THE LAW AGAINST FAMILY PLANNING: A COMMONWEALTH SURVEY

prepared by

Victor Tunkel

Faculty of Laws, Queen Mary College, University of London

for

THE COMMONWEALTH SECRETARIAT

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CONTENTS

		Page
	Summary of Paper	2
1.	Introduction:	3
	(a) the problem stated	3
	(b) object and scope of survey	3
	(c) main source of the Commonwealth's laws	4
	(d) breadth of the laws	4
2.	Current FP methods:	
	(a) contraceptive methods	7
	(b) the new "contraception"	7
	(i) intercepting methods	8
	(ii) displanting methods	8
3.	Legislative hindrance and help	9
	(a) examples of laws tending to restrict FP	9
	(i) s.58-type legislation	9
	(ii) s.58-type legislation as explained in Bourne	12
	(iii) s.58-type legislation plus MTP legislation	14
	(b) examples of laws which promote FP	17
4.	The need for reform	18
5.	Some suggestions for reform	19
	(a) complete decriminalisation	19
	(b) legalisation by reference to the stage of pregnancy	20
	(c) legalisation by reference to the means used	21
	(d) legalisation by reference to the FP practitioner	21
	(e) legalisation by reference to function	22
	(f) legalisation through lack of evidence	23
	(g) conclusions on approaches to legalisation	24
	Notes and References	25

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Summary

Medical science has provided important new methods of family planning (FP). In so far as some of these operate after the moment of fertilisation, or even after implantation is complete, they appear to infringe the criminal law relating to abortion as it exists in many Commonwealth countries. This is because the crime of abortion, in the form in which most Commonwealth countries have it, extends to any conduct directed towards a woman, whether pregnant or not, intended to cause her miscarriage. The law is antiquated and largely ignored, but it remains the law and threatens to obstruct the new FP methods now being developed.

In some countries a more lenient construction of their abortion law is possible; in others there is recent legislation for the medical termination of pregnancy (MTP). But neither of these approaches is a satisfactory substitute for clear and positive legislation with modern FP in mind.

Various suggestions for legalisation are made, with their advantages and disadvantages discussed. No one approach will suit all countries because of their varying states of present law and attitudes; but it is hoped that experts in each country may find in the suggestions a pointer towards a formula to suit their needs.

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1. Introduction

(a) The problem stated

Ask any well-informed Commonwealth citizen if "contraception" (or "birth control" or "family planning") are much the same thing as "abortion" and you would surely receive a clear negative. If pressed to distinguish them, he or she might make some analogy with prevention and cure. And one suspects that most lawyers and many doctors would answer similarly. But the advance of science into this area makes it difficult for the law of most Commonwealth countries to support any such distinction. Presentday family planning (FP) practice, however ethical medically and desirable socially, is increasingly moving into the line of fire of the criminal law.

(b) Object and scope of this survey

The object of this paper is to show: how this has come about; that the law as expressed is hostile to the use of modern FP techniques and the introduction of new ones; the need for reform; and some ways of effecting it.

The picture that emerges may seem at times unrealistic, in that FP activities are seldom interfered with in fact by those who administer the law. Nevertheless it is important to see the law as the potential hindrance that it is, especially in relation to the new FP techniques now being developed.

Because the law concerned is abortion law, it will be necessary to examine Commonwealth countries' abortion legislation in some detail, but only so as to ascertain how it affects FP. The area of activity to which the crime of abortion and the defence of medical termination of pregnancy (MTP) properly apply is not part of this survey. It is dealt with in the accompanying paper by Rebecca Cook and Bernard Dickens.

Throughout this paper I have adopted the term FP as being the most general one available from among the poor assortment of terms, mostly euphemisms, that have so far been coined. But this generality, together with the need to delimit the scope of this paper and the accompanying one by Cook and Dickens, calls for an exclusionary definition. I would therefore initially define FP, as used in this paper, as the prevention of or interference with pregnancy by means designed to be applied either to women who are not then pregnant; or to those whose pregnancy is not then known and is not then reasonably discoverable. (Later in this paper it will be necessary to narrow this definition so as to focus on recent and developing FP methods).

(c) Main source of the Commonwealth's laws

Because of their legal heritage, most Commonwealth countries' abortion law is derived from the English Offences Against the Person Act 1861, s.58 (itself mainly a re-statement of legislation going back to 1803). This in its essentials applies to two classes of person:

(1) "Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent," and

(2) "Whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent...."

(d) Breadth of the laws

It is not appropriate in the present paper to subject these provisions to close analysis (1) but the following features or implications should be noted:

(1) The crime is called "abortion" but this word does not appear in the letter or the spirit of s.58. The crime consists of attempting to cause miscarriage. There is no definition of "miscarriage" in any of the abortion legislation; but considering the depth of nineteenth-century concern for the unborn child, extending to protect the non-pregnant woman also, it is hard to disagree with the conclusion of Professor Glanville Williams (2):

"At present [1958]both English law and the law of the great majority of the United States regard any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The foetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized."

So also Professor Dickens(3), who defines "miscarriage" as "a removal or discharge of the contents of the uterus before natural birth". A judicial definition to the same effect, by Chief Justice Thomson of Malaysia, is discussed further below (4).

Footnotes: these appear on page 25

A few countries, e.g. Ghana and Singapore (5), refer in their legislation to both "abortion" and "miscarriage", but the general legal understanding of these words is that they are synonyms.

(2) The first part prohibits such attempts by the pregnant woman on herself; the second part prohibits such attempts by outsiders even where the woman is not pregnant.

(3) If the operator has the intent specified, it is no defence to show -

i) that the woman was not pregnant; or

ii) that the woman was known to the operator to be non-pregnant; or

iii) that he used a means which did not work; or

iv) that he used a means which did not work and which would not have worked even if the woman had been pregnant; or

v) that he used a means which in fact worked but in a non-abortive way,

because the section, as expressed, forbids any conduct whatever when done with that specified intention as to consequences. It is important to grasp this point, that everything depends on the operator's belief as to the way his technique actually works. The crime consists in doing virtually anything directed towards a woman with that belief, however ill-founded the belief may be.

(4) It follows that the object of the second part is not only to protect the foetus (if any) but to protect the woman from operations and administrations of every sort.

(5) The woman's consent is no defence.

(6) Both parts contain the word "unlawfully".

Some Commonwealth countries have varied the wording of their versions of this provision. Where such variations could be significant for FP purposes they will be considered separately. But in the following discussion all Commonwealth enactments which appear to derive from the English provision will, for convenience, be referred to as "s.58".

The above-listed implications of s.58 in relation to FP have not gone unchallenged. The most recent authoritative examination

of these issues is contained in the Report of the Royal Commission on Contraception, Sterilisation and Abortion in New Zealand (March 1977) under the chairmanship of Mr. Justice McMullin. The Report opens with a Summary (p.23) in which the Commission state their conclusion: "For reasons which we fully discuss in the chapter [Chapter 4], we are of the view that pregnancy, the state at which abortion is directed, commences at implantation". This conclusion is of such importance for FP that one turns eagerly to Chapter 4 for the full discussion. But all one finds is that the Commission (p. 92) simply define "contraception" to include the prevention not only of fertilisation but of implantation, so as to beg the fundamental question. It is only in Chapter 24 that the Report eventually focuses on the real issue: the meaning of "miscarriage". After claiming to have referred to "most dictionaries, both ordinary and medical" (without specifying or quoting them), they proceed to define this as (p.269) "the premature expulsion of the fetus or embryo". They then add: "the use of these terms presupposes implantation because it is only after that stage has been reached that the terms 'embryo' and 'fetus' are used". And they therefore reject an American medical dictionary which defines "miscarriage" as "the loss of the products of conception" as being too wide: "wide enough to include the loss of the fertilised ovum... before it has implanted".

This seems to repeat the inverted reasoning observed earlier with "contraception", whereby the unknown quantity is established by defining it. One cannot avoid the impression that the Commission have synthesised a modern definition - the New Zealand legislation dates from 1867 - convenient to their conclusions, culled from dictionaries compiled well before the present debate; and have then extracted further definitional inferences from their own definition.

Perhaps aware of this dubious reasoning, the Commission close their argument with what is meant to be a practical justification for their conclusions. In the event it is a most unfortunate passage (p.269):

> "Only when the fertilised ovum has implanted... does... pregnancy commence. Before that stage is reached, it would be virtually impossible in any prosecution to prove that an act was done with intent to procure a miscarriage unless there was some evidence that there was something to miscarry."

Quite apart from the elementary error of confusing the evidence of a crime with the crime itself, this suggestion that one cannot prove intent unless one can prove the existence of the object aimed at can only be described as a blunder. Is the picpocket's intent in doubt if he dips into what happens to be an empty pocket? More to the point, does a back-street abortionist in New Zealand have a defence of no intent if the woman is not

pregnant? Does the woman herself? That the Commission later get it right, on p. 282 in connexion with "menstrual extraction", is not entirely reassuring, and tends to confirm the impression of confused and wishful thinking in what went before. With this shaky foundation it is not surprising to find the McMullin Report's FP law reform proposals are similarly ill-considered. These will be examined later in the section on legalisation.

2. Current FP Methods (6)

(a) Contraceptive methods

Once upon a time, when FP consisted only of contraception (proper) or "natural" methods, there was no possible overlap with abortion law. Mechanical devices such as condoms and diaphragms, which act as a physical barrier to the union of sperm and ovum, are quite lawful from the point of view. So also is sterilisation by tubal litigation and vasectomy, which prevent female and male generative elements coalescing; and the various types of contraceptive pill in ordinary use, in so far as they merely inhibit ovulation.

(b) The new "contraception"

In recent years, new and more effective FP methods have been introduced which are known, or believed, to operate after fertilisation and even after implantation. Terminology is difficult here: "contraceptives" they are certainly not, however often they may be so described, for they do not prevent conception but rather interfere subsequent to it.

(The tendentious use of the term "contraception" to cover all FP techniques is now widespread and incorrigible, owing to the poverty of terminology previously mentioned. This is a pity because it serves to confuse the essential issues, but lawyers (at least) know there is no magic in words. The Lane Report (Report of the Committee on the Working of the Abortion Act (U.K.)(7) at p. 266 defines contraception admirably: "the prevention by artificial means of fertilisation of the ovum".)

Since this paper is concerned largely with the law relating to post-conceptive methods for interrupting pregnancy, it is awkward not to have a general term by which to refer to them. They are strictly "abortifacients" but this is a little over-resonant and is too imprecise for present purposes. So from here on references to FP should be understood to include only post-conceptive methods, that is to say, those whose mechanism of action occurs after the moment of fertilisation. A brief and non-technical summary of these will now be attempted (for a fuller discussion, please refer to the accompanying paper by Mr. Mostyn Embrey).

(i) Intercepting methods

First came the intra-uterine device (IUD) which, inserted into the uterus of a non-pregnant woman, prevents the fertilised ovum from implanting. The precise mode of operation of the IUD is still in doubt but it is generally accepted that it does not prevent fertilisation. Then came the pill. Of the types now in general use, both the "continuous" or "mini" pill (primarily) and the "combined" pill (as a secondary effect) work on the uterus so as to make it inhospitable to any fertilised ovum.

Whilst the IUD and, to some extent, the pill, operate on the results of coitus, they are usually used pre-coitally on women not then pregnant, or believed to be. But there are further ways of intercepting the fertilised ovum, used post-coitally: the "morning-after" pill is expressly aimed at preventing the implantation of any ovum that may have been fertilised by recent unprotected intercourse. And there are current experiments in the post-coital insertion of IUDs.

Since these methods interfere with the transport of the fertilised ovum, or with its destination in the uterus, so as to hinder its implanting, the name "interceptive" has been suggested for them(8). This will serve so long as it is appreciated that they are not a variety of the genus "contraceptive".

(ii) Displanting methods

A further group of techniques is now in use which avowedly operate against the fully implanted foetus. Here again we have the familiar problem of euphemistic names. There is "menstrual regulation", the removal by a suction tube of the contents of the uterus. The Lane Committee resolved to call this "uterine evacuation", with the comment that (para.86):

> "this procedure is called by some who advocate its use 'menstrual evacuation' or 'menstrual regulation', which we do not consider to be appropriate descriptions when the purpose is to procure abortion if conception and implantation have taken place. An alternative name for the procedure in the U.S.A. is 'endometrial aspiration', but although this name appears to be more accurately descriptive it is uninformative about the purpose of the operation".

Uterine evacuation has indeed a legitimate use for menstrual regulation, inducing and removing in a few convenient minutes a non-pregnant woman's monthly period. It is also used widely in clinics for early

abortions where these are allowed by law. Between these two uses comes the question of its use as a means of post-coital FP: after intercourse but before the woman is known to be pregnant. Because it is simple and convenient, trained health auxiliaries can use it; and it has been suggested (9) that unqualified women can use it on one another in mutual self-help clinics and that a woman could even be trained to use it on herself.

Chemical substances may be used to the same purpose: prostaglandin, administered after implantation, causes the expulsion of the conception.

And so on to the future, the methods becoming more efficient and trouble-free but, without the long-awaited male pill, more obviously early abortion. There is little dispute now about the medical facts; so what is the attitude of Commonwealth countries' laws?

3. Legislative Hindrance and Help

Laws in this area are of two types:

(a) Those whose effect is to restrict modern FP. These consist of criminal laws aimed at abortion (old-style), read together with modern statutes or cases making therapeutic or social exceptions;

(b) Those whose effect is to promote modern FP. These are mainly administrative provisions authorising FP agencies and providing resources for them, or listing prescribable substances; etc.

A list of countries and their laws of type (a) is contained in the parallel paper "Abortion Laws in Commonwealth Countries". Here I will first try to categorise these laws according to their impact on FP; then consider some examples of type (b) to see how these relate to type 1). In considering the effect of the criminal laws I have tried to ascertain what the provision actually says and what interpretations seem reasonable. I am aware that in some countries the law may not be so understood; or its enforcement fall short of or even exceed what it appears to say.

(a) Examples of laws tending to restrict FP

(i) s.58-type Legislation A number of countries have adopted s.58 with little or no alteration. These include Antigua, Botswana, Malawi, St. Kitts, Tanzania, Tonga, Virgin Islands.

These countries therefore outlaw any conduct intended to prevent a fertilised ovum from implanting or to cause an implanted ovum to be expelled. It would seem to follow that

all FP methods which work, or are believed to work, after the moment of fertilisation, are illegal. There is the exception for the woman who, when not pregnant, uses a method intended to work later when she has conceived. This, the accidental result of the requirement that she be "with child" might excuse a woman taking the ordinary pill or, if it were possible, inserting her own IUD. But this is not a very large loophole. Moreover, certain countries have tighter versions of s.58 which extend to self-operation by the non-pregnant woman also: Bahamas, Belize, Ghana, Grenada, Nauru, Nigeria (Southern States), Queensland, St. Lucia, St. Vincent, Western Samoa. But of these several, including the Bahamas, Belize, Ghana and St. Lucia more than compensate for this strictness by a further very liberal section, providing a specific defence of "medical or surgical treatment of a pregnant woman". This, if done in good faith and without negligence is lawful even though "it causes or is intended to cause abortion or miscarriage...." This is very widely and vaguely worded. It could certainly cover FP if that be regarded as itself "medical treatment"; or, presumably, part of some genuinely required treatment. So relief of anxiety or depression about pregnancy could be included. There is no restriction in the section itself on who may perform the medical treatment, though it is arguable that unqualified treatment must be potentially negligent when qualified assistance is reasonably available.

Within this category, certain countries have a somewhat different provision. Bangladesh, Malaysia, Nigeria, (Northern States), and Sri Lanka (and India and Singapore in category (iii) below) while aiming at the woman herself as well as outsiders and while going so far as to omit the word "unlawfully" (as to which see below) have what otherwise appears a laxer provision: "whoever voluntarily causes a woman with child to miscarry....". This could be interpreted as prohibiting only post-coital conduct, and so exempting the inserter of an IUD, for otherwise the words "with child" are mere surplusage. Indeed, as framed, the law would require the prosecution to prove that the woman had actually miscarried, impractical in the case of an intercepted embryo. But in Munah Binti Ali v Public Prosecutor (1958)(10) a Malaysian Court of Appeal upheld a conviction for attempt where no pregnancy had been proved. In so doing they followed what was then believed to be the position in English law on impossible attempts; but the decision of the House of Lords in Haughton v Smith (1974) (11) that there can be no attempt where the object of the crime is non-existent, now casts doubt on earlier authorities. If therefore a FP practitioner in one of these countries were now charged with causing miscarriage by the use of an intercepting or displanting method, he could quite properly argue that the dissenting judgment of Thomson, C.J., in Munah has been subsequently vindicated. The learned

Chief Justice said that "causes a woman with child to miscarry" means "to cause her to lose from the womb prematurely the products of conception, and that therefore there can be no offence under the section unless there are products of conception...."; to prove which would be almost impossible in any circumstance short of a police trap.

Akin to these countries' law is that of Malta and Mauritius, where it is a crime to cause "the miscarriage of any woman with child". Again, there is no "unlawfully" and the question of attempt is left to the general law. (The Mauritius Code uses the expression "quick with child" but this means no more than "with child". This can be seen from the French version of the Code where the equivalent phrase is "une femme enceinte"; and in the English authority Wycherley (1838) (12).)

Once again, therefore, we have an abortion law expressed in very wide terms but in relation to FP, probably unenforceable in practice.

A few countries (Kenya, Nigeria (Southern States), Papua New Guinea, Queensland, Seychelles and Uganda) have a further specific provision: "a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable having regard to the patient's state at the time, and to all the circumstances of the case."

If this has any application to FP it is an odd mixture, by turns restrictive and liberal. On the strict side, it declares only the preservation of the mother's life as a justification for operations upon an unborn child. But the disjunctive "or" seems to give an alternative defence of operating on "any person for his benefit"; so FP operations could, by free interpretation, be lawful without the need to show risk to the mother's life, always depending on current notions of what amounts to "benefit". The provision as it stands is remarkably liberal in giving the defence to "a person", (for s.58 itself makes no exceptions even for doctors) provided he acts "in good faith and with reasonable care and skill". Since an unqualified person is not by the section itself precluded from operating, this ought to mean such care and skill as is reasonable for such a person to have in all the circumstances. But the important qualification "if the performance of the operation is reasonable" bars the unqualified where a qualified operator is reasonably available; unless there is some dire emergency, but this would not be a matter of routine FP. Perhaps the best argument against the section's application to FP is its concern only with "surgical operations". This term is not defined. It could be argued to just about include uterine evacuation; but if the test is whether anaesthesia

is normally required, no FP methods would come within it. A mischief-rule construction would surely confine the section to surgery as generally understood, leaving FP in these countries as in all the others, to take its chance with s.58.

Extending over almost the whole of this category is the requirement that the prosecution show that what was done was done "unlawfully". (In this respect the Tongan enactment is curiously worded. It makes it a crime to administer drugs etc., or unlawfully to use any instrument. And this omission of "unlawfully" in the first form of the actus reus is repeated in the following section: the woman, pregnant or not, is guilty if she administers a drug to herself, or uses on herself or permits to be unlawfully used on her any instrument. Here is surely some aberration by the draftsman? It seems unlikely to have been intended to prohibit the use of drugs absolutely while countenancing the possibility of a defence for those using instruments.)

Would courts in these countries, if sympathetic to FP, allow a defence submission of "lawfulness" in appropriate circumstances? The question has not so far arisen in decided cases. A court could treat the word as having no meaning; or it could interpret it to mean "where not otherwise excused by the general part of the criminal law" so as to allow defences of necessity, duress, etc. But these are very narrow defences whose very existence is sometimes doubted. Necessity, on a balance of evils test, might uphold the preservation of the mother's life as a higher value, but probably not a lesser objective such as her health or welfare. So interpreted, the word would not offer much hope for mere FP.

A freer interpretation was given to "unlawfully" by the English case R v Bourne (1938) (13). This has been followed in certain Commonwealth cases; and law officers in other countries have indicated in response to the Commonwealth Secretariat's questionnaire that they believe their courts would follow it if the matter arose for decision. All such countries fall into the next category.

(ii) s.58-type legislation, as explained in Bourne In Bourne an English judge at first instance held that "unlawfully" in the section requires the prosecution to show the operation was not done to save the life or health (physical or mental) of the woman. As Bourne was acquitted, no appeal was then possible to test this ruling. It became the licence for all MTP in England for the following thirty years; yet it could have been overthrown at any time (so as, in effect, to criminate doctors retrospectively) by a subsequent appeal court decision. Although the case has now been approved by some Commonwealth courts, it might be thought desirable even at this late stage for the English

Court of Appeal to be asked by the English Attorney-General to review it under its new jurisdiction(14) as a service to the Commonwealth. (Paradoxically, such review would almost certainly not affect English law: see category (iii) below.) Such a review would also clear up the discrepancies between the two reports of the case and could provide some guidance, albeit obiter, on the further narrowing of the word "unlawfully" so as to provide a clear basis of legality for post-conceptive FP. Of course this would be an academic and somewhat abstract exercise which judges are traditionally unwilling to undertake. But then the new jurisdiction to review acquittals is avowedly academic in that it was expressly instituted for the clarification of the law for future cases only. Bourne as it stands is not much help to routine FP. It would be an exaggeration to describe the normal desire of a woman not to become pregnant as anxiety which imperils her mental health. Still, the case has potential in its refusal to treat "unlawfully" as mere nineteenth-century surplusage (which it probably was). Instead, the conduct described in s.58 was expressly held not to be forbidden in all circumstances and it remains open for countries in this category to discover for themselves what further conduct, especially post-fertilisation FP may be lawful.

Which countries are these? They include the following, whose courts have actually considered Bourne and applied similar principles: the Australian States of Victoria (Davidson, 1969) (15), New South Wales (Wald, 1971)(16), Queensland (Ross, 1955)(17), Fiji (Emberson, 1976) (18), Kenya (Mehar Singh Bansel, 1959) (19), New Zealand (Woolnough, 1976)(20), Nigeria (Southern States) (Edgal, 1948) (21). From other countries in a growing category which includes Barbados, Bermuda, British Virgin Islands, Ghana, Guyana, Jamaica, Sierra Leone, St. Kitts, Swaziland and Trinidad and Tobago, have come opinions that their courts would follow Bourne. But some of these, including Bermuda, Guyana, Nauru, New Zealand, Nigeria (Southern States) and Queensland have the stricter form of s.58 applying to conduct by the woman herself. This may mean that a non-pregnant woman who uses means intended to work after fertilisation may still be acquitted if the prosecution fail to negative her defence of protection of her health. But the Bourne ruling was expressly confined to medical practitioners; so we have a further point which a new look at the case could clarify.

Certain countries' laws omit "unlawfully" altogether. Of these, Tonga has already been considered and Canada, India and Singapore fit best into category (iii) below. There remains a group, including Bangladesh, Malaysia, Nigeria (Northern States) and Sri Lanka which have in substitution for "unlawfully" the requirement that the prosecution prove that the miscarriage (or attempt thereat) was "not caused in good faith for the purpose of saving the life of the woman..."

These words are strikingly similar to those on which the judge in Bourne relied to explain the meaning of "unlawfully", so the omission of "unlawfully" itself is significant only if other general defences (e.g. duress) are thereby excluded. There remains the more important question whether the courts in these countries would construe "saving the life" as Bourne does. (Some suggestion that they would may perhaps be inferred from the Sri Lanka case Waidyasekera (1955) (22)). But for reasons already noted Bourne offers little to FP practice; and the literal requirement that the woman be with child and actually miscarry may, as remarked earlier, in practice preclude the application of this type of enactment to FP as defined for the purposes of this paper.

(iii) s.58-type legislation plus MPT legislation Certain countries have by statute provided that it shall be a defence to s.58 for MTP to be carried out in specified circumstances. The U.K. Abortion Act 1967 is an example, with its medical and social grounds and procedures to be complied with. Comparable legislation has been enacted in Australia (Northern Territory & South Australia), Canada, Cyprus, Hong Kong, India, Jammu & Kashmir, Singapore, and Zambia.

One might have hoped that in such recent and permissive MTP provisions the legislators would have spared a thought for modern FP. But on the contrary, not merely did they choose to ignore it (for, by 1967 the post-fertilisation action of at least the IUD had been frequently discussed in medical literature) but unwittingly made FP avoidance of s.58 even more difficult. The U.K. Act (and those of Hong Kong, South Australia; and Canada and Singapore, in effect) by s.5(2) practically expunged the word "unlawfully" and any hopes based on it: "For the purposes of the law relating to abortion, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by section 1 of this Act."

In the Canadian Criminal Code, s.58 is restated with "unlawfully" omitted altogether. (Presumably it was thought that the general defences provided by the Code, plus the new MTP provisions, made further expansion of "unlawfully" unnecessary.) There follows the MTP defence, with the usual formalities requiring a hospital committee to certify that the continuation of the pregnancy would be likely to endanger life or health. So once again the legislators have ignored FP; and its practitioners ignore the law, encouraged by government health agencies who seem quite unaware that the criminal law is pointing at them.

This deletion of "unlawfully" in MTP enactments, wholly negative in its effect, is bad enough for modern FP. But there is worse in the positive side of such legislation. The U.K. Act and those based on it provide a defence to s.58

only "when a pregnancy is terminated" in the prescribed circumstances. (The Canadian Code is slightly looser, giving the doctor a defence if he "uses... any means for the purpose of carrying out his intention to procure the miscarriage...".) This has been interpreted in England, notably by the Lane Committee, (para 91) to mean that post-conceptive FP remains criminal despite full compliance with the Act, unless the woman to be pregnant:

"... we are doubtful whether the wording of the Abortion Act is apt to cover a speculative abortive procedure carried out on a woman who may or may not be pregnant and at a time when it would be impossible to establish whether she had been so or not.... It seems to us that the Abortion Act does not envisage any such speculative procedure. However, sections 58 and 59 of the Offences Against the Person Act 1861 appear to cover the situation...."

In this opinon the Committee have followed A.J.C. Hoggett who, writing at the time of enactment, said (23): "To apply, section 1 requires the termination of a pregnancy.... An offence is committed if the woman to be aborted is not in fact pregnant..."

If these views are right, FP is at a stroke deprived of its best potential defence under the old Act and denied its statutory defence under the new one. The only crumb of comfort is that new methods of pregnancy testing will afford earlier and quicker diagnosis. So a FP practitioner who takes all this seriously (are there any?) may avoid conviction by insisting that patients seeking menstrual regulation first submit to a pregnancy test before he extracts; which operation must still be in full compliance with the Act. "Morning after" pills on this view remain illegal and purported compliance with the Act would make no difference. What of the IUD? (The Lane Committee avoided this issue.) Perhaps it is not in the Committee's sense "speculative" since it is designed and usually (24) intended to work only against a future fertilised ovum, "when a pregnancy is terminated". On this construction IUD insertion would be lawful under the Act. (To point out that IUDs are not inserted pursuant to the Act but quite irrespective of it would be to insert an unwelcome foreign element - reality - into the self-fertilising womb of the law.)

It is astonishing how little reaction there has been to this authoritative condemnation of "speculative" FP, especially considering that a less restrictive interpretation of the Act is arguable (25) and that it is just at this early "speculative" state that FP is physically and mentally best for the patient. Even the Committee's remedial proposal has lain unimplemented They recommended a new sub-section to be added to the U.K. Act: "In this Act references to termination of a pregnancy include acts done with intent to terminate a pregnancy if such

exists". Their intention was to legalise "speculative" uterine evacuation so long as the Act was otherwise complied with. But this might then have been understood as outlawing all post-fertilisation FP if not done under the Act. Compared with such an outcome, the present uncertainties and dubious legalities are far preferable; so perhaps we should not complain that the Lane Report has not been adopted (26), while seeking a more thorough and FP-minded re-examination of the law.

In concluding this category of countries' laws, it is instructive to look at the legislation of Singapore, the Commonwealth country which has advanced furthest in relaxing abortion law in favour of MTP. Its crime of abortion is of the less strict form, requiring an actual miscarriage; but attempts will be criminal on ordinary principles of proximity. Where there is no pregnancy, or none proved, much will depend on whether the mainland case of Munah (10) is authority on the island and, if so, whether a Singapore court would prefer the principle of Haughton v Smith. Though even if a pregnancy, and therefore an actual miscarriage, cannot be proved it may still be possible to convict of the full crime where there is in the circumstances of the case evidence which raises a strong inference of pregnancy.

Turning to Singapore's MTP legislation, all that is required is for the woman to consent in writing, the doctor to be specially qualified, and for him to do it in an approved hospital; and these last two requirements are waived where drugs alone are used, which looks very helpful for FP in the future. However, "unlawfully" nowhere appears and one cannot know what would be the attitude of a criminal court to cases falling within the criminal law and not clearly exempted by the MTP provisions. To take examples:

1) A Singapore woman is fitted with an IUD. If, as suggested, this can be shown to work so as to "cause a woman with child to miscarry", this is an offence unless the inserter is a doctor and he has the special qualifications and inserts in an approved hospital and has the woman's written consent. (It is true that s.9 of the Singapore Act appears to give doctors complete immunity: "No registered medical practitioner shall be liable civilly or criminally for carrying out treatment to terminate a pregnancy so long as the pregnant woman consents to such treatment and so long as such treatment is not carried out in a negligent manner." But this must presumably be read in the context of the Act and the criminal law of abortion by inserting some words after "treatment" such as "under the provisions of this Act"; otherwise, taken literally, any doctor could set up his own back-street clinic with impunity. And there is the further difficulty of fitting the non-pregnant IUD patient in the words of s.9). Is it the practice in Singapore to insert IUDs only in such restrictive circumstances?

2) A Singapore woman complains of menstrual irregularity. In an approved hospital the fully qualified doctor realises she may be pregnant but decided to proceed as for menstraul irregularity and dispenses with a pregnancy test. Under his supervision her uterus is evacuated by a qualified and experienced nurse. If the woman was in fact pregnant, this is an offence, probably by all three persons. If not pregnant but all thought she was, there would be an attempt (or complicity in it) by all three if Munah is followed. Lack of evidence would normally be a difficulty in either event but the woman might in a fit of depression go and confess to the police. Or even be an agente provocateuse.

3) Anxious after recent unprotected intercourse, a Singapore woman consults her doctor, who gives her a prescription for "morning after" pills. If she had in fact conceived this would be an offence unless she consented in writing.

These cases do not seem wholly implausible. On any reasonable view of FP practice, none of them should come near the ambit of the criminal law. If, as argued, they do, it suggests that Singapore's remarkable relaxation of the criminal law has been wholly MTP-minded and that little attention has been paid to the legal needs of FP. Indeed it is something of an irony that where countries have older legislation opposed to all forms of abortion and MTP, there may be room for FP to manoeuvre. Yet the "advanced" legislation of the U.K. variety seems almost to go out of its way to hinder FP.

(b) Examples of laws which promote FP

Most Commonwealth countries encourage general FP activities. Many Governments channel funds to their state health services for this purpose, or to unofficial FP agencies. It seems that once the policy decision to support FP has been taken in principle, questions of methods and facilities are usually left to medical administrators, who may obtain advice from international bodies like the IPPF and WHO.

Such an arrangement may work well enough in practice. But if the FP methods are not spelt out in legislative form, there must eventually arise the anomalous situation in which the doctors use techniques of FP which the criminal law forbids. You then have one branch of the government doing its best to promote what another is duty-bound to prevent or punish.

This cannot be right. If governments give money for or otherwise encourage FP, they should do so by statutory provisions so as to repeal pro tanto, or exempt from the effect of, their criminal laws. A very few governments have so legislated but even they do not seem to have had this problem clearly in mind. An example is the U.K.'s National Health Service Reorganisation Act

1973, s.4 (re-enacting the NHS (FP) Act of 1967) which provides through the NHS "advice on contraception... and the supply of contraceptive substances and appliances....". The section has the marginal note "Family planning service", but the insistence that this be only by "contraception" suggests that only such methods as operate prior to and in prevention of conception are authorised. Although as already mentioned the word "contraceptive" is sometimes used uninformedly or tendentiously to include all manner of FP devices and techniques, the U.K. Parliament is deemed to know the existing law, the facts of life and the correct meaning of words at the date of the Act (which here means 1967). The correct meaning of "contraception", re-emphasised in the Lane Report presented to Parliament, has not been challenged or disputed there. It thus seems that little thought was given to the problem by the U.K. Parliament when they had the opportunity, and that much U.K. FP practice remains of doubtful legality.

Another approach to the legalising of FP and avoidance of the criminal law is for statute to empower the health authority to list or register approved FP devices. Provided the terms of the statute are wide enough to give the health authorities a free hand (unlike the U.K. provision, above) this could presumably be held to impliedly repeal, or to provide a defence to, the criminal law. The Health (Contraceptive) Act 1974 of Victoria is an example of such legislation. But its purpose seems to be to control or facilitate marketing and advertising of such devices as it assumes are legal. It is doubtful and unsatisfactory that such a legislative side-wind can be relied on as effecting decisions of major legal principle.

4. The Need For Reform

The spectacle of a hopelessly antiquated law being marched over, unnoticed, by the forces of science and medicine, is not a edifying one. It is not made better by the possibility, however remote, of their tripping on it, The fact that the law is seldom, if ever, invoked against FP is not the point. There is no certainty that it will remain quiescent in all countries, especially when some new method of FP arouses public interest and debate. But anyway, a law which is disregarded, whether from policy, apathy, ignorance or any other cause, remains a law and a potential hindrance. If it is not intended to hinder it should not be couched so as to threaten to. If it is expressed in antiquated terms of uncertain breadth, it should be restated to suit modern needs.

Of course, it is possible and indeed proper for lawyers to seek loopholes in the present laws or get them interpreted less restrictively. Some suggestions along these lines have been made in this paper. It is well to remember that abortion laws are not aimed at FP; they hit it accidentally. But whilst it may be proper to try to construe laws narrowly so as to remove FP activity from their line of fire, it cannot be satisfactory to do only this: and especially when the exercise leads us to distort the accepted meaning of words or to ignore the scientific evidence.

5. Some Suggestions for Reform

As there is no one national law, let alone one national attitude, it is not practical to make a single, broad proposal that would suit all or even most Commonwealth countries. The disparities of existing legislation, local conditions and policies on the one hand, and the prospect of new and foreseeable methods on the other, make it necessary to suggest for discussion a variety of approaches, all of them flexible, from which individual countries' experts could choose what suits them best.

(a) Complete decriminalisation

This is frequently asked for in connection with MTP. And the suggestion is that if MTP were freely available on request, all FP would *ipso facto* be lawful. That this is a fallacy is demonstrated in this paper by the Singapore examples. Similarly in the U.S.A.: the Supreme Court ruled (27) in 1973 that women have a constitutional right to abortion during the first trimester and virtually up to the time of viability. But the Court stressed the need for the decision of a doctor and did not sanction self-abortion or women's mutual medication in self-help clinics. Yet self-administered or mutual FP methods could be commonplace before long.

The point is that "complete" decriminalisation is never really complete because this is not truly wanted by anyone, and for several reasons. Firstly, the old-fashioned back-street or village abortionist is still with us. He or she remains a social danger and therefore has to remain outlawed. But as long as the crime remains, the problem of defining exemptions remains. And here FP needs to be provided for quite distinctly from MTP especially in countries which frown on MTP anyway. Perhaps the crime of abortion may eventually wither away and be dealt with as a species of assault or unauthorised medication. This could come about with the advent of a safe abortion pill or suppository which would transform illegal abortionists into mere unauthorised suppliers, no longer a serious menace. But meanwhile FP needs specific legalising and the legislative reformer must keep the criminal law context always in view. A good example of what happens when reformers fail to do this is provided by the McMullin Commission, referred to earlier. Among their recommendations (p.282) is the retention of an equivalent of s.58 plus a MTP defence; with "miscarriage" defined as"the premature explusion of the fetus or embryo after implantation".

This would mean that an unqualified abortionist (boy-friend, back-street, etc.) who is proved to have used a drug or instrument on a girl without any pretence of lawful authority would have a complete defence (the burden of negativing which would lie on the prosecution: p.279) if -

1. he did it within the 11 pre-implantation days (p.94) of the

fertilising intercourse; because he would not thus have intended to interfere with a fully-implanted ovum; or -

2. he did it in the belief that it was within the 11 days. And since this belief might be based in turn on the woman's belief, or on what she untruly told him, his defence, true or false, would be virtually unassailable where the act was done at any time before the woman was manifestly pregnant; or -

3. he did it knowing the woman was, say, one month pregnant, but having the genuine belief that implantation takes place only after, say, two missed periods.

Whereas if the woman was not pregnant, but she thought she was two weeks gone and told him so, both would be guilty of the full crime of abortion!

No thought appears to have been given to such undesirable side-effects of tinkering with the criminal law. But since the Commission regard this proposal as merely confirming the existing law in New Zealand, it would be instructive to obtain the opinion of a practising criminal lawyer there on the present validity of the above-enumerated "defences".

Another reason why FP's legalisation should not depend on MTP's is the formal complications surrounding the latter. Wherever MTP has been legalised, it has been hedged about by requirements of indications, certification, time and place, stage of pregnancy, qualifications of doctors; and by much form-filling. This apparatus, seemingly inseparable accompaniment to MTP is quite inappropriate and unnecessary for FP.

Finally, the legislation of MTP is still a delicate or controversial issue in some countries where "illegal" FP may be in full swing. The rationalising of their law to accord with their currently approved practice should not be delayed on account of the quite separate debate on MTP.

(b) Legalisation by reference to the stage of pregnancy

The stage that a pregnancy has reached is of especial significance, both medical and legal, to MTP. It would be possible similarly to make FP legal by reference to the stage that the practitioner believes (adding "in good faith" and/or "on reasonable grounds and after due enquiry and examination", if desired) the pregnancy, if any, to have reached. This would have the advantage of giving the conscientious practitioner complete protection no matter which method was used. It would go hand in hand with the speedier testing of ever earlier pregnancies, which research is steadily developing. And pre-coital methods which work soon after conception would be made legal beyond any question,

provided there was a proper initial examination or enquiry. Stages which suggest themselves are where treatment commences up to one week from the presumed-fertilising intercourse, or up to fourteen days from the missed period, depending on the method used.

The disadvantage of this approach is that it tends to blur the distinction between FP and MTP. If the existence of a pregnancy is ascertainable, it should be ascertained. And if found to exist, the doctor will be deliberately performing an abortion, no matter how early the pregnancy is. Would countries averse to MTP accept post-conceptive FP if defined in terms which allow a slight overlap with MTP?

(c) Legalisation by reference to means used

It is not uncommon for laws which prohibit or control an activity to make specific exceptions for certain precisely defined pieces of equipment, species, commodities, etc. Such legislation is sometimes criticised where the exceptions are arbitrary, but it seems to work reasonably well interpretatively if the draftsman has both consulted and drafted intelligently.

It would be possible to provide that it shall not amount to the offence of abortion, attempted abortion or complicity in abortion where any of the following devices or techniques are used or supplied by any person for the purpose only of causing the miscarriage of any female, whether pregnant or not. The methods proposed to be legalised would then be set out with precision (or with deliberate generality where future extensions of existing methods are foreseeable).

The advantages of this approach are self-evident. But there are disadvantages here too. Legislative lists can be or become inflexible. There should be machinery for adding to or amending the list without full legislative debate each time. The Minister of Health can be given delegated powers to do this after proper consultation though this may lead to further controversy where people think he is too conservative or too willing to accept a new method. There is the further difficulty, encountered earlier, of overlap. FP methods like uterine evacuation and the use of prostaglandin are also used for MTP and the possibility of abuse as alleged in Price (1968) (28) remains. If therefore this approach be adopted, it may be desirable to combine it with the stage-of-pregnancy approach considered above.

(d) Legalisation by reference to the FP practitioner

In the Singapore Abortion Act, referred to above, there is a blanket immunity from criminal and civil proceedings for all registered medical practitioners (provided, one must assume, they comply with the Act; this is not made clear). One could similarly provide that notwithstanding the existing law, it shall be lawful for a registered medical practitioner to do any act in good faith in the

proper conduct of ethical family planning practice. This last expression would have to be defined, probably in terms of ends and/or means. In cases of doubt the sole criterion of lawfulness would be current ethical practice, including properly conducted experiment, research and development. (The need for consent of the woman would be implicit in the definition but should be made explicit so as to avoid the difficulties surrounding, for example, the sterilisation of minors.)

This approach would exclude unnecessary interference from the law and give desirable flexibility for the future. Opposing it would be those who are unhappy to leave such questions to medical ethics; those who see the restriction to registered practitioners (let alone any further requirement of special qualifications) as too narrow for the needs of FP practice; and self-administering women. But these objections are not insuperable. Medical ethics could not justify conduct going outside the definition of "family planning", and the final arbiter of what is ethical would still be a court, hearing evidence of current professional practice. (Compare R v Smith (John) (1974) (29), a case of illegal MTP by a doctor.) As to the other objectors, it would not be difficult to accommodate them by extending the qualification to such paramedicals as local conditions required; and by adding "and it shall be lawful for any person to (a) submit to any such act, or (b) under the supervision or advice of such [FP practitioner as extended] to apply to themselves such method, substance or device as is proper to be so applied in the course of ethical family planning practice".

(e) Legalisation by reference to function

Because the criminal legislation is in functional terms (causing, or intending to cause, "miscarriage" of a woman "with child", etc.) it might be thought appropriate to specify what biological functions or processes it is to be lawful to promote or defeat. Thus to legalise all FP methods which operate up to the moment of full implantation, countries with s.58 could say:

> "Notwithstanding anything contained in the law relating to abortion, it shall not be unlawful if (a) a [qualified] woman by any means whatever introduced any substance or device into, or produces any substance or effect in her body with intent to prevent the occurrence of one or more of her reproductive processes of ovulation, fertilisation and implantation; or (b) any other [qualified] person with the like intent by any means whatever, introduces any substance or device into, or produces any substance or effect in the body of a woman".

Questions of qualification similar to those discussed above would arise. And this points to one important complication; there might have to be varying qualifications or restrictions for particular methods; so we are led back to the approach by methods and qualifications, discussed earlier. In addition, it is not

possible to extend this approach to include displantation, without encroaching on MTP.

A mere fundamental objection to the legal authorisation of FP by function is that mechanisms and processes are not fully understood. A new method's legality should not have to wait for final ascertainment of its mechanism. An existing method should not be made illegal by subsequent findings that it can operate against the newly implanted ovum. For as we have seen, there are methods which function in more than one way, and which may straddle the implantation line.

(f) Legalisation through lack of evidence

Lack of evidence already plays a part, rightly or wrongly, in the acceptance of post-conceptive FP. Prosecutors, if they have thought about it at all, may well have concluded that without proof that the woman was in fact pregnant, there could be no successful prosecution. It is hoped that the fallacy behind any such interpretation of s.58 has been amply demonstrated. (According to the Lane Committee (para 91) it was this very lack of knowledge that prevented post-conceptive FP coming within the U.K. Abortion Act, leaving it illegal in all circumstances.) And even in those countries which do require evidence of an actual pregnancy, we have seen how attempt may be used in the absence of such evidence.

Secondly, the uncertainty about the precise operation of some methods, in particular IUDs and the ordinary pill, also encourages the argument that there is no provable breach of the law. I suggest this attitude is wrong in law and policy. It ignores the wording of s.58 requiring an intent of which mere foresight of or belief as to the way a method works is the principal ingredient. Moreover science is steadily supplying the evidence and it would be futile as well as unworthy to shut one's eyes to this or to hope that people generally (and lawyers in particular) will not hear of it.

But if the present tendency to take refuge in ignorance has little to commend it, it does point to a further way of legalising FP. The distinction between post-conceptive FP and MTP on which this paper is based, is essentially one of lack of evidence: that at the time of the use of the (potentially) post-conceptive methods, the pregnancy, if any, is not known to exist and is not reasonably discoverable. (The fact that it could be discovered by waiting some days more, is beside the point; indeed, it is unreasonable to postpone treatment and so miss what may be physically and mentally the ideal moment.)

It would not be difficult, therefore, to legalise FP of all sorts in terms of treatment, etc. (to be defined) by persons (to be speficied) performed at a time either when the woman is not pregnant; or when her pregnancy is not known to, and not reasonably diagnosable by, the person performing the treatment.

As always, there are disadvantages. Such a defence would of course diminish in scope as pregnancy-testing improves and MTP consequently displaces FP earlier in gestation. The interval between fertilising intercourse and effective pregnancy testing is steadily shortening. Even now it may be short enough for the reformed law to require a pregnancy test in every case; for, after all, there is only the woman's word as to the vital dates. A doctor could not then legally avoid the formalities of (or ban on) MTP by forbearing to carry out a pregnancy test, because of the criminal law's doctrine of wilful blindness. Indeed, this may already be the law.

(g) Conclusions on approaches to legalisation

It is unlikely that any one of the above approaches will in isolation suffice to legalise post-conceptive FP. A combination of such approaches seems best and what combination is appropriate for any one country must depend on its present law, practice and attitudes, and present and foreseeable facilities. Meanwhile, it is doubtful whether there is any Commonwealth country where post-conceptive FP is not already being practised to some extent. As for the future, the tide of scientific progress, in response to human need, is relentless. It would be vain and Canute-like for the law to remain negative and obstructive. Forward-looking family planning policy needs positive help from a forward-looking law.

NOTES AND REFERENCES

(1) For a more detailed examination, see my article "Modern Anti-Pregnancy Techniques and the Criminal Law" [1974]Crim. L.R. 461

(2) The Sanctity of Life and the Criminal Law (London, 1958) 141

(3) Abortion and the Law (London 1966) 30

(4) See note 10 below

(5) The detailed references to legislation of Commonwealth countries concerning abortion and MTP are set out in the Appendix to the accompanying paper "Abortion Laws in Commonwealth Countries". It has therefore been thought unnecessary to repeat these references in the notes to this paper.

(6) This section contains a minimum of medical information, which is considered only from a legal viewpoint. The accompanying paper by Mr. Embrey should be consulted for a fully-informed account.

(7) 1974 CMND 5579

(8) See Morris and Van Wagenen (1973) 115 Am. Journal of Ob. & Gyn. 101

(9) By e.g. Patricia Ashdown-Sharp in the Sunday Times, London, May 7, 1972, describing developments in the U.S.A.

(10) (1958) 24 MLJ 159

(11) [1975] AC 476

(12) (1838) 8 C & P 262

(13) [1938] 3 All E R 615; [1939] 1 KB 687

(14) s.36 Criminal Justice Act 1972

(15) [1969] VR 667

(16) (1971) 3 NSW DCR 25

(17) (1955) 48 St Rep Qd 48

(18) Crim. Case No. 16 of 1976

(19) [1959] EACA 813

(20) CA 14/76

(21) (1948) 4 WACA 133

(22) (1955) 57 NLR 202

(23) [1968] Crim L R 247, 256

(24) For the post-coital insertion of IUDs, see the accompanying paper by Mr. Embrey. For the improper use by a doctor of an IUD on a woman 3 months pregnant, see R v Price [1969] 1 QB 541

(25) See Smith & Hogan, Criminal Law 3rd Ed., 1973, 278

(26) A clause to implement the proposed new sub-section was included in the Abortion (Amendment) Bill 1977. The Bill has however failed to get through Parliament.

(27) Roe v Wade and Doe v Bolton 1973, 35 L. Ed. 2d 147, 201

(28) See note 24 above

(29) [1974] 1 All E R 376