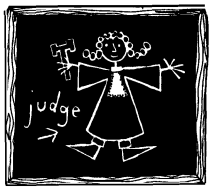

LEGAL STUDIES

Ordering the law on abortion in Australia's 'wild west'

The arrests

In early February this year, two medical practitioners in Western Australia — Dr Victor Chan and Dr Hoh Peng Lee — were arrested and charged under the laws in that State which make involvement with abortion a crime.[1]

The abortion in relation to which they were charged was performed in November 1996 on a Maori woman at the Nanyarra Clinic in the Perth suburb of Rivervale. After the operation was performed, the woman asked to be given the dead foetus so that she could take it home and give it a culturally appropriate burial. The clinic complied with her request. The woman took the foetus home and put it in her refrigerator. One of her children then went to school and announced to his class that his mother had a dead baby in their refrigerator. His teacher reported the matter, and the Western Australian police began investigating the circumstances of this case. They questioned the woman, the clinic's counsellor and the doctors involved, apparently with a view to prosecuting all parties. A decision was made to prosecute only the operating doctor and the anaesthetist who had carried out the procedure.

The political responses

That decision caused a furore. These charges were the first laid against medical practitioners under Western Australia's anti-abortion laws in over thirty years. The decision to prosecute challenged the accepted wisdom — amongst the medical profession and the general public — that the relatively liberal abortion practice that has pertained in parts of Western Australia since the 1970s, under which around 9000 abortions are now performed each year, either falls within the law or is safely outside the attention of law enforcement authorities.

After the decision to prosecute these doctors was announced, many abortion services in Western Australia were cancelled or suspended due to nervousness on the part of health care professionals about their legal position. Many Western Australian women were advised to travel interstate to obtain an abortion. Two women were admitted to hospital in a seriously ill condition after attempting to perform abortions on themselves. The Western Australian Attorney-General, Peter Foss, then gave public assurances that there had been no change in prosecution policy concerning abortion, and that the Chan/Lee case did not herald a police crackdown on medical staff performing abortions in Western Australia.[2] Despite these statements, access to abortion services across Western Australia remained restricted due to continuing doubt about the legal consequences of terminating a pregnancy.

The prospect of stricter enforcement of Western Australia's anti-abortion laws was applauded by 'pro-life' organisations including Right to Life Australia, the Coalition for Defence of Human Life and the Catholic Doctors' Association. The Catholic Archbishop of Perth and a number of State and Federal parliamentarians[3] also made public statements indicating their strong opposition to abortion. This anti-abortion stance was not shared, however, by the general public in Western Australia: a Westpoll survey conducted in late February indicated the 82% of Western Australians thought that abortion should be legal.[4] The enforcement of the Western Australian law was strongly criticised by a range of 'pro-choice' groups (including the Association for a Legal Right to Abortion and the Women's Abortion Action Campaign),[5] by the Family Planning Association, by the Western Australian Police Commissioner Bob Falconer, by a range of State and Federal parliamentarians,[6] and by peak medical organisations. The latter included the influential Australian Medical Association, which put its weight behind calls for legislative reform to liberalise the State's abortion laws. In late February, doctors at the King Edward Memorial Hospital, Western Australia's largest maternity hospital, informed the State Government that unless it changed the law within eight weeks, to make it clear that their abortion practice was lawful, they would impose a total ban on performing terminations of pregnancy.

In early March, Western Australian Premier Richard Court — who does not hold a pro-choice position on abortion — bowed to pressure from the medical profession and agreed to introduce a Bill to reform the State's abortion laws. A Bill subsequently was drafted by Attorney-General Peter Foss, and introduced into the lower house of the Western Australian Parliament by Health Minister Kevin Prince on 10 March 1998.[7] Although the Foss-Prince Bill was presented by the Government, it was 'not strictly speaking a Government Bill',[8] and was subject to a so-called 'conscience vote' under which individual parliamentarians were left free to vote on the matter according to their own personal beliefs. The Foss-Prince Bill proposed a series of four reform options, retaining the *prima facie* prohibition on abortion in the Western Australian *Criminal Code*, but setting out circumstances under which abortion would be lawful. The Foss-Prince Bill was structured so that parliamentarians could be asked to vote on each of the four (increasingly liberal) reform options in turn, and thereby arrive at a position where a majority agreed to some kind of change to the anti-abortion laws. The most liberal reform option contained in the Foss-Prince Bill proposed allowing abortion on the request of the pregnant woman, subject to a new legal requirement that she receives counselling about the consequences of abortion. The Foss-Prince Bill was passed by the lower house of the Western Australian Parliament on 2 April 1998 by 31 votes to 25. It was passed in a form which endorsed the most liberal of the four reform options, in respect of pregnancies up to 20 weeks.[9]

While the lower house of the Western Australian Parliament was considering the Foss-Prince Bill, the upper house was considering another reform option. An alternative Bill, proposing complete repeal of the laws in Western Australia that criminalise abortion, was introduced on 10 March into the upper house by Australian Labor Party member Cheryl Davenport.[10] Her Private Member's Bill, which was also subject to a conscience vote, passed the upper house on 2 April by 22 votes to 11. It passed with amendments introducing the same restrictions on abortion contained in the final version of the Foss-Prince Bill, except that the restrictions

in the amended Davenport Bill are proposed under Western Australia's health legislation rather than under its *Criminal Code*.[11]

At the time of writing, it is impossible to predict whether the Davenport Bill, the Foss-Prince Bill, or some amended version of either, ultimately will be passed by both houses of the Western Australian Parliament and thus become law. If either Bill passes in its current form, Western Australia will have the most liberal abortion laws in Australia. If neither Bill passes into law, the responsibility to clarify the law in Western Australia on this issue will instead pass back to the courts. They will have the opportunity to provide such clarification if the prosecutions of Drs Chan and Lee proceed. These doctors have been remanded on bail to appear in Perth Magistrate's court on 14 April.

The law

The public debate over the prosecutions of Drs Chan and Lee has been characterised throughout by a high level of misunderstanding — and misinformation — about the law under which they were prosecuted. This has meant that a great deal of the analysis of the situation, and of the subsequent question of reforming the relevant law, has been confused and misleading.

The confusion began in earnest when the Western Australian Director of Public Prosecutions, David McKechnie QC, attempted to justify his decision to prosecute these doctors by offering the opinion that abortion was only lawful in Western Australia in the most restricted of circumstances: if the abortion was needed to save the life of the pregnant woman.[12] As the following discussion explains, this interpretation of the legal situation in Western Australia was at best strained, and at worst perverse. It was also widely and uncritically reported as 'the legal truth.' Cloaked in the respectability of professional and supposedly objective legal opinion, the Director of Public Prosecutions' interpretation of his State's abortion laws distorted the reform debate by setting its starting point firmly at the anti-abortion end of the spectrum.

The ready acceptance of the Director of Public Prosecutions' interpretation of the law was possible because Western Australia's anti-abortion laws are both complicated and unclear. The relevant law is contained in the Western Australian *Criminal Code*.[13] Sections 199, 200 and 201 of this *Criminal Code* make it a crime for anyone to be involved with any act performed 'unlawfully' with intent to procure a miscarriage. Conviction can result in imprisonment for up to 14 years for the doctor performing the abortion, and for up to 7 years for the pregnant woman requesting the abortion.

Similar provisions exist in all other States and Territories of Australia.[14] In most of these other jurisdictions there is case law (Victoria,[15] New South Wales[16] and Queensland[17]) or legislation (South Australia[18] and the Northern Territory[19]) defining 'unlawful' in this context and thus explaining when abortion is permitted. In Western Australia, however, there has never been any judicial or legislative explanation of the meaning of 'unlawful' abortion.[20]

Another section of the Western Australian *Criminal Code*, however, establishes a two-limbed defence that allows any surgical procedure to be performed 1) on a person for their 'benefit', or 2) 'upon an unborn child for the preservation of the mother's life.'[21] This is subject to the blanket proviso that the operation must be performed in good faith and to do so must be reasonable, having regard to the patient's state at the time and to all the circumstances of the case. Despite the absence of relevant case law in Western Australia, it has long been assumed that this defence determines the meaning of 'unlawful' for the purposes of the anti-abortion provisions in the Western Australian *Criminal Code*. It has also been widely assumed that the scope of this defence is the same as that of an identically worded provision in the Queensland *Criminal Code*.[22] There have been a number of cases in Queensland affirming that this provision makes abortion lawful in Queensland according to the test advanced nearly 30 years ago in Victoria in the groundbreaking case *R v Davidson* [1969] VR 667.[23] That case established that an abortion is lawful wherever it is 'necessary' and 'proportionate.' 'Necessary' in this context means the abortion is necessary to preserve the pregnant woman from a serious danger to her life or to her physical or mental health, beyond the normal dangers of pregnancy and childbirth, that would result if the pregnancy continued. 'Proportionate' means the abortion is in the circumstances not out of proportion to the danger to be averted.

The assumption that the law in Western Australia allows abortions if they satisfy the test in *R v Davidson* seemed both reasonable and safe. The assumption seemed reasonable because it is clear that the law in most Australian jurisdictions permits abortion to avert a risk to the pregnant woman's physical or mental health, and does not require the risk to be of such severity that it threatens her life. Additionally, in most of those jurisdictions, the test in *R v Davidson* has been cited with approval by judges or legislators offering clarification or further liberalisation of the law.

The assumption seemed safe because supporting the test in *R v Davidson* does not require a lawmaker or law enforcement official to be seen to be endorsing a position on abortion that is in any way extreme. The test in *R v Davidson* was certainly groundbreaking, and controversial, in 1969. Almost three decades later, however, the same test sits somewhere in the middle of the spectrum of laws world-wide that regulate abortion. The liberal extreme is now represented by countries where the law allows abortion on the request of the pregnant woman, at least in the early stages of pregnancy. This is the legal position in countries such as Canada, South Africa, and the USA. It is also the case in most Western European nations including France, Italy, Greece, the Netherlands, Sweden, Norway, Denmark, Belgium and Austria. Theoretically it would be possible for a court to interpret the relevant provisions of the Western Australian *Criminal Code* as permitting abortion on request. The court could do this by focusing on the limb of the *Criminal Code* defence that recognises the 'benefit' of the patient as a legally relevant factor. This would amount to judicial decriminalisation of abortion. Although decriminalisation of abortion in Western Australia was recommended in reports issued by the Western Australian Health Department in 1986[24] and 1990,[25] and in the 1994 report of the Western Australian Chief Justice's Task Force on Gender Bias,[26] achieving this end by judicial means is highly unlikely any part of Australia, as it would open the court to the criticism that it had usurped the role of the legislature.[27]

The illiberal extreme of legal regulation of abortion is represented by laws that either completely prohibit the procedure, or only allow it in the most limited circumstances, such as to save a pregnant woman's life. As explained above, this was the interpretation of the Western Australian law offered by the

Continued on p.98

on the basis that the NT Criminal Code provision is materially different from the Queensland provision considered in *Walden v Hensler*. The Queensland provision excuses 'an act done with respect to any property', while the NT provision excuses 'an act done with respect to property'. It would appear that an extension of the excuse in this way is inconsistent with *Walden v Hensler*, as well as with the common law in *R v Skivington* (1967) 1 All ER 483, where the claim of right defence operated to excuse the defendant from a robbery charge but not from an assault.

The case should best be viewed as a recognition of the right of Aboriginal people to enforce at least some Aboriginal laws on Aboriginal land. Gillies SM notes that the prosecution was unable to point to any law of the Commonwealth or the Territory which prohibits a Yolngu senior elder on Yolngu land from enforcing Yolngu law. Indeed, Gillies SM found that the grant of land under the *Aboriginal Land Rights (NT) Act 1976* conferred a benefit which included an implied right to observe and administer Aboriginal law on that land, at least where any such laws are not specifically over-ridden by the general law. The magistrate, therefore, found that Yunupingu had a defence under s.26(1)(a) of the Code, that his actions were authorised by law.

This decision, if approved by a higher court, has potentially far-reaching implications for the application of Aboriginal law. The application of this law may be limited in some areas, for example, by earlier case law stating that spearing and other traditional punishments are not condoned by the general law. This case is unlikely to have gone to trial had Yunupingu not been in danger of imprisonment. It could be considered, therefore, an unintended consequence of the NT Government's mandatory sentencing legislation.

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Legal Studies column continued from p.90

Director of Public Prosecutions. Theoretically it would be possible for a court to interpret the relevant provisions of the Western Australian *Criminal Code* in this way, by focusing on the limb of the defence that allows a procedure to be performed 'upon an unborn child for the preservation of its mother's life' and by interpreting the words 'preservation of ... life' literally. Since the important English case of *R v Bourne* was decided in the 1930s, however, this kind of restricted and literal approach to interpreting anti-abortion laws has been progressively abandoned throughout the common law world.[28] It should also be noted that only a small handful of countries today have laws that limit permissible abortions to those needed to save the pregnant woman's life. These countries include Iran, Uganda, the United Arab Emirates, the Philippines and Afghanistan.

The prosecutions of Drs Chan and Lee and subsequent events have made it clear, however, that it is no longer safe or reasonable to make any assumptions about the current — or future — state of Western Australia's abortion laws. The legal and political balls have been thrown in the air. Exactly where they will fall, and whether they will fall by legislative or judicial pronouncement, is anyone's guess.

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References

1. The relevant laws are discussed in some detail below.
2. 'Police back off after bungled self-abortion,' *Australian*, 13 February 1998.
3. Almost all these parliamentarians were men. They were predominantly members of the Liberal Party or the National Party, but there were also several members of the Australian Labor Party and some Independents.
4. 'WA Says Yes,' *West Australian*, 21 February 1998.
5. A range of 'pro-choice' groups soon co-ordinated their efforts under the organisational banner Coalition for Legal Abortion.
6. All these parliamentarians were women. Most were members of the Australian Labor Party or the Australian Democrats, as well as several Greens and some Independents.
7. *Criminal Code Amendment Bill* 1998 (WA).
8. Second Reading Speech, *Criminal Code Amendment Bill 1998* (WA).
9. At the time of writing, more detailed information about the exact form in which the Foss-Prince Bill was passed by the lower house was unavailable.
10. *Criminal Code Amendment (Abortion Bill) 1998* (WA).
11. Again, at the time of writing, more detailed information about the exact form in which the Davenport Bill was passed by the upper house was unavailable.
12. See 'Doctors warn of backyard abortions,' *West Australian*, 7 February 1998, 'Legal doubt on thousands of abortions,' *Weekend Australian*, 7-8 February 1998.
13. *Criminal Code 1913* (WA).
14. *Crimes Act 1958* (Vic), ss.65 and 66; *Crimes Act 1900* (NSW), ss.82, 82 and 84; *Crimes Act 1900* (ACT), ss.42, 43 and 44; *Criminal Code Act 1899* (Qld), ss.224, 225 and 226; *Criminal Code Act 1924* (Tas), ss.134 and 135; *Criminal Law Consolidation Act 1935* (SA), ss.81 and 82; *Criminal Code Act 1983* (NT), ss.172 and 173.
15. *R v Davidson* [1969] VR 667.
16. *R v Wald* (1972) 3 DCR (NSW) 25, *CES and Another v Superclinics (Australia) Pty Ltd and Others* (1995) 38 NSWLR 47.
17. *R v Bayliss & Cullen* [1986] 9 Qld Lawyers Reports 8.
18. *Criminal Law Consolidation Act 1935* (SA), s.82A. Section introduced 1969.
19. *Criminal Code Act 1983* (NT), s.174. Section introduced in 1974.
20. Nor has there been any judicial or legislative clarification of the anti-abortion laws in Tasmania and the Australian Capital Territory.
21. *Criminal Code 1913* (WA), s.259.
22. *Criminal Code Act 1899* (Qld), s.282.
23. [1969] VR 667 per Menhennitt J (often referred to as 'the Menhennitt ruling'). The applicability of the *R v Davidson* test in Queensland was confirmed in *R v Bayliss & Cullen* [1986] 9 Qld Lawyers Reports 8.
24. Health Department of Western Australia, *Women's Health and Well-Being: Report of the Working Party on Women and Health*, Perth, WA Department of Health, 1986.
25. Health Department of Western Australia, *Report of the Ministerial Task Force to Review Obstetric, Neonatal and Gynaecological Services in Western Australia*, Perth, WA Department of Health, January 1990
26. Chief Justice of Western Australia, *Report of the Chief Justice's Task Force on Gender Bias*, Perth, 1994.
27. Compare the situation in Canada, where judicial decriminalisation of abortion took place in 1988. In *Morgentaler, Smoling & Scott v the Queen* (1988) 44 DLR (4th) 385, the Supreme Court of Canada struck down the Canadian federal law criminalising abortion on the basis that it violated the rights of Canadian women under Canada's Bill of Rights (the *Canadian Charter of Rights and Freedoms*).
28. See *R v Bourne* [1938] 3 All ER 615 and [1939] 1 KB 687; *R v Bergman and Ferguson*, unreported, Central Criminal Court, May 1948; *R v Newton and Stungo* [1958] Crim LR 469; *R v Davidson* [1969] VR 667; *R v Wald* (1972) 3 DCR (NSW) 25; *R v Woolnough* [1977] 2 NZLR 508; *R v Bayliss & Cullen* [1986] 9 Qld Lawyers Reports 8.

Slevin references continued from p.60

5. Print M8600 *Re Comalco Aluminium Limited,* President O'Connor, Senior Deputy President Macbean, Senior Deputy President Polites, Deputy President Harrison, Commissioner Merriman, Sydney, 23 January 1996.
6. *Re Freight Rail Corporation* Print P3097 Senior Deputy President Harrison, Sydney, 17 July 1997.
7. *Coal and Allied Operations Pty Ltd v CFMEU* 74 IR 110.
8. *Re Coal and Allied Pty Limited,* Print P8382 Justice Giudice, Justice Munro, Commissioner Larkin, Sydney, 29 January 1998.