Abortion

1. INTRODUCTION
   1. The majority of Australian states and territories continue to recognise unlawful abortions.
   2. These legislative provisions reflected across Australia criminalise any attempt to procure an abortion except in certain circumstances where to do so is deemed ‘lawful’. Despite the criminalisation of abortions it is estimated over 100,000 are performed throughout Australia each year (textbook p369).
2. MODELS OF REGULATION
3. Common law model
   1. NSW and Victoria
   2. Courts not parliament have liberalised the original criminal laws
   3. Lawful abortions can be performed
4. Reform legislation model
   1. SA, NT and Tasmania
   2. Parliaments not courts liberalised and clarified criminal laws by passing reform egislation
   3. Criminal statutes are retained
   4. Medical prac’s can perform lawful therapeutic abortions as long as they act in good faith and comply with specified conditions
5. Health model
   1. WA, ACT and VIC
      1. Regulation – more like health procedures
      2. WA and Vic have a distinction between pre and post 20-24 weeks
   2. ACT is the most liberal
6. QUEENSLAND

**Section 224 – Attempts to procure abortion**

Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.

* **Section 225** ***QCC*** creates a similar offence in relation to an act by a woman who with intent procures her own miscarriage.
* **Section 226 *QCC*** makes it an offence for any person to unlawfully supply or procure for any other person any thing whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.
  1. Unlawful abortions – the offence.
     1. Who has performed the abortion?
        1. Is the abortion performed by a ***doctor*?**
           1. Here the abortion has been performed by a doctor. Section 224 of the Criminal Code makes it an offence for a person, with intent, to procure a miscarriage in another, whether pregnant or not, by unlawfully using force, poison or instruments or any other means and such a person is liable to 14 years imprisonment.
        2. It should be noted an unlawful abortion does not constitute murder or manslaughter (s292 CC).
        3. Here, [doctor] has used [force/poison/instrument] to cause [patient] to abort her pregnancy and will be liable under s224 unless [doctor] can establish the abortion was lawful.
  2. Has **woman *procured her* *own*** miscarriage or *permitted* an abortion?
     1. Here [patient] has attempted to/has procured her own miscarriage. Section 225 of the Criminal Code makes it an offence for a woman to intentionally procure or permit her own miscarriage, whether pregnant or not, by unlawfully using force, poison or instruments or any other means and such a person is liable to 7 years imprisonment.
     2. It should be noted an unlawful abortion does not constitute murder or manslaughter (s292 CC).
  3. Has the person ***supplied*** anything to procure an abortion?
     1. Section 226 of the Criminal Code makes it an offence for a person to unlawfully supply another with the means of procuring a miscarriage in a woman, whether pregnant or not, knowing it is intended to be so used and such a person is liable to 3 years imprisonment.
     2. Here [person] has supplied [thing] to [another] with the knowledge it would *unlawfully* procure a miscarriage in another and therefore may be liable for up to 3 years imprisonment.
     3. NB:
        1. Where no knowledge no offence
        2. Was the abortion UNLAWFUL? – i.e. go through Davidson test
  4. Lawful abortions – the defences
     1. Surgical operations: s282 Code
        1. Under QLD law, the abortion performed by [doctor/woman] will not be unlawful
           1. Note that this section has recently been amended to reflect medical abortions
        2. where done for the preservation of the mother’s life;
        3. was performed in good faith with reasonable care and skill; and
        4. was reasonable having regard to the patient’s state at the time and to all circumstances of the case (s282 CC).
           1. This new provision applies retrospectively
     2. **The Davidson Test –**To preserve the life of the mother
     3. In interpreting the term ‘for the preservation of the mothers life’ the ‘Menhennit’ rules/ *R v Davidson* test is applicable (*R v Bayliss*).
     4. Under the *Davidson* test, an abortion is for the preservation of the mother’s life and therefore lawful where:
        1. It is necessary to preserve the woman from serious danger to her life (is not defined) or physical or mental health which would occur if the pregnancy were to continue; and
           1. RE mental health also see ***State of Qld v B*** (NB: only single judge of sup. Court – so not 100% binding)

12 year allowed to have an abortion due to the harm the pregnancy would have on her mental health

* + - * 1. Is not out of proportion to the danger to be averted in the circumstances
    1. This test has been approved and extended in *R v Wald* to include
       1. Economic, social or medical grounds that would result in serious danger to a woman’s physical or mental health at some stage during the pregnancy.
       2. This was further extended by Kirby ACJ in *CES v Superclinics* to include a consideration of the mother’s economic and social circumstances after the birth of the child in which she will find herself (NB: note special circumstances of CES case below).
       3. It should be noted it is unclear whether these extensions to *Davidson* will apply due to the limited judicial consideration given to the issue.
    2. The risk of abortion will not be out of proportion to the danger to be averted where it goes beyond normal dangers of pregnancy/childbirth, for example the potential damage to a mother’s health or from raising an unwanted/disabled child, which is a difficult test to satisfy.

1. **THE BURDEN OF PROOF** 
   1. The burden of proof is on the prosecution to establish the above beyond reasonable doubt. Here.......
2. **INTENT**
   1. The doctor will not be liable where they honestly believe it is lawful to procure an abortion in the circumstances and the onus is on the prosecution to prove on the balance of probabilities the doctor intentionally acted unlawfully (*CES*). This is a subjective test.
3. **FOETAL ABNORMALITY**
   1. Foetal abnormality does not provide a lawful excuse for procuring an abortion in Qld unless the anticipated effects of giving birth to a severely disabled child will cause serious damage to the mental or physical health of the mother, considering social and economic factors as well (*Vievers v Connolley).*
      1. NB: The judge in *Vievers* held giving birth to a severely disabled child would expose the mother the serious danger to her mental health. Although this danger did not come to light until the birth, the birth was a natural consequence of pregnancy and would still therefore entail a serious danger to her mental health (at p329).
4. **FATHER OF THE UNBORN CHILD**
   1. The father of an unborn child, acting as its next friend, has no lawful right to an injunction to prevent the mother having an abortion (*AG Qld; Ex rel Kerr v T; F v F*)
   2. Conclusion
5. Although the above case law demonstrates it is possible for doctors to be prosecuted for performing an abortion, the lack of case law on the subject suggests it is unlikely a doctor will be either charged or convicted unless special circumstances exist. Here ...................

***CES v Superclinics***

* Full time student, 21 years,
* Involved in an unstable emotional relationship
* Attended the clinic 5 times because she hadn’t had her period
* Had three pregnancy tests but was told they were negative
* By time she was diagnosed it was too late for her to have an abortion, 19 ½ weeks pregnant
* Would be unlawful to have an abortion
* Kirby J considered factors of what damage would occur after birth, instead of just during
* Was allowed damages for the pain and suffering incurred in birth of healthy child and for economic loss caused by confinement and rearing child to 18 years

***R v Sood* (2005)**

* Doctor Sood was convicted of procuring an unlawful abortion
* Had not consulted adequately with patient to determine whether an abortion was lawful
* The woman was 22-24 weeks pregnant and gave birth in a toilet bowl

1. Other Jurisdictions

* 1. Western Australia
     1. Abortion is no longer an offence in Western Australia where performed in good faith with reasonable care and skill and is justified under the Health Act 1911 WA (where pregnant woman up to 20 weeks gives informed consent/ or will suffer serious danger to personal/family/social life or her health s334(3)) (s199 CC WA). The woman must receive independent counselling (s334(4), (5) HA) and where a minor under 16 years a parent must be involved or obtain a court order from Children’s court (s334(9) HA).
     2. Where the woman has passed 20 weeks gestation an abortion is unlawful unless the mother or unborn child has a severe medical condition (s334(7) HA)
  2. ACT
     1. Abortion is no longer an offence under the common law or statute in the ACT provided it is carried out in an approved facility (Crimes Act 1900 ACT).
  3. NSW and Victoria
     1. An abortion is unlawful in NSW and Vic unless the Davidson, Wald and CES tests apply to absolve liability.
  4. Tasmania
     1. Abortion is unlawful in Tasmania unless two doctors certify that continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the woman than if the pregnancy were terminated and informed consent has been provided (s164(2)(a), (b) CC Act 1924 (Tas).
  5. Northern Territory
     1. Termination in hospital with appropriate consent is lawful up to 14 weeks where two doctors believe in good faith continuation of the pregnancy would involve (s11 Medical Services Act)
     2. Greater risk to woman’s life or physical/mental health; or
     3. A substantial risk the child will be seriously handicapped due to physical/mental abnormalities

Wrongful Birth/Life and Child Destruction

1. WRONGFUL BIRTH - CLAIMS BY PARENTS
   1. Where child is born with a *disability* for child care costs
      1. Parents are entitled to claim compensation for additional costs in birthing and raising a disabled child which was born as a result of a doctor’s negligence in failing to prevent the pregnancy or detect the abnormality in time to terminate (*Parkinson v St James*; *Rand v East Dorset*).
   2. Where *unplanned* child is born *healthy* for child care costs
      1. Where an unplanned child is born healthy the courts are reluctant to award compensation for child care costs than where it is born with a disability (*Cattanach v Melchior*), and Qld now has legislation preventing these claims (CLA Ch2 Pt 5).
2. WRONGFUL LIFE - CLAIMS BY CHILDREN
   1. The High Court of Australia has determined this is not a lawful casue of action in Australia and a child is not able to recover damages for wrongful life (*Harriton v Stephens; Waller v James*).

***Waller v James/Hoolahan***

* W was born with severe blood clotting condition as a result of fathers genetic condition which father had
* Pregnancy was achieved through IVF
* No test was conducted for this condition
* It caused severe brain damage, cerebral palsy, seizures – needed to be looked after for whole life
* W argued mother would have terminated pregnancy if they had known and doctors were negligent in failing to inform them of the risk

1. CHILD DESTRUCTION
   1. In Qld it is illegal to kill a child immediately prior to birth or prevent a child from being born alive punishable by imprisonment for life (s313 Code) and is a more serious offence than abortion. A child that is born alive but later dies as a result of injuries sustained while still within the mother the person may be guilty of homicide (*AG Ref No.3*).
   2. If the foetus is capable of breathing, generally or with a ventilator, the person may be guilty of child destruction, however this may overlap with the offence of abortion. There is no definite stage of pregnancy at which a child is considered capable of breathing, however the suggested age at present is 23 weeks.
2. **Defences**
   1. It is a defence to this offence if the doctor in question acted to save the mothers life or prevent a serious risk to physical or mental health (s282 Code)