24 Termination of pregnancy and related issues

This chapter focusses on the legal aspects of termination of pregnancy (abortion) in Australia and the issues of child destruction, concealment of birth and infanticide. Abortion may raise serious ethical questions for the doctor, consideration of which may be influenced by personal and religious beliefs. This chapter focusses on the law and does not attempt to address the complex ethical, social and community considerations surrounding abortion, but a relevant bibliography is provided.

24.1 Legal regulation of abortion: historical background

The criminal law relating to abortion in Australia varies from state to state. With the exception of the Australian Capital Territory, Victoria and more recently Tasmania, procuring a miscarriage is a criminal offence to which there is a defence if certain criteria (see below) set by law are met. The law in the Australian states and the territories had its origin in British law where the Miscarriage of Women Act 1803 (UK) made it a capital offence for any person 'unlawfully to administer any noxious and destructive substance or thing with intent to procure the miscarriage of a woman 'quick' with child.' Later, the offence was extended to include the period prior to 'quickening'.[1]

The law of abortion protected the fetus *in utero* and the law of homicide protected the infant after birth, but during the process of birth itself, the fetus did not have the protection of the criminal law. To fill this gap, the Infant Life (Preservation) Act 1929 (UK) was passed to create the offence of 'child destruction'. The Act provided that a person is not guilty of 'causing a child to die before it has an existence independent of its mother' if it could be proved that 'the act which caused the death of the child was done in good faith for the purpose only of preserving the life of the mother'. In 1938, in the UK case of *R v Bourne* [1],

[1] Quickening refers to the point at which a pregnant woman first becomes aware of the movement of the fetus, usually at 18–20 weeks with a first pregnancy. The term is derived from an old meaning of 'quick'—to be alive.

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Justice Macnaghten adopted this concept of preservation of the life of the mother in determining the circumstances in which an abortion could be said to be lawful and said:

> if the doctor is of the opinion, 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 jury are quite entitled to take the view that the doctor, who, in those circumstances and in the honest belief, operates, is operating for the purpose of preserving the life of the woman [1].

Later, the Abortion Act 1967 (UK) was passed. It laid down the grounds and conditions under which the termination of pregnancy would be lawful. In brief, the legality of abortion under the Act depends on two doctors forming the opinion in good faith that either there is a risk to the life of the woman or a risk of injury to her physical and mental health or of any existing children of her family greater than if the pregnancy were terminated, or that there is substantial risk of serious abnormality in the child. The passage of this legislation may have influenced some key decisions made by Australian courts shortly thereafter.

24.2 Abortion law in Australia

Abortion ceased to be a crime in the ACT in 2002, in Victoria in 2008 and in Tasmania in 2013. However, abortion is still regulated in those jurisdictions (see section 24.3), and failure to comply with the regulation is an offence. In New South Wales, Queensland, South Australia, Western Australia and the Northern Territory, the law and its current interpretation is based primarily on the Victorian case of *R v Davidson* [2,3]. Dr Davidson was prosecuted in 1969 in the Supreme Court of Victoria on five counts of abortion contrary to Section 65 of the *Crimes Act 1958* (Vic), which made it a felony to 'unlawfully' procure, or attempt to procure, an abortion. The trial judge, Justice Menhennit, reviewed the then relevant legislation and decisions in the UK and Australia and gave the following ruling on the meaning to be applied to the term 'unlawfulness':

> On the basis of all the foregoing, I accordingly decide that the relevant law in relation to unlawfulness is as follows:
>
> For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was —

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