wales, the ACT and, probably, Queensland.

2.3. The Argument

It is argued below that the State laws on abortion,[82] and the non-enforcement policy, amount to discrimination against women contrary to s5(2). Further, it is argued that the provision of abortion services would come within the prima facie meaning of "services" in s22 and the exclusion in s32 is inapplicable, and that the defence in s7B is not available.

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81 The onus is on the respondent to show reasonableness: s7C.

82 Except those now applicable in Western Australia.

It is concluded, then, that the State laws are inconsistent with the SDA and therefore invalid by s109 of the Constitution.

3. Section 5(2) of the SDA: Indirect Discrimination

3.1. Condition or Requirement[83]

Indirect discrimination involves the imposition of a "condition" or "requirement". Courts and tribunals have taken the view that a complained-of "condition" or "requirement" must be formulated with some precision[84] but that there should be a liberal interpretation of what kind of rules, policies or practices come within the terms.[85]

In considering an allegation of discrimination in the provision of services, the High Court in *Waters v Public Transport Corporation*[86] held that a "requirement" or "condition" must involve something over and above that which is necessarily inherent in the services. However, in applying this principle the Court construed the words generously. Six of the seven judges held that the requirement in a new public transport ticketing system, that passengers buy and scratch their own tickets without the assistance of a conductor, was a requirement or condition.

The state imposes a rule that *a pregnant woman, in order to avoid criminal liability, refrain from having an abortion unless a medical practitioner reasonably believes that her health would be in serious danger by continuing the pregnancy.* In this way women must refrain from controlling their fertility. Given the breadth of the courts' and tribunals' approach there is little doubt that this rule would constitute either a "condition" or "requirement".

3.2. Which Disadvantages or is Likely to Disadvantage Persons of One Sex

3.2.1. Introduction: Two Arguments About "Disadvantage"

Does the requirement that a pregnant woman refrain from having an abortion unless a medical practitioner reasonably believes her health would be in serious danger "disadvantage" women? This element of the action requires the most detailed analysis.

Until 1995, s5(2) of the SDA required an express comparison between the sexes. It was necessary for a complainant to prove that: "a substantially higher proportion of persons of the opposite sex" were able to comply with the requirement or condition; and the complainant was not able to comply. This resulted in complex assessments of "base-

83 In 1995 the SDA was amended to include "practices" as well as conditions and requirements but this is not relevant for the present discussion.

84 See *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 185 per Dawson J.

85 At 196 per McHugh J; *Waters v Public Transport Corporation* (1991) 173 CLR 349.

86 (1991) 173 CLR 349.

groups" of women and men.[87] Now the central concept is simply "disadvantage" and no express, direct comparison is included.

The Australian Law Reform Commission (ALRC), which recommended the amendment, reported that it would "simplify" the provision.[88] No case has as yet explored the meaning of "disadvantage" in detail. In order to examine this issue, we need to consider the two arguments that can be made that a denial of abortion services does disadvantage women.

3.2.2. Characterise Men's Experience as Comparable

The first argument is premised on a broader characterisation of abortion so that men *do* have comparable experiences. Abortion can be characterised as a health service, specifically a reproductive health service.[89] Denial of abortion is therefore denial of access to a service which can promote a fundamental component of women's health and reproductive freedom. Restrictive abortion laws target *women's* health, leaving men free to promote their health unhindered. Women are "disadvantaged" in a *direct comparison with men*. Rebecca Cook and Bernard Dickens write:

> It may be argued ... that men may medically protect their lives and health against danger without restraint, but that pregnant women may not do so where restrictive abortion laws exist.[90]

Thus, it can be argued that there is comparable male experience to that of terminating pregnancy, though not of the abortion specifically. A denial or impairment of women's access would amount to disadvantage.[91]

Moreover, equal access to health services and enjoyment of reproductive choices are rights recognised by CEDAW, which the SDA implements.[92] Thus, the rights are cognisable within the concept of "disadvantage" in the SDA.

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87 See, eg, *Australian Iron and Steel Pty Ltd v Banovic.*

88 Australian Law Reform Commission, *Equality Before the Law: Justice for Women* pp45-47.

89 Cook & Dickens, "Abortion Laws in Commonwealth Countries" (1979) 30(3) *International Digest of Health Legislation* 463, quoted in Women's Electoral Lobby (WA), *Inequality of Access to Abortion Services in Australia: A Report to the Committee on the Elimination of Discrimination Against Women (CEDAW)* (WEL, Perth 1988) p2.

90 Cook & Dickens, *Emerging Issues in Commonwealth Abortion Laws* (Commonwealth Secretariat, London 1983) p60, quoted in Women's Electoral Lobby (WA), *Inequality of Access to Abortion Services in Australia: A Report to the Committee on the Elimination of Discrimination Against Women (CEDAW)* p3.

91 An equivalent for men may be the criminalisation of prostate cancer services, or perhaps the criminalisation of all interstate and international travel for men who have made a woman pregnant or of the food men of child-producing age can eat on the basis of research showing the risk of reduced sperm count.

92 Articles 12 and 16.

3.2.3. Where No Male Comparator: Focus on Women's Detriment

The second argument that restrictive abortion laws disadvantage women is premised on a narrower characterisation of abortion as a sui generis experience of women.[93] No male comparator exists. This argument is apparently more complex because, where it can be said that an experience is unique to one sex, the law has had difficulty in determining its theory of discrimination. However, the two arguments ultimately converge. The apparent difficulty has been because of the "common sense" notion that discrimination requires a direct comparison between two things.[94] Thus, if abortion is characterised in this way, as a sui generis experience of women, then the meaning of "disadvantage" in s5(2) of the SDA is very important indeed. Can it accommodate the circumstance where there is no male comparator?

Although abortion can be said to be a sui generis experience of women, denial of services can be said to disadvantage women. This is because, on one model of sex equality, discrimination is discernible when detriment, measured by reference to fundamental social indicia, is suffered by just one group. Thus, an analysis of disadvantage is not confined to a direct comparison with the opposite sex, but focuses on the question whether a relevant detriment is suffered by the one group affected.

A brief explanation of the equality theory on which this argument rests is useful.

3.2.3. (a) Three Models of Equality

According to one approach to equality, sometimes called the formal model, equality means sameness. Equality between the sexes therefore means identical treatment of women and men in all situations. Another approach has been called the "differences" approach. This means that where women are different from men different treatment is justified including, sometimes, special protection. The central task of both these approaches is to look for differences. On the strict, formal approach distinctions of any kind will amount to

93 For example, Wilson J in *R v Morgentaler* [1988] 1 SCR 30 at 171:

> It is probably impossible for a man to respond, even imaginatively, to [the "profound social and ethical"] dilemma [of whether or not to terminate a pregnancy] not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

94 Eg *Mount Isa Mines v Marks* (1992) EOC para 92-420 at 78-994. At first instance it was held that differential treatment of pregnant women in the lead industry was not sex discrimination because men and women were not in the same position and so could not be compared. See also Morgan, "Equality Rights in the Australian Context: A Feminist Assessment" in Alston (ed), *Towards an Australian Bill of Rights* (Centre for Public and International Law, Canberra 1994) pp123-144; *Geduldig v Aiello* 417 US 484 (1974); Littleton, "Reconstructing Sexual Equality" in Bartlett & Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press, Boulder 1991) p47.

discrimination. On the second approach some distinctions will be "saved" if they are based on true (primarily biological) difference.[95]

The formal approach to equality works well where men and women are seen to be in exactly the same situation. Both a man and a woman want service in a shop; refusal of service to one because she is a woman amounts to discrimination. And the recognition of differences, under the second approach, can promote fairness for women if special needs are met, such as those relating to maternity care. However, these approaches, which have been described as the corollary of each other,[96] have been criticised as simply not being capable of accounting for some social situations.[97]

If difference from men justifies different treatment then, so long as a difference is perceived, there is no reference point by which the *standard* of treatment can be measured. That is, the "difference" approach sometimes allows benign, protective treatment of women but it also allows lesser treatment, justified by difference. The approach cannot account for how "difference" becomes *detriment*.[98] It may be clear that the provision of maternity facilities is based on a justifiable difference and is therefore not discrimination. But what of the refusal to provide costless childcare - or denial of abortion services? Is that unjustifiable or justifiable treatment by reference to a difference? Neither the formal nor the "differences" approach provides a principled way to answer this question.

The "disadvantage" or "subordination" approach to equality seeks to address this problem. It asks:

> whether differences in treatment or in social conditions have led to women's inequality. It does not focus on whether some differences between women and men justify different treatment but instead looks at the effects on women of a particular legal rule or practice. ...

95 See MacKinnon, *Feminism Unmodified: Discourses in Life and Law* (Harvard University Press, Cambridge 1987) Ch 2.

96 At pp33-34.

97 At Ch 2; Australian Law Reform Commission, *Equality Before the Law: Women's Equality* pp47-48.

98 A succinct illustration of this is women's place in the legal profession. There is no question now that women and men are perceived as the same in this regard so that a refusal to allow women to practise law would be perceived as discrimination. However, in the past women and men were described as relevantly different such that the exclusion of women could be justified on this basis. See *Bradwell v Illinois* 83 US (16 Wall) 130 at 141-142 (1876); *Edith Haynes* (1904) 6 WAR 209.

> The subordination approach asks whether a practice or rule has harmed women or has been detrimental to them by obstructing the achievement of equality in a particular context.[99]

Thus, although the disadvantage approach is ultimately concerned with equality *between women and men* it does not restrict its focus to questions of differences and sameness between the sexes. Even where there is an experience unique to one sex discrimination can still occur. The approach focuses on the impact of laws rather than their form and asks whether there are detrimental effects. The enquiry is contextual and looks to primary social indicia: economic security (poverty); bodily and personal security (violence or personal invasion); education; self-determination or autonomy (civic exclusion). If women are disadvantaged by a law or policy by reference to these factors then discrimination has occurred regardless of the fact that the disadvantage can be characterised as the upshot of one of women's natural "differences".

3.2.3. (b) "Disadvantage" in s5(2) Imports the Third Model

It is submitted that, whatever the position before the amendment of 1995, "disadvantage" in s5(2) of the SDA imports the third model of equality. As explained, until 1995, s5(2) required an express comparison between the sexes. Now the central concept is simply "disadvantage".

Although there has been no detailed analysis of the amendment as yet,[100] a similar provision in the *Discrimination Act* 1991 (ACT) has been interpreted. In *Prezzi v Discrimination Commissioner*, the ACT Administrative Appeals Tribunal held that s8 of that Act

> does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute. All that is required is an examination of the treatment accorded the aggrieved person. ... If the consequence for the aggrieved person ... is unfavourable ... there is discrimination.[101]

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99 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* pp47-48.

100 However, see the statement by Commissioner Basten in *David Hagar, Douglas Morrish and Victor Marinaro v Minister for Health and Family Services* (Unreported, HREOC, Basten (Inquiry Commissioner), 19 February 1997) para 67: "[S]ubsection [5](1) [defining direct discrimination] requires a comparison of the treatment of the complainant and a person of the opposite sex, whilst subsection (2) merely refers to 'disadvantaging' persons of the same sex as the complainant"; cf *Marea Hickie v Hunt and Hunt* (Unreported, HREOC, Evatt (Inquiry Commissioner), 7 March 1988).

101 (1996) EOC 92-803 at 78, 945-78,946.

Moreover, accompanying the ALRC's recommendation for the amendment was a general analysis of equality theory similar to that outlined above. The Commission referred to the third model as the "subordination" approach but the concepts coincide with those referred to here, and in other theoretical writing, as either the "subordination" or "disadvantage" approach.[102] Moreover, the concepts of substantive as opposed to formal equality and the focus on social context associated with the third model were reflected in the second reading speech introducing the 1995 amendments.[103]

Thus, even though there is no male experience comparable to that of abortion for a woman, denial of a service related to that experience may nevertheless "disadvantage" women. If, when the social context and the effect on women are taken into account, women can be said to suffer detriment then they will have been disadvantaged, regardless of the fact that no man has ever been forced into precisely that situation.

3.2.3. (c) The Reference Point for "Disadvantage": CEDAW

Although the disadvantage approach to discrimination does not require a male comparator it nevertheless contains an implicit reference point.[104] Generally speaking, according to feminist theory, it asks the question whether there is detriment by reference to primary aspects of social existence[105] such as those listed above: economic and personal security, education and self-determination.

More specifically, however, it is suggested that, in the context of the SDA, in situations where there is no obvious male comparator, direct reference should be made to the fundamental rights and entitlements contained in CEDAW. Thus, where there is no obvious comparative experience of the opposite sex, the question becomes: does a particular law or practice (here the laws relating to abortion services) have the effect of denying or diminishing women's entitlement to the fundamental right to, for example, employment,[106] education,[107] reproduction[108] or participation in the political and public life of a country,[109] all of which are protected by CEDAW.

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102 See Graycar, "Matrimonial Property Law Reform: What Lessons Can We Learn?" (unpublished paper, Family Law Conference, 1996) pp12-15. For similar analyses see Graycar & Morgan, *The Hidden Gender of Law* (Federation Press, Sydney 1990) pp40-55; Littleton, "Reconstructing Sexual Equality" in Bartlett & Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* pp46-50. See also, Chapman, "Implementing Stage Two of the Lavarch Report: The Sex Discrimination Amendment Act 1995 (Cth)" 9 *Aust J Labour Law* 162 at 164.

103 Second reading speech, Sex Discrimination Amendment Bill 1995, Aust, Parl, *Debates* (1995) Vol 202 at 2459, 2461.

104 Cf *Prezzi v Discrimination Commissioner* (1996) EOC 92-803 at 78,946.

105 See, eg, MacKinnon, *Feminism Unmodified: Discourses in Life and Law* pp42-45.

106 Article 11.

107 Article 10.

108 Article 16.

109 Article 7.

If the focus of argument is "abortion", then, rather than a "health service", women's experience is sui generis and, it is suggested, the approach discussed must be taken in applying the concept of "disadvantage".

3.2.4. The Two Arguments Converge

It can be seen that the two analyses of "disadvantage" and denial of abortion services converge. The first requires a direct comparison with men's experience but by reference to a general "health service". Equal access to health services is protected by CEDAW and the SDA. The second argument makes an assessment of one group only, but again it is a determination of detriment by reference to primary social indicia recognised in CEDAW. Both analyses ultimately ask the question whether women have been denied protections guaranteed by CEDAW and the SDA.

3.3. Applying the Concept of "Disadvantage": Do Abortion Laws Disadvantage Women?

The analysis in this section focuses on the second argument discussed above and considers "disadvantage", first, in relation to the terms of the abortion laws themselves and, second, in relation to the policy of non-enforcement.

3.3.1. Disadvantages Arising From the Laws

(i) Physical and psychological disadvantages

A state-imposed requirement that a woman continue an unwanted pregnancy, bear a child and then decide whether to raise the child or "give it up" for adoption is a requirement that a woman perform bodily and psychic functions of the most extraordinary kind against her will. In *R v Morgentaler* the Supreme Court of Canada considered a provincial law criminalising abortion. Dickson CJ said:

> Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person.[110]

Pregnancy is often a most welcome thing but it is not always so. Some women experience it as an invasion of the body.[111] For some women the anxiety induced by the prospect of

110 [1988] 1 SCR 30 at 56-57.

111 In evidence in the US case of *Thornburgh v American College of Obstetricians and Gynecologists* 476 US 747 (1986) one woman writes: "I learned I was pregnant. ... I was sick in my heart and I thought I would kill myself. It was as if I had been told my body had been invaded with cancer. It seemed that very wrong." And another, after having had an abortion: "On the ride home from the clinic, the relief was enormous. I felt happy for the first time in weeks. ... I had my body back." Extracts from the Amicus Brief cited in

having to continue a pregnancy is extreme and, although the apparent cause is physical, the disruption, disorientation and fear is diffuse. Robin West writes:

> The *harm* of an unwanted pregnancy is that the baby will elicit a *surrender* (not an end) of the mother's life. The *fear* of unwanted pregnancy is that one will lose control of one's individuated being (not that one will die). Thus, one woman writes, "I was like any other woman who had an unintended pregnancy, I was terrified and felt as though my life was out of my control."[112]

Moreover, where abortions are unlawful and the law is enforced the practical reality is that women will nevertheless seek to terminate pregnancies.[113] Physical and psychological harm results. Some Australian women have suffered the ultimate harm from the criminalisation of abortion by losing their lives.[114]

(ii) Economic disadvantages

Bearing a child costs money, through medical expenses as well as, for many women, time off paid work. Women are not guaranteed paid maternity leave either by industrial or anti-

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West, "Jurisprudence and Gender" in Bartlett & Kennedy (eds), *Feminist Legal Theory* pp214-215. See also *CES v Superclinics* (1995) 38 NSWLR 47 at 65, 77 per Kirby A-CJ.

112 West, "Jurisprudence and Gender" in Bartlett & Kennedy (eds), *Feminist Legal Theory* p215 (emphasis original).

113 See White & Savage-Davis, *Stories From Our Lives: Women's Experiences of Abortion* (ALRA (WA), Perth 1994). After the prosecution of the doctors in WA two women, who believed they would be denied access to an abortion, attempted to terminate their pregnancies themselves. Both were hospitalised (Davenport, second reading speech of the Criminal Code Amendment (Abortion) Bill 1998, WA, Parl, *Debates* LC, 10 March 1998 at 10).

114 Many Australian women have died from unlawful abortions. Betty Cole reports: "For example, in 1942-3, a woman ... died a putrid mess. Worst of all, she left behind four motherless children and a husband because she believed she *deserved* to die." (Quoted in Davenport, second reading speech of the Criminal Code Amendment (Abortion) Bill 1998. WA, Parl, *Debates* LC, 10 March 1998 at 10.) And see White & Savage-Davis, *Stories From Our Lives: Women's Experiences of Abortion* Stories 1 and 13. However, statistics are difficult to obtain because of the illegality. (Davenport, "The Abortion Debate: A Woman's Right to Choose", Maiden Speech, WA, Parl, *Debates* (1989) Vol 277 at 1803.) In England, in the first decade of legal abortions, the number of recorded deaths due to abortion fell from 160 between 1960-63 to 9 between 1983-84 And the proportion of all maternal deaths from abortion fell from 25% to 7%. (Munday, "21 Years of Legal Abortion", quoted in Davenport, "The Abortion Debate: A Woman's Right to Choose". Maiden Speech, WA, Parl, *Debates* (1989) Vol 277 at 1804).

discrimination legislation.[115] A woman who decides to raise her child incurs further, very substantial expense.[116]

In addition to the out-of-pocket expenses, raising a child exacerbates the economic disadvantage Australian women face with respect to paid work. If the mother lives with a male partner she is far less likely than him to do paid work and more likely to do part time and lower paid work.[117] Even if she receives an equitable share of the income, her opportunity for financial independence is restricted. If she raises the child on her own she and her child are likely to be among the poorest of Australians.[118]

Poor women will suffer economic disadvantage disproportionately. Moreover, certain groups within Australian society, including Aboriginal women, are more likely to live in poverty.[119]

(iii) Other social disadvantages

Other social disadvantages created by enforced pregnancy include disrupted educational plans[120] and denial of freedom of conscience or religion.[121]

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115 The Australian Government recorded a reservation to CEDAW relating to the obligation in Article 11(2) to provide paid maternity leave.

116 It was held in the context of a negligence action, *CES v Superclinics*, that the cost of raising a child born from an unwanted pregnancy does not sound in damages because the cause of that financial loss results not from the pregnancy itself but from the *mother's choice* to raise her child or for public policy reasons (at 78-79 per Priestley JA). Such a conclusion, even if it can be transposed to discrimination law, is arguably flawed. It relies on the idea that the "wanting" by the mother breaks the chain of causation. This Escher-like progression does not accord with many women's experience of pregnancy and maternity. See Himmelweit, "More Than a 'Woman's Right to Choose'" (1988) *Feminist Review* 38 at 50, in Graycar & Morgan *The Hidden Gender of Law* p214. See also discussion of *CES v Superclinics* in Graycar & Morgan, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law" (1996) 18 *Syd LR* 323 at 340-341. For a compelling story of an unwanted pregnancy producing a loved child see Sykes, *Snake Cradle* (Allen & Unwin, Sydney 1997).

117 Mitchell, "Women's Incomes" in Edwards & Magarey (eds), *Women in a Restructuring Australia: Work and Welfare* (Allen & Unwin, Sydney 1995) pp82-84. And see Scutt, "'Married to the Job' versus 'Doing the Job'" in Scutt, *The Incredible Woman: Power and Sexual Politics* (Artemis Publishing, Melbourne 1997) Vol 2 pp109, 111.

118 Mitchell, "Women's Incomes" in Edwards & Magarey (eds), *Women in a Restructuring Australia: Work and Welfare* pp91-92; Burns & Scott, *Mother-Headed Families and Why They Have Increased* (Lawrence Erlbaum Associates, Hove, UK 1994) px.

119 Daly, "Employment and Social Security for Aboriginal Women" in Edwards & Magarey (eds), *Women in a Restructuring Australia: Work and Welfare* p170.

120 See eg, *CES v Superclinics* (1995) 38 NSWLR 47 at 65, 77 per Kirby A-CJ; White & Savage-Davis, *Stories From Our Lives: Women's Experiences of Abortion* Stories 7 and 10.

121 *R v Morgentaler* [1988] 1 SCR 30 at 179. Section 116 of the Commonwealth Constitution prohibits Commonwealth legislation prohibiting free exercise of religion. The section may

(iv) Self determination

Denial of the right *to decide for oneself* that an abortion is necessary denies a woman self-determination or autonomy. In *R v Morgentaler* Wilson J said: "the right to make fundamental personal decisions without interference from the state" is "a critical component of the right to liberty.[122] Although abstract, the right to self-determination with respect to one's own health and body is possibly the most fundamental entitlement denied by laws which criminalise abortion. It is one of the freedoms at the heart of a democratic society.[123]

(v) Rights protected by CEDAW

As discussed, the concept of disadvantage in s5(2) of the SDA has, as its reference point, the rights and freedoms protected by the Convention which the SDA implements. Are the disadvantages identified above, then, those relating to rights and freedoms covered by CEDAW?

Article 16 of CEDAW protects women's right to "decide freely and responsibly on the number and spacing of their children" and to have access to the "means to enable them to exercise" this right. A right to decide when to have children must include the right to decide *not* to have children and protection from the consequences of the denial of the entitlement.

Article 12 protects women's right to equality in the field of health care to ensure "access to health care services including those related to family planning". Other relevant provisions include Article 10 which protects women's right to education and Article 11 which protects the right to work.

Moreover, the Preamble of CEDAW invokes a wide range of international instruments as the basis on which CEDAW is founded, including the Universal Declaration of Human Rights (UNDHR). In effect, CEDAW protects specifically for women the individual rights protected in the general instruments. The UNDHR guarantees the rights to life, liberty,

encompass the right to have no religion (*Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1942) 67 CLR 116 at 123) but has been interpreted very narrowly otherwise (*Church of New Faith v Commissioner of Payroll Tax (Vic)* (1983) 154 CLR 120). The section does not restrict State Parliaments, of course. However, the enquiry here is not whether there is a constitutional or legal guarantee but whether the abortion laws disadvantage women by reference to a right protected by CEDAW and s5(2) of the SDA.

122 [1988] 1 SCR 30 at 166.

123 See Mill, *On Liberty* (Hackett Publishing Co, Indianapolis 1978, first pub 1859) p12, quoted in *R v Jones* [1986] 2 SCR 284 at 318-319.

and security of the person,[124] privacy, family and the home[125] and thought, conscience and religion.[126]

Thus, the disadvantages suffered by women as a result of abortion laws are of a kind protected by CEDAW. It is to be noted, also, that the Preamble to CEDAW recognises that issues of race and racism are intertwined with those of sex equality. Eradication of the former is essential for the latter.[127] Therefore, any particular impact of abortion laws on racial minorities, for example the disproportionate economic impact on Aboriginal women identified above, is contrary to the obligations in CEDAW.

3.3.2. Disadvantages Arising From the Non-Enforcement Policy Associated with State Abortion Laws

Most Australian women who want an abortion in fact obtain one. Except for impairment of their right to self-determination,[128] these women do not suffer the disadvantages so far discussed.

(i) The threat of prosecution

The threat of prosecution could be considered relatively remote, even after the recent Western Australian prosecutions,[129] but the existence of the criminal provisions themselves may amount to a disadvantage even in the absence of law enforcement.[130]

(ii) Uncertain criminal laws and impossibility of obeying them

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124 Article 3.

125 Article 12.

126 Article 18. See also Articles 23 (work) and 26 (education).

127 Paragraph 10 of the Preamble.

128 Because their decision is subject to approval by a doctor willing to perform the abortion. As one Queensland court noted (without, apparently, considering it problematic for women): "The great social responsibility [of abortion] is firmly placed by the law upon the shoulders of the medical profession": *R v Smith* [1973] 1 WLR 1510 at 1512, quoted in *K v T* [1983] 1 QdR 396 at 398.

129 The prosecutions of Drs Chan and Lee were dropped on 30 July 1998: *West Australian* 31 July 1998.

130 *Croome v Tasmania* (1997) 142 ALR 397. There, the plaintiffs challenged the validity of Tasmanian laws criminalising homosexual sex on grounds that they were inconsistent with the *Human Rights (Sexual Conduct) Act* 1994 (Cth) and invalid within s109 of the Constitution. The High Court, in an interlocutory proceeding, held that the plaintiffs had sufficient interest in the criminal laws to establish standing despite the fact that the laws had not been prosecuted for many years. See also *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994. There, the United Nations Human Rights Committee considered a challenge to the same Tasmanian laws. The complainant argued successfully that the sections contravened privacy guarantees in the International Convention on Civil and Political Rights despite there having been no prosecutions in recent years. Non-enforcement "does not amount to a guarantee that no actions will be brought against homosexuals in the future".

Women who seek abortions through, for example, the Family Planning Association of Australia or another service provider, within the first, say, twelve weeks of pregnancy, will obtain a termination. Of these women, those who are *not* in "serious danger" of mental or physical ill-health from continuing the pregnancy are forced to characterise themselves as being in such danger and to break the criminal law. They must do this in order to access what is a socially tolerated service. This is no inconvenience. It is a serious invasion into women's entitlement to full citizenship. The entitlement to know the law and be free of arbitrary justice is a fundamental democratic right. "The basic tenet of our penal jurisprudence is that every citizen is 'ruled by the law, and by the law alone'."[131]

In *Polyukhovich v Commonwealth,* in an examination of retroactive criminal laws, Toohey J wrote:

> All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future. ... Laws should function to give reasonable warning of their operation and permit individuals to rely on that scope and meaning until expressly altered.[132]

Abortion laws are not retroactively made but the principle can be applied insofar as the systematic obfuscation of the law, with capriciously timed prosecutions, prevent women citizens from properly knowing the criminal laws under which they live.

Moreover, a citizen undertakes to obey the laws,[133] such duty being made practically impossible where social practice differs systematically from State criminal laws. Thus, the denial of both the right to know the criminal law and the opportunity to perform one of the fundamental obligations of citizenship are serious limitations on women's civic participation. Distortions are created in women's lives through being silenced as citizens, including experiences of shame, subterfuge and deception.[134]

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131 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 609 per Deane J, quoting Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan Education, Basingstoke, 10th ed 1959) p202.

132 At 688. See also at 609 per Deane J, at 704-705 per Gaudron J; cf at 536 per Mason CJ, at 642-644 per Dawson J, at 720 per McHugh J.

133 *Australian Citizenship Act* 1948 (Cth) s13(1)(h); Commonwealth Department of Immigration and Multicultural Affairs, "Responsibilities and Privileges" in *How to Apply for Grant of Australian Citizenship*, Form A1027i.

134 White & Savage-Davis, *Stories From Our Lives: Women's Experiences of Abortion* Stories 2, 4, 18, 19, 20, 23, 24.

CES v Superclinics, an action in negligence for failure to diagnose a pregnancy in time for an abortion, illustrates one way in which women's citizenship is impaired by non-enforcement. In her argument CES relied on the practical reality that, had she known of her pregnancy early enough, she *would have had* an abortion. But the question on which CES's entitlement to civil redress rested was not whether she *would* have obtained an abortion but whether such an abortion would have been *legal*. The upshot of *CES v Superclinics* is that, although healthy women may, as a matter of fact, obtain an abortion, they must be careful not to rely on that fact as citizens. If their abortion would not have been lawful they may be denied aspects of citizenship, including ordinary access to civil courts for redress.[135]

(iii) Inadequate training of doctors and inequitable access

The non-enforcement policy results in inadequate training of doctors[136] and inequitable access to a medical service because of the small number of facilities. This affects rural women particularly.[137]

(iv) Rights protected by CEDAW

The entitlement to civic participation as a full citizen underpins CEDAW as a whole. Specifically, Article 1 defines the scope of CEDAW to include the political field and Article 7 guarantees equality for women in the "political and public life of the country". Article 12 protects the right to health care and Article 14 creates an obligation to take into account the particular problems faced by rural women.

3.4. Disadvantages: Conclusion

Abortion laws disadvantage a healthy woman wanting a termination physically, psychologically, economically and socially. She is further disadvantaged in that her enjoyment of self-determination is denied or impaired. The non-enforcement policy also disadvantages a woman. Even if she obtains an abortion, she lives with a threat of prosecution and is denied full citizenship in that she lives with uncertain criminal laws. These disadvantages relate to a number of rights and freedoms protected by CEDAW and, it is submitted, which come within the scope of s5(2) of the SDA.

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135 A majority of the Court of Appeal in *CES v Superclinics* held that CES's abortion would not have been unlawful so the question whether recovery of damages would be precluded by illegality was not determined. The point here remains, however, that women who, as a matter of practice *can* obtain abortions must not rely on that as a right of citizenship when other areas of life are affected.

136 Davenport, "The Abortion Debate", Maiden Speech, WA, Parl, *Debates* (1989) Vol 277 at 1803.

137 Women's Electoral Lobby (WA), *Inequality of Access to Abortion Services in Australia: A Report to the Committee on the Elimination of Discrimination Against Women (CEDAW)* pp13, 39-41.

4. Section 22 of the SDA: "Services"

On the analysis so far, State abortion laws are arguably sexually discriminatory under s5(2) of the SDA. As explained, however, sex discrimination must come within one of the areas of public life specified in the SDA in order to be unlawful. It is clear that provision of abortion services would come within the prima facie meaning of "services" in s22.[138] However, s32 of the SDA provides that services of such a nature which can only be provided to one sex are excluded from the Act.

Views were expressed before the enactment of the SDA that abortion services were excluded from its operation because of this provision. Indeed, government representatives took this view.[139] It is doubtful, however, that s32 had this effect. Its clearest purpose is to make the Act workable by preventing the bringing of complaints in relation to beneficial services provided to one sex: for example, those for prostate cancer. Section 32 precludes a complaint by a *woman* against the provision of such a service. On this reading of the section it precludes an action by a *man* claiming sex discrimination because available abortion services are *not* provided to *him*.[140] The question of *detrimental* treatment with respect to a service which can only be provided to one sex (including denial of the service) is another issue. Could the criminalisation of prostate cancer services be the basis for a complaint by a *man*?

However, even if s32 did have the effect of excluding abortion services from the Act because they can only be provided to women, it is suggested that the 1995 amendment makes it clear that such services are no longer excluded. As Senator Ryan explained in 1983,[141] s32 takes its meaning in light of the definition of discrimination in s5. For the reasons discussed above with respect to "disadvantage" in s5(2) of the SDA it is argued that s5 discrimination can now arise where detriment is suffered by one sex only. Section 32 must therefore be read for its narrower purpose of precluding challenges to beneficial services.

Thus, the elements required to establish a complaint under s22 could be established and the issue now is whether there is a defence.

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138 Section 4 of the SDA defines services to include those "(d) ... of a kind provided by the members of any profession or trade". Medical services come within the SDA. See, eg, *Proudfoot v ACT Board of Health* (1992) EOC 92-417.

139 Aust, Parl, *Debates* S (1983) Vol 101 at 3964.

140 This is how Senator Ryan explained the operation of clause 32 in relation to abortion in 1983. Ironically, Senator Harradine, who proposed an amendment which would have expressly excluded abortions from the scope of the Act, was of the view that the Act as it was passed did not exclude abortion services: Aust, Parl, *Debates* S (1983) Vol 101 at 3967-3968.

141 At p3964.

5. Section 7B of the SDA: The Defence of Reasonableness

Discrimination under ss5(2) and 22 of the SDA is not unlawful if the State can, pursuant to s7B, prove that the imposition of the requirement is "reasonable".

The onus of proving this element is on the State.[142] Reasonableness is a question of fact[143] and the point of view of the complainant and the respondent must be taken into account.[144] Bowen CJ and Gummow J stated in *Secretary, Department of Foreign Affairs and Trade v Styles*:

> [T]he test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.[145]

Section 7B(2) of the SDA, enacted in 1995, takes up this judicial statement in setting out a non-exhaustive list of matters to be taken into account in deciding the question of reasonableness. The matters are:

> (a) the nature and extent of the disadvantage experienced by the complainant;
>
> (b) the feasibility of overcoming the disadvantage; and
>
> (c) whether the disadvantage is proportionate to the result sought by the respondent in imposing the condition or requirement.

It is useful to use these factors as a framework for analysis.

5.1. The Nature and Extent of the Disadvantage

The threshold struggle in the discourse about abortion is epistemological, ie *how* reality should be determined, not what it "is". The nature and extent of the disadvantage depends on the perspective taken. From the standpoint of women who are denied an abortion the disadvantages discussed in the previous section are of the first order. But from other

142 Section 7C.

143 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1998) EOC 92-908 at 78,060.

144 At 78,059-78,060. See also *Secretary, Dept of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251.

145 At 263. The test was approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349.

standpoints it would seem they are minor or non-existent. The answer to the question "*who* has the knowledge", then, will determine the question as to the nature and extent of the detriment.

From the standpoint of a woman wanting an abortion the practical consequences of denial are profound - physically, psychologically, economically and socially - as is the denial of her autonomy. Blackmun J in *Thornburgh v American College of Obstetricians and Gynecologists* said:

> Few decisions are more ... basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental.[146]

On the other hand the disadvantages experienced by women are perceived as minor or non-existent from a standpoint other than her own. For example, Meagher JA in *CES v Superclinics*, relying on a biblical source, asserts that childbearing and rearing will, necessarily, be joyful whatever the circumstances:

> Every child is a cause of happiness to its parents. Every parent looks on his child as David did on Absalom, or Oedipus on Antigone. In *St John's Gospel* (16.21) it is said: "A woman when she is in travail hath sorrow, because her hour has come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world."[147]

It will matter, then, where knowledge, ie where the "truth", is presumed to lie. It is submitted that, on the question of disadvantage, the perspective to be taken must be from the point of view of women who have experienced the decision to have an abortion and have been denied access, or who have had an unlawful abortion. This is justified by the philosophical position that those who experience an event practically are the primary source of knowledge about its nature.[148] More specifically, such an action based on the SDA is concerned with disadvantage to *women* and so women must be taken to be the source of knowledge about its extent. That is, although the balancing test in determining reasonableness is objective, there are subjective elements within it.[149] In determining the first factor, the nature and extent of disadvantage, the point of view of those affected should be taken.

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146 (1986) 106 SCt 2169 at 2184-2185. See also *Morgentaler* [1988] 1 SCR 30 at 171.

147 (1995) 38 NSWLR 47 at 87.

148 Various modernist and postmodernist schools of philosophy take this position in different ways. One postmodernist school is associated with Michel Foucault. See, eg, Foucault, *The Archaeology of Knowledge* (Tavistock, London 1972) pp3-55; Foucault, "Truth and Power" in Gordon (ed), *Power/Knowledge* (Harvester Press, Brighton 1980) pp109-133.

149 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1998) EOC 92-908 at 78,060.

If the perspective is taken from the point of view of this group of women - who have been denied access to abortion or who have obtained an unlawful one - then it is submitted that the disadvantages, discussed in the previous section, are to be considered extremely severe. Short of taking the life of a person, perpetual imprisonment or the removal of a wanted child, it is difficult to imagine a greater disempowerment.

5.2. The Feasibility of Overcoming the Disadvantage

Decriminalisation of abortion in many other countries[150] provide working models for Australian States. Financial considerations can be taken into account in determining feasibility[151] but the financial burden here would not be sufficient to prove that the laws are reasonable. Many abortions are already being provided each year in Australia, at least in urban areas, and the additional costs of funding adequate State facilities[152] are unlikely to exceed the health and other social costs of unwanted mothering. Moreover, there is no indication in the State criminal laws that economic considerations are part of their purpose. The moral and political feasibility of overcoming the disadvantage is best discussed in relation to the next factor.

5.3. Proportionality

The third factor in s7B requires consideration of whether the disadvantage caused by the imposition of the requirement is proportionate to the result sought by the person who imposes it. Here, of course, the State imposes the requirement. The legislative purpose behind the criminalisation of abortion is not clear. In the Victorian *Crimes Act* 1958 the abortion provisions are contained within Sub-Division 11 in Division 1 - Offences Against the Person. As originally enacted, other Sub-Divisions in this Division included Homicide, Child Destruction, Rape, Bigamy, Concealing Birth of a Child, Unnatural and Indecent Offences (including the "abominable crime of buggery" and "gross indecency" between males), and Carnal Knowledge.

It is unclear from this legislative scheme whether the purpose of the abortion offence was to sanction a crime of the severity and import of a killing or to control sex-related public behaviour considered offensive.[153] It has a high maximum penalty (15 years) and it is in

150 Australia is in a small minority of western countries which does not permit abortion on a woman's request, at least in the early stages of a pregnancy: Cica, "Ordering the Law on Abortion in Australia's 'Wild West'" (1998) 23 *Alt LJ* 89 at 90, 98.

151 *Waters v Public Transport Corporation* (1991) 173 CLR 349.

152 Note that the dissonance associated with abortion law and practice results in a high proportion of the few available facilities being private. Women's Electoral Lobby (WA), *Inequality of Access to Abortion Services in Australia: A Report to the Committee on the Elimination of Discrimination Against Women (CEDAW)* pp8-12, 39.

153 This ambiguity does not appear in the Queensland and Tasmanian Codes (or the WA Code). There, the abortion provisions are contained in Part IV titled "Acts Injurious to the Public Generally" and the sections appear in a chapter titled, "Offences Against Morality".

the same Division as Homicide, suggesting the former purpose. But, of 14 Sub-Divisions originally enacted, Homicide is Sub-Division 1 and Abortion Sub-Division 11, following the sections on Bigamy and close to those on Unnatural and Indecent Offences. If it were held that the prohibition on abortion had the latter purpose of controlling public morality it could not be said to be proportionate to the disadvantages imposed on women denied access.[154]

If it were held, however, that the sections reveal a purpose of sanctioning a serious personal violation the State would be free to make a rights-based argument, similar to that in the public debate on abortion. The Division is titled "Offences Against the Person" but it is not clear who the "person" is who is being protected. The person may be the potential father, the woman or the foetus.

There is no indication that the legislation is designed to protect the potential father's interests. The only circumstances in which an abortion is lawful relates to the pregnant woman and for criminalisation to advance the interests of potential fathers it would need to be assumed that all such fathers would oppose an abortion. That is clearly unsustainable.

Neither could it be said that criminalisation is in the interests of the woman. A woman seeking an abortion clearly wants the pregnancy terminated. Legislation supporting this interest would provide safe, legal access to the procedure. Moreover, the argument, implicit in some public comment, that women who seek abortions do not *know* what is in their own *long term* best interests is, again, insupportable as justification for criminal sanction.

Foetuses have no personhood in the law,[155] and therefore no legal rights themselves, but the State can protect future human beings. It may be argued that the foetus is the "person" in a general sense who criminalisation of abortion is designed to protect. This reflects the public argument that the foetus is a life and the criminal law the appropriate vehicle for protecting its sanctity. The disadvantages experienced by women denied abortions are profound but so too is the disadvantage to the foetus in terminating a developing life.

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154 Such a purpose is the equivalent of that in the provisions prohibiting homosexual sex, characterising it as "indecency". Those provisions have now been repealed. Further, the "public morality" analysis with respect to abortion has been re-characterised by feminist critics as a purpose directed at controlling women's bodies and reproductive capacities. See, eg, Henderson "The Confused Law of Abortion in NSW: *CES v Superclinics*" (1996) 7 *Polemic* 150 at 150; and, from another perspective, Cannold, *The Abortion Myth: Feminism, Morality and the Hard Choices Women Make* (Allen & Unwin, Sydney 1998) pp116-117.

155 *K v T* [1983] 1 QdR 396 at 401-402. For Canada, see *Winnipeg Child and Family Services (Northwest Area) v G(DF)* [1997] 3 SCR 925; for the United States, cf Johnsen, "The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection" (1986) 95 *Yale LJ* 599.

How does the criminal law accommodate this conundrum? The law creates an offence which makes terminations unlawful, protecting the future human being, but provides a defence to protect the interests of the woman. Thus, the offence on its own could not be said to be proportionate to the disadvantages imposed because it would make all terminations unlawful, but the State could argue that the offence and the defence create a scheme which balances two profound interests.

5.3.1 Conclusion on Proportionality

It is submitted that the laws prohibiting abortions are not, however, proportionate to the disadvantages imposed, notwithstanding the defence, for the following reasons:

1. The defence makes no distinction between different stages of pregnancy. There is no scientific answer to the question when life begins,[156] therefore it is a philosophical question about which the state can take a view. However, as argued, the detriment imposed by the laws is extremely severe. Denying autonomy in the decision about abortion even in the very earliest stages of a pregnancy is not proportionate to the disadvantages suffered by the woman affected. Indeed, such a restriction is tantamount to adopting a religious view about the beginning of life and this is inappropriate regulation by the state.

2. The defence turns on the determination of a medical practitioner as to the woman's health. Even if in all cases the doctor's view coincided with that of the woman, such a scheme denies to women arguably the most profound entitlement, that of self-determination. A proportionate legislative scheme would provide a defence which turned on the woman's decision.

3. Regulation of abortion is in the criminal law. Placing the harshest and most shaming form of legal sanction on those seeking abortions fails to recognise the profundity of a woman's decision whether or not to terminate her pregnancy. It pits the pregnant woman against her foetus and her own body and imports the strongest moral disapprobation. It implies a mistrust. A morally neutral, civil framework would simply confine behaviour. If the profundity of a woman's position is recognised, the moral approbation contained in criminal sanction can be seen to be disproportionate to the objective of protecting a foetus.

4. As noted, the law pits the pregnant woman against her foetus and her own body by creating an offence circumscribed by a defence. This is arguably a disproportionate scheme whether contained in criminal or civil law. It adopts the model appropriate for interpersonal relations where the State protects the interests of *one* against the *other*. This is an inaccurate reflection of the relationship between a pregnant woman and her foetus or

156 Leff, "The Leff Law Dictionary: A Fragment" (1985) 94 *Yale LJ* 1855 at 1997, quoted in Johnsen, "The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection" (1986) 95 *Yale LJ* 599 at 599.

unborn child. It fails to recognise the sui generis nature of this experience in which there are neither two people nor, at least at some stage in the pregnancy, one.[157] No other human experience is the same and to adopt a model which ignores this uniqueness is problematic. This is so not simply because it fails to recognise a very significant aspect of women's reproductive experience but because it ignores the tremendous onus placed on women who make a decision about termination.[158] This, in turn, leads to a *punishing* regime and *fails* to lead to a regime of support. The binary model underlying the laws, therefore, is disproportionate to the objective of protecting the foetus. A model recognising the symbiotic relationship between a pregnant woman and her developing foetus and the responsibility to which this gives rise would lead to provision of support to the woman, both practical and emotional.

5. If it is accepted that a significant proportion of abortions are in fact illegal then the acceptance of this non-enforcement policy by parliaments is itself illustrative of a lack of support for the abortion laws. Once again, this suggests that the laws are disproportionate.

5.4. Conclusion on the Defence of Reasonableness and Suggestions for Reform

It is suggested that existing abortion laws (except, perhaps, the recent enactments in Western Australia)[159] could not be shown to be reasonable within the meaning of s7B of the SDA. It is beyond the scope of this paper to suggest how "reasonable" abortion laws could be drafted, however, the above arguments suggest there are certain features which must be included.

1. The decision to have an abortion should rest with the pregnant woman alone at least until a late stage in the pregnancy.

2. Regulation should not be criminal.

3. Counselling services should be available in all situations.

4. To the extent that late term terminations are prohibited adequate state support should be provided for:

- coming to terms with the continuation of the pregnancy;

157 Cannold, *The Abortion Myth: Feminism, Morality and the Hard Choices Women Make* pp74-75; Rich, *Of Woman Born* (Norton, New York 1976) p63, quoted in Hartsock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Harding & Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Methodology and Philosophy of Science* (D Reidel, Dordrecht 1983) p298.

158 *R v Morgentaler* [1988] 1 SCR 30 at 171; and Cannold, *The Abortion Myth: Feminism, Morality and the Hard Choices Women Make* generally.

159 The new WA legislation includes the first and third of the features listed in this section, not the second and is silent on the fourth.

- the decision whether or not to raise the child; and

- the consequences of either decision, including adequate financial support to raise the child as a single parent.

6. Conclusion to Part II: s109 of the Constitution

If, as has been argued, State abortion laws are contrary to ss5(2) and 22 of the SDA then they are invalid to the extent of the inconsistency under s109 of the Constitution.[160]

PART III - CONCLUSION

An argument has been made that abortion laws in all States except Western Australia are inconsistent with the SDA and therefore invalid. It has been said that a stipulation in criminal law that a healthy woman refrain from having an abortion unless a medical practitioner reasonably believes her health would be seriously endangered is a "condition or requirement" which disadvantages women. The requirement imposes a detriment on women by reference to fundamental rights and freedoms protected by CEDAW and the SDA. Therefore, although it can be said to affect women only, it nevertheless creates a disadvantage for women. The laws are therefore indirectly discriminatory within s5(2) of the SDA.

Moreover, abortion services are likely to come within the meaning of "services" in s22 of the SDA and are likely not to be excluded by s32.

It is possible that the legislative scheme in the Victorian legislation, similar to that in other States, has the purpose of protecting the public from morally offensive behaviour. This would not be proportionate to the severe disadvantages that the laws impose. A legislative objective of protecting the foetus may be the basis of reasonable legislation but existing laws are not proportionate to this objective because they prohibit abortion at all stages of pregnancy, do not provide a defence for the woman, regulate terminations through the criminal law and are based on a binary model which does not accurately reflect the relationship between a woman and her developing foetus. Such a model fails to provide support for the woman and shames her situation. Therefore, the State laws are unlikely to come within the defence of "reasonableness" within s7B of the SDA.

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160 Section 109 requires a "State law" to be inconsistent with a Commonwealth law and this does not include the common law. In this case the common law defence of necessity in the common law States (Victoria and New South Wales) would likely be held to be part of the statutory offence of abortion for the purposes of s109 (see *Williams v Hursey* (1959) 103 CLR 30). If that were not the case, and the common law defence were treated separately, then the SDA would act directly on the common law, overriding it (*Felton v Mulligan* (1971) 124 CLR 367 at 370). Section 109 does not operate in relation to the Territories. Again, an inconsistent Commonwealth law would operate directly on laws enacted by Territory legislatures.

Recently the Western Australian abortion laws have changed. However, the changes that were made resulted from political as opposed to legal challenges. The argument made in this paper is that the abortion laws in the remaining jurisdictions are subject to challenge on legal grounds because, pursuant to s109 of the Commonwealth Constitution, the State abortion laws are inconsistent with the Commonwealth SDA.

Furthermore, this argument has been made as an illustrative example. A declaration by a superior court that a State law is invalid is a potent remedy. There has, however, been only one case so far in which the SDA has been used, in conjunction with s109 of the Constitution, to render a State law invalid. There are severe limitations on the scope of the SDA, particularly due to the restriction to certain areas of public life and the numerous specified exemptions. It is circumscribed more than any other federal human rights legislation. These limitations, along with the expense of instigating large scale actions, substantially explain the dearth of "s109 litigation". However, it has been suggested with the arguments about abortion laws that these barriers to "s109 challenges" are perhaps not prohibitive in all circumstances.