CONFRONTING THE FEAR OF BEING 'CAUGHT': DISCOURSES ON ABORTION IN WESTERN AUSTRALIA

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The unresolved legal status of abortion in Australian States and Territories, as evidenced by the persistent gap between law and practice, calls for a critical assessment of the elements constituting abortion discourse in Australia. The recent changes to the Western Australian criminal laws governing abortion provide a unique opportunity for such an assessment. This paper critically analyses the language and conceptual tools relied upon in the Western Australian parliamentary debates, and explores the ways in which an equality concept might apply in a revisioning of abortion laws. It is argued that the uncritical embrace of certain concepts and language in the context of abortion and women's reproductive rights will dangerously belie efforts aimed at redressing inequality.

INTRODUCTION

> Can we live with our conscience if we, the politicians [of Western Australia], in failing to change the law, witness women dying or sterilising themselves unnecessarily because access to a safe, legal medical service is denied?[1]
>
> Hon Cheryl Davenport 1998

The fear of becoming pregnant confronts every sexually active, heterosexual female at some stage during, and perhaps even throughout, her entire reproductive life. When the fear becomes reality, many women throughout history have taken drastic measures in the absence of medical assistance. In 1949 Simone de Beauvoir was one of the first to find expression for this largely unspoken yet unrelenting fear and reality of unwanted pregnancy:

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1 Western Australia, *Parliamentary Debates*, 10 March 1998 at 10 (Cheryl Davenport).

> [H]e is resentful of the woman's too fertile body; she dreads the germs of life that he risks placing within her. And both are appalled when in spite of all precautions she finds herself caught .... Then resort is had to an especially desperate remedy: that is, abortion.[2]

While there are consequences for both men and women following conception, de Beauvoir describes only the woman as being 'caught'. This is so for a number of reasons. Not only is a woman caught physically by a pregnancy, she is also caught by the social and economic conditions which surround and define pregnancy. Given that not all women wish to become mothers immediately, or ever, and that not all women have the financial means or support to continue a pregnancy, abortion has long provided a remedy in the context of unplanned and unwanted pregnancy.

In this context, the decision to become a mother, to have an abortion, or to place a child up for adoption is intrinsic to the notion of 'being caught'. The difficulty of this decision is illustrated first, by the automatic labelling of the pregnant woman as 'mother';[3] secondly, in the number of attempts made by men to assert rights in relation to pregnancy and particularly the termination of pregnancy;[4] and thirdly, in the laws that criminalise abortion and restrict access to safe medical procedures.[5] The impact of these factors can determine a woman's decision when facing pregnancy. However, the limitation common to all women making reproductive decisions, with which this paper is principally concerned, is the existence of a legal framework that has restricted access to safe abortion procedures.

While it has been pointed out by Australian feminists that "there is no one area of 'the law' dealing comprehensively with the subject of abortion",[6] legal barriers to abortion persist most strikingly in the criminal laws of Australian States and Territories.[7] In most cases, these laws apply both to the woman

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2 S de Beauvoir, *The Second Sex*, Picador (1998) p 502.

3 The labelling of women as 'mothers' is discussed further in Part II A (i).

4 The incidence of forceful behaviour and threats of legal intervention is perhaps even more common than the few reported cases suggest. In early 1998, it was reported that a man had exerted coercive physical force upon his girlfriend on being informed that she intended to terminate her pregnancy: T Stoney, "Woman Hit by Ex-Fiance", *The Herald Sun* (Melbourne), July 1998, p 27. The woman was abducted and assaulted by her ex-fiancé after she had told him she planned to have an abortion. See also *Attorney-General's Reference (No 3 of 1994)* [1998] 245, which concerned the death of a baby born prematurely as a result of injuries sustained in the womb, inflicted by the father. In other cases, men have instituted legal proceedings on behalf of the foetus to prevent women from having abortions: see *Attorney General for the State of Queensland (Ex rel Kerr) v T* (1983) 57 ALJR 285 (*Kerr*) which followed the English approach in *Paton v British Pregnancy Advisory Trustees* [1979] QB 276 (*Paton*). In *Kerr*, the application for leave to appeal to the High Court was rejected by Gibbs CJ who commented at 286 that: "[t]here are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims". See also *In the Marriage of F and F* (1989) FLC 92-031; and *Tremblay v Daigle* (1989) 62 DLR 4th 643.

5 Discussion of the criminal laws relating to abortion appears in Part I A.

6 R Graycar and J Morgan, "Before the High Court – 'Unnatural rejection of womanhood and motherhood': Pregnancy, Damages and the Law" (1996) 18 *Sydney Law Review* 323 at 330; R Graycar and J Morgan, *The Hidden Gender of Law*, Federation Press (1990) pp 4-5.

7 *Crimes Act* 1958 (Vic), ss 65-6; *Crimes Act* 1900 (NSW), ss 82-3; *Criminal Code* 1899 (Qld), ss 224-6; *Criminal Code Act* 1924 (Tas), ss 134-5; *Criminal Law Consolidation Act* 1935 (SA), ss 81-2.

seeking the abortion and to the person performing the procedure in circumstances where the "woman's life" is not sufficiently endangered by the pregnancy.[8] However, while the criminal laws remain firmly entrenched in statute, their effect in practice has generally been minimal, with some 80,000 publicly funded abortions occurring each year throughout Australia.[9] Recent polls have further evidenced a significant change in social attitudes towards abortion, indicating a growing acceptance of the practice.[10] In February 1998, 47 per cent of those surveyed in a Morgan poll thought that abortion laws should be reformed making abortion easier to obtain, while only 38 per cent thought the laws should remain as they are.[11] Importantly, according to women of common childbearing age, 54 per cent of those aged between 25 and 35 years, and 56 per cent of those between 35 and 49 years, agreed that abortion should be easier to obtain.[12] At the State level, the proportion of those who thought abortion laws should be liberalised was 55 per cent in Tasmania, 53 per cent in Victoria and 53 per cent in Western Australia.[13]

However, this climate of increasing acceptance of abortion received a jolt in February 1998 when two Western Australian doctors were charged with procuring an unlawful abortion.[14] The arrests were triggered by events which spurred a media frenzy across Australia.[15] The charges related to an abortion performed on a Maori woman in Perth in November 1996. Following the procedure, the woman requested that she be given the aborted foetus so that a traditional Maori burial ceremony could be carried out. This was permitted and the woman took the aborted foetus home and placed it in the refrigerator until appropriate arrangements could be made. Upon discovering the unusual contents of the refrigerator, one of the woman's school age children announced the

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8 See *Crimes Act* 1958 (Vic), s 66; *R v Davidson* [1969] VR 667; and *R v Wald* (1971) 3 DCR (NSW) 25.

9 National Health and Medical Research Council (NHMRC), *An Information Paper on Termination of Pregnancy in Australia* (1996) at xi and 3 (*Information Paper*). The paper indicated that in 1994 a woman who had an abortion with general anaesthesia in a private hospital incurred out-of-pocket costs of approximately $600, after the Medicare rebate of $165. 40, at 3.

10 Morgan Poll, 24 February 1998, The Roy Morgan Research Centre: <http://www.roymorgan.com/polls/1998/3058/page-1.html>. A random sample of 100 was surveyed. Kelley and Bean have also drawn a correlation between support for women's equality and support for women's abortion rights: J Kelley and C Bean (eds), *Australian Attitudes: Social and Political Analyses from the National Social Science Survey*, Allen and Unwin (1988) pp 11, 16, 19.

11 Morgan Poll, note 10 *supra*.

12 *Ibid.*

13 *Ibid.* The figures in other States, while below 50 per cent, were not insubstantial: 48 per cent in New South Wales, 41 per cent in Queensland and 31 per cent in South Australia. Perhaps the reason why the figure was so low in South Australia is a reflection of South Australia being the only State other than Western Australia to have reformed its laws on abortion in the last 20 years. In 1969, the *Criminal Law Consolidation Act* 1935 (SA) was amended to incorporate the notion of lawful abortion based on the risk to the woman's health, determined by reference to the woman's "actual or reasonably foreseeable environment": s 82a(1)(a)(I) and (3). With respect to Western Australia, a separate opinion poll taken in early 1998 suggested that 82 per cent of the State were in favour of abortion law reform: see Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 615 (Ljiljanna Ravlich).

14 Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 16 (Cheryl Davenport).

15 See V Laurie, "The Body Politic" *The Australian* (Sydney), 16-17 May 1998, pp 13-14 (*The Australian Magazine*).

finding to his classmates. The child's teacher contacted the police and an investigation followed.[16]

These events re-ignited the abortion debate in Australia,[17] with serious consequences for the State of Western Australia: medical termination procedures were suspended[18] and women were forced either to continue unwanted pregnancies, fly interstate to access medical procedures,[19] or perform abortions upon themselves.[20] It was in this context that Western Australian parliamentarian Cheryl Davenport[21] spoke with urgency to the Legislative Council of the need to repeal those sections of the Western Australian *Criminal Code*[22] making abortion illegal. Within three months, in May 1998, Western Australia had drafted the most liberal abortion laws in the country. The reforms represent a significant shift in the legal treatment of abortion in Australia. However, although the Western Australian abortion laws go some way towards appreciating the complexities associated with pregnancy, this recognition has come extremely late.[23]

The liberalisation of abortion laws in Western Australia has given rise to important social, political and legal questions. What were the motivating factors underlying the reform of abortion laws in Western Australia? What are the implications of justifying the new legislative provisions on the basis of abstract notions of rights, privacy, choice and equality? What role did women play in

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16 N Cica, "Ordering the Law on Abortion in Australia's Wild West" (1998) 23 *Alternative Law Journal* 89.

17 For example, the Western Australian debate prompted ACT parliamentarian Wayne Berry (ALP) to push for the decriminalisation of abortion in that jurisdiction. See C Le Grand, "Abortion Back on Agenda" *The Australian* (Sydney), 23 May 1998, p 29. It also prompted ACT parliamentarian, Paul Osborne (Independent), to introduce two regressive Bills which were met with much public resistance: see Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 August 1998 at 1332 (Paul Osborne); at 1358 (Wayne Berry); and 27 August 1998 at 1455. The Health Regulation (Abortions) Bill 1998, introduced into the Legislative Assembly of the Australian Capital Territory Government on 26 August 1998, purported to clarify the circumstances in which abortions may and may not be performed, depending on the nature of the risk to the health of the woman and the developmental stage of the foetus. The Bill was discharged from the Assembly on 18 November 1998, at which time Osborne introduced a second Bill, the Health Regulation (Maternal Health Information) Bill 1998. This Bill was passed by the unicameral government on 26 November 1998. The *Health Regulation (Maternal Health Information) Act* 1998 (ACT) provides the legislative basis for the provision of prescribed information to women contemplating an abortion to require a 'cooling off' period between making the decision and undergoing the procedure.

18 Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 8 (Cheryl Davenport).

19 D Reardon, "WA Call to Fund Fares East for Abortions" *The Age* (Melbourne), 2 May 1998, p 7.

20 Within two days of the trial of the Western Australian doctors, two women believed they would be unable to access medical termination procedures and chose to self-abort. Both were hospitalised as a result: Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 10 (Cheryl Davenport).

21 Member of the Legislative Council, (ALP). This paper identifies the political party of each Member of Parliament appearing in the present discussion in order to demonstrate that the debate was not dictated by party politics.

22 *Criminal Code Act* 1913 (WA), Appendix B to *Criminal Code Act Compilation Act* 1913 (WA), ss 199-202 (*Criminal Code* (WA)).

23 The first recommendation for reform in Western Australia came in 1994 from the Chief Justice of Western Australia, *Report of the Chief Justice's Task Force on Gender Bias* (1994) para 9, which called for the repeal of ss 199-201 of the *Criminal Code* 1913 (WA).

this transformation? Should other States and Territories reform their laws too, or simply continue to allow the common law statements from Victoria and New South Wales on existing laws to regulate abortion access? This paper endeavours to address these questions. In particular, this paper will focus on the parliamentary debates of the Legislative Council and Legislative Assembly of Western Australia and examine whether these debates have charted the way for a new legal discourse on abortion. It is argued that a new legal discourse is required if women are to become, for the first time in Australia, the subject of, rather than subjected to, political and legal discourse on abortion. Such a discourse will have both symbolic and substantive power with which women may forge new identities and determine for themselves their relationship with their own bodies, pregnancy, motherhood and the state.

A discussion of the development of abortion discourse in Australia, and particularly the recent contribution made by Western Australia, is useful because it affords the opportunity to evaluate the various elements which have made up that discourse. An examination of the conceptual tools applied in the Western Australian parliamentary debates will indicate that some tools are more effective than others and that some are far less damaging and far less open to manipulation. These observations should be considered in future discussions on abortion in Australia to ensure the continuing development of abortion discourse. This paper is divided into two main Parts. Part I provides an overview of the historical underpinnings of abortion discourse in Australia. It outlines the contextual background to the legal treatment of abortion, by tracing the history of abortion with reference to the persistent gap between law and practice. A discussion of the common law follows, revealing a brave attempt to adjust the statutory laws to the lives of women. An examination of the new Western Australian abortion laws then considers the progress, if any, that the amendments have made in comparison with the common law positions in Victoria and New South Wales which also permit abortion in a wide range of circumstances. Part II begins the discourse analysis of the unique Western Australian parliamentary debates which led to the most liberal abortion legislation in Australia to date. The focus of this Part is on a number of themes evident throughout the parliamentary debates in both the speeches supporting and opposing reform. Overuse of the terms 'mother' and 'unborn child' in the debates will be discussed, noting that such use reinforces the assumptions that 'women' and 'mothers' are interchangeable terms, and that foetuses have legal status. The conceptual tools of privacy, rights, choice and equality also play a significant role in the debates and this Part considers both the importance of engaging with such concepts and the risks associated with particular formulations. The paper concludes that the Western Australian debates not only represent a significant shift in social and political attitudes towards abortion, but also provide a challenge for all other Australian States and Territories[24] to amend their criminal

24 The *Health Regulation (Maternal Health Information) Act* 1998 (ACT) should be noted. However, given that this paper was written before the passing of this new law, its focus is exclusively upon the Western Australian debates and amending legislation.

laws to reflect the reality of the common practice of abortion and in doing so to legally provide for the needs of women.

I. ABORTION IN AUSTRALIA

It is important to contextualise the discussion of abortion by recounting briefly the social and legal history of abortion as well as the legal narratives which have helped resuscitate the abortion debate in Australia. This Part focuses on the recent case law on abortion and the reformed abortion laws in Western Australia.

A. The Social and Statutory History of Abortion in Australia: A History of Criminalisation

> For women, pregnancy could be one of the most difficult consequences of their sexual relations; their material survival could depend on their having access to solutions, and often, on those solutions remaining secret.[25]

Documented historical accounts show that abortions have been performed in Australia since the 1850s,[26] but it is generally acknowledged that abortions occurred well before that time.[27] The criminalisation of abortion occurred in Australia in the nineteenth century following a series of amendments to the statutory laws in England.[28] However, despite the criminalisation of abortion, there appeared to be tacit acceptance of the actions of women with respect to reproduction during that time.[29] Judith Allen has argued that this acceptance

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25 J Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880*, Oxford University Press (1990) p 73, writing of the experience of Australian women in relation to pregnancy and abortion during the late nineteenth century.

26 T Libesman and V Sripathy (eds), *Your Body Your Baby: Women's Legal Rights from Conception to Birth*, Redfern Legal Centre Publishing (1996) 25; J Allen, *ibid.*

27 See also Graycar and Morgan (1990), note 6 *supra*, p 201. There is little documentation on the practice of abortion among Australian Indigenous women. However, my own discussions with some Indigenous women suggest that abortion was practised long before white invasion. It is both interesting and important to investigate further Indigenous women's perspective on this issue.

28 The first criminal abortion statute in England was *Lord Ellenborough's Act* 1803 (UK) 43 Geo 3, c 58, ss 1-2. This Act made abortion after 'quickening' a crime, but provided lesser penalties for abortion before quickening. 'Quickening' was understood as the time when the woman first felt movement of the foetus inside her. Later the *Infant Life (Preservation) Act* 1929 (UK) 19 & 20 Geo 5, c 34 was passed which made the wilful "destruction of the life of a child capable of being born alive", performed with the necessary intent, a felony. It also introduced for the first time a good faith element and the justification of termination only for the purpose of preserving the life of the mother. Then came the *Abortion Act* 1967 (UK) 15 & 16 Eliz 2, c 87 which permits a licensed practitioner to perform an abortion where to continue the pregnancy would cause injury to the physical or mental health of the woman or where there is a substantial risk of the child suffering from physical or mental abnormalities. The Act also allows for account to be taken of the woman's actual or reasonably foreseeable environment. The Australian criminal statutes are influenced by the Acts preceding the *Abortion Act* 1967 (UK). See also Barbara Brookes, *Abortion in England 1900-1967*, Croom Helm (1988) p 24.

29 Allen, note 25 *supra*, p 31. Allen found that during the late nineteenth and early twentieth centuries there were "low rates of indictment for reproduction-related offences" from abortion to infanticide.

was associated with widespread reluctance about subjecting certain female experiences to scrutiny: "a reluctance tinged with unease on the parts of the [predominantly male] coroners, judges, juries, counsel, police, journalists and others".[30] However, this uneasiness and tacit acceptance did little to prevent deaths from illegal abortions. While most doctors were willing to perform abortions, criminalisation ensured that access to proper surgical procedures came at a price very few women could afford.[31] Thus, during the nineteenth century, an increasing number of deaths were caused by abortions performed by unskilled 'backyard abortionists' or by women consuming pills, self-administering injections or inserting other objects into the uterus to induce abortion.[32]

It is well established at common law that abortion is not murder. This is because a foetus is not regarded as a human being until born alive.[33] However, abortion remains fixed in statutes throughout Australia as a criminal offence. Under most statutory provisions, abortion is only illegal when it is performed 'unlawfully'.[34] According to the literal meaning of the criminal law provisions, an abortion is unlawful when it is performed other than when the woman's life is at risk.[35]

In practice the situation has changed dramatically from that which existed a century ago, and although abortion is not completely legal in any Territory or State (even in reformed Western Australia),[36] the circumstances in which women may obtain abortions have been liberalised over the years. However, while abortion is widely available, there remains considerable variation in the provision of services within and between the States and Territories. For example, in Tasmania, services are so limited that 40 per cent of women seeking abortions travel interstate.[37]

Abortion also continues to be the only widely practised and publicly funded medical procedure that is criminalised,[38] yet it is one of the most common medical procedures in Australia.[39] Prior to reforms brought about by the historic *Morgentaler* decision[40] in Canada, Judy Fudge pointed out that there are serious

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30 *Ibid.*

31 *Ibid*, pp 26-40.

32 *Ibid*, p 31; Libesman and Sripathy, note 26 *supra*, p 25.

33 Sir Edward Coke's description of homicide, as applied in the common law of New South Wales and Victoria, provides that murder involves the death of "any reasonable creature in being": see L Waller and CR Williams, *Criminal Law Text and Cases*, Butterworths (7th ed, 1993), p 130; see also *R v Hutty* [1953] VR 338 at 339; *Kerr* (1983) 57 ALJR 285 at 286; and *Paton* [1979] QB 276.

34 *Crimes Act* 1958 (Vic), ss 65-6; *Crimes Act* 1900 (NSW), ss 82-3; *Criminal Code* 1899 (Qld), ss 224-6; *Criminal Code Act* 1924 (Tas), ss 134-5; *Criminal Law Consolidation Act* 1935 (SA), ss 81-2.

35 *Ibid.* The former provisions of the *Criminal Code* 1913 (WA) did not refer to risks to the mother's health. However, the word 'unlawfully' appeared in the relevant sections: ss 199-201.

36 In Western Australia, limitations on the right to abortion exist with respect to pregnancies beyond 20 weeks, by requiring the consent of two doctors: *Acts Amendment (Abortion) Act* 1998 (WA) amending s 334 of the *Health Act* 1911 (WA). See discussion in Part I C (ii).

37 NHMRC, *Information Paper*, note 9 *supra* at 7.

38 One of the anonymous referees pointed out that the practices of euthanasia and female genital mutilation are other medical procedures that are criminalised. However, I note that there is no Medicare number for either female genital mutilation or euthanasia.

39 NHMRC, *Information Paper*, note 9 *supra* at 3.

40 *R v Morgentaler* [1988] 1 SCR 30 (*Morgentaler*).

dangers in continuing to allow abortion to be regulated in this way.[41] Fudge argued that in using the criminal law, the most coercive of state powers, the state is implying that women cannot be trusted with the responsibility of reproductive decisions.[42] Criminalisation implies that women's decisions are particularly damaging to society, which not only perpetuates but firmly entrenches inequality between the sexes. Further, it lends support to the feminist observation that procreation is socially gendered and that women's inequality is sealed by the fact that they are caught between the social subjugation experienced in pregnancy and the economic and social disadvantage of the sexual division of labour.[43]

B. Common Law Adjustments to the Literal Meaning in Criminal Law Statutes

Abortions have constituted and continue to constitute the lived reality of a large number of Australian women, the majority of whom do not fit neatly within the statutory requirements for legal abortion. The common law, at least in two States, has seemingly responded to this incongruity between law and practice by offering expansive interpretations of the statutory provisions limiting access to abortion.

In the Victorian case of *R v Davidson*,[44] Menhennit J paid close attention to the word 'unlawful' in the statutory provisions, concluding that the defence of necessity could apply where there is an honest belief, on reasonable grounds, that the abortion is necessary to "preserve the woman from a serious danger to her life or her physical health or mental health", and is proportionate to the danger to be averted.[45] The Menhennit judgment was followed in New South Wales in *R v Wald*.[46] In that case, Levine DCJ extended the Menhennit ruling by adding social and economic grounds to the assessment of 'danger' to the woman's physical and mental health. These judgments have provided the legal bases for women's access to abortion in the States of Victoria and New South Wales, and later Queensland where the Levine judgment was accepted in *R v Bayliss and Cullen*.[47] While these decisions have been presumed to apply in other States, they remain of persuasive authority only.

As Regina Graycar and Jenny Morgan have noted, these two rulings represent "rather flimsy precedents" for women throughout Australia.[48] Just how flimsy was recently realised when a negligence action for wrongful birth gave rise to a ruling based on the illegality of an abortion that never occurred, in the case of *CES v Superclinics (Australia) Pty Ltd*.[49] At first instance, in the Common Law

41 J Fudge, "The Public/Private Distinction: The Possibilities of the Limits to the use of the *Charter* to Further Feminist Struggles" (1987) 25 *Osgoode Hall Law Journal* 485 at 544.

42 *Ibid.*

43 L Smith, "An Equality Approach to Reproductive Choice: *R v Sullivan*" (1991) 4 *Yale Journal of Law and Feminism* 91 at 117.

44 [1969] VR 667 (*Davidson*).

45 *Ibid* at 672.

46 (1971) 3 DCR (NSW) 25 (*Wald*).

47 (1986) 9 Qld Lawyer Reps 8, per McGuire J.

48 Graycar and Morgan (1990), note 6 *supra*, p 200.

49 (1995) 38 NSWLR 47 (*CES*).

Division of the Supreme Court of New South Wales, Newman J found against the plaintiff on grounds of illegality.[50] The case involved an action for medical negligence, where the defendant's medical practitioners had repeatedly failed to diagnose the plaintiff's pregnancy. When the pregnancy was eventually confirmed, it was no longer safe for an abortion to be performed. The plaintiff was denied the opportunity of considering abortion as an option and was thus forced to carry the unwanted pregnancy to term as a result of the practitioners' negligence. Newman J found that the defendants had breached their duty of care to the plaintiff, but denied the plaintiff an award of damages given that she had merely lost the opportunity to perform an illegal act, albeit a hypothetical illegal act.[51]

Graycar and Morgan have challenged this basis for determining the case on two grounds: first, that on a traditional interpretation of the defence of illegality, Justice Newman's finding made little sense given that it was impossible to determine who exactly was involved in the (joint) illegal enterprise; and secondly, even on a very broad interpretation of illegality it was no longer possible to determine if and when the abortion would have been illegal.[52] In effect, Newman J ruled on a potential termination *after* the period during which an abortion would have been possible (ie the child had already been born).[53] This is in contrast with Gibbs CJ in *Kerr*[54] and Lindenmayer J in *In the Marriage of F and F*[55] who, when dealing with situations where abortion still remained a possibility, refused to speculate about the criminality of those proposed abortions in the civil proceedings before them, preferring instead to leave the matters to the criminal courts.[56] Justice Newman's decision was appealed and heard before Kirby A-CJ, Priestley and Meagher JJA of the Court of Appeal, where the decision was reversed and damages awarded.[57] While the three judges came to different conclusions from that of Newman J, they too determined the case on the basis of the (hypothetical) illegality of a hypothetical abortion.

A further disappointment from a feminist perspective was the fact that damages in *CES* were restricted to losses incurred up until the date on which the child could have been adopted out. Priestley JA, with whom Kirby A-CJ concurred (reluctantly) as to damages, held that: "keeping the child after that time was something which [the plaintiff] chose to do" and therefore "any expense of rearing the child thereafter was not relevantly caused by the breach of duty, but by the plaintiff's own choice, and no defendant is legally responsible for it".[58] Thus, Priestley JA concluded, in no uncertain terms, that it was the plaintiff's "choice" which caused the subsequent loss associated with child

50 *CES v Superclinics (Australia) Pty Ltd* (unreported, NSW SC, Newman J, 18 April 1994).
51 *Ibid* at 15-17.
52 Graycar and Morgan (1996), note 6 *supra* at 327-9.
53 *Ibid* at 332.
54 (1983) 57 ALJR 285 at 286.
55 (1989) FLC 92-031.
56 Graycar and Morgan (1996), note 6 *supra* at 332.
57 *CES*, note 49 *supra*.
58 *Ibid* at 84.

raising.[59] Priestley JA noted that had the plaintiff adopted the child out and suffered "pain of heart" and "other emotional problems later in life", the defendants would probably be responsible.[60]

In reaching his conclusions, Priestley JA assumed that a genuine choice existed for the plaintiff in determining whether to continue in her role as child-raiser, or alternatively, to give up the child for adoption. His Honour further reasoned that this 'choice' was enough to sever the chain of causation. Graycar and Morgan have argued that it is difficult to understand why damage from 'pain of heart' from adopting out the child "would be characterised as causally related to the negligence while the far more likely scenario, of keeping the child, was not".[61] In a recent study on the myths and ethics of abortion, Leslie Cannold problematised this assumption of an unfettered choice.[62] In support of the arguments of Graycar and Morgan, Cannold concluded that increasingly women are rejecting adoption as an alternative both to abortion and child raising.[63] This is due to a range of reasons including the pain women have experienced as a result of adoption; the availability of social security benefits for sole parents; the wide provision of abortion services and the funding of the procedure under Medicare;[64] and the different ways in which women are beginning to perceive the responsibilities arising out of the pregnant relationship.[65] Cannold has found that women more frequently see a decision to proceed with a pregnancy as a decision to raise the child after birth; the point being that the pregnant relationship "is not merely a physical one".[66] A significant number of women interviewed by Cannold ruled out adoption completely, not only because it would be too painful for them, but also because of the undesirable effects it would have on the child.[67]

The failure of the court to delve deeper into the actual scope of the plaintiff's 'choice' in *CES* indicated a failure to comprehend that most women now see a decision to continue with a pregnancy as a decision to rear the child.[68] This perspective does not mean that women regard unplanned pregnancy and subsequent childbirth as a 'blessing', though some might and certainly some

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59 *Ibid* at 85.

60 *Ibid* at 84.

61 Graycar and Morgan (1996), note 6 *supra* at 340.

62 L Cannold, *The Abortion Myth: Feminism, Morality and the Hard Choices Women Make*, Allen and Unwin (1998).

63 *Ibid*, pp 97-104.

64 Graycar and Morgan (1996), note 6 *supra* at 340.

65 Cannold, note 62 *supra*, pp 97-104.

66 *Ibid*, p 102.

67 *Ibid*.

68 See Cannold, note 62, *supra*, p xxvii. Cannold's research was in response to the thesis of Peter Singer and Deane Wells who argue that the solution to the abortion conflict is ectogenesis (ie, artificial wombs). This would create a situation where women could not decide to abort and would not need to abort as development of the embryo or foetus could continue in an artificial womb once removed from the woman. However, Cannold's findings indicated that this was not a solution for most women as it neglects the question of motherhood which, Cannold argues, is central to the decision of whether to proceed with a pregnancy.

judges have viewed it so,[69] but simply that it is more desirable than adoption, particularly if abortion is no longer available. On this analysis then, any loss incurred as a result of raising the child in a case of wrongful birth would fall within recoverable damages. Evidence supporting this analysis can be found in the dramatic decline in adoptions in recent times, from 9 798 adoptions nationally in 1971-2 to 764 in 1993-4, of which only 177 were adoptions by non-relatives.[70] The court's denial of damages in *CES* on the basis of an alleged choice to adopt out was thus significantly out of step with current practice.

However, there were some positive aspects to the *CES* case which are worth recalling. They derive solely from the judgment of Kirby A-CJ.[71] First, with respect to the *Wald* test, Kirby A-CJ responded to the perceived limitation on the economic and social conditions that may be taken into account when determining the grounds for legal abortion. He concluded, similarly to de Jersey J in *Vievers v Connolly*,[72] that it is also relevant to consider the effect that economic, social and mental conditions "may have *after* the birth of the child, when the consequences are most likely to manifest themselves".[73] Secondly, Kirby A-CJ determined that the court should not prevent or limit recovery on the grounds of public policy which have been invoked in the past. His Honour rejected the notion that a healthy child is always a blessing and thus not a matter for compensation,[74] concluding that such a declaration is quite inappropriate for the courts.[75] In support of this, Kirby A-CJ pointed to the widespread use of contraception as an indication of "a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing".[76] It is unfortunate that these two observations of Kirby A-CJ did not play a greater role in the final calculation of damages.

CES prompted much academic discussion[77] and both feminists and the Catholic Church sought amicus curiae in the appeal to the High Court.[78]

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69 See *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522; not followed in the subsequent English cases of *Thake v Maurice* [1984] 2 All ER 513, and *Emeh v Kensington Area Health Authority* [1985] QB 1012; and criticised by Pratt DCJ in *Dahl v Purnell* (1992) 15 Qld Lawyer Reports 31 at 35. For an excellent discussion of these cases see Graycar and Morgan (1996), note 6 *supra* at 333-40.

70 P Zabar and G Angus, *Adoptions in Australia 1993-1994*, Australian Institute of Health and Welfare: Child Welfare Series No 11 (1995) Table 17, cited in Graycar and Morgan (1996), note 6 *supra*.

71 For a discussion of Acting Chief Justice Kirby's judgment in terms of its realistic assessment of public mores and attitudes, see J Swanton, "Damages for 'wrongful birth' – *CES v Superclinics (Aust) Pty Ltd*" (1996) 4 *Torts Law Journal* 1.

72 (1994) Aust Torts Reports 81-309 (SC Qld).

73 *CES*, note 49 *supra* at 65 (emphasis in original).

74 *Ibid* at 73, cf *Udale* [1983] 2 All ER 522 at 527, per Jupp J.

75 *CES*, note 49 *supra* at 73.

76 *Ibid* at 74.

77 JA Devereux, "Actions for Wrongful Birth" (1996) 4 *Tort Law Review* 107; L Crowley-Smith, "Therapeutic Abortions and the Emergence of Wrongful Birth Actions in Australia: A Serious Danger to Mental Health?" (1996) 3 *Journal of Law and Medicine* 359; Graycar and Morgan (1996), note 6 *supra*; K Peterson, "Wrongful Conception and Birth: The Loss of reproductive Freedom and Medical Irresponsibility" (1996) 18 *Sydney Law Review* 503; Swanton, note 71 *supra*; C Tricker, "Sex, Lies and Legal Debate: Abortion Law in Australia" (1995) 17 *Sydney Law Review* 446; J Wainer, "Abortion Before the High Court" (1997) 8 *Australian Feminist Law Journal* 133.

However, while many waited anxiously for what would be the first High Court ruling on abortion, the case settled before a formal judgment was handed down. The implications of *CES* and the cases which have widened the bases for legal abortion, have done much to define the limits of abortion discourse in Australia. They have also demonstrated an urgent need for legislative clarification of abortion laws.

C. The New Western Australian Abortion Laws: Regressive or Revolutionary?

(i) Background to the Acts Amendment (Abortion) Act 1998 (WA)

In February 1998, Dr Victor Chan and Dr Hoh Peng Lee were charged with having procured an unlawful abortion. In March 1998, Cheryl Davenport introduced into the Legislative Council of Western Australia a private member's Bill aimed at decriminalising abortion. In May 1998, the *Acts Amendment (Abortion) Act* 1998 (WA) was passed. The Act removed from the Western Australian *Criminal Code* certain offences relating to abortion[79] and amended the *Health Act* 1911 (WA) to regulate abortion procedures.[80] It also introduced a positive obligation on practitioners to properly inform women of the risks involved in the procedure and that counselling will be available.[81]

While many Western Australians might have thought that the right to abortion had been won almost thirty years ago, the attempt at prosecution and the passing of these amendments proved that this was not the case. Rather, the 1998 amending Act signifies a victory for Western Australian women, and in

78 It was highly unusual for the Catholic Church to be granted amicus curiae. In *Bropho v Tickner* (1993) 40 FCR 165 at 172, Wilcox J stated that: "the intervention of amicus curiae is a relatively rare event, the amicus' role normally being confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked". It was even more surprising that leave to appear was granted given that none of the parties supported the Bishops' intervention in the case. The Court was split on the application 3:3, and a statutory majority (determined by the casting vote of the Chief Justice) meant that the Bishops' application was admitted. The Bishops argued that there is no such thing as a 'lawful abortion' under the *Crimes Act* 1900 (NSW) and that: "the law should accept the legal personality of the unborn child" (Bishops' Submission para 9). The Abortion Providers Federation was admitted as amicus curiae after the Catholic Church and feminists from around Australia rallied to assist in the preparation of the Abortion Providers' brief. The Women's Electoral Lobby also prepared a brief seeking intervention, but the case settled before the issue of standing was decided. See Wainer, note 77 *supra* at 136-8. It certainly seems discordant that the Catholic Church's intervener status was *determined* ahead of the other applicants. Jocelyn Scutt took an interesting position in this debate, arguing that intervener status should be granted in a wider range of circumstances, bringing Australian courts into line with the United States, making for broader and more democratic judicial decision making: see J Scutt, "Lionel Murphy and Women's Issues" in Coper and Williams (eds), *Justice Lionel Murphy: Influential or Merely Present?*, Federation Press (1997).

79 *Criminal Code* (WA), ss 199-201, 259.

80 *Health Act* 1911 (WA), ss 334-5.

81 *Health Act* 1911 (WA), s 334.

particular Cheryl Davenport who, without party support,[82] saw the achievement of a goal which was first set in her maiden speech to the Legislative Council in 1989.[83] This achievement is remarkable not simply because it involved a female politician who was able to convince a male dominated Parliament to vote in favour of an essentially gender specific Bill,[84] but also because of the highly controversial subject matter of the Bill. Abortion is an issue which evokes great controversy within the Australian community; controversy which the National Health and Medical Research Council's information paper on abortion predicted as unlikely ever to be resolved.[85] Given that almost 80 per cent of members in both Houses of Parliament in Western Australia are male,[86] it seems even more extraordinary that controversy was subordinated in order for the most liberal abortion laws in Australia to be passed.[87] On the other hand, given that women's decisions to have abortions can also serve men's needs, perhaps it was not such an extraordinary event after all.

(ii) What Does the New Act Guarantee for Women?

The new law essentially establishes a woman's 'informed consent' as the sole condition of abortion for pregnancies under 20 weeks,[88] so long as the abortion

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82 It should be noted that Davenport's Bill had the support of Liberal party member and Attorney-General, Peter Foss. This support evidenced a genuine attempt to make the Bill bipartisan. Peter Foss also initiated a separate Bill entitled the Criminal Code Amendment Bill. However, while this Bill was considered almost simultaneously with Davenport's Criminal Code Amendment (Abortion) Bill, it was eventually discharged, leaving Davenport's Bill as the sole basis for the reforms. A small number of the extracts examined in this paper are taken from the debates on both Bills. Those extracts discussing the Foss Bill are from the Legislative Assembly, 17 March 1998. However, the slight variation in content of the Bills does not alter the meaning of the debates for the purposes of this paper. For a discussion of each of the Bills, see Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 668-9 (Edward Cunningham, ALP).

83 Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 8 (Cheryl Davenport).

84 In a 1992 United Nations report on women in politics it was estimated that the representation of women in parliament would need to exceed 35 per cent for women to have an effect on high level decision-making. This figure has been referred to as the 'critical mass' required for women to achieve influence: see United Nations, Centre for Social Development and Humanitarian Affairs, *Women in Politics and Decision-Making in the Twentieth Century*, Kluwer Academic Publications (1992) p 107. In the Western Australian Parliament, women were some 20 per cent of representatives.

85 NHMRC, *Information Paper*, note 9 *supra* at 1. See also the results of a study conducted in 1988 by J Kelley and C Bean, which confirmed that abortion "is one of the most controversial issues in the Western world": J Kelley and C Bean, note 10 *supra*, p 3.

86 The number of women in the Western Australian Parliament in March 1998 was 13 out of a total of 57 members in the Legislative Assembly (22.8 per cent women) and seven out of 34 members in the Legislative Council (20 per cent women). See Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 611 (Ljiljanna Ravlich).

87 Many male members commented upon how uncomfortable they felt discussing an issue that essentially relates to women. For example, the first male speaker in favour of the Bill, Ken Travers (ALP), feeling unqualified as a male to speak exclusively about the issue of abortion, asked his partner Trish Cowles to write the speech he presented in Parliament: Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 616. See also Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1998 at 739 (Tom Helm, ALP); at 768 (Barry House, Lib); at 779-80 (Greg Smith, Lib). Greg Smith stated: "I am prepared to say it is not in the domain of a man to comment on abortion because I have never had to experience carrying a child to full term nor the trauma of an unwanted pregnancy .... I do not have the right to force a woman to go on with an unwanted pregnancy".

88 *Health Act* 1911 (WA), s 334(3)(a).

is performed by a medical practitioner in good faith and with reasonable care and skill.[89] A woman's consent will only be 'informed' when a *second practitioner* has advised her of any risks associated with abortion and has *offered* to refer her to counselling for other matters related to abortion and carrying a pregnancy to term.[90] If a woman is under the age of 16 years, and therefore a 'dependant minor', she will not be regarded as having given informed consent.[91] Informed consent in this situation is only possible where the woman's custodial parent has been informed that an abortion is being considered and has been allowed to participate in a counselling process and consultations between the woman and her practitioner.[92]

Beyond 20 weeks, two doctors must also agree that the 'mother' or the unborn 'child' has a severe medical condition justifying the termination.[93] These doctors must be members of a panel appointed specifically for the task by the Minister.[94] The amendments further require that every abortion performed in the State be reported to the Executive Director of Public Health.[95]

Should an abortion be unlawfully performed, the woman herself is no longer criminally liable. The practitioner, however, remains subject to criminal sanction. While the doctor does not face imprisonment, a penalty of $50,000 will be imposed where there is a finding of unlawful abortion. Where the person who has performed the unlawful abortion is not a medical practitioner, they face a maximum of five years imprisonment.[96]

These amendments seem to create several hurdles for women seeking abortions. While a woman's consent is ostensibly the sole criterion for an abortion, upon closer reading it becomes clear that consent must be informed and that informed consent requires consultation with a second doctor. In Victoria and New South Wales, following the common law's wide interpretation of the criminal law provisions, a woman may obtain an abortion after having consulted only one practitioner.[97] However, the difference in Victoria and New South Wales is that the decision is technically the doctor's whereas in Western Australia the decision is the woman's once the formal requirements have been satisfied. The legislation seems to impose an unnecessary burden on a woman to see a second practitioner, particularly when this is not a requirement of any other medical procedure. However, the fact that a woman's consent is primary is of great symbolic value for all Western Australian women and goes some way towards redressing the power imbalance women have experienced between their reproductive choices and the policies and decisions of medical and legal institutions. That a doctor need only *offer* a woman counselling and not enforce it, is another positive aspect of the amendments. In offering women the choice

89 *Criminal Code* (WA), s 199(1)(a).
90 *Health Act* 1919 (WA), s 334(5).
91 *Ibid*, s 334(8)(b).
92 *Ibid*, s 334(8).
93 *Ibid*, s 334 (7)(a).
94 *Ibid*.
95 *Ibid*, s 335(5)(d)(e).
96 *Criminal Code* (WA), s 199(2) (3).
97 *Davidson*, note 44 *supra*; *Wald*, note 46 *supra*.

of counselling rather than imposing it, the legislation does not adopt a completely paternalistic approach to women's reproductive health.[98] However, it is argued that it would be even more progressive to both trust that women will seek counselling of their own accord if it is needed and recognise that not all women regard counselling as necessary or helpful.

In general, public reception of the amendments has been positive.[99] However, some members of the medical profession remain sceptical. Dr Harry Cohen, an abortion law reform activist, has stated that: "[t]here is concern because we think there will be some nuisance prosecutions made. In other words, someone will complain six months down the track that they were not properly counselled or something like that".[100] On the other hand, some doctors believe that conditions have improved markedly. Former president of the Western Australian State branch of the Australian Medical Association, Dr Scott Blackwell, commented that while the new laws were not perfect they at least gave doctors legal certainty, unlike the previous laws.[101]

In reviewing the statutory and case law history of abortion in Australia, including the most recent developments, this Part has set the backdrop for a closer discussion of the Western Australian parliamentary debates and abortion discourse.

II. THEMES OF THE WESTERN AUSTRALIAN PARLIAMENTARY DEBATE ON ABORTION

The Western Australian parliamentary debates have provided the most sophisticated discussion on abortion in Australian politics.[102] Conscious of the importance of this particular debate, most parliamentarians took special effort in preparing their speeches to ensure that the issue was genuinely investigated and

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98 Cf *Health Regulation (Maternal Health Information) Act* 1998 (ACT).

99 See D Reardon, "Abortion on Demand in WA" *Sydney Morning Herald* (Sydney), 22 May 1998, p 7; D Reardon, "Abortion Now Legal in WA" *The Age* (Melbourne), 22 May 1998, p 6; Editorial, "WA Vote Makes Abortion Legal" *Herald Sun* (Melbourne), 22 May 1998, p 10.

100 M Perry, "Australian Women Get Abortion on Demand" *The Australian* (Sydney), 21 May 1998.

101 D Reardon, "Abortion Now Legal in WA" *The Age* (Melbourne), 22 May 1998, p 6.

102 While women politicians were the instigators and primary supporters of the Bill, progressive discussion was not restricted to their contributions alone. A significant number of male members spoke in favour of reform, distinguishing this debate from previous discussions on abortion in Australia. See Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 689 (Fred Riebeling, ALP, who argued that the Parliament should be looking at the impact the criminal laws have on women, and not issues such as when life begins); at 691 (Alan Carpenter, ALP, who emphasised that reality determined this issue long ago); at 661-2 (Dr Geoffrey Gallop, ALP, who reminded the Parliament that women are differently situated when they become pregnant. He also commented that to insist that women go through with each and every pregnancy imposes a rigid and inflexible form of moral reasoning); Legislative Council, 18 March 1998 at 735-7 (John Halden, ALP, who stressed that a "silly law" has existed which has been tolerated because the majority view is that women must have this opportunity available to them). Another notable advocate of change was Bruce Donaldson (Lib), who emphasised that: "we must also realise that the gestation period is not nine months, it is at least 18 years for all children": Western Australia, *Parliamentary Debates*, Legislative Council, 1 April 1998 at 1177.

appropriately resolved.[103] So unique was the debate in this regard that it prompted many members to conclude that it was the most challenging and rewarding of their careers.[104]

A number of themes can be identified in the Western Australian parliamentary debates which form the structure of the following discussion. Certain terms and concepts such as 'mother', 'rights', 'privacy', 'choice' and 'equality' were invoked by both sides of the debate, for and against reform of Western Australia's abortion laws. This Part focuses on the conceptual justifications used in supporting and rejecting reform and in arguing for increased regulation and tighter restrictions on the practice of abortion. The speeches opposing reform generally relied upon arguments characteristic of the anti-choice position which first gained prominence following *Roe v Wade* in 1973.[105] Closer analysis of this language reveals the operation of certain assumptions about women and women's bodies, which work to perpetuate the conditions of substantive inequality between the sexes. On the other hand, while the speakers in favour of reform used similar conceptual tools, they were reformulated and interpreted in often radically different ways. This Part explores the ways in which these concepts were used both to promote and demote law reform in the area of abortion.

A. Imagery and Language

(i) Every Woman a Mother

Both unwitting and intentional use of emotive language appeared in the parliamentary debates on abortion. Roger Nicholls[106] is an example of a reformer who frequently used the word 'mother' to describe a pregnant woman who should be able to choose termination.[107] Tom Stephens,[108] arguing against reform, also made extensive reference to the 'mother' during pregnancy and to

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103 Arthur Marshall (Lib), personally against abortion, assessed whether his views were commensurate with that of his electorate by conducting a small survey in his local area (of 37 people: five male and 32 female). In light of the results of this survey, Marshall decided to convey a representative view of his electorate, and voted in favour of the Bill: Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 679. Norm Kelly (AD) also went to great lengths to research the history of abortion, concluding that the origin of our current laws "which are based on the medicalisation and commodification of the female body" were made by men to exercise control over women, and "they are the same laws with which we are confronted today": Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 754-5.

104 Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1998 at 781 (Cheryl Davenport); at 780 (Norman Moore, Lib, commenting: "This debate has demonstrated the maturity of this House and its capacity to debate and consider issues of great complexity and passion in an exemplary manner"); 1 April 1998 at 1215 (Peter Foss, Lib, stating: "The atmosphere in this House during the debate has been extraordinary ... I think we are all changed as a result of it"); at 1219 (Giz Watson, GWA: "I am proud and delighted to be part of this historic piece of legislation. I hope that the passage of this Bill has partly been as a result of the changes in this place [the Legislative Council] and that it is a sign of other progressive legislation of which this Council can be a part").

105 See generally K Luker, *Abortion and the Politics of Motherhood*, University of California Press (1984).

106 Member of the Legislative Assembly, (Lib).

107 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 697 (Roger Nicholls, commenting: "Ultimately, it is a decision for the mother").

108 Member of the Legislative Council, (ALP).

the "newborn baby in the mother's womb".[109] It is argued that his labelling is premature since it is women who should be deciding when and whether they wish to become mothers in the context of expected or unexpected pregnancies. This argument is supported by Cannold's recent finding that the question of abortion is today more a question of 'motherhood' for many women.[110] Thus, to label women who have recently become pregnant as 'mothers', is not only presumptuous, but also assists in distorting and erasing women's voices on a matter which is specific to them. Further, it reinforces the notion that women's primary social and biological function is to reproduce and rear.

(ii) Imagining 'Woman with Child'

Prior to the recent amendments, the Western Australian *Criminal Code* described a pregnant woman as a "woman with child", which carries the connotation of the foetus having the legal status of a child.[111] Tom Stephens, arguing against reform, also played upon this notion of the 'child' in utero.[112] During his speech, Stephens urged members to "visualise" the unborn and asked: "Is it a person?".[113] His main objective was to raise the question of when life begins. Stephens invited people to picture a series of images in their mind's eye. He asked them first to imagine the "baby" in the third trimester and to consider its advanced form, size and weight.[114] He advised members to think about the stage at which they consider they are dealing with a "person".[115] "Rewinding the tape a little" he then described the development of the "baby" during the second trimester.[116] Science tells us, reminded Stephens, that at this stage the "baby's eyes have opened" and that the "mother, father and family can feel the baby kicking inside the mother's womb".[117] He confirmed that at this stage the "baby" is "easily recognisable as a small human being".[118] Rewinding the "imaginary tape" back even further to the first trimester, he remarked: "[w]e can see the baby's heart beating, and its rudimentary organs have formed".[119]

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109 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 602 (Tom Stephens); see also Legislative Council, 18 March 1998 at 746 (Edmund Dermer, ALP, who stated that: "[a] child is a child before birth"), at 624 (Simon O'Brien, Lib); Legislative Assembly, 17 March 1998 at 682 (John Kobelke, ALP).

110 Cannold, note 62 *supra*, pp 87-117.

111 *Criminal Code* 1913 (WA), ss 199-201. Cf *Criminal Law Consolidation Act* 1935 (SA), s 81.

112 Stephens was not alone in the use of strong words and images. Simon O'Brien (Lib) made graphic references to Roman Polanski's film production of *Macbeth*. He examined the scene depicting "death of the maternal bed". He said: "I recall vividly that her [the woman's] belly was slit open after her death and the infant was removed from the woman alive": Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 622. Many others referred continuously to the foetus as a 'child': see Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 668 (Edward Cunningham, ALP).

113 *Ibid.*

114 *Ibid* at 602.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

Finally, he asked everyone to reflect back over the process of pregnancy and to "visualise a newborn baby in the mother's womb".[120]

By recounting the prenatal developmental stages in reverse, from the most advanced trimester to the earliest, Stephens was attempting to blur the distinction between foetuses and humans, assuming that at some stage the foetus may correctly be referred to, or at least recognised, as a human in utero. Further, the terminology Stephens used to describe embryonic and foetal development implies personhood. His repeated use of the word 'baby', together with the interchangeable use of the words 'unborn' and 'newborn child' function to give normalcy to the idea that the foetus is a human being entitled to legal rights. If, however, the definitions are strictly tested, the idea begins to fall apart. For example, 'baby', in the *Macquarie Dictionary*, is defined as an "infant, young child of either sex".[121] 'Newborn' is defined as "recently or only just born",[122] with 'born' being defined as "brought forth into *independent* being or life, as from the womb".[123] Taken together, these definitions clearly make a nonsense of Stephens' request of members to visualise a "newborn baby in the mother's womb". Thus, the terminology employed by Stephens carefully mixes in utero development with signifiers of independently existing human life and human status. As Sheila McHale[124] noted in her speech, references to 'unborn child' and 'baby' manipulate the public into perceiving the foetus as a baby, with potential life being equated with actual life.[125]

Using this language to describe the foetus both subordinates women's fundamental role during gestation and is incompatible with legal language.[126] The law has always recognised a distinction between 'persons' and 'non-persons' as noted above.[127]. This distinction is reflected in the law of murder.[128] According to law, murder takes place when there has been an unlawful killing of a reasonable creature in being.[129] Therefore, if someone is not yet born, there

120 *Ibid.*

121 *The Macquarie Dictionary* (2nd ed, 1996) p 121. 'Infant' is defined as "a child during the earliest period of its life", p 901; and 'child' is defined as "a baby or infant", p 313.

122 *Ibid*, p 1198.

123 *Ibid*, p 206 (emphasis added).

124 Member of the Legislative Assembly, (ALP).

125 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 676 (Sheila McHale). Cf Dianna Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-91) 4 *Canadian Journal of Women and the Law* 407.

126 The philosophical and ethical arguments about when life begins are beyond the scope of this paper. For further discussion on this debate see C Mackenzie, "Abortion and Embodiment" (1992) 70 *Australasian Journal of Philosophy* 136.

127 See Part I A.

128 See *Crimes Act* 1958 (Vic), s 3 and Sir Edward Coke's definition of homicide, note 33 *supra*.

129 *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 at 254 is the most recent House of Lords decision in this context. The case concerned the death of a premature baby who sustained injury in utero as a result of stabbing wounds inflicted by the biological father to the pregnant woman. Lord Mustill reiterated the case law position: "the child does not attain a sufficient human personality to be the subject of a crime of violence, and in particular of a crime of murder, until it enjoys an existence separate from its mother; hence, whilst it is in the womb it does not have a human personality", at 255.

can be no murder.[130] Moreover, the common law does not regard abortion as murder, as discussed above. To construct the foetus as a human being in the way Stephens does is therefore misleading legally.

However, as Stephens is quick to stress, "[e]ven the advocates for abortion law reform no longer adopt the defence that we are not dealing with a life in this situation".[131] Objections to detailed descriptions of the foetus were most visible in the 1970s when the right to abortion was first articulated by the feminist movement. The tendency was to understand the embryo as a lump of tissue rather than a form of life or potential life. Today however, Stephens is right to have noticed a change in the feminist movement on this point[132] as was suggested in many of the contributions by women politicians in favour of reform in the parliamentary debates.[133] Catharine MacKinnon has argued that the abortion choice should not be contingent on whether the foetus is a form of life. Rather, she asks, "[w]hy should women not make life or death decisions?".[134] This angle is also reflected in the research of Cannold when she talks of the ethical aspect of the decision to have an abortion.[135] However, to focus exclusively on the question of when life begins, as Stephens did, is limiting in the context of reproductive choices. As this paper has highlighted, the question of whether to have a child or not can involve many more considerations of complex material, emotional and ethical dimensions.

B. Liberal Rights Discourse on Abortion

Formal liberal rights have played a significant role in feminist visions and programs for improving the situation of women. The right to vote, the right to equal pay and the right to formal equality have featured most prominently in the liberal feminist agenda for change. Gavigan has argued that these liberal concepts provide useful tools in legitimising a woman's right to control her body

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130 Although, in some jurisdictions there are specific statutory offences relating to the foetus which is in the process of being born, but is not yet alive and separate from its mother. Destruction of the foetus at this stage is neither abortion nor murder, but a statutory offence: see *Crimes Act* 1958 (Vic), s 10. For further discussion see Waller and Williams, note 33 *supra*, p 135.

131 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 602 (Tom Stephens).

132 On a theoretical level, some French philosophers have attempted to resuscitate and redefine 'the maternal'. These thinkers have reinvestigated what is commonly referred to as essentialism or biological determinism. Helene Cixous locates the 'essence of femininity' in the womb, (re)claiming the feminine as the 'maternal sex': D Stanton, "Difference on Trial: A Critique of the Maternal Metaphor in Cixous, Irigaray and Kristeva" in J Allen and IM Young (eds), *The Thinking Muse: Feminism and Modern French Philosophy*, Indiana University Press (1989) p 156. Luce Irigaray claims that women are always mothers: L Irigaray, *Ethique de la difference sexuelle*, Editions de Minuit (1984) p 27. And Julia Kristeva describes the feminine function as maternal: J Kristeva, *La revolution du langage poetique*, Editions du Seuil (1974) pp 499-500. These philosophers have departed from liberal feminism's emphasis on the oppressiveness of motherhood as an institution and have instead focussed on the potential of a radical revisioning of motherhood for the empowerment of women.

133 See Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 14 (Cheryl Davenport); Legislative Assembly, 17 March 1998 at 657 (Diana Warnock) ; Legislative Council, 18 March 1998 at 772 (Christine Sharp).

134 C MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press (1987) p 94.

135 Cannold, note 62 *supra*.

and reproductive capacity without state interference.[136] The argument for using rights as a strategy in the abortion context seems particularly convincing where women's reproductive choices have been regulated by criminal laws.

Privacy, choice and equality have provided the primary focus for a discussion of rights to abortion access. They have been invoked in various ways in the United States, Canada and Australia. The fundamental criticism of the liberal formulation of rights is that they are mere entitlements and thus fail to provide the enabling conditions in which rights may be exercised meaningfully by all women of various races, classes, ethnicities, sexualities and abilities.[137] The major problems with rights discourse in the context of abortion relate specifically to the liberal formulation of privacy, an absolute right to choose, and formal equality.

C. Rights

(i) Rights Discourse

Arguing that abortion should be conceived of as a 'civil right' is problematic. 'Rights', whether civil or constitutional, are specifically focussed on the individual and thus promote the alienation and separation of the individual from the community.[138] The effect of securing specific reproductive rights might be that individual women who experience pregnancy or abortion, experience it in isolation and without provision of appropriate medical services, financial assistance or advice and counselling. The experiences of pregnancy, abortion and motherhood risk being 'privatised'. In other words, calling something a 'right' has the effect of compartmentalising certain experiences and needs, and removing them from their contextual, and often communal, framework. Moreover, the recognition of one right does not automatically lead to the recognition of another right which might be necessary for the meaningful existence of the first. Exclusivity thus attaches to the right and reduces the responsibility of men and the rest of the community in relation to reproduction.

Judy Fudge and Jenny Morgan have both expressed the view that because rights are abstract and decontextualised they offer limited potential for women.[139] This is because, in their abstract form, rights are as equally amenable to interpretations that are antithetical to feminist struggles as they are to progressive interpretations.[140] While Patricia Williams has mainly reflected

136 SA Gavigan, "Women and Abortion in Canada: What's Law Got To Do With It?" in HJ Maroney and M Luxton (eds), *Feminism and Political Economy: Women in Canada*, Methuen (1987) pp 263 at 271.

137 See, R Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom*, Verso (1985).

138 See criticisms made by Critical Legal Scholars: M Tushnet, "An Essay on Rights" (1984) 62 *Texas Law Review* 1363 at 1382-3; cf R Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 *Harvard Civil Rights – Civil Liberties Law Review* 301 at 305.

139 Fudge, note 41 *supra*; J Morgan, "Equality Rights in the Australian Context: A Feminist Assessment" in Philip Alston (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law, ANU (1994) pp 123, 124-5.

140 *Ibid.*

upon the power of rights discourse,[141] she has also observed that in a capitalist society rights have been commodified and accordingly are available only to those who can afford to exercise them.[142] In this way, rights as formal legal powers cannot be meaningful without collective efforts to provide all women with the means to utilise them.[143] This problem is already manifest to a very large extent in the abortion context. While Australia's government health system partially covers the cost of an abortion, the choice as to which clinic or hospital a woman attends will be dictated by her financial situation. A further problem is that women in rural areas, particularly Aboriginal women, bear the additional cost of transport to the nearest abortion clinic or hospital. Thus, a civil or statutory right to abortion on its own is illusory for many women.

However, there are some positive observations about the potential of rights which should be considered. Elizabeth Schneider has argued that rights are a form of political statement which can initiate social change, or at least radically reshape and redefine theory.[144] For this reason, there is value in talking about abortion access as a 'right'. However, the disadvantages associated with rights discourse in the abortion context resonated in a number of contributions to the Western Australian parliamentary debates. These will now be considered.

(ii) Rights: Formal and Foetal

In the parliamentary debates, the language of rights was used vigorously to advocate the rights of the *foetus* in those speeches opposing change to the abortion laws.[145] An example of the way 'rights' arguments were deployed is found, again, in the speech of Tom Stephens. While Stephens began by acknowledging the "undeniable right for women to have justice and equity", he insisted that this should not be "construed as justification for setting women's rights against the child's right to life".[146] He went on to say that if a woman's

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141 P Williams, *The Alchemy of Race and Rights*, Harvard University Press (1991); P Williams, "'Minority Critique of CLS: Alchemical Notes" (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 424 at 429.

142 Williams (1991), note 141 *supra*, see especially ch 1, "Excluding Voices: A Necklace of Thoughts on the Ideology of Style", p 29.

143 See W Galston, "Practical Philosophy and the Bill of Rights: Perspectives on Some Contemporary Issues" in M Lacey and K Haakonssen (eds), *A Culture of Rights*, Cambridge University Press (1992) pp 215, 234.

144 E Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 *New York University Law Review* 589 at 610.

145 See Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1998 at 750 (Barbara Scott, Lib). Scott argued that abortion "is not a political issue, it is not a women's issue; it is not a legal issue or a moral issue, but rather it is a question of human rights". In framing her argument in this way, Scott precluded women from the definition of human rights, and denied outright that human rights might be political or indeed moral. Spoken in the year of the 50th anniversary of the Universal Declaration of Human Rights, Scott made no reference either to the Declaration, the Fourth World Conference on Women in Beijing in 1995, or the existing International Conventions dealing with human rights. See generally Amnesty International, *Report on the Fourth World Conference on Women*, IOR 41/30/95; N Streeter, "Beijing and Beyond ..." (1996) 11 *Berkeley Women's Law Journal* 200; D Otto, "Holding Up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women" (1996) 6 *Australian Feminist Law Journal* 7.

146 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 597 (Tom Stephens).

rights and the "child's rights" are to be pitted against one another, then the woman's rights must be "offset" by her conduct, such as the "regrettably prevalent ... use and abuse of alcohol by women during their pregnancy".[147] The implications of this formulation are clearly debilitating for pregnant women. Not only does Stephens invoke a negative stereotype of women, he also proposes that certain state-imposed limits should confine the freedom of a woman in relation to her body during nine months of pregnancy.

(iii) Women as Independent Rights Bearers

In the debates, there was also a strong emphasis on *women's* rights. Ljiljanna Ravlich[148] was the first speaker in support of the Bill and immediately identified as "pro-choice".[149] Ravlich argued that abortion amounts to a "civil right".[150] She referred to liberal feminist Betty Friedan and her book *The Feminine Mystique*,[151] and pledged support for Friedan's view that: "motherhood will be a joyous act only when women are free to make the decision to become a mother with full conscious choice and in full human responsibility".[152] Most other speakers in support of the Bill also used the language of rights in a general sense as a vehicle for achieving change to Western Australia's criminal laws.

It would thus seem that in the Western Australian parliamentary debates the language of rights played an influential role in the passing of the amending legislation. However, the value and scope of 'rights discourse' should always be questioned. It is clear that the guarantees which the new amending Act affords women are fairly limited and certainly do not go any way towards ensuring that all women have the financial means to exercise their right to choose termination. However, it is perhaps overly optimistic to expect a piece of amending legislation alone to achieve this.

D. Privacy

(i) Roe v Wade: the Right to Privacy

In the historic decision of *Roe v Wade*,[153] the Supreme Court of the United States found that the right to liberty under the Fourteenth Amendment implies a fundamental right to privacy[154] which is broad enough to encompass a woman's decision to terminate her pregnancy.[155] This decision, while progressive in allowing for a right to abortion to be legally protected, has been the subject of

147 *Ibid.*
148 Member of the Legislative Council, (ALP).
149 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 610 (Ljiljanna Ravlich).
150 *Ibid* at 613.
151 B Friedan, *The Feminine Mystique*, Penguin Books (1974).
152 *Ibid.*
153 (1973) 35 L Ed 2d 147.
154 For a discussion of the right to privacy and abortion in the United States see P Smith, "The Right to Privacy: *Roe v Wade* Revisited" (1983) 43 *The Jurist* 289.
155 (1973) 35 L Ed 2d 147 at 176-7, per Justice Blackmun.

much feminist criticism.[156] In relying on the right to privacy, the court not only evaded the complex social issues of abortion access, but also reinforced the public/private dichotomy which has been the target of many feminist critiques.[157] In brief, the dichotomy demarcates the limits of government intervention. While the public sphere has been the legitimate site of government activity, the private sphere has been the preserve of political non-intervention. The dichotomy is thus blind to the degree to which women have been subjected to inequality and violence, particularly sexual violence, in the 'protected' private sphere.[158] Arguments dependent on the right to privacy therefore augment women's oppression precisely because the private sphere of inequality has been shielded from scrutiny.

Rosalind Petchesky has argued that the right to privacy is a "shaky" basis for women's abortion rights in that it emphasises the individual and personal nature of pregnancy and child-bearing, thereby removing any basis for arguing that women as a class are entitled to abortion services.[159] This promotes division among women given that women are not all similarly situated. This risk of division was solidified in the later decision of *Harris v McRae*[160] where the US Supreme Court decided that the right to privacy did not require the federal health system to fund abortions, even those deemed medically necessary. As MacKinnon has noted, the effect of this decision was to permit government support for one type of reproductive decision but not another: that is, "to fund continuing conceptions and not to fund discontinuing them".[161]

(ii) Privacy in the Western Australian Debates: One Doctor's View of Abortion Rights

Minimal reference was made to the concept of privacy in the Western Australian debates which is positive given the feminist caution that has attended the rise of privacy rights. Dr Judith Edwards[162] was one of a small number of speakers who argued for the right to abortion in terms of privacy. That a doctor should raise this argument is perhaps unfortunate given that the right of privacy has been interpreted as favouring the professional and proprietary claims of doctors.[163] However, as a parliamentarian, a health professional and a mother, Dr Edwards spoke from a broader perspective.

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156 See MacKinnon, note 134 *supra*, pp 93-102; Graycar and Morgan (1990), note 6 *supra*, pp 202-7; Petchesky, note 137 *supra*, pp 289-302; J Hontz, "25 Years Later: The Impact of *Roe v Wade*" (1998) 25 *Human Rights* 8; E Reilly, "The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights" (1996) 5 *American Journal of Gender and the Law* 147; E Howard, "The Roe'd to Confusion" (1993) 30 *Houston Law Review* 1457.

157 See Petchesky, note 137 *supra*, p 295; J Elshtain, *Public Man, Private Woman*, Princeton University Press (1981) p 243.

158 See M Poovey, "The Abortion Question and the Death of Man" in J Butler and J Scott (eds), *Feminists Theorize the Political*, Routledge (1992) p 239.

159 Petchesky, note 137 *supra*, p 295.

160 *Harris v McRae* 448 US 297 (1980).

161 MacKinnon, note 134 *supra*, p 96.

162 Member of the Legislative Assembly, (ALP).

163 Petchesky, note 137 *supra*, p 295.

As a practitioner, Dr Edwards was consulted by many women who thought they were pregnant, and she could usually tell from the tone of the their voice how they felt about it.[164] Dr Edwards confirmed that there is no stereotype of a woman seeking a termination.[165] She acknowledged how difficult a decision to terminate is for most women and that in her experience the single most common emotional response following a termination was relief.[166] Dr Edwards also pointed to the high failure rate of contraception and that because women's contraceptive choices are becoming more and more limited, due to potential health dangers of some methods,[167] the abortion pill (post-coital contraception) should be made more widely available to women.[168]

Dr Edwards' argument about privacy derived from her medical background, personal experience with women patients, and her involvement with an Abortion Information Service, the Family Planning Association, the Aboriginal Medical Service and the Sexual Assault Referral Centre.[169] Dr Edwards stated that she had believed in abortion law reform for 20 years[170] and underscored the importance of recognising that ultimately the decision to terminate a pregnancy is a decision for the woman to make herself.[171] The decision is one for the woman's moral judgment and "it is a *private* and personal decision to be made between her and her doctor".[172]

Dr Edwards' use of privacy is not a legal formulation so much as a social one. However, the risks attached to legal privacy also have relevance for a social formulation. As noted above, the privacy argument was first used successfully in the legal context of abortion in the American case of *Roe v Wade*.[173] It was held that while there is no explicit mention of a right to privacy in the Constitution of the United States, the Supreme Court had recognised "certain areas or zones of privacy" arising out of the Fourteenth Amendment which guarantees the right to liberty.[174] The right to abortion inhering in the personal right to privacy was not, however, held to be absolute, but rather remained qualified by "important state interests".[175]

Abortion framed as a private choice, belonging in the private sphere of life, provides the grounds for a state to refuse any interventional support or aid: financial, medical or emotional. Abortion framed as a conditional private choice

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164 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 665.

165 *Ibid.*

166 *Ibid.*

167 See generally E Siegel Watkins, *On the Pill: A Social History of Oral Contraceptives*, John Hopkins University Press (1998) p 73.

168 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 665-6. See J Raymond, "RU 486: Progress or Peril?" in J Callahan (ed), *Reproduction, Ethics and the Law: Feminist Perspectives*, Indiana University Press (1995).

169 Note 164 *supra* at 665.

170 *Ibid* at 664.

171 *Ibid* at 667 (emphasis added).

172 *Ibid.*

173 (1973) 35 L Ed 2d, 147.

174 *Ibid* at 176. Blackmun J also referred to the First, Fourth, Fifth and Ninth Amendments as providing the bases for the right to privacy.

175 *Ibid* at 177-8.

also allows for unwarranted intervention into the reproductive choices of women. Thus, it would seem more beneficial for women to discard the notion of a private choice and instead conceptualise abortion as a personal decision made in the context of public services and assistance. That very few references were made to abortion access couched in terms of a right to privacy is a positive indication of the developing discourse on abortion which is not contingent on an entrenched Bill of Rights.

E. Choice

(i) The Right to Choose

Rights to abortion have often been framed in terms of an absolute right to choose. In formulating abortion rights in this way, as a means of reforming criminal laws, there is the risk of initiating "the elision from decriminalisation to deregulation".[176] Put another way, seeking a right to choose that is free from state intervention actually reinforces the public/private split which has historically worked to women's disadvantage. It means that the state has no responsibility or positive obligation either to provide safe, funded medical termination procedures *or* to assist women in their choice to raise children.

(ii) 'Choosing' Contraception

The concept of 'choice' was used throughout the debates in various ways. From the perspective of those opposing reform, Barbara Scott summarised reproductive 'choice' as existing for women in the form of contraception. She argued that women *can* avoid unwanted pregnancies, and thus the decision to have an abortion, by choosing contraception. This, she argued, is women's choice. Like Justice Priestley's formulation of choice in *CES*, Scott's formulation suffers from the same technical, decontextualised application. As many of the speakers highlighted throughout the debates, women's choices are not fail-safe with respect to contraception.[177] Failure rates of contraception are high and many members offered personal accounts of their own experience with failed contraception, missing a period, and the ensuing waiting game for confirmation of an unwanted pregnancy.[178] Scott also failed to fully comprehend other factors which impact upon a woman's 'choice'. She erases economic, social and cultural factors from the picture, which are so often determinative of the issue for many women. Scott also implied that it is women who should bear the sole responsibility and health risks of contraception. Men are expunged from the responsibility of contraception since it is "women's choice".

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176 E Kingdom, "Legal Recognition of a Woman's Right to Choose" in J Brophy and C Smart (eds), *Women in Law*, Routledge and Kegan Paul (1985) p 143.

177 See Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 654 (Diana Warnock, ALP).

178 See Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 627 (Helen Hodgson, AD).

(iii) The Right to Choose Abortion

Many parliamentarians in support of the proposed abortion reform Bill also relied on the concept of choice. Helen Hodgson opened her speech with the statement: "This debate is about choice".[179] She also clarified from the outset that she did not identify as "pro-abortion", as the anti-abortion campaigners would label her, but rather as "pro-choice".[180] Her position is based on the idea that abortion is an issue of self-determination for women which includes the right to have control over their bodies, fertility and health and not to be dictated to by others who disagree with their decision.[181]

Hodgson indicated the broader implications of legislation recognising the right of women to make reproductive choices. She argued that such legislation is essential in a society which has changed dramatically in the last one hundred years. Since laws now recognise women's right to own property, to vote and to have equal pay for equal work (even though in practice equal pay is yet to be achieved), the right to choose is the next step, and one which is long overdue.[182] Hodgson therefore rallied the politicians of Western Australia, saying: "[w]e have the power today with this legislation to give back women control over not only their bodies but also their psychological wellbeing and in some cases their future and the ability to control their lives".[183]

Hodgson went on to explain the three basic choices women have when they become pregnant.[184] She summarised those choices as being: to raise the child, to adopt the child out, or to have an abortion.[185] She then focussed specifically on the choice of adoption, highlighting the complexities associated with such an option. She stressed the evidence of emotional trauma and guilt associated with this decision.[186] Responding in part to the arguments of anti-abortion campaigners, she continued:

> Adopting out a child can scar a woman for life. I use those words very carefully because we are continually being told by people who oppose abortion that abortion can scar a woman for life. I am sorry, but the alternatives have the same possibility. Adoption is not a guilt-free option.[187]

In raising the complexities associated with the decisions faced by pregnant women, Hodgson highlighted the issues glossed over by Priestley JA in *CES*.[188] Although Priestley JA did recognise that damages would probably have been available had the plaintiff chosen adoption and suffered 'pain of heart', he did

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179 *Ibid* at 625.
180 *Ibid.*
181 *Ibid.*
182 *Ibid.* Hodgson's approach could be viewed as an argument motivated by equality as much as by choice.
183 *Ibid.*
184 See Part II C (ii).
185 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 626 (Helen Hodgson).
186 *Ibid.*
187 *Ibid.*
188 (1995) 38 NSWLR 47 at 84-5.

not engage with the complex emotional issues which attend such a decision or the decision to raise the child.[189] Hodgson's point is that *any* decision a woman makes when she faces pregnancy may have serious psychological consequences, not least of which is postnatal depression following the birth of a child.[190]

Hodgson then went on to ask a very confronting question and introduced her own personal experience, a technique employed frequently by other parliamentarians.[191] She asked: "How many members in this place have had to personally confront this issue?".[192] She continued, "I have":

> Several years ago I presented to my GP with symptoms which could have been consistent with pregnancy in spite of the fact that I was using birth control. I did not have to make the choice but I remember a period of about a week before the tests came back confirming that I was not pregnant when I went through agonies trying to decide what I would do if it were the case. However, it was my choice based on my circumstances. I would not impose my choice or decision on anybody else. This is the principle we are being asked to support today.[193]

Hodgson concluded by saying that a "vote in favour of this Bill does not mean that we would consider abortion as an option for ourselves or our partners but that we recognise the right of others to do so".[194]

Ljiljanna Ravlich also supported this notion of choice, particularly the view that: "decisions about abortion are not about ending a pregnancy, but about choosing motherhood".[195] Christine Sharp[196] agreed, adding that being pro-choice "is not symbolic of women being anti-life".[197] Rather, following the radical approach of Catharine MacKinnon, Sharp argued that abortion is about life organising life:

> I see it as a process of affirming life. Therefore, I am prepared to sit through the remonstrations which assure us that a foetus is a life. I know that a foetus is a life. Any [woman] who has been pregnant and felt life inside her has no doubt about that notion. Sometimes, with integrity, women ... choose to terminate that life. I see this

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189 *Ibid* at 84.

190 See generally MM Maloney, *Postnatal Depression: A Study of Mothers in the Metropolitan Area of Perth, Western Australia*, Curtin University Press (1995); J Carter (ed), *Postnatal Depression: Towards a Research Agenda for Human Services and Health: Proceedings from the Postnatal Depression Workshop*, AGPS (1992).

191 For examples of story telling methods employed in the debates see Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 15-16 (Cheryl Davenport); 17 March 1998 at 627 (Helen Hodgson); Legislative Assembly, 17 March 1998 at 664 (Dr Judith Edwards); at 680 (William Thomas, ALP).

192 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 627 (Helen Hodgson).

193 *Ibid.*

194 *Ibid.*

195 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 613 (Ljiljanna Ravlich).

196 Member of Legislative Council, (GWA).

197 Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1998 at 772 (Christine Sharp).

courage, which women must adopt from time to time, as life affirming. I see women taking the awesome responsibility of motherhood seriously.[198]

The focus of Hodgson, Ravlich and Sharp on 'choice' is convincing on the surface, and was probably very strategic in facilitating the movement of the Bill through the parliamentary process. However, as noted above, feminists such as Elizabeth Kingdom[199] and Judy Fudge[200] have cautioned that securing 'choice' for women can in fact have the effect of eliminating any state responsibility whatsoever. Therefore, if choice is to be argued it must be situated in the context of state responsibility with respect to the provision of safe medical services and advice.

Indeed Petchesky's argument for abortion rights to be accompanied by a complete range of social services, health care, prenatal care, child care, contraception, protection from sterilisation and sexual abuse provides a comprehensive starting point.[201] It is not enough for a society to simply give women a formal choice to terminate a pregnancy, to adopt, or to raise a child. Society and government must also assist economically and structurally with that decision by: putting in place adequate child care facilities; providing an income for women who wish to stay at home and raise their children; and encouraging men to share in the responsibilities of child-raising.

(iv) The Politics of Choice

Some members persisted in recycling arguments and prejudices from the abortion debate of 30 years ago, which in fact represent the downside of recognising a 'right to choose'. The relevance of such arguments to the present debate is questionable. However, they do serve to illustrate that complete consensus on the issue is far from being realised and that abortion is a subject which continues to evoke extreme responses. The following sections reproduce some of these responses, followed by an analysis of their underlying assumptions.

198 *Ibid.* This is not necessarily inconsistent with the common law position because to say that something is a 'life' is not necessarily to say that it is a 'person'. Mackenzie considers the distinction between 'human beings' and 'persons' and the argument that only 'persons' can be members of the moral community. She explores "how far advanced since conception a human being needs to be before it begins to have a right to life by virtue of being *like* a person – that is, at what stage should we start treating a fetus *as if* it were a person?" She argues that personhood, while contingent, "is constituted by a complex of properties that supervene on a specific physical constitution". And further, that the "force of the feminist defense of abortion must lie in its highlighting of the moral particularity of the relationship between a woman and a fetus". For further discussion see Catriona McKenzie, "Abortion and Embodiment" in PA Komesaross, *Troubled Bodies: Critical Perspectives on Post Modernism, Medical Ethics and the Body*, Melbourne University Press (1995) 39 at 45-7.

199 Kingdom, note 176 *supra.*

200 Fudge, note 41 *supra.*

201 Petchesky, note 137 *supra.*

(a) Bikinis and Bigotry

The most controversial statement made in the debates was that of parliamentarian Iain MacLean:[202]

> Of course, some people in the community regard a pregnancy as an imposition. They have very little feeling for human life. They think that they are the centre of the universe, and will abort a baby just because it is convenient, or because summer is approaching and they want to wear a bikini. These people have no understanding. I cannot support this 'abortion on demand' proposal just because pregnancy is an inconvenience to some people.
>
> [Interruption from the gallery.][203]

The following day these comments reappeared in a Perth newspaper, *The West Australian*, and received condemnation later that day from John Halden in the Legislative Council.[204] Halden argued that such comments have "typified the attitude of our society".[205] "They are," he continued, "comments, thoughts and beliefs that marginalise, discriminate against and dehumanise women."[206] In a brave attempt to set the record straight, Halden argued:

> It is a disgrace to women in our society that some individual who purports to represent anybody should make that outrageous comment. I know of the emotion in this argument and I accept the rights of people to have different views. However, when some flea gets up in the other place [the Legislative Assembly] and makes such outrageous comments, he deserves to be flicked. I am about to flick him. It is about time that nonsense in our society is dispensed with .... How dare anybody trivialise such an emotive issue to that extent? ... [T]here comes a point when one has to draw a line in the sand and say, 'You cannot go further than this' because this is an outrage and over the top. Somebody has to get up and say, 'This is not acceptable'.[207]

(b) Pregnancy and 'Financial Gain'

In addition to Iain MacLean's statement, another controversial claim was made and later echoed in the words of One Nation Party President, Pauline Hanson, on the subject of single mothers and social security benefits.[208] These comments were made by Eric Charlton[209] during the speech of Helen Hodgson[210] who spoke in support of the Bill about the choices available to

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202 Member of the Legislative Assembly, (Lib).

203 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 674 (Iain MacLean).

204 Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1998 at 735 (John Halden).

205 *Ibid.*

206 *Ibid.*

207 *Ibid.*

208 M Munro, interview with Pauline Hanson, President of the One Nation Party and Kathleen Swinburne, President of the Sole Parents Union, *A Current Affair*, (Sydney, 16 July 1998). The interview focussed on Hanson's speech to the Federal Parliament calling for the termination of welfare payments to single mothers. Hanson's speech was a response to the federal inquiry into divorce rates.

209 Eric Charlton, Member of the Legislative Council, (Nat).

210 Member of the Legislative Council, (AD).

women who become pregnant. Hodgson attempted to illustrate why those choices are limited, arguing that: "in many cases, in light of the support that is available, a woman decides that it is viable to continue with her pregnancy". On the other hand, "[i]f the support of others is not available, the woman faces enormous odds in not only providing for herself but also caring for the child". Hodgson proceeded briefly before the interjection from Charlton:

> It creates the situation in which women are forced to go out and work because they do not receive enough money on the supporting parents' benefit to look after themselves. Therefore, they must provide child care. They must take all these factors into consideration. Sometimes a woman finds that [continuing the pregnancy] is not a viable option without a good support network which is not available under our social security and welfare system in this State.
>
> Hon EJ Charlton: Some have additional children to supplement their income.
>
> Hon Ljiljanna Ravlich: What a load of nonsense!
>
> Hon EJ Charlton: Do you want me to introduce you to some?
>
> The Deputy President: Order ...[211]

(c) Patriarchal Presumptions

Permeating the comments of both MacLean and Charlton is the assumption that many women are selfish and that they order their lives and life decisions according to 'convenience'. Such arguments carelessly place women in a dangerous double-bind in the face of unwanted or unplanned pregnancy. On one hand, Charlton's comments demean the reasons women, particularly single mothers, continue pregnancies, while on the other hand, MacLean's comments imply that motherhood should be women's priority and that a rejection of motherhood is a sign of women's immorality. Evident in these comments and also in the anti-choice movement's parallel position is "a distinct distrust of the motives and intentions of women who seek abortions"[212] and likewise of those single women who choose to continue their pregnancies. Thus, notions of 'good' (read 'married') women and motherhood are seen not only as intersecting but inseparable.

In particular, MacLean's 'bikini' comment seriously devalues the experience of women and women's reproductive capacity. It completely obliterates the complexities women face in making decisions about pregnancy, motherhood and abortion; complexities that are often socially manufactured. While MacLean chose the image of the 'body conscious beach girl', others have taken the image of the 'career woman', appropriating it to achieve the same ends. There have been a number of assertions in recent times that most abortions are had by professional women because they are concerned about the impact a child will have on their careers.[213] Cannold discovered from her study that in fact most

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211 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 626 (Helen Hodgson, Eric Charlton and Ljiljana Ravlich), (emphasis added).

212 Cannold, note 62 *supra*, p 110.

213 *Ibid*, pp 111-12.

women have abortions because they cannot afford a child, or because they do not wish to raise a child without a father,[214] and not because of some harmful effect it might have on their careers. However, using the labels of 'convenience' and 'selfishness' as the primary reasons women have abortions, places the responsibility for unwanted pregnancies solely on the shoulders of women and away from the state and society as a whole.[215] 'Selfishness' in particular is targeted because it seems to strike a chord in most women. John Halden acknowledged this when he said: "[t]he majority [ie women] in this community are made to feel guilty about wanting some quality of life no matter how many children they do or do not want".[216] Abortion counsellor Antonia Clissa has also observed in women who are contemplating abortion:

> [They] are very concerned about being considered selfish. ... A lot of this fear of 'being selfish' is very closely tied to women's self-worth, self-esteem and their social conditioning.[217]

It is disappointing that in a debate which was generally well-developed and sophisticated, some members felt drawn to call upon ideas and assumptions that have long expired and that in fact work to perpetuate the subordination of women by confining their worth to their reproductive capacity.

In the alternative, it could be argued that if women's choice is paramount, how relevant is the way women perceive, regard or value life and pregnancy anyway? Should it matter that women want careers or want to wear bikinis and have abortions accordingly? If it is a woman's decision, should she be forced to divulge her reasons and subject them to the scrutiny of medical practitioners, lawyers, politicians or other members of the public? What emerged from the Western Australian parliamentary debates was a strong emphasis upon trusting women to make reproductive decisions;[218] whether they regard this decision as simple or difficult is irrelevant to the question of whether or not they have the right to make that decision in the first place. Moreover, it was made clear in the debates that it is not for others to speculate on the morality, motivation or meaning of that decision.

F. Equality

(i) The Equality Paradigm

The legal conception of equality is gendered. Submerged in the liberal foundations of legal discourse, equality is inscribed with the key assumptions underlying liberalism. Liberal legal discourse assumes that the liberal paradigm

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214 *Ibid.*

215 *Ibid.*

216 Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1998 at 735 (John Halden).

217 Cannold, note 62 *supra*, p 112.

218 See Diana Warnock, (ALP), urging that we "must trust women, and not patronise them": Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 655. See also Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 621 (Giz Watson) and at 628 (James Scott).

is a neutral, non-gendered framework which has the capacity to locate inequality in an unbiased way. Not only does it assume that rights are an effective means of achieving equality, it also employs a particular understanding of 'equality', one that values an economy of sameness over diversity, and individualism over interconnectedness. Equality is thus a concept that privileges specific notions of sameness over difference, general over particular, but which fails to supply a criteria for determining when persons may be said to be the same or different, or when practices may be said to be general or particular.[219]

Conventional liberal theory holds that equality is only intelligible by reference to inequality. In order to establish difference or inequality, a unitary concept is needed from which to make a comparison. The concept thus turns on establishing a point of reference: 'equal to what'? Legal language uses a normative standard which has been defined by the interests, experiences and values of men in public life. Understood as embodying a model of sameness, the fight for gender equality "forecloses contestation of the baseline of men's experiences and glosses over the inequality between men that it reproduces between women".[220] Therefore, equality functions as a unidimensional paradigm of gender equality that embraces the inequitable foundations of the status quo,[221] which could hardly amount to emancipatory means for women, particularly in the context of reproduction. Moreover, a problem integrally linked to the unchallenged standards for measuring gender equality is the gendered hierarchy of rights that results because the standards are based on male experience and corporeality. Thus equality and rights can be described as regimes of exclusion;[222] women's reproductive capacity is one such exclusion.

Equality in this sense has automatically reinforced dominant values to the detriment of women. The message and indeed the practical reality is that women are entitled to equal treatment to the extent that they are the same as men and so long as their needs are general to 'humans' (read men) rather than particular to women.[223] Attempts to redress inequality through law almost exclusively adhere to the Aristotelian model of treating likes alike.[224] This formulation of equality is known as 'formal equality', or 'strict identical treatment' and fails to allow for the recognition or accommodation of the gender specific needs of women.

Reproduction is an obvious area of 'difference' between men and women. Indeed, there are many issues arising from reproduction and its correlation with social inequality that require a much broader analysis than can be covered here. However, it can be said with certainty that women are grossly disadvantaged simply because of their reproductive capacity. For example, lack of abortion rights and the practice of forced sterilisation in some countries are determinative

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219 See C Bacchi, *Same Difference: Feminism and Sexual Difference*, Allen and Unwin (1990).

220 Otto, note 145 *supra* at 12.

221 *Ibid.*

222 See D Otto, "Challenging the New World Order: International Law, Global Democracy and the Possibilities for Women" (1993) 3 *Transnational Law & Contemporary Problems* 371 at 389. Otto utilises the phrase "exclusion by equality" in demonstrating the specific ways in which equality can impose Western standards upon differently situated women across cultures.

223 C MacKinnon, "Reflections of Sex Equality Under the Law" (1991) 100 *Yale Law Journal* 1290.

224 *Ibid* at 1291.

of women's (reproductive) lives.[225] Furthermore, it has been recorded that 500 000 women die avoidably each year of pregnancy related causes, such as lack of access to basic obstetric care.[226] Another report has indicated that in 1990, 61 000 women from around the world died from the effects of illegal abortion.[227] Maternity leave policy has also led to the subordination of women, even while ostensibly progressive and responsive to women's specific needs. A comprehensive comparative study concluded that in countries where maternity leave policies exist, no matter how flexible, most operate as a disincentive to employ women, and prove to be obstacles to the advancement of a career.[228] Such issues reflect the way societies have structured women's options and neglected reproduction-specific risks and realities, thus laying the inequitable, intractable foundations of the status quo.

Formal equality has therefore proven to be inadequate in meeting the needs of women and in redressing the social imbalance between men and women. Some radical feminist thinkers have responded with a reformulation of equality based on a substantive assessment of the areas of inequality between men and women. MacKinnon has argued that in refusing to look at what has been done substantively to women through our laws and social practices, inequality is institutionalised in law and begins to "look just like principle".[229] Thus, substantive equality requires consideration of the power structures that operate to disempower women and to deny and silence their specific needs. MacKinnon calls this the 'inequality approach' which:

> understands the sexes to be not simply socially differentiated but socially *unequal*. In this broader view, all practices which subordinate women to men are prohibited. The inequality approach ... sees women's situation as a structural problem of enforced inferiority that needs to be radically altered.[230]

As Graycar and Morgan have argued, analysing abortion as a question of inequality would allow issues of gender hierarchy to be addressed as well as the

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225 See generally J Pettman, *Worlding Women: A Feminist International Politics*, Allen and Unwin (1996) p 11. In the Australian context, analyses have been conducted with respect to the high percentage of sterilisations of women with disabilities: see H Rhoades, "Intellectual Disability and Sterilisation: An Inevitable Connection?" (1995) 9 *Australian Journal of Family Law* 234; H Rhoades, *Sterilisation Decision Making and the Family Court:: The Far Bridge or the Fields?*, Master of Laws thesis, University of Melbourne (1997).

226 R Cook, "Women's International Human Rights: The Way Forward" in R Cook (ed), *Human Rights of Women: National Perspectives and International Perspectives*, University of Pennsylvania Press (2nd ed, 1995) pp 3, 13. See also R Cook, "International Protection of Women's Reproductive Rights" (1992) 24 *New York University of Journal of International Law and Politics* 645 at 689.

227 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 620 (Giz Watson).

228 See I Porras, "Maternity Leave Policies: An International Survey" (1988) 11 *Harvard Women's Law Journal* 171.

229 MacKinnon, *Feminism Unmodified*, note 134 *supra*, p 166.

230 MacKinnon, *Sexual Harassment of Working Women*, Yale University Press (1979) pp 4-5.

role which "lack of reproductive freedom plays in the perpetuation of that hierarchy".[231]

(ii) The Canadian Approach

In the abortion context, Lynn Smith has argued that a substantive equality or 'inequality' challenge is far more strategic than traditional arguments such as the right to choose.[232] In recent times a substantive equality approach has been used in reproductive rights cases in the Supreme Court of Canada with some success.[233] In *R v Sullivan*,[234] a case about two midwives who were charged with criminal negligence causing the death of the child of the plaintiff, the Women's Legal Education and Action Fund (LEAF) was granted leave to intervene. In its brief, LEAF employed an equality based argument. It argued first that the sex equality guarantee contained in the Canadian *Charter of Rights and Freedoms*,[235] must be taken into account when interpreting legislation. Entailed in this focus on sex equality "is a restoration of the pregnant woman to a central place in the legal analysis" which thereby promotes women's equality rather than entrenching inequality.[236]

LEAF argued, in particular, that the development of doctrine concerning the legal relations of woman and foetus must not further entrench sex inequality. LEAF's approach proceeded from the recognition that pregnancy occurs in a context of sex inequality: "an inequality which encompasses women's experiences of fertility and infertility, conception and contraception, pregnancy and the end of pregnancy, whether through miscarriage, abortion, or birth and child-rearing".[237] This approach is not simply saying that women directly experience pregnancy and birth, but that women *because they are women* experience social inequality in a range of circumstances related to procreation.[238] LEAF added that though reproduction has consequences for both men and women, its impact on the two sexes is not the same. This is due to the social inequality within which women experience pregnancy, birth and child-raising.[239] Thus, any legislative or doctrinal developments should be guided by a recognition of these factors.

Another argument raised by LEAF related to the fact that women often do not control the conditions under which they become pregnant. Because women do not have complete control over sexual access to their bodies due to the social

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231 Graycar and Morgan (1990), note 6 *supra*, p 209. See also S Law, "Rethinking Sex and the Constitution" (1984) 132 *University of Pennsylvania Law Review* 935.

232 Smith, note 43 *supra* at 112.

233 It should be noted that in the Ontario Court of Appeal case of *Morgentaler*, which preceded the famous Supreme Court decision, it was held that because access to abortion is a matter that only affects women and not men, it does not concern the issue of equality. *R v Morgentaler* 22 DLR 4th 641 (Ont CA 1985) at 680-5.

234 63 CCC 3d 97 (1991) (Can).

235 *Constitution Act* 1982 Part I, s15, Schedule B *Canada Act* 1982 (UK), c 11 (*Charter*).

236 Smith, note 43 *supra* at 112.

237 *Ibid* at 114.

238 *Ibid.*

239 *Ibid.*

context of inequality, and because contraception frequently fails, women's fertility is never completely under their control either.[240] Women's decisions during and following pregnancy are also limited due to reasons such as lack of financial support, inadequate health care and housing, lack of or limited child care facilities and a work force which operates on the assumption that everyone has a male life-cycle and the same freedom from child care responsibilities.[241] The conditions of inequality surrounding reproduction demand consideration in law making and legal interpretation if the imbalance between the sexes is ever to be redressed.

To emphasise this point, LEAF also invoked the idea of women being 'caught' in inequality on a broader scale. It is women, not men, "who are caught, in varying degrees, between the reproductive consequences of sexual use and aggression on the one side, and the economic and other consequences of the sex role allocations of labour in the market and family on the other".[242] Thus, LEAF concluded:

> Women are prevented from having children they do want and forced to have children they do not want and cannot want because they cannot responsibly care for them. LEAF submits that this reality is best described as one of inequality.[243]

(iii) Strict Identical Treatment in the Western Australian Debates

As already discussed, the strict identical treatment model of equality does not sit well in the context of reproduction and the biological specificity of the sexes, however, it has been advocated as one answer to inequality between the sexes.[244] Paul Omodei,[245] one such advocate in the parliamentary debates, pointed out that if the right to abortion were recognised, it "would be the first basic right assigned to women but not to men".[246] Omodei used this allegation as his starting point for arguing that reproduction must be viewed in the context of 'relationships'.[247] In other words, men must be given an equal say in decision-making about reproduction. Omodei argued that because the father's relationship to the child is equally as important as the mother's, then a father's responsibility to his child begins when the child is a foetus in the "mother's womb".[248] He concluded by asking the question, in true strict-equality style: "if women are given the choice to *kill babies*, will men be given the choice too?".[249]

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240 *Ibid* at 116.
241 *Ibid* at 115-6.
242 *Ibid* at 116.
243 *Ibid.*
244 For a discussion see E Sheehy, "Feminist Argumentation Before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: the Sound of One Hand Clapping" (1991) 18 *Melbourne University Law Review* 450.
245 Member of the Legislative Assembly, (Lib).
246 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 658 (Paul Omodei).
247 *Ibid.*
248 *Ibid* at 659.
249 *Ibid* (emphasis added).

What is troublesome about this approach is that it assumes, not only that foetuses are already 'babies',[250] but also that men and women already have equal rights. In so arguing, Omodei suggests that existing rights are gender neutral and that men and women share equally in them. He thus adopts a formalistic approach to rights which is blind to structural inequalities based on sex. Omodei also assumes that men and women have equal roles in the biological reproductive process. This is nonsensical given that men only supply the sperm, while women not only menstruate each month prior to the pregnancy and throughout their reproductive lives, but endure nine months of pregnancy, usually a long and painful child-birth and serious health problems, particularly related to their reproductive organs, later in life.[251] However, formal equality excludes such considerations.

Missing from Omodei's argument is any reference to the ways in which men and women are unequal, especially in relation to child-raising. He assumes that women have an equal voice with men in the decisions that most affect their lives, that women have free choice in their sexual relations and that they have access to safe and reliable means of contraception.[252] While some men, like Omodei, might wish to secure a greater role for themselves in reproductive decision-making (which many men in fact have), they forget about the large scale abandonment many mothers face following the birth of a child. Finally, in asserting that relationships are the 'proper' contexts in which reproductive decisions ought to be made, Omodei gives primacy to the heterosexual relationship. The heterosexual unit is increasingly an outmoded understanding of 'family' which works to privilege one category of relationship over another on the basis of sexuality.

In conclusion, Omodei appealed to chivalry and argued that women should reciprocate that notion when it comes to 'children'. He emphasised that men are always expected to risk their lives to protect 'women and children' (as evidenced by the phrase 'women and children first')[253] and accordingly women should apply this principle to the 'children' in their wombs.[254] Omodei thereby equated pregnancy with the sorts of extreme circumstances men face when 'women and children first' is likely to come into play.[255] In so doing, he not only assumed

250 For analysis of the terminology employed in the debates see Part II A.

251 See generally J Ussher (ed), *Body Talk: The Material and Discursive Regulation of Sexuality, Madness and Reproduction*, Routledge (1997); A Oakley (ed), *Women, Medicine and Health*, Edinburgh University Press (1993); H Roberts (ed), *Women's Health Counts*, Routledge (1990). Medical responses to women's reproductive organs and problems post-birth have varied over time. For example, in 1969 Wright argued that: "the uterus has but one function: reproduction. After the last planned pregnancy, the uterus becomes a useless, bleeding, symptom-producing, potentially cancer-bearing organ and should be removed": R Wright, "Hysterectomy: Past, Present and Future" (1969) 33 *Obstetrics and Gynaecology* 560 at 561.

252 J Grimshaw, *Femnist Philosophers: Women's Perspectives on Philosophical Traditions*, Wheatsheaf Books (1986).

253 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 1998 at 660 (Paul Omodei).

254 *Ibid.*

255 *Ibid.* Omodei reminded the Parliament that: "[t]he saying 'women and children first' is not a cliche invented by Hollywood for movies like *Titanic*; it is a principle of behaviour which has long been with us, and we hope will never be abandoned".

chivalry still exists, but also that the decisions women and men face are essentially the same and of the same magnitude.

(iv) Substantive Equality in the Western Australian Debates

The instigator and heroine of this debate, Cheryl Davenport, made the strongest case for equality as the basis for reforming abortion law. Arguing for 'equality' as a means of promoting women's rights in relation to pregnancy thus signalled the beginnings of a discourse focussed on substantive equality[256] rather than strict identical treatment as argued by Omodei, and formal equality as argued by Tom Stephens.[257]

Cheryl Davenport's equality angle did not go into as much detail as LEAF's factum in the *Sullivan* case. That Davenport raised abortion as an equality issue, however, is crucially important. It has provided an entry point into the discourse of substantive equality in the Australian context. While Australia lacks a Bill of Rights entrenching the right to equality, and while there appears to be no implied equality right in the Australian Constitution,[258] an equality discourse concerned with substantive equality is valuable and necessary in guiding the development of legislation and doctrine.

In her second reading speech, Davenport referred to a number of sources in support of an equality based argument for changes to the *Criminal Code* of Western Australia. She made particular reference to the legal arguments of Stella Tarrant, a lecturer at the University of Western Australia, which draw together issues of citizenship and equality.[259] Tarrant has argued that as long as abortion remains governed by the criminal laws in each State, equal citizenship is denied to women who have abortions. A constitutional challenge could thus be brought on the grounds that State criminal laws are in conflict with the Commonwealth's sex discrimination legislation and gender neutral citizenship laws, under s 109 of the Constitution.[260] Tarrant has further elaborated that:

> A woman who is forced to live an unwanted pregnancy and raise her child or decide to have her or him adopted is denied the opportunity to decide when to have children and how many children to have. She is disadvantaged physically, psychologically, economically and socially .... Moreover, a woman who has, in fact, had an abortion or who contemplates the possibility of having one in the future is disadvantaged insofar as she lives with a threat of prosecution and uncertain criminal laws. These disadvantages are likely to be experienced more seriously by women with few financial resources or who are Aboriginal or who live in rural areas.[261]

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256 See generally MacKinnon, note 223 *supra*; MacKinnon, note 134 *supra*, pp 96-102.

257 See Part II A (i).

258 See *Leeth v Commonwealth* (1992) 174 CLR 455. Only Deane and Toohey JJ found in the Constitution an underlying doctrine of equality of the people of the Commonwealth under the law and before the Courts, at 486-91. Gaudron J held that: "a concept of equal justice – a concept which requires the like treatment of people in like circumstances – ... is fundamental to the judicial process", at 502.

259 Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 15 (Cheryl Davenport).

260 *Ibid.*

261 *Ibid*, Davenport quoting Tarrant.

To this Davenport added that in failing to change the law we are "inviting women to continue to break the law, as well as not trusting them with the responsibility to determine decisions relating to their own bodies".[262] Thus, Davenport argued that without change, women's inequality will inevitably continue.

Davenport made further reference to South Africa's *Choice of Termination of Pregnancy Act* 1996 which was instigated by the South African Health Minister, Nkosazana Zuma.[263] The South African Act emphasises the values of "human dignity, the achievement of equality, the security of the person, non-racism and non-sexism, and the advancement of human rights and freedoms".[264] It recognises the state's responsibility to provide reproductive health services and ensure safe conditions under which the right of choice may be exercised free from fear.[265] Davenport also pointed to The Netherlands which introduced legislation in 1984 making abortion services freely accessible.[266] In citing the liberal laws of both South Africa and The Netherlands, Davenport was purporting to situate this debate in a setting of precedent on the issues of substantive equality and progressive attitudes in relation to abortion access. Using substantive equality as her starting point, Davenport thus provided a fundamental challenge to the criminal laws on abortion.

Giz Watson[267] similarly expressed concerns on the basis of equality. Watson identified the important role, as a female politician, of representing women.[268] In relation to abortion, she quoted statistics indicating that one in three Western Australian women will have an abortion at some stage during their reproductive lives,[269] and that 50 per cent of terminations are the result of failed contraception.[270] Watson emphasised how vital it is that this substantial group of women have a voice in Parliament. As their political representative, Watson spoke both for herself and for those women who, "under the current legislation, have broken the law".[271]

Watson also raised the issue of equality *between* women. She spoke of the essential need to speak out for those women who are traditionally unrepresented in Parliament. In this group she included young women, women from non-English speaking backgrounds, Aboriginal women and women from rural areas.[272] These groups of women would be most affected if the criminal laws relating to abortion remained unchanged, and thus in addition to sex

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262 *Ibid.*
263 *Ibid* at 17.
264 *Ibid.*
265 *Ibid.*
266 *Ibid.*
267 Member of the Legislative Council, (GWA).
268 Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 1998 at 620 (Giz Watson).
269 *Ibid.* See also Western Australia, *Parliamentary Debates*, Legislative Council, 1 April 1998 at 1178 (Ken Travers).
270 *Ibid* at 621.
271 *Ibid* at 620.
272 *Ibid.*

discrimination, there would be discrimination on other levels such as race, age, ethnicity and geographical location. Primarily, however, the essence of this debate for Watson was women's rights:[273]

> It is about control of our lives and bodies, and reproduction. It is about the economic circumstances of women, women's aspirations, and what they choose to do with their lives. Women who choose to terminate a pregnancy live with that decision. Women will always be in the best position to make a choice about their future, their fertility, and whether to have a baby at any time.[274]

Giz Watson introduced crucial factors into the debate on women's rights and equality such as economic circumstances, race and ethnicity. The discussion of equality in these debates thus evolved into an informed and textured discourse on substantive equality; a discourse which holds great potential for abortion access in other States and for further issues related to women's inequality in Australian society.

III. CONCLUSION

The Western Australian parliamentary debates paved the way for the most progressive legislation on abortion in Australia and made a significant contribution to the development of a new discourse on abortion and women's reproductive rights. The debate managed to cover a diverse body of material and perspectives without regressing into the stalemate that usually attends this topic. Nor at any point did it appear to be a tokenistic debate about an issue that was too difficult or too controversial for the politicians of Western Australia.

The dynamic and determinative role played by Cheryl Davenport was another important feature of this debate. Davenport introduced the notion of substantive equality as a means of focussing attention on women's specific reproductive needs and the way those needs have been the source of oppression and inequality for all women. In so doing, Davenport began a dialogue which has the potential to target further sites of structural inequality.

However, though the parliamentary discussion was generally thoughtful and detailed, it was not comprehensive. Many risks associated with the use of certain conceptual tools to achieve abortion access were ignored. This paper has highlighted some of the risks which must be carefully negotiated when employing these concepts in future discussions on abortion.

Perhaps the most important outcome, however, is that the legislative amendments set a prototype for other States and Territories to follow. While the legislation imposes an extra hurdle by requiring women to consult a second medical practitioner, the significance of conferring on women the power to determine their own reproductive choices far outweighs the introduction of this formality. Moreover, the legislation shifts technical control over reproductive

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273 *Ibid* at 621.
274 *Ibid.*

capacity from the legal and medical institutions to women themselves. This is a victory for all women and symbolises a positive step toward the achievement of substantive equality. With the dawning of a new millennium, the opportunity is here for other States and Territories to reform their criminal laws on abortion and to recognise legislatively the reality of abortion and the importance and need for women's reproductive control.

In order for the symbolic conferral of power to women to be meaningful, legal access to abortion must be supported by a network of other services and governmental commitments to the elimination of structural inequalities. This means that abortion services should be widely available in all States and Territories; there should be financial assistance for those in need; child care facilities should be provided; male partners should help shoulder the responsibilities of child-raising and domestic work; and a government subsidy should exist for all female reproductive and contraceptive expenses currently borne by women, including tampons, sanitary pads, pain relief medication for menstrual cramps and other side effects of menstruation, the pill, all other contraceptive devices and RU 486.[275]

The Western Australian debate is an extremely important event in Australia's history of abortion and women's rights. It shows a willingness on the part of both men and women to confront not only the fear of being caught, but the myriad consequences that may follow from that reality. De Beauvoir's description of only women being 'caught' still rings true. However, support for women has emerged with the implementation of the new Western Australian laws, and further assistance should be made available in the form of new services which respond to the specific needs surrounding women's reproductive capacity and motherhood. The challenge for law makers then is to continue to enact this support.

275 The cost of contraception was regarded as a significant issue in the debate on abortion law reform by Cheryl Davenport and Giz Watson: Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998 at 17 (Cheryl Davenport); 17 March 1998 at 621 (Giz Watson).