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ABORTION IN THE SHADOW OF THE CRIMINAL LAW? THE CASE OF SOUTH AUSTRALIA

Abstract

In 1969, the South Australian Parliament passed amendments to the criminal law designed to liberalise abortion and clearly state the circumstances in which abortion services might lawfully be provided by medical practitioners. Nevertheless, abortion offences, and the circumstances under which abortion may lawfully be provided, are stated in the *Criminal Law Consolidation Act 1935* (SA), and this fact has given rise to continued concern about the legality of abortion in South Australia. This article considers whether there is any basis for these concerns, with particular focus on the provision of medication abortion, which was not contemplated by Parliament in 1969. In doing so, it draws on the language of the provisions and the extensive parliamentary debates that preceded their passage into law, arguing that Parliament's primary goal was to preserve women's health through clarifying the contexts in which lawful abortion would be available. We contend that any suggestion that medical abortion is criminal in South Australia, or that medical practitioners who comply with the statutory scheme in good faith run the risk of being prosecuted, is not grounded in an accurate account of the positive law. Nor is it supported by the application of the law in practice since 1969.

I Introduction

In 1969, the South Australian Parliament liberalised abortion and clearly stated the circumstances in which medical practitioners could lawfully provide abortion services. Nevertheless, abortion offences, and the requirements for the provision of lawful abortion, continue to be set out in the *Criminal Law Consolidation Act 1935* (SA).

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Australian research has demonstrated that the continued status of abortion as a potential criminal offence in some jurisdictions affects the willingness of medical practitioners to provide abortion services and the manner in which abortion services are provided.[1] Researchers have shown that abortion services in New South Wales and Queensland, in particular, adopt restrictive practices to manage the perceived risk of prosecution even though these practices are not explicitly required by the law. These procedures may take place even where medical practitioners indicate this is 'usually unnecessary, time consuming, emotionally distressing for the woman concerned and often detrimental to her physical and/or mental health'.[2]

This article considers whether there is any basis for concern about the legality of medical abortion (the term used in the legislation for abortion provided by a medical practitioner) in South Australia. Arguments that abortion may not be lawful are made both by supporters and opponents of the provision of abortion services.[3] Such arguments sometimes make reference to a case which (unsuccessfully) asserted the illegality of medical practitioner-provided abortion in South Australia.[4]

We begin by investigating the history and context in which South Australia's abortion laws were amended. We argue that like the English Parliament, which reformed abortion laws only slightly earlier, the South Australian Parliament passed these laws with the intention of liberalising access to safe abortion services in order to protect women's health. As we show below, prior to liberalisation, some women were able to access safe and effective services, but others were subjected to unsafe services.

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1 Caroline de Costa, Heather Douglas and Kirsten Black, 'Making it Legal: Abortion Providers' Knowledge and Use of Abortion Law in New South Wales and Queensland' (2013) 53 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 184, 187; Caroline de Costa et al, 'Abortion Law Across Australia — A Review of Nine Jurisdictions' (2015) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 105, 109. See also Kirsten I Black, Heather Douglas and Caroline de Costa, 'Women's Access to Abortion After 20 Weeks' Gestation for Fetal Chromosomal Abnormalities: Views and Experiences of Doctors in New South Wales and Queensland' (2015) 55 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 144; Heather Douglas, Kirsten Black and Caroline de Costa, 'Manufacturing Mental Illness (and Lawful Abortion): Doctors' Attitudes to Abortion Law and Practice in New South Wales and Queensland' (2013) 20 *Journal of Law and Medicine* 560.

2 de Costa, Douglas and Black, above n 1, 188.

3 See, eg, Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316; Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1, 10; Mark J Rankin, 'The Offence of Child Destruction: Issues for Medical Abortion' (2013) 35 *Sydney Law Review* 1. The Australian Medical Association called on the states and territories to clarify their laws in 2005: Ronli Sifris, 'The Legal and Factual Status of Abortion in Australia' (2013) 38 *Alternative Law Journal* 108, 111.

4 *City of Woodville v SA Health Commission* [1991] SASC 2761 (8 March 1991) (Matheson J).

Some died as a result. In order to protect women's health in this context, Parliament sought to resolve doubt about the circumstances under which lawful abortion was available in South Australia. It created legislative provisions containing clearly stated circumstances in which abortion could lawfully be provided, in which decisions about the provision of abortion services were placed in the hands of medical practitioners rather than women seeking abortion. The well-demonstrated safety of medical abortion since 1970 indicates the success of the 1969 Parliament's efforts to safeguard women's health.

The positive law has thus been stated in relatively clear terms since 1969. The 1969 reforms successfully ended uncertainty about when abortion was lawful, allowing safe, lawful abortion to be offered through the public health system. Non-medical abortion provision came to an end, and prosecutions of abortion providers ceased. In the 45 years that have passed since liberalisation, we have identified only one prosecution of a medical practitioner for abortion offences in South Australia.[5] He was acquitted of one charge at trial and had his conviction on the other quashed on appeal after allegations that he had failed to comply with the statutory scheme could not be proved beyond reasonable doubt.

It is a truism of the legal realist tradition that the law is not merely to be found tucked within the (admittedly now digital) pages of the statutes and judgments which are commonly supposed to be its primary sources. Oliver Wendell Holmes famously stated this principle in 1897: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'[6] Given the lack of prosecutions in the post-liberalisation period, it might seem that a confident prophesy could be made about the criminal liability of South Australian medical practitioners in relation to the provision of abortion services: compliance with the statutory scheme established in 1969 means that abortion is lawful, and medical practitioners can provide abortion services without concern that they might be prosecuted. Yet, the presence of abortion in the criminal law continues to be deployed as evidence that abortion is both illegal and fraught with risk (including risk to medical practitioners).[7] This perception clearly does affect medical practitioners, as other researchers have demonstrated.[8] No doubt these concerns are driven, in part, by the repeated portrayal of these jurisdictions as places where abortion provision depends on non-prosecution and where the law is 'vulnerable, unclear and untested'; portrayals that Kate Gleeson has persuasively argued are unsubstantiated and incorrect.[9] We contend that surgical abortion in a medically supervised setting is clearly lawful in South Australia provided it complies with the statutory scheme. The assertion that 'abortion

5 *R v Anderson* (1973) 5 SASR 256.

6 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 461.

7 See the detailed account provided by Kate Gleeson, 'The Other Abortion Myth — The Failure of the Common Law' (2009) 6 *Bioethical Inquiry* 69.

8 de Costa, Douglas and Black, above n 1; de Costa et al, above n 1, 109.

9 Gleeson, above n 7, 70.

is and has always been illegal' is, as Gleeson has argued, one of the 'tenacious myths about abortion law and politics in Australia'.[10]

However, one potential area of doubt arises in relation to the provision of medical abortion by medication rather than by surgical procedure, which was not contemplated by Parliament in 1969. The laws dealing with the induction of abortion through drugs in South Australia are still closely modelled on the provisions of the *Offences Against the Person Act 1861* (UK).[11] At the time it was drafted, safe, effective abortion by medication was not available, and Parliament chose to prohibit attempts to procure abortion using 'any poison or other noxious thing',[12] language which the reforms of 1969 left untouched.

We argue that under a literal construction of the statute, the drugs currently in use are neither poisons nor noxious. However, currently, the provisions created to ensure safe surgical abortion in 1969 are being applied to abortion by the use of drugs in South Australia. We contend that this situation is unsatisfactory for a number of reasons, including the likelihood that this approach no longer performs the function intended for it in 1969: protecting women's health. We argue that any Parliament concerned about the ambiguity of the law or by its impacts on women's health (as the Parliament of 1969 clearly was) might consider taking the democratic and thorough approach which led to the laws we now have.

We begin this paper by considering the context in which the South Australian Parliament came to consider abortion and pass liberalising legislation in 1969. This investigation forms the basis for our contentions about the mischief Parliament sought to address by amending the law in 1969, and the interpretation of the statutory provisions that continue to state the circumstances under which abortion is lawful in South Australia. In doing so, they form the foundation of our argument that abortion is lawful in South Australia.

II The Impact of Uncertainty: The Chilling Effect of the Common Law Prior to 1969

Prior to the passage of the 1969 amendments, abortion was an offence in South Australia unless performed in circumstances which would render it 'lawful'. However, these circumstances were not stated in the *Criminal Law Consolidation Act 1935* (SA). Rather, they were to be sought in the common law, which offered very little in the way of dependable precedent. A decision of a single judge of the English Central Criminal Court offered the best guidance then available.[13] Dr Bourne had

10 Ibid.

11 Rankin, 'Disappearing Crime of Abortion', above n 3, 7–8.

12 *Criminal Law Consolidation Act 1935* (SA) ss 81(2), 82.

13 *R v Bourne* [1939] 1 KB 687 ('*Bourne*').

been acquitted after having put himself forward as a defendant for a test case.[14] He had performed an abortion on a 14-year-old girl who had been gang raped. At least one other medical practitioner had refused to provide an abortion in spite of the girl's profound distress.

In determining the case, Macnaghten J found that abortion was not 'unlawful' if it was performed to preserve a woman's life. If a medical practitioner held the honest belief, 'on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck', the medical practitioner could be seen as having acted for the purpose of preserving the mother's life.[15] This case established the principle that a serious threat to the pregnant woman's physical or mental health was sufficient to ground lawful abortion. In doing so, it liberalised access to abortion which some had believed might only be lawful if the woman's life was in imminent physical danger.

While it was seen as likely that the decision in *Bourne* would be accepted as persuasive in South Australia, given that the relevant provisions were closely based on the English statute, this was not certain. As early as 1938, a local doctor proposed a South Australian test case to allow clarification of the law (as *Bourne* had done for England). This approach was not supported by the local medical association and failed to go forward.[16]

Uncertainty about the legal status of abortion had a profound impact on its availability prior to 1969. In practice, abortion *might* have been available where two doctors agreed in writing that abortion was necessary to save the woman's life, or that she was psychologically incapable of continuing the pregnancy or (from the 1960s onwards) that there was a case of severe deformity of the foetus due to rubella or Huntington's chorea.[17] Jill Blewitt summarises: 'In this situation, with few doctors caring to find out what was "lawful", the incidence of notified abortions was low.'[18] Psychological grounds were usually only viewed as sufficient if the woman was 'in dire distress', 'at the point of overt psychiatric illness or actually psychiatrically sick' according to a doctor who practised during this period and was interviewed for Baird's oral history of abortion.[19]

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14 Caroline M de Costa, 'The King Versus Aleck Bourne' (2009) 191 *Medical Journal of Australia* 230, 231.

15 *Bourne* [1939] 1 KB 687, 694.

16 Clare Parker, 'A Parliament's Right to Choose: Abortion Law Reform in South Australia' (2014) 11 *History Australia* 60, 62–3.

17 Barbara Baird, *'I Had One Too . . .' An Oral History of Abortion in South Australia Before 1970* (Women's Studies Unit, Flinders University of South Australia, 1990) 59.

18 Jill Blewett, 'The Abortion Law Reform Association of South Australia: 1968–73' in Jan Mercer (ed), *The Other Half: Women in Australian Society* (Penguin, 1975) 377, 378, quoted in ibid. See also Lyn Finch and Jon Stratton, 'The Australian Working Class and the Practice of Abortion 1880–1939' (1988) 12 *Journal of Australian Studies* 45, 63.

19 Baird, *An Oral History of Abortion in South Australia Before 1970*, above n 17, 59.

As a result, the vast majority of abortions that took place in South Australia prior to reform were performed in the belief (incorrect though it may have been) that they were illegal, even when they were performed by doctors.[20] Despite doctors having come to predominate among abortion providers in most parts of Australia prior to liberalisation, Baird has argued it is likely that non-medical practitioners provided a higher proportion of abortion services in South Australia before 1969 because there were so few doctors performing abortions in this State.[21] Abortion was primarily provided by non-doctor practitioners with a wide variety of skill levels[22] or through self-abortion, practices which *Bourne* would not have sanctioned.[23]

Historians have constructed a complex picture of abortion provision in the pre-liberalisation period using a variety of sources ranging from court data and newspaper reportage to oral history. Their research certainly documents 'the existence of mercenary and unskilled abortionists who created severe health problems for women'.[24] Yet, as Barbara Baird and Judith Allen have persuasively argued, despite the widely held idea that 'backyard' or non-doctor abortionists were the primary cause of such suffering, the reality was quite different. While safe and compassionate care was provided by some non-doctor abortionists (including medically trained providers such as nurses and midwives), some doctors notoriously provided unsafe and unethical abortion services, some of which resulted in deaths.[25]

Even in the 1960s, sex education was rare and contraception was unreliable and difficult to obtain. High demand for abortion and the legal uncertainty surrounding the status of abortion services created an environment in which corruption and selective prosecution could thrive. Well-known doctor and abortion reform campaigner Bertram Wainer began actively campaigning for legal change and the eradication of non-medical providers in the eastern states in 1968.[26] Wainer's campaign brought

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20 Ibid 63. Baird explains that while the 1969 reforms made their way through Parliament, a general practitioner who had done many abortions during the 1960s was arrested and charged along with a patient. The trial was scheduled to take place in early 1970 but the Crown chose not to proceed when the reforms came into effect.

21 Barbara Baird, '"The Incompetent, Barbarous Old Lady Round the Corner": The Image of the Backyard Abortionist in Pro-abortion Politics' (1996) 22(1) *Hecate* 7, 8–9.

22 Baird, *An Oral History of Abortion in South Australia Before 1970*, above n 17, 73.

23 *Bourne* [1939] 1 KB 687; Barbara Baird, 'The Self-Aborting Woman' (1998) 13 *Australian Feminist Studies* 323; Gideon Haigh, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, 2008) 38–9.

24 Baird, 'The Incompetent, Barbarous Old Lady Round the Corner', above n 21, 9. More detailed accounts are available in the work of Judith Allen, based on criminal records: Judith A Allen, *Sex & Secrets: Crimes Involving Australian Women Since 1880* (Oxford University Press, 1990) 101–3.

25 Baird, 'The Incompetent, Barbarous Old Lady Round the Corner', above n 21, 17; Allen, above n 24, 99–100; Haigh, above n 23, 17–18, 58–60, 97. See also Gleeson, above n 7, 71; Finch and Stratton, above n 18, 62.

26 Allen, above n 24, 204.

greater public notoriety to claims that some abortion services were being provided by unqualified practitioners as well as by doctors charging high fees for providing poor quality care in an environment of police corruption.

The widespread refusal of doctors to provide abortion even in circumstances of extreme mental distress or risk to the life or health of the pregnant woman left these women with no access to legal abortion. By the 1960s, rises in the price of medical abortion had created a new market for non-medical abortion even in states where it was more readily available.[27] As Gideon Haigh puts it: 'Abortion suited the avaricious'.[28] This state of affairs was clearly known to some members of the South Australian Parliament, who made apparent references to rumours of corruption and profiteering in abortion services in Victoria during parliamentary debate. For example, members who expressed opposition to decisions about abortion being made by medical practitioners often based their opposition on the potential for medical practitioners to be profiteers: 'We have no proof that every doctor is a "goodie", that he would not capitalize on some of this legislation to make a fairly good business out of it.'[29]

This was the context in which the South Australian Parliament began to consider the law in relation to abortion in 1968, first through a select committee process and then through extensive debate on the Bill itself. There had been no decisive ruling on when an abortion might be lawful in any common law Australian state. There was a minority of opinion in Parliament that *Bourne*[30] stated the law with sufficient clarity. The Honourable Colin Davies Rowe, for example, argued that *Bourne* was sufficient 'because it makes it clear that the medical man who acts in good faith has proper protection'.[31] However, uncertainty about the way a South Australian court would view *Bourne* predominated: 'As regards *Bourne*'s case, we can only guess what the courts in this State would determine. I think everyone is hoping that no case will be brought before the court so that it can be tested.'[32]

Parliamentary debate over the Bill makes it clear that Parliament sought to clarify the law through the democratic process rather than leaving it in the hands of the courts.[33]

> [T]he proper way to proceed is to bring before the State Parliament a proposal to establish what the law on abortion should be, rather than to take some doctor,

27 Ibid 247.

28 Haigh, above n 23, 54.

29 South Australia, *Parliamentary Debates*, Legislative Council, 13 November 1969, 2997 (Arthur Whyte).

30 [1939] 1 KB 687.

31 South Australia, *Parliamentary Debates*, Legislative Council, 19 November 1969, 3104 (Colin Rowe).

32 South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2517 (John Ryan) — seeking clarity for the medical profession.

33 Parker, above n 16, 73.

> who, according to his own lights, is acting with complete legitimacy, before the courts, and get the courts to determine the law.[34]

We argue that the thoroughness with which the 1969 amendments were debated provides considerable guidance about Parliament's intention in passing the amending legislation. As we have already argued, part of the task Parliament set for itself was the resolution of doubt about the circumstances in which abortion was lawfully available: clarity which the common law did not then provide. As a result, it is possible to offer both a confident account of the statutory law and a strong sense of parliamentary intention which might guide the interpretation of any provision that has become ambiguous as social and medical circumstances have changed in the subsequent 45 years.

III Parliament Sets Out to Offer Legal Certainty

> [W]e should not be calamity howlers about what might happen under the provisions of this Bill — Geoffery Virgo.[35]

We argue that when the South Australian Parliament passed the 1969 amendments, its intention was to address the risk to women's health posed by 'the potentially dangerous practice of illegal abortion'.[36] Very few abortions were provided by doctors in South Australia prior to liberalisation, meaning that women had virtually no access to abortion services which would have been lawful under *Bourne*.[37] The abortion services that were available were unregulated and sometimes unsafe or even lethal. Parliament was determined to address this risk to women's health by stating the law in clear terms, which had been thoroughly and publicly debated,[38] rather than leaving the legal regulation of abortion in the hands of the courts. As we will explain below, it did so by placing central decisions about the provision of abortion in the hands of medical practitioners.

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34 South Australia, *Parliamentary Debates*, House of Assembly, 23 October 1969, 2469 (Hugh Hudson) — rejecting the idea that the law should be rendered certain by the prosecution of a doctor, but supporting legal access to abortion, which he 'abhors' but thinks is sometimes necessary. Reliance on a policy of non-prosecution was also rejected by Mr William Field Nankivell of the Australian Labor Party ('ALP'), district of Mallee: South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2511.

35 South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2516.

36 Parker, above n 16, 75.

37 [1939] 1 KB 687.

38 The law of abortion was referred to a select committee in December 1968 prior to being debated in Parliament. An 'unprecedented number of petitions' and several opinion polls were placed before Parliament during the select committee hearings and debate over the Bill. They were summarised by Attorney-General Robin Rhodes Millhouse (Liberal, Mitcham): South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2318.

The plain language of any statute is central to its interpretation, and the abortion provisions are no different. In South Australia, however, parliamentary debates may also be consulted in order to discover the mischief Parliament sought to address by passing legislation — the purpose of the statute[39] — and thus to establish the context for the application of contemporary principles of statutory interpretation.[40] There are some specific features of the passage of these particular amendments that offer more guidance than usual in determining the mischief Parliament sought to address, despite the absence of a clause setting out the objectives of the Act.

The Bill was introduced by the then Liberal Attorney-General, Robin Millhouse[41] during the premiership of Steele Hall (Liberal and Country League). The Bill was subject to a conscience vote, and public interest in the proposed legislation was high. A large number of members declared that they would follow the tradition of the time by not allowing their vote on a piece of 'social legislation' to be cast in silence. Many members delivered speeches articulating their voting intentions as well as the reasons for their positions on the Bill.

As a result of the conscience vote, votes were not cast along party lines. The then ALP leader of the opposition (Don Dunstan) articulated his preference for abortion on demand: 'my own position is that a woman should have a right to determine whether she proceeds with a pregnancy or not and, if required to vote on this, I would vote in favour of abortion on demand.'[42] However, the deputy leader of the opposition — the Honourable James Corcoran (ALP, Coles) — not only opposed the Bill on the basis that it provided for the destruction of life[43] but articulated an anti-abortion perspective in relation to virtually every clause throughout a debate in which most members stood to make only a single speech. This level of division led to a thorough testing of the Bill.

The debate was complex. Some members who had grown up in working-class environments observing the frightened and desperate clientele of the neighbourhood abortionist believed the Bill did not go far enough.[44] A few advocated for access to sex education and contraceptives[45] and spoke of desperate constituents seeking

39 *Owen v South Australia* (1996) 66 SASR 251; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 92.

40 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; Pearce and Geddes, above n 39, 93; *Burch v South Australia* (1998) 71 SASR 12; *Police v Kennedy* (1998) 71 SASR 175; *Gerah Imports Pty Ltd v Duke Group Pty Ltd (in liq)* (2004) 88 SASR 419.

41 Robin Rhodes Millhouse (Liberal, Mitcham) subsequently resigned from the Liberal Party in 1973 and later became the first Australian Democrats Member of Parliament elected in South Australia.

42 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2325–6 (Donald Dunstan).

43 Ibid 2330 (James Corcoran).

44 Ibid 2337–8 (Cyril Hutchens).

45 South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1969, 2422 (Molly Byrne).

access to abortion services.[46] Other members articulated their opposition to abortion on demand but supported the Bill as offering a medically supervised gateway to access abortion in some circumstances.[47] Still others rejected the Bill on moral and/or religious grounds, likened abortion to the Nazi death camps,[48] railed against the permissive society,[49] and opposed abortion even in cases of rape and serious foetal abnormality.[50]

Debate included statements from some of the first women elected to the South Australian Parliament. The Honourable Joyce Steele (Liberal), one of the first two women elected to the South Australian Parliament in 1950, said she regarded the foetus as a potential life. Nevertheless, she went on to say: 'I believe that this matter should be left to a woman's conscience to decide whether she has the right to have an abortion performed.'[51] Mrs Molly Byrne (ALP) also supported reform: 'I do not think our laws should force women into this position [backyard abortion], as is the case at present.'[52]

Notwithstanding the complexity of the debate and the variety of views expressed, opposition to the Bill proceeded through a series of proposed amendments which were voted on by the House of Assembly one by one. Many amendments were also proposed in the Legislative Council. As a result, almost every clause was tested and concrete alternative positions were rejected in Parliament despite the Bill having come through a select committee process prior to being debated in Parliament. The degree of confidence it is possible to have about the statutory language ultimately chosen and that which was rejected is therefore unusually high in comparison to a good deal of contemporary legislation.

It is clear that this legislation was understood as liberalising and not merely codifying access to abortion at the time it was passed. Parliamentary debate proceeded on the basis that when the *Criminal Law Consolidation Act (SA)* 1935 referred (then, as now) to 'unlawful' abortion, there was a clear implication that abortion must be lawful in some circumstances. Prior to reform, these circumstances were established by the common law, presumptively based on the persuasive case of *Bourne*, as explained

46 Ibid (Molly Byrne).

47 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2337 (Raymond Hall).

48 South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1969, 2408 (Allan Burdon).

49 Ibid 2419 (William McAnaney).

50 Ibid 2416 (Thomas Casey).

51 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2340 (Joyce Steele).

52 South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1969, 2422 (Molly Byrne).

above.[53] Millhouse introduced the Bill as substantially enacting the common law position,[54] yet, rather than requiring a serious risk to the physical or mental health of the woman, as *Bourne* had, the Bill established the grounds for lawful termination of pregnancy more widely. Rather than asking whether there was a probability of serious risk to the woman's physical or mental health as *Bourne* did, it compared the risk presented by the continuation of the pregnancy with the risks presented by termination. When it finally emerged as law, s 82A(1)(a)(i) required that two medical practitioners examine the woman and form an opinion in good faith 'that the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated'.[55]

Proposals for a wider test failed. Abortion on demand, without the agreement of a doctor, was canvassed as an option which some members preferred to the provisions of the Bill. [56] Abortion on request was proposed through an amendment which would have rendered abortion a decision to be made by a woman and her doctor. It was defeated by a substantial majority.[57] Medical practitioners were seen as enabling health and safety to be made paramount.[58] However, they were also seen as an appropriate gateway to abortion which would prevent abortion on demand.

> I do not accept the statement that this Bill will provide abortion on demand, because it requires that medical practitioners should act in good faith. I have sufficient confidence in the medical profession to believe that doctors will act in good faith, and *we should not be calamity howlers about what might happen under the provisions of this Bill*.[59]

As Clare Parker's historical research makes clear, the process of abortion law reform in South Australia did not begin because of a campaign for women's reproductive freedom. Rather, it rose on the twin pillars of liberal regard for the principle that law and morality should be distinct domains, and safe abortion as a public health issue.[60]

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53 [1939] 1 KB 687. This was especially clear in the Legislative Council: South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1969, 2840 (Charles Hill). See analysis in Parker, above n 16, 62.

54 South Australia, *Parliamentary Debates*, House of Assembly, 19 February 1969, 3710 (Robin Millhouse).

55 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(i).

56 See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2325–6 (Donald Dunstan).

57 South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2530.

58 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2335–6 (Samuel Lawn).

59 South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2516 (Geoffrey Virgo) (emphasis added) — rejecting the social clause but otherwise supporting the Bill.

60 Parker, above n 16, 60.

> The politicians who supported the bill did not seek the empowerment of women. Rather, it was seen as an exercise in sound law-making that separated morality from the secular law, granting freedom of conscience to the individual rather than imposing a state-sanctioned morality on everyone, as well as a measure designed to save the life and improve the reproductive health of women by placing control of the procedure in doctors' hands.[61]

Abortion on demand was not the only test discussed by Parliament in 1968 which would have resulted in more liberal abortion laws in South Australia. The original Bill included a proposal for a 'social clause' which was the most controversial aspect of the Bill, and a significant departure from the common law as stated in *Bourne*. It would have enabled consideration of the impact of continuing the pregnancy on the existing children of the family as a factor in determining whether an abortion should be permitted. This provision was eventually removed by an amendment proposed by Millhouse himself.[62]

Another proposal for a wider test involved the requirement for a period of residence in South Australia prior to termination,[63] which was designed to prevent South Australia from becoming the abortion capital of the country at a time when the passage of these reforms would have made lawful abortion more readily available in South Australia than in any other state or territory. During debate, the duration of residence required was reduced to two months, and then passed in the face of passionate advocacy from Joyce Steele, in particular, that the clause placed women's health in danger and should be removed.[64] A further proposal to remove this clause failed in the Legislative Council.[65]

However, amendments designed to narrow the scope of lawful abortion proposed in the Bill also failed. Many would have restricted the scope of lawful abortion contemplated by *Bourne* at common law.

One clear example was a proposal to have access to lawful abortion based only upon danger to maternal physical health by removing all reference to mental health from the Bill. This proposal was rejected by the House of Assembly.[66] Numerous amendments to the s 82A(1) test, which provides for lawful abortion where 'the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated'[67] designed to narrow the test were proposed. Amendments which

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[61] Ibid 77–8.

[62] South Australia, *Parliamentary Debates*, House of Assembly, 29 October 1969, 2597.

[63] *Criminal Law Consolidation Act 1935* (SA) s 82A(2).

[64] South Australia, *Parliamentary Debates*, House of Assembly, 4 December 1969, 3680 (Joyce Steele).

[65] South Australia, *Parliamentary Debates*, Legislative Council, 3 December 1969, 3513.

[66] South Australia, *Parliamentary Debates*, House of Assembly, 4 December 1969, 3676.

[67] *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(i).

would have deleted 'greater risk' and substituted 'serious danger',[68] 'grave danger' or 'substantially greater risk' all failed.[69] Some of these amendments were proposed on the basis that by 1969 it was clear that an abortion in the first trimester carried less risk to maternal health than carrying a pregnancy to full term.[70] The Legislative Council was told that abortion in early pregnancy represented an 'almost negligible' risk to the health of the woman,[71] and this remains the case today.

A further unsuccessful proposal to restrict the test proposed in the Bill involved the 'emergency clause'. The clause ultimately became part of the *Criminal Law Consolidation Act 1935* (SA) and now states that abortion is lawful

> if the pregnancy of a woman is terminated by a legally qualified medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave injury to the physical or mental health, of the pregnant woman.[72]

During debate, the 'emergency clause' was subject to a proposal that it be deleted, but this motion was lost in the House of Assembly and the emergency clause was therefore retained.[73]

Several other amendments were also viewed as too restrictive and therefore failed to pass. Proposals for the two medical practitioners involved in making the decision about the availability of an abortion to be psychiatrists and/or obstetricians were rejected by a substantial majority. Members of Parliament expressed concern about the limitations this would impose on access and quality of care, especially for poor and rural women. Concerns that restricted access would lead to a continuation of illegal abortion were expressed and resulted in defeat of the proposed amendment.[74] In the Northern Territory, it continues to be the case today that an obstetrician or gynaecologist must be one of the two medical practitioners who agree an abortion is warranted.[75] Concerns similar to those expressed in South Australian Parliament in 1969 continue to be expressed in the Northern Territory today.[76]

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[68] South Australia, *Parliamentary Debates*, House of Assembly, 29 October 1969, 2596.

[69] South Australia, *Parliamentary Debates*, Legislative Council, 3 December 1969, 3506, 3511.

[70] South Australia, *Parliamentary Debates*, House of Assembly, 29 October 1969, 2596 (James Corcoran).

[71] South Australia, *Parliamentary Debates*, Legislative Council, 13 November 1969, 2996 (Arthur Whyte).

[72] *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(b).

[73] South Australia, *Parliamentary Debates*, House of Assembly, 4 December 1969, 3676.

[74] South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1969, 2534.

[75] *Criminal Code Act 1983* (NT) sch 1 ss 208B–208C. See also *Medical Services Act 1982* (NT) s 11.

[76] de Costa et al, above n 1, 109.

The 'Eugenic clause', as it was called at the time, now s 82A(1)(a)(ii), was retained despite a proposal to strike it out.[77] The section states that abortion is not an offence where two medical practitioners form the opinion in good faith 'that there is a substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped'.[78] Discussion in the House of Assembly focused on thalidomide and rubella. A further proposal to strike out this clause failed in the Legislative Council.[79]

The medicalisation of abortion was central to the 1969 amendments. Parliamentary debate — and the legislation that emerged from it — evince a clear preference for decisions about abortion to be made by medical professionals and not by women seeking an abortion. Parliamentary debate contains repeated references to the professionalism, ethics and good faith of the medical profession. 'We entrust members of the medical profession with great responsibilities … when they hold life in their hands in many cases'.[80]

The medicalisation of abortion has been the subject of critique. The South Australian legislation was modelled closely on the *Abortion Act 1967* (UK), which has itself since been amended. Sally Sheldon argues that the UK Act, which cast abortion 'as essentially a matter for the expert knowledge and control of doctors and medical science has had very positive effects in paving the way for women's access to the provision of safe, legal terminations.'[81] It appears clear that medicalisation has been similarly successful in enabling access to affordable and safe abortion services in South Australia through placing decision-making power in the hands of medical practitioners rather than of women seeking an abortion. In South Australia, in contrast to many other Australian jurisdictions, abortion is primarily provided as a public health service rather than being primarily provided through the private sector as it is in jurisdictions such as New South Wales and Queensland, where the law is less clear.[82]

Yet, as Sally Sheldon (among other critics) has pointed out, medicalisation carries risks.[83] Legal safety and medical safety do not necessarily correlate with affordability

77 South Australia, *Parliamentary Debates*, House of Assembly, 29 October 1969, 2601.

78 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii); Parker, above n 16, 74.

79 South Australia, *Parliamentary Debates*, Legislative Council, 3 December 1969, 3511.

80 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2337 (Raymond Hall). See also South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1969, 2410 (Glen Pearson).

81 Sally Sheldon, 'The Law of Abortion and the Politics of Medicalisation' in Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth, 1995) 105, 119.

82 de Costa et al, above n 1, 109.

83 Sheldon, above n 81; Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229; Rankin, 'Recent Developments', above n 3.

or accessibility,[84] and the interests of women seeking abortion and of the medical professionals who might provide these services, will not always be consonant.[85] Further, as Barbara Baird has argued, legislation that places access to abortion in the hands of medical practitioners and hospitals[86] means that 'the legislatively enforced limits on the ways that abortions can be performed … leave the way open for hospitals to impose limits on service provision'.[87] Caroline de Costa and her co-authors have demonstrated that this is occurring in Queensland and New South Wales.[88]

As South Australian law requires surgical abortion to be provided in a hospital in order for it to be lawful, and contains extensive mandatory reporting requirements, the possibility of hospitals limiting abortion service provision is clearly also a risk in South Australia. As de Costa and her co-authors have argued, this risk arises because the law permits only hospitals and medical practitioners to provide lawful abortion services. This places hospitals and medical practitioners in a unique position to restrict the provision of abortion services in ways which the statutory regime itself does not demand. If it should be the case that hospitals or medical practitioners are imposing restrictions on the provision of abortion services, we would argue that it is important to inquire into whether these restrictions are required by law, or imposed as a matter of practice. This distinction is a significant one in many areas where the law comes into contention. We now turn to one area of South Australian law affecting a significant number of procedures where we would argue that restrictions imposed on contemporary practice exceed what the law requires.

IV Medication Abortion

While the law relating to abortion has remained unchanged since 1969, the way that abortion is managed by medical practitioners is changing in ways that were not contemplated in 1969. The combination of the drugs mifepristone (also known as RU486) and misoprostol, (which we are referring to as 'medication abortion') has radically changed abortion provision. However, the laws we now have were never designed to address such drugs. Instead, they date back to a period when women could buy or acquire 'potions, purgatives, enemas, emetics and uterine douches prepared at home from the likes of oil of savine, oil of tansy, ergot of rye, pennyroyal, aloes and myrrh, or ready-mixed by amateur apothecaries'.[89] Some caused abortion and poisoned the woman herself, while others were neither poisonous nor effective, though no doubt they were profitable.[90] The South Australian provisions dealing with

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84 For recent Australian examples, see Sifris, above n 3, 110–11.

85 Baird, 'The Incompetent, Barbarous Old Lady Round the Corner', above n 21, 13.

86 Ibid 15.

87 Ibid.

88 de Costa, Douglas and Black, above n 1; de Costa et al, above n 1.

89 Haigh, above n 23, 13.

90 This appears to have been the case in relation to the pills involved in *R v Lindner* [1938] SASR 412, discussed below. Finch and Stratton, above n 18, 56 discuss the effectiveness and availability of chemical abortion in Australia prior to 1939, suggesting it was

abortifacients are based on the *Offences Against the Person Act 1861* (UK). They were not altered in 1969 when surgical abortion was the only safe method used by the medical profession and no safe, effective medication option was available.

This has given rise to understandable concern about whether the prescription and administration of mifepristone (which renders the pregnancy unviable) and misoprostol (which causes the expulsion of the contents of the uterus) must comply with the s 82A requirements in order to be lawful. In South Australia, the s 82 requirements for performing lawful surgical abortion are currently being routinely applied to medication abortion. Notification through the prescribed form in the *Criminal Law Consolidation Act 1935* (SA) and regulations is completed; two medical practitioners must agree on the request for abortion meeting the statutory test, there is an expectation that the drugs will be prescribed and taken in a hospital setting, and so on.

Caroline de Costa and her co-authors demonstrate that a great deal of circumspection that is not required by the legislation that sets out the relevant law is being exercised in relation to abortion services in Queensland and New South Wales.[91] It seems logical to us to inquire whether the same is true of South Australia. In South Australia, the criminal law regulates abortion procured through the use of a 'poison or other noxious thing'.

> 81 — Attempts to procure abortion
>
> …
>
> (2) Any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be guilty of an offence and liable to be imprisoned for life.[92]

The language of the provision dealing with supply is very similar:

> 82 — Procuring drugs etc to cause abortion
>
> Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years.[93]

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well known within working class women's networks but that its failure often led to the use of mechanical methods.

91 de Costa, Douglas and Black, above n 1; de Costa et al, above n 1.

92 *Criminal Law Consolidation Act 1935* (SA) s 81(2).

93 Ibid s 82.

In order to make the issue clear, we compare the law of the Northern Territory with the South Australian law. The *Criminal Code Act 1983* (NT) regulates the use of any 'drug' for the termination of pregnancy. 'Drug' is defined to include 'a poison'. The law thus has a wider reach than 'poison or other noxious thing', the language of the South Australian law, with the result that mifepristone unquestionably falls within the *Criminal Code Act 1983* (NT) provisions.[94]

In South Australia, there are two ways to reach the conclusion that mifepristone is regulated by s 82A. The first implies an acceptance that mifepristone is a 'poison or other noxious thing'.[95] The second relies on the language of s 82A(9), which provides that: 'For the purposes of sections 81 and 82, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by this section.'[96]

A *Is Mifepristone a 'Poison or Other Noxious Thing'?*

Section 21 of the *Acts Interpretation Act 1915* (SA) makes it clear that legislation is deemed to be 'always speaking' and therefore applicable to '[new] circumstances as they arise'. *National Mutual Life Association of Australasia Ltd v Commissioner of State Taxation*[97] indicates that this provision requires the natural meaning of the words of the statute to be informed by their meaning at the time they were enacted, but not limited to it. Rather, a contextual approach will be taken.

> At one time the approach of the courts was that Acts were to be construed … in accordance with their natural meaning at the time of enactment. This approach has largely been abandoned, particularly in jurisdictions such as South Australia which have an express 'always speaking' requirement.[98]

Further, s 22(1) of the *Acts Interpretation Act 1915* (SA) establishes that

> where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.

The term 'poison or other noxious thing' is not defined in the Act. The question therefore arises whether mifepristone can be regarded as 'a poison or other noxious thing' within the natural meaning of these words. We contend that it is neither poisonous nor noxious.

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94 *Criminal Code Act 1983* (NT) sch 1 ss 208A–208B.

95 *Criminal Law Consolidation Act 1935* (SA) ss 81(2), 82. Section 81(2) deals with attempts to procure abortion and s 82 deals with procuring drugs etc to cause abortion.

96 Ibid s 82A(9).

97 (2011) 110 SASR 536.

98 Ibid 566 [111].

The only precedent on the interpretation of this phrase is *R v Lindner*.[99] Lindner was charged under s 82 with supplying pills to a woman referred to in the judgment as 'Jacka'. As the other elements of the offence were not seriously disputed, this case turned on whether the pills were a 'poison or other noxious thing', which the appeal court found was a matter of fact for the determination of the jury.[100] The jury at trial had been asked whether the pills were 'noxious, that is capable of doing harm to a pregnant woman'.[101] The jury had found that they were not, and the language of the instruction was not impugned on appeal. On this basis, the guilty verdict reached at trial was set aside on appeal as insupportable in law. The Court stated that 'the means, adopted or intended [to induce miscarriage], must be such as to involve some appreciable risk of harm'.[102] The fact that the legislation is applicable whether or not the woman is actually pregnant strongly suggests the conclusion that the risk of harm must be to the woman herself and not to the foetus.[103]

The Court in *R v Lindner* expressly discarded case law from New South Wales on the basis that the legislation there used the expression 'drug or noxious thing'.[104] In the New South Wales cases, it was clearly enough for the prosecution to show that the accused had supplied a 'drug', but these cases were found to be inapplicable in South Australia.

The Crown prosecutor apparently drew language from both s 81(2):

> Any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or *other means whatsoever* with the like intent, shall be guilty of an offence …[105]

And from s 82:

> Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument *or thing whatsoever*, knowing that it is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years.[106]

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99 [1938] SASR 412.

100 Ibid 416.

101 Ibid 413.

102 Ibid 416. Judgment of Murray CJ, Napier and Richards JJ in the South Australian Court of Criminal Appeal.

103 *Criminal Law Consolidation Act 1935* (SA) s 81(2), for example, states: 'Any person who, with intent to procure the miscarriage of any woman, *whether she is or is not* with child' (emphasis added).

104 *R v Lindner* [1938] SASR 412, 416.

105 *Criminal Law Consolidation Act 1935* (SA) s 81(2) (emphasis added).

106 Ibid s 82 (emphasis added).

The prosecutor stated: 'The words "any other means" [in s 81(2)] are intended to prohibit anything done with intent to procure abortion. The word "whatsoever" [in s 82] must have some effect'.[107] The Court instead accepted the appellant's contention

> that the Statute deals separately — in two distinct sentences — with the two recognized methods of procuring miscarriage, first by means of active agents — poisons or noxious things — which are 'administered' or 'taken,' to operate by their intrinsic force or properties, and secondly by other means as for instance by 'instruments or other things,' which are 'used' but possess no active properties.[108]

The Court went on to explain that in s 81

> [t]he Statute specifies the things that it is felony to take, and having done so, it turns to the use of other means — force in one form or another — but it is very doubtful whether the second limb of the prohibition was intended to embrace the subject matter — things that can be taken — which is completely covered in the preceding sentence. The word 'other' is referable to 'instrument'; it is not referable to 'poison or noxious thing.'[109]

In reaching its judgment, the Court considered cases from the UK where the language of the statute was then identical. It also considered cases from New Zealand — in each case a conviction was precluded by a finding that the substance in question was not a 'poison or other noxious thing'. The Court referred to an unreported decision of the South Australian Court of Criminal Appeal in which the jury had been instructed 'that they could not convict unless the stuff was a poison or noxious thing'.[110]

R v Lindner suggests that unless a substance is capable of causing appreciable harm to a pregnant woman it cannot be regarded as 'a poison or other noxious thing' within the meaning of ss 81–2. This was also the approach taken in *R v Brennan*,[111] in which the jury was instructed to decide whether mifepristone and misoprostol were 'noxious' by reference to whether they were noxious to the second defendant, Leach, and not whether they would have been 'noxious' to any foetus she may or may not have been carrying. Since ss 81–2 of the South Australian Act are applicable whether or not the woman is pregnant, the conclusion that the law regulates only substances which are poisonous or noxious to the woman herself is especially compelling.

'Poison or other noxious thing' bears a clear natural meaning now, just as it did in 1938. It therefore appears entirely plausible that in the absence of proof that mifepristone is a 'poison or other noxious thing' it is not an offence in South Australia

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107 *R v Lindner* [1938] SASR 412, 413 (citations omitted).

108 Ibid 414.

109 Ibid 415.

110 Ibid 416 citing *R v Cornelius* (Unreported, Supreme Court of South Australia, October 1937).

111 (Unreported, District Court of Queensland, Everson DCJ, 14 October 2010).

to procure, supply, administer or cause it to be taken with intent to procure a miscarriage unless s 82A(9) compels this conclusion.

There is no medical evidence that mifepristone, alone or in combination with misoprostol, is poisonous or noxious. Rather, there is a substantial body of evidence that demonstrates that mifepristone (and the combination of mifepristone and misoprostol) are medically safe. Extensive international use of mifepristone and misoprostol[112] has generated data collection with the statistical power to demonstrate the frequency of complications with a high degree of confidence despite their very low frequency. The death rate resulting from medication abortion in the USA is one in 100 000.[113] For an Australian woman, the risk of death from continuing a pregnancy to term is six times higher than if she were to terminate the pregnancy.[114] The risk of death following abortion in the USA has also been assessed comparatively. It is lower than the risk associated with plastic surgery or dental procedures and equivalent to the risk of death associated with running a marathon, driving a car for 782 miles or participating in a major bicycle race.[115] Rates of complications, such as transfusion, infection and haemorrhage are also very low.[116]

Should doubt remain, the Court in *R v Lindner* reiterated the long-standing principle that in the case of any ambiguity, ‘the accused is entitled to the benefit of the doubt’ in the interpretation of a penal statute.[117] Although this principle is more narrowly

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112 Mifepristone (in combination with misoprostol) has been in routine use to induce abortion in France and China since 1988. These drugs were approved for use in a further 58 countries by 2013. Marketing approval was granted in Australia in 2012. Gynuity Health Projects, *List of Mifepristone Approvals* (June 2015) <http://gynuity.org/resources/read/llist-of-mifepristone-approval-en/%20countries>.

113 The largest published data collection is derived from post marketing surveillance conducted by the Food and Drug Administration following the first 1.52 million doses of mifepristone/misoprostol distributed following marketing approval in the USA in 2006. Jillian T Henderson et al, ‘Safety of Mifepristone Abortions in Clinical Use’ (2005) 72 *Contraception* 175; Philip Goldstone, Jill Michelson and Eve Williamson, ‘Early Medical Abortion Using Low-Dose Mifepristone Followed by Buccal Misoprostol: A Large Australian Observational Study’ (2012) 197 *Medical Journal of Australia* 282; Ea Mulligan and Hayley Messenger, ‘Mifepristone in South Australia: The First 1343 Tablets’ (2011) 40 *Australian Family Physician* 342.

114 World Health Organization, *Trends in Maternal Mortality: 1990 to 2013* (2014) <http://apps.who.int/iris/bitstream/10665/112697/1/WHO_RHR_14.13_eng.pdf>. For more recent and local data, see Wendy Scheil et al, *Pregnancy Outcome in South Australia 2011* (Pregnancy Outcome Unit, SA Health, Government of South Australia, 2013).

115 Elizabeth G Raymond et al, ‘Mortality of Induced Abortion, Other Outpatient Surgical Procedures and Common Activities in the United States’ (2014) 90 *Contraception* 476.

116 Mary Gatter, Kelly Cleland and Deborah L Nucatola, ‘Efficacy and Safety of Medical Abortion Using Mifepristone and Buccal Misoprostol Through 63 Days’ (2015) 91 *Contraception* 269.

117 [1938] SASR 412, 416 (citations omitted). Judgment of Murray CJ, Napier and Richards JJ in the South Australian Court of Criminal Appeal.

interpreted now than in the past,[118] the principle that a penal statute should be strictly construed in the case of ambiguity remains.[119] The principle that penal statutes are to be strictly construed has been applied by an English court in the context of abortion.[120]

A purposive interpretation of the statute would, we argue, produce the same result. We have argued that protecting women's health was a central focus of the amending legislation. It is logical that Parliament would seek to control the supply and administration of poisons and noxious substances, which represent a clear risk to women's health. Parliament did not amend the language of the statute in line with other readily comparable statutes in existence in 1968–69 in order to regulate 'drugs' rather than poisons and noxious substances.

We contend that mifepristone is not a 'poison or other noxious thing', within the meaning of the statute.

B *What is the Effect of s 82A(9)?*

If mifepristone and misoprostol are neither poisons nor noxious substances, the broad language of s 82A(9) remains as the only provision which might bring abortion through the use of safe medications within the criminal law in South Australia. Again, there is only one case which considers this issue. Chief Justice Bray considered this provision in *R v Anderson*.[121] There, he considered the possibility that this provision would render all abortion unlawful unless undertaken within the terms of s 82A.

From the perspective of 1973, and perhaps also from the perspective of one so concerned to protect the defences afforded by the common law from all but the most clearly expressed of incursions from Parliament, this struck Bray CJ as 'very odd'.[122] It implied that even abortions which would have been lawful under the common law might become unlawful under the liberalised 1969 provisions.[123] This was a conclusion Bray CJ was not ready to embrace. However, no decision on this question was required by the case before him. He found the consequences of a broad reading of the provision 'unpalatable' and stated that this might be grounds for reading down the provision. Finally, he proposed that 'the unsatisfactory state of s 82a in this regard should be drawn to the attention of the legislature.'[124]

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118 *Beckwith v The Queen* (1976) 135 CLR 569, 576.

119 Ibid; *R v Lindner* [1938] SASR 412, 416; *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 145; *Waugh v Kippen* (1986) 160 CLR 156, 164; Pearce and Geddes, above n 39, 369.

120 *C v S* [1988] 1 QB 135.

121 (1973) 5 SASR 256, 270–1.

122 Ibid 270, then accepted by Bray CJ as having been stated by *Bourne* [1939] 1 KB 687.

123 Then accepted by Bray CJ as having been stated by *Bourne* [1939] 1 KB 687.

124 *R v Anderson* (1973) 5 SASR 256, 271.

It remains the case that no court has ruled on the meaning of s 82A(9) and the interpretation of this provision must remain a source of potential concern in relation to the provision of abortion induced by the use of drugs. If this provision leaves room for the operation of the common law, the ongoing lack of clarity about the common law and its continued dependence on a small number of decisions made by single judges means that the common law itself is not clear.[125]

C *What is 'Treatment for the Termination of the Pregnancy'?*

In the case of surgical abortion, the conduct which amounts to 'treatment for the termination of the pregnancy' has a clear beginning and end, and s 82A requires that this procedure is conducted within a hospital in order for it to be lawful. It is far less obvious what might amount to 'treatment for the termination of the pregnancy' in relation to medication abortion. As we stated above, current practice in South Australia requires medical practitioners to prescribe mifepristone inside a hospital, and for both mifepristone and misoprostol to be taken by the patient in a hospital. Which part of the process of a medication abortion amounts to 'treatment for the termination of the pregnancy'?

Taking mifepristone renders the pregnancy unviable, terminating the pregnancy. Does s 82A mean that the ingestion of this drug is 'treatment for the termination of the pregnancy', which must take place in a hospital? Section 82A was not drafted to address such a situation.

The function of misoprostol is to cause the expulsion of the contents of the uterus. Requiring misoprostol to be taken in a hospital setting is likely to mean that, for women who live some distance away from the hospital where they have received 'treatment', the process of expelling the contents of the uterus will commence before they arrive home, as misoprostol can take effect from 30 minutes to six hours after ingestion. This does not represent optimal health care. Indeed, it seems likely to compromise women's health needlessly, coming into conflict with the intention with which this legislation was passed.

V If the Law is so Clear, Why all the Angst?

Assertions that abortion is illegal in South Australia (and in general) have persisted in spite of the 1969 legislation (and the common law grounding of lawful abortion before 1969). One obvious example is *City of Woodville v SA Health Commission*,[126] in which the plaintiff sought to prevent the Pregnancy Advisory Centre opening within their council area on the basis that abortion was an offence under s 82A of the *Criminal Law Consolidation Act 1935* (SA). The application was refused on the basis that s 82A establishes that treatment for the termination of pregnancy must be carried out in a

125 *Bourne* [1939] 1 KB 687; *R v Davidson* [1969] VR 667 (Menhennitt J) ('*the Menhennitt ruling*'); *R v Wald* (1971) 3 DCR (NSW) 25 (Levine J) ('*Wald*'); *R v Bayliss* (1986) 9 Qld Lawyer Reps 8 (McGuire J).

126 [1991] SASC 2761 (8 March 1991).

hospital and the proposed centre would be a hospital in the relevant legal sense. Justice Matheson found that the plaintiff did not have standing, and stated:

> this Court should not exercise its discretion to grant interlocutory relief on the assumption that the South Australian Health Commission or any other person would be an accessory to the commission of a serious crime when the determination of such issues has been left by Parliament to a jury.[127]

Such arguments are not limited to South Australia. Standing was the conclusive issue in *Right to Life Association (NSW) Inc v Secretary of the Department of Human Services and Health*,[128] in which Right to Life sought review of the Therapeutic Goods Administration's decision to permit clinical trials of mifepristone as a breach of s 83 of the *Crimes Act 1900* (NSW) and s 65 of the *Crimes Act 1958* (Vic). The Court found that Right to Life did not have standing on this issue and this decision was affirmed on appeal.[129]

Cases such as these give the impression that abortion is always unlawful without any substantive underpinning. In doing so, they give a sense of plausibility to concerns that medical abortion providers may be prosecuted, as do arguments which emphasise 'the fundamental criminal status of abortion'.[130] These concerns are not, in any obvious sense, based on the letter of the law. If we take our eyes off the letter of the law and look to its substantive operation, historians have documented low rates of arrest, prosecution and conviction of doctor abortionists even prior to liberalisation. Judith Allen, for example, contends (based on New South Wales data) that selective policing and prosecution meant that from the early 1900s, 'the competent attracted little attention and had little to fear'.[131] She identifies the likelihood of prosecution in that period as being associated with: female non-doctor abortionists; late-term abortion (in the fourth month of pregnancy or later — often occasioned by the time taken to save the necessary fee); high charges; and a critically ill or dead patient.[132] Juries have long been reluctant to convict abortionists[133] (especially doctors), and in the 1950s through to the 1970s, abortion was widely available, seldom prosecuted and even less frequently resulted in conviction.[134]

If prosecution and conviction were rare prior to liberalisation, they have become rarer still since. Yet, prosecutions have had an immense impact in debates over abortion, and their apparent capriciousness[135] has often been part of the reason for their impact.

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[127] Ibid [50].

[128] (1994) 52 FCR 209.

[129] *Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50.

[130] Rankin, 'Disappearing Crime of Abortion', above n 3, 4.

[131] Allen, above n 24, 104. Haigh, above n 23 allows a similar conclusion.

[132] Allen, above n 24, 165.

[133] Finch and Stratton, above n 18, 47.

[134] Gleeson, above n 7, 72–3.

[135] Jenny Morgan, 'Abortion Law Reform: The Importance of Democratic Change' (2012) 35 *University of New South Wales Law Journal* 142, 149.

Some prosecutions, however, have been triggered by controversy. *Wald*[136] took place during a spate of arrests driven by a scandal about police corruption in relation to abortion — arrests which abruptly halted after all of the accused were acquitted.[137] As Kate Gleeson has argued, 'this reactionary moment in corrupt state governance … does not support a theory that Australia has a long history of prosecuting women and doctors over abortions.'[138] Rather, *Wald* formed a turning point in New South Wales. Judith Allen contends that *Wald* eroded the capacity of corrupt police to extort abortion providers and their patients by clarifying the circumstances under which medical abortion would be lawful. She argues public funding further undermined the provision of non-medical abortion and attendant corruption by reducing the price of medical abortion.[139]

In other cases, prosecution has triggered controversy to such an extent that it has resulted in law reform. Tasmania saw law reform after the 'sudden and unanticipated'[140] police investigation of doctors providing abortion services.[141] In Western Australia, decriminalisation occurred when a change in the Director of Public Prosecutions' policy led to a prosecution which was subsequently discontinued.[142] In each case, prosecutorial action called into question the previously accepted belief in those jurisdictions that *the Menhennitt ruling* was the source of the law in each state. This experience quite appropriately gives rise to concern in other jurisdictions where the grounds for lawful abortion continue to be stated by the common law.

Only one medical practitioner has, so far as we can discover, been prosecuted for an abortion-related offence in South Australia since the 1969 amendments became law.[143] He was charged with abortion offences in relation to two procedures carried out in his surgery and thus not complying with the s 82A(1) requirement for abortion to take place in a hospital. He was acquitted of the first at trial after asserting that he

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136 [1971] 3 DCR (NSW) 25.

137 Allen, above n 24, 209.

138 Gleeson, above n 7, 73.

139 Allen, above n 24, 209. See also Gleeson, above n 7, 73.

140 Nicolee Dixon, 'Abortion Law Reform: An Overview of Current Issues' (Research Brief No 2003/09, Queensland Parliamentary Library, Queensland Parliament, 2003) 17.

141 Barbara Baird, 'Abortion Politics During the Howard Years: Beyond Liberalisation' (2013) 44 *Australian Historical Studies* 245, 253–4.

142 Dixon, above n 140, 17. Historically, changes in the policing and prosecution of abortion, which have often occurred after changes in crucial personnel, have resulted in abrupt changes in policy. One example is the appointment of 'an activist Catholic, Francis Holland' to the role of Police Commissioner in Victoria in the mid-1960s, which led to a sudden and dramatic escalation in prosecutions for abortion offences. These events appear to have triggered the test case that produced clarification in the law of Victoria: *the Menhennitt ruling* [1969] VR 667. See Morgan, above n 135, 146.

143 *R v Anderson* (1973) 5 SASR 256. Some of the medical evidence before the Court suggested that Anderson was using 'the backyard method' rather than dilation and curettage, which was clearly, at this stage, the accepted method, and a method with which Anderson was clearly familiar.

had performed the abortion 'pursuant to [s 82A(1)], because he thought an immediate termination necessary to prevent grave injury to [the woman's] physical or mental health, particularly her mental health'.[144] His conviction on the second charge was quashed on appeal on the basis that there was reasonable doubt about whether he had ever believed the complainant was pregnant. This gave rise to doubt about whether the mental element of the offence had been proved and whether an abortion had actually been performed. It follows that there has been no conviction of a medical practitioner for providing an abortion in South Australia in the post-liberalisation period.[145]

If prosecutions are rare (though unpredictable), convictions of medical practitioners for abortion-related offences in the post-liberalisation period have been rarer still.[146] Yet, the potential consequences of a prosecution mean that the small number of prosecutions that do exist have a disproportionately chilling effect: they participate in generating the perception that abortion is not a standard medical procedure, nor even a medical procedure with profound ethical implications. After all, many medical procedures have profound ethical implications which do not result in their inclusion in the criminal law or their being subject to claims of illegality.

The sense that abortion is not a standard medical procedure is constantly emphasised in South Australia by the requirements that must be met for lawful abortion, which are extensive and certainly not dictated by the medical risks of the procedure. Abortion is medically straightforward and very safe. The requirements imposed by the amendments of 1969 require personal examination of the patient, the agreement of two medical practitioners, provision of the service in a hospital, completion of a form recording a required set of personal details collected by the state government and so on. Even more restrictive requirements are imposed in the Northern Territory, with the result that abortion services are not available outside Alice Springs and Darwin, despite the highly dispersed remote population of the Northern Territory.[147] As Jenny Morgan has pointed out, the regulatory regime that resulted from the liberalisation of abortion in South Australia is more restrictive than that which was obtained in New South Wales and Victoria (and continues in New South Wales) under the common law after *the Menhennitt ruling*. For example, *the Menhennitt ruling* does not stipulate a requirement for two medical practitioners to agree, does

144 Ibid 262 (Bray CJ).

145 There has been a conviction for a non-doctor attempting to procure an abortion *R v C* [2004] SADC 26 (27 February 2004). The attempted charge was one of 11 charges and formed part of a series of alleged assaults. The defendant was not medically qualified and the charge related to conduct that was clearly dangerous and apparently non-consensual.

146 Key among them is *R v Sood* [2006] NSWSC 1141 (31 October 2006), which involved the conviction of a doctor for an abortion performed without an examination of the patient. This action could not hope to meet the requirements for a lawful abortion in New South Wales. See commentary in Gleeson, above n 7, 69–70.

147 de Costa et al, above n 1, 109.

not involve reporting requirements and does not require the procedure to take place in a hospital.[148]

However, conviction is not the only form of harm a medical practitioner can suffer for providing abortion services. A widely-publicised Victorian case in which a doctor was sacked (though later reinstated), six doctors were suspended and an eight-year process which ultimately exonerated them followed, is instructive.[149] The history of Australian abortion service provision is littered with examples of medical practitioners apparently passed over for important roles because of their support for abortion services,[150] expert authors pilloried in mainstream media for their participation in writing reports on the subject and medical practitioners stopped in Australian airports or required to agree to conditions prior to being permitted entry to Australia to speak to other abortion providers.[151] The reports themselves have been downgraded, withdrawn, censored (and needless to say, not acted upon)[152] when they cast abortion as a health service and not only a moral issue.[153] It should therefore not be assumed that the expectation of conviction is the only issue that might concern abortion providers.

VI Conclusion

In this article, we have argued that when the South Australian Parliament liberalised access to abortion in 1969 its primary goal was to preserve women's health through clarifying the contexts in which lawful abortion would be available. It chose to do so through a select committee process followed by exhaustive debate in Parliament, resulting in new provisions that were thoroughly tested by the democratic process. We have argued that despite public claims to the contrary, abortion services that comply with the statutory scheme in South Australia are lawful. The demonstrable safety of abortion services in South Australia since 1969, and the absence of prosecutions and convictions in this State, suggest that Parliament achieved its goals. The law in relation to surgical abortion was rendered clear, with immediate, positive

[148] Morgan, above n 135, 147–8. The common law position is summarised in *the Menhennitt ruling* [1969] VR 667, 672:

> 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.

[149] Lachlan J de Crespigny and Julian Savulescu, 'Abortion: Time to Clarify Australia's Confusing Laws' (2004) 181 *Medical Journal of Australia* 201.

[150] Baird, 'Abortion Politics During the Howard Years', above n 141, 250.

[151] Ibid 251.

[152] Ibid 250; Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make* (Allen & Unwin, 1998) xxx–xxxi.

[153] Baird, 'Abortion Politics During the Howard Years', above n 141, 251.

impacts on women's health. The deaths and serious injuries that were a persistent feature of abortion provision prior to 1969 have been all but eliminated.[154]

The advent of safe, effective medication abortion is not addressed by the statutory language we now have. We have argued that the drugs now in use for this purpose are neither poisons nor noxious substances. The current South Australian legislation using these terms was drafted to address the social, moral and medical context of much earlier times. If abortion through the use of medication is caught within the current legislation, it is caught by virtue of s 82A(9) rather than by the language adopted to address abortion through the use of poisons and noxious substances. The s 82A provisions of 1969, designed to ensure the safety and legality of surgical abortion, are poorly adapted to the contemporary provision of abortion by medication. They now conflict with the provision of quality medical care. In our view, the legislation should be amended to render it consistent with the provision of best practice medical care, at the very minimum. The use of legislation designed to ensure women's health and safety to prevent best practice in medical care is an affront to the intentions with which this legislation was originally passed.

We would contend that any suggestion that abortion carried out in compliance with the statutory scheme is criminal in South Australia, or that medical practitioners who comply with the statutory scheme in good faith run the risk of being prosecuted, is not grounded in an accurate account of the positive law. Nor is it supported by the application of the law in practice since 1969.[155]

Nevertheless, the continued presence of abortion-related offences in the criminal law is undesirable. As researchers have demonstrated in relation to other jurisdictions, the presence of abortion offences generates concern in the medical profession and creates potential for the imposition of restrictions on abortion services which the legislative scheme itself does not demand. These circumstances give rise to treatment regimes and restrictions on the availability of abortion that prejudice women's health, rather than protect it. Currently, law reform is under discussion in New South Wales.[156] Reforms are currently before the Parliament of the Northern Territory in the form of the Medical Services Amendment Bill 2015 (NT). The Victorian Parliament has recently passed amendments to the *Public Health and Wellbeing Act 2008* (Vic) creating buffer zones around reproductive health services.[157] The time is ripe for reconsideration in South Australia. We would argue that South Australia

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154 Farhat Yusuf and Stefania Siedlecky, 'Legal Abortion in South Australia: A Review of the First 30 Years' (2002) 42 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 15, 21.

155 Kate Gleeson makes a similar argument in relation to New South Wales and the 1998 debates over abortion law in Western Australia: Gleeson, above n 7.

156 The Greens New South Wales, *Greens MP Launches NSW Abortion Law Reform Campaign at Martin Place* (28 September 2015) <http://nsw.greens.org.au/news/nsw/greens-mp-launches-nsw-abortion-law-reform-campaign-martin-place>.

157 Public Health and Wellbeing Amendment (Safe Access) Bill 2015 (Vic) cl 3, which inserts pt 9A in the *Public Health and Wellbeing Act 2008* (Vic).

should follow Victoria[158] and the Australian Capital Territory in removing abortion from the criminal law so that abortion provision can be driven by concern for the provision of quality health care services rather than by concern to avoid criminal consequences (expressed in language that dates back, in some cases, to the Victorian era) or by unfounded beliefs that parliamentary support for safe, medical abortion will be punished by the electorate.[159]

[158] See discussion of the Victorian example as evidence of democratic process being used to remove abortion from the criminal law in a way that 'configures women as responsible decision-makers, at least until the foetus is at 24 weeks' gestation': Morgan, above n 135, 172.

[159] Helen Pringle, 'Abortion in Australian Elections: A Vote Loser for Women?' (2012) 27 *Australian Feminist Studies* 389.