## III. The Present Ground: Legal Reform

### A. Statutory Changes and Proposals

#### 1. Generally

Since 1977 relatively few initiatives have been taken among Commonwealth jurisdictions to enact new legislation. Belize, New Zealand and Seychelles introduced new advanced laws; Hong Kong in 1981 introduced changes to its pre existing advanced law. No less impact upon Commonwealth abortion legislation has come from changes brought about in Commonwealth membership. The laws of the newer Member States tend in general to conform to, and thereby to confirm the philosophy of, pre-existing criminal law patterns. The abortion laws of Vanuatu and Zimbabwe, however, present instructive advanced laws. The Termination of Pregnancy Act of Zimbabwe, for instance addresses grounds for abortion, creates an appeal procedure when official permission to terminate a pregnancy is denied, contains an emergency exception from regular authorisation and, for instance, regulates the fees chargeable for abortion services.

The major developments in Commonwealth abortion management have arisen through refinements, clarifications and limitations recognized in existing laws, to create more systematic patterns of delivery of abortion services, and of other associated health services. Some developments have concerned the role of nurses and by inference comparable health professionals, others have distinguished more clearly between abortion and post-coital contraception, and yet others have recognized that menstrual therapies requiring emptying of the uterus may legitimately be available without observance of legislated provisions applicable to abortion.

Accordingly, while the field of abortion legislation cannot be seen significantly to have changed since 1977, the definition of that field has been drawn more sharply, and it has become more clearly differentiated from such related fields as fertility control and woman's health care. Further, within the abortion field, the infrastructure has become more fully established and the role of doctors as initiators but not sole executors of abortion procedures has been judicially clarified.

The commentary which follows identifies a number of areas in which such developments have occurred, considered first regarding particular issues and their implications, and then in the wider context of action and perceptions on the plane of public law and international agreements. Initially, however, distinctive provisions of legislation of States which have been amended or introduced to Commonwealth experience since 1977 will be addressed. This exploration of laws relates to tables II and III below, which record the status as of 1 November 1982 of abortion provisions in all Commonwealth jurisdictions, derived from answers kindly provided in response to questionnaires sent to all member states by the Legal Division of the Commonwealth Secretariat. In addition, an extensive bibliography is presented, to reveal the evolving depth of Commonwealth national, international and comparative literature in this expanding area, and to offer ministries and agencies in Member States a convenient means of access to the literature in order to gain more detailed and comparative information.

ii. Specific Changes

At the end of April, 1981, the Republic of Seychelles enacted its Termination of Pregnancy Act, 1981, which amended its formerly purely prohibitive Penal Code in favour of permitting doctors in defined circumstances to peform abortions. The Act presents an interesting model of legislation for geographically compact, jurisdictions, since it concentrates legal abortion services upon a single, specified hospital, namely Victoria Hospital, Mahe. The Act permits a consultant gynaecologist to perform an abortion at the hospital, if three doctors from the opinion in good faith that continuance of pregnancy would involve risk to the pregnant woman's life, or risk of injury to her physical or mental health greater than if the pregnancy were terminated. Alternatively, their opinion may be that there is substantial risk that if the child were born alive, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The language of the Act shows an origin in Britain's Abortion Act 1967, although the health indication in the 1981 Act is limited to the pregnant woman's physical and mental health, and does not include the health of any existing children of her family, as does the 1967 Act. The 1981 Seychelle Act imaginatively expands upon the earlier Act, however, in permitting account to be taken of the pregnant woman's actual or reasonably foreseeable environment to determine not only risk to her health, but also risk of serious handicap to an abnormal child. This displays admirable sensitivity to the relation between the parental environment and a child's potential to experience relative normality or handicap. The act further allows abortions to be done if the pregnancy is a result of rape or incest.

The requirement of three medical opinions may appear demanding in principle, especially since the three must consult any other doctor in Seychelles who holds a specialist qualification in a field, such as psychiatry, relevant to the health of the pregnant woman. In fact this may not necessarily be an obstacle to prompt termination of a dangerous pregnancy, however, since the three doctors who must form an opinion are the attending physician who proposes the termination of pregnancy, the consultant gynaecologist who is to perform the termination, and the Director of Health Services in the Ministry of Health. If the latter acts speedily and in reliance upon the skill, experience and good faith of the two doctors with clinical and first-hand knowledge of the patient, this approval procedure need not present delay constituting harm to the pregnant woman, such as by postponing the procedure until the second trimester.

The Act replaces the three physicans' opinions by the opinion of a judge when on the balance of probabilities, the judge finds that the pregnancy is the result of rape or incest. It is instructive that the finding should have to be only on the balance of probabilities, since a criminal conviction for these offences would be possible only upon the more demanding standard of proof beyond reasonable doubt. It is evident, however, that the 1981 Act permits speedy formation of a judicial opinion upon medical and other evidence, without completion of forensic investigations resulting in a criminal charge. Medical opinions are also displaced upon judicial determination of the pregnant woman's unfitness for motherhood, for instance on account of her mental, retardation or deficiency.

Pregnancy may be terminated only before the end of the sixteenth week of pregnancy, unless the Director of Health Services is of opinion that there are exceptional grounds for later termination. Since the Director's opinion

is required for earlier abortions, however, the opinion that the procedure is justifiable in itself, and that it is justifiable after sixteen weeks of pregnancy, may become merged into a single assessment. Pregnancy is deemed to have started on the date determined by the Director in his sole opinion, so that a complex biomedical and philosophical dilemma is obviated by an ad hoc administrative ruling, based upon medical and circumstantial evidence.

The Minister of Health is obliged to make regulations under authority of the 1981 Act for certified expression of the medical opinions required before an abortion can be performed, and for presevation and disposal of these certificates. Regulations must also provide for reports to the Director of Health Services regarding abortions performed, and for limiting disclosure of reports required to be submitted. The Act also contains a conscientious objection clause, closely modelled upon the British 1967 provision, permitting a person to object to participation in abortion procedures, if able to discharge the burden of proving such objection in any legal proceedings which may result. The general right of conscientious objection does not apply, however, regarding treatment which is necessary to save the life, or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

The Act's permission of abortions only in the Victoria Hospital and upon three medical certificates has no exception for cases of emergency. If an emergency were to arise, therefore, when certificates could not be acquired and the Victoria Hospital was inaccessible for any reason, a life-saving or health-preserving abortion might be medically indicated, but unavailable under terms of the 1981 Act. The necessity doctrine recognized in the Bourne case might well be available in such a case to provide exoneration for action taken in good faith. This may appear from section 147 of the Penal Code, which follows section 58 of the English Act of 1861 in prescribing the behaviour of "Any person who .... unlawfully administers" a poison or other noxious thing or uses force or other means with intent to procure miscarriage (emphasis added). This implicit recognition of lawful abortion even outside the terms of the 1981 Act is reinforced by the absence from the Act of the provision found in Britian's 1967 Act, which in other regards was used as a model, that "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 .... this Act." (Section 5(2)). The British Act gives statutory recognition to the needs of necessity, when detailed requirements of the Act cannot be observed.

The new advanced law of Belize was achieved through re-enactment of its Criminal Code in 1980. The earlier law permitted abortion only to preserve a pregnant woman's life. The new Criminal Code conforms to modern advanced laws by adding to basic law the provisions that no offence is committed when a doctor acts upon two medical opinions that continuation of pregnancy involves risk either to the life of the pregnant woman or to her physical or mental health, or that of any existing children of her family, greater than if pregnancy were terminated. Termination is also permitted if the two opinions find susbtantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. After 28 weeks of gestation, however, pregnancy is terminable only to save the mother's life, unless it be shown that the unborn child was not capable of being born alive.

These provisions appear to have been derived from Britain's Abortion Act 1967, as is the addition that, in determining risk of injury to health, account may be taken of the pregnant woman's actual or reasonably foreseeable environment. The Criminal Code of Belize also adopts the conscientious objection provision of the 1967 Act, permitting refusal to participation in abortion treatment by any person able to prove conscientious objection, but with an exception where such treatment is necessary to save life or to prevent grave permanent injury to a woman's physical or mental health. The law of Belize includes no other provisions of Britain's 1967 Act.

Zimbabwe's Termination of Pregnancy Act, 1977 was based upon the Report of the [Rhodesian] Commission of Inquiry into Termination of Pregnancy 1976, and enacted against the background of Roman-Dutch Common law. It represents in principle a standard type of advanced law, whose principal deviation from the norm is its rejection of a mental health indication for abortion. Section 3 provides that "No person may terminate a pregnancy otherwise than in accordance with the provisions of this Act," and section 4 permits such termination "where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, so as the case may be." This rejection of a psychiatric indication for abortion may be based upon sceptical observations in the 1976 Report, but it raises the question whether a woman's threat of suicide, reflecting that the balance of her mind and may be disturbed, would furnish grounds of abortion due to danger to her life. Other indications for abortion are such serious risk of physical or mental defect in the child as would create permanent serious handicap, and reasonable possibility of conception as a result of unlawful intercourse. The Act interestingly defines "pregnancy" as "an intra-uterine pregnancy where the foetus is alive", so that ectopic or tubal pregnancy can apparently be terminated without having to conform to the Act.

Subject to an emergency exception, procedures may be performed only by doctors in desginated institutions with written permission of the superintendent. Such permission is dependent upon two doctors, not involved in the same professional partnership or practice, certifying appropriate danger to the woman or danger of serious handicap in an abnormal child. Regarding the indication of unlawful intercourse, permission for abortion is dependent upon a magistrate's certification of complaint, of appropriate interrogation of the woman and others involved, and of a finding on a balance of probabilities that unlawful intercourse resulted in the pregnancy. An alleged victim of rape or incest must make an affidavit or other statement under oath to this effect, explaining that the offence could be the cause of pregnancy.

An interesting provision of the Act is that, if an institution's superintendent refuses permission, any person dissatisfied may appeal to the Secretary for Health. Such person may include the woman, a member of ther family and, for instance, her doctor. It will be interesting to monitor whether in fact appeals are taken under this provision their degree of success. No appeal appears possible, however, against the grant of a superintendent's permission. A superintendent receiving medical opinions of indications for abortion must submit them to the Secretary for Health, and the Secretary may obtain any information he seeks regarding an abortion, whether or not the provisions of the Act have been observed, and whether or not the information tends to incriminate the person required to provide it. When there is an opinion that an offence has been committed, the Secretary

for Health shall report to the Attorney-General. The Secretary must also report a finding of professional misconduct to the Registrar of the Medical Council.

The Act has an emergency exemption from prior certification requirements regarding abortion on grounds of the woman's life or health, when the doctor must submit a report to the Secretary for Health within 48 hours of performing the procedure. Further, it provides that, notwithstanding the provisions of any law or agreement to the contrary, no doctor, nurse or other employee of a designated institution shall be obliged to participate or assist in an abortion. The wording is very broad, with no requirement that objection be based on, for instance, conscience, no exception for immediate life-threatening emergency, and no limit to the scope of "assistance." It may be questioned, however, whether this provision would protect refusal based, for instance, upon grounds of endangered woman's race or religion. The Act also governs fees for abortion services, and regulations made under the Act prescribes the same fees as are normally charged for similar medical and institutional services.

The law in force in Zimbabwe was guided by the earlier published Report of a Commission of Inquiry. This same pattern of legislative development occured in New Zealand, whose Report of the (McMullin) Royal Commission of Inquiry on Contraception, Sterilisation and Abortion, published in March 1977, paved the way to the Contraception, Sterlisation and Abortion Act 1977 and related amendments to the basic Crimes Act 1961. The New Zealand legislature did not enact the full recommendations of the Royal Commission in 1977, however and the departure from those initial proposals was part of a vigorous public and professional debate in New Zealand on the issue of abortion. Indeed, at one point the medical profession's non co-operation with the 1977 Act's complex system of authorising abortions was described as a strike. The legislative outcome of further consideration of the 1977 Act was amending legislation of 1978 to alter both the Contraception, Sterlisation, and Abortion Act and the Crimes Act. This legislation introduced measures proposed in the Report of the McMullin Commission but not adopted in 1977, and was recommended by the Abortion Supervisory Committee constituted under the 1977 Act.

The Committee has the task of granting or refusing applications for licences made by heads of institutions, under which abortions may be performed. A full licence authorises abortions in the institution regardless of the duration of pregnancy, and a limited licence is authority for the performance of procedures in the institution only during the first 12 weeks of pregnancy. Every doctor approached about or proposing an abortion must, at the woman's request, refer the case to two certifying consultants (at least one of whom is practising obstetrician or gynaecologist) with a request that they determine whether or not the procedure should be authorised. Only one other doctor need be referred to if the doctor originally approached is a certifying consultant. If they disagree, they must refer the case to a third such consultant. The Abortion Supervisory Committee maintains a list of doctors who act as certifying consultants. Authorisation by two such consultants is required in every case, except when an abortion is immediately necessary to save the woman's life or prevent serious, permanent injury to her physical or mental health.

Abortions may be performed with legal protection against criminal charges only upon legislated indications. The indications under legislation

of 1977 and 1978 amending the Crimes Act 1961 conform to the standard criteria of advanced laws, including the indications of serious danger (beyond that normally attendant upon childbirth) of life or physical or mental health, incest and sexual intercourse with a woman under care or protection, and indirectly, rape. The legislation states that, while not in themselves grounds for abortion, account may be taken in determining serious danger to life or physical or mental health both reasonable grounds for believing pregnancy is the result of rape, and the woman's age being near the beginning or the end of the usual child-bearing years. The Crimes Amendment Act 1978 added the indication for pregnancies of less than 20 weeks' duration that there is a substantial risk that the child, if born, would be so physcially or mentally abnormal as to be serious handicapped.

The detailed administrative scheme constituting and determing the functions of New Zealand's Abortion Supervisory Committee is too elaborate for simple presentation, the original Contraception, Sterilisation, and Abortion Act 1977 running to 46 sections and 26 pages in length, of which 37 sections and 17 pages are devoted to abortion. Among the Committee's duties are to take all reasonable and practicable steps to ensure that sufficient and adequate facilities are available throughout the country for counselling women seeking advice on abortion, to recommend maximum fees for services, to ensure that the administration of the law is consistent, and to ensure the effective operation of the Act. An interesting provision is that in creating a list of certifying consultants, the Committee shall have regard to the desirability of appointing doctors whose assessment of cases will not be coloured by views on abortion generally incompatible with the tenor of the Act, which under section 30(5) include views:

"(a) That an abortion should not be performed in any circumstances;

(b) That the question of whether an abortion should or should not be performed in any case is entirely a matter for the woman and a doctor to decide."

In the Supreme Court of New Zealand case of In the Matter of Margaret Lena Brasted (1979) it was held that doctors' views held before enactment of the 1977 legislation should not be taken into account, since the Act of that year showed both views legally unacceptable, and a conscientious doctor operating under the Act would be expected to apply its own non-extremist philosophy.

The Offences against the Person (Amendment) Ordinance 1981 of Hong Kong introduces changes of considerable significance to Hong Kong's pre-existing advanced law. To the indication for abortion that two doctors are of opinion that that pregnancy involves risk to the woman's life or risk of injury to physical or mental health greater than if pregnancy were terminated, was added two doctors' opinion that there is substantial risk that if the child were born, it would suffer from such physical or mental abnormality as to be seriously handicapped. Further, regarding those pregnant before the age of sixteen, or pregnant by rape or other sexual offences of which they are victims, doctors were empowered to find risks of injury to health by continuation of pregnancy greater than if an abortion were performed. A woman's complaint of a sexual offence made to a police officer within three months of its commission creates a rebuttable presumption that the doctor believed the pregnancy to have been so caused. Nevertheless, a pregnancy of more than 24 weeks' duration may be terminated only if two doctors find this necessary to save the woman's life. The Act also reduces the extraordinarily severe

punishment of life imprisonment for a woman who procures her own abortion from up to life imprisonment to up to seven years' imprisonment and a fine. In contrast, New Zealand's legislation provides a maximum penalty of a fine not exceeding $200.

Hong Kong's 1981 Ordinance goes beyond amendment to the law on abortion as such to introduce the crime of child destruction, based upon the English Infant Life (Preservation) Act, 1929, whose language was read into the 1861 Act's basic abortion law in the celebrated case of R. v. Bourne. It punishes as if for manslaughter whoever, with intent to destroy the life of a child capable of being born alive, wilfully causes the child to die before it has an existence independent of its mother. The exception to this, however, applied in the Bourne case, is that the act causing the child's death was not done in good faith for the purpose only of preserving the woman's life, which the Bourne case interpreted to include preserving her physical or mental health. Pregnancy for at least 28 weeks raises a rebuttable presumption that the child is capable of live birth.

The 1981 Penal Code of the Republic of Vanuatu formerly New Hebrides deals with abortion in a provision which is both simple and sophisticated. Section 117 provides penalties of two years imprisonment for anyone intentionally procuring a woman's miscarriage, including the woman herself, but provides that it shall be a defence to show that the act constituted a termination of pregnancy "for good medical reasons." This clearly includes danger to life or health, both physical and mental, but accommodates the medical implications of fear of serious fetal defect likely to result in handicap of the child born, and also social or socioeconomic factors describable as socio-medical and, for instance, rape and incest. Further, it supposes the medical reasons to have been satisfactory to a doctor, but does not limit such reasoning to doctors. Where no doctor is accessible, it may permit a nurse, midwife or other suitably qualified person acting in good faith to reach an assessment representing a good medical reason. The absence of monitoring procedures to ensure good faith enables courts to determine legality upon the facts of each case, subject to the provision that no prosecution shall be commenced without written consent of the Public Prosecutor. This introduces a potential for administrative monitoring, so that procedures conducted in individual hospitals may be given immunity from prosecution under indicated provisions. The system clearly lacks the certainity and specificity of a legislated scheme, but it has flexibility and an ability to accommodate new perceptions and sensitivities with the concept of medically appropriate treatment.

iii. Proposed Changes

Since 1977 a number of jurisdictions have proposed that their abortion legislation be amended. Barbados, for instance, publicised a draft law, which was not presented at that time. An interesting feature of this Bill is that it would have provided for delegation by doctors to appropriately trained health personnel:

> "The Treatment for the termination of a pregnancy of not more than 12 weeks duration may be administered by or under the supervision of a Registered medical practitioners ...." 4(1) (emphasis added).

A feature of countries which have adopted advanced laws has been the occasional incidence of "black-lash" proposals aimed to reduce the scope of such laws. Perhaps most notable of these, in view of the wide Commonwealth reference to the British Abortion Act 1967, and adoption of a number of its provisions elsewhere, was the Private Member's Bill proposed in the U.K. Parliament by John Corrie, M.P. The proposal was unsuccessful, and attracted vigorous opposition from the medical profession, but it also gained support of some who feared the 1967 Act was being abused. The Bill proposed among other reforms to reduce an upper limit for abortions of 28 weeks gestation to 20 weeks; this was unacceptable, but an amendment to 24 weeks was supported at third reading in the House of Commons.

The Nigerian Society of Gynaecology Obstetrics sponsored a bill seeking to legalise termination of pregnancy if 2 registerd doctors are convinced the life of the pregnant woman is endangered and if there is a substantial risk that the child would be born with a physical or mental handicap. Ironically the present and most vocal opposition came from certain women; and yet the Nigerian Society of Gynaecology Obstetrics sponsored the bill because of its concern of "the increasing number of illegal abortions carried out under inadequate health conditions which lead to a high death rates among women."

In Queensland, Australia, the government introduced legislation in 1980 intended to limit lawful abortion, and was opposed politically and by the medical profession. The Bill limited abortion to women who face death or suicide as a result of childbirth, and to victims of rape or incest, under specified conditions. Considerable controvery was raised by the tenor and detail of the Bill, which was defeated. Similarly in 1978 the Legislative Assembly of the Australian Capital Territory rejected a Bill that sought to prohibit the operation of private abortion clinics.

Despite these restrictive initiatives, however, the general thrust of developments in Commonwealth abortion law has been towards liberalisation. This may be a realistic movement, since even in jurisdictions with restrictive law and severe penalties for breach, there are few signs of criminal enforcement of the law since 1977. Further, in such jurisdictions many signs exist of illegal abortion idenitified in medcial practice in hopsital admissions. Laws appearing restrictive de jure may be liberal de facto because among other things lack of enforcement. Very few prosecutions for illegal abortions have been brought since 1977. Similarly, laws appearing liberal de jure may operate with restrictive effect. Further, not all laws defined in this Report as advanced are necessarily liberal, as the case of Canada may show, since its abortion law omits indications such as rape, incest and fetal abnormality liable to cause severe handicap. Evidence shows that under the advanced laws of Canada, Britain and New Zealand, legitimate abortion requests go unmet, leaving women to the resources of self-help and travel to more accommodating jurisdictions, such as the United States and, for instance, Australia.

These experiences serve to remind readers that this commentary is based simply upon the apparent state of Commonwealth laws. It is not a sociological record or analysis of how individual laws are found to operate. Identically worded laws may have quite different operation in practice, in ways beyond the trained perceptions of lawyers.

B. Judicial and Administrative Interpretations

i. Generally

While relatively little legislation has been proposed regarding abortion, and even less has been enacted, judical and administrative bodies in the Commonwealth have actively influenced perceptions of abortion law in significant ways in the course of the last five years. Indeed, a number of these initiatives are of such profound impact upon the present law, notably in achieving differentiation of abortion from similar medical treatments of women, as to warrant special consideration. This must relate not merely to understanding of existing law, but to the emergence of new issues out of existing law.

Accordingly, the section which follows this will address Emerging Issues, and include a number of issues which are derived from judicial and administrative interpretations of the law. Such issues as the legal difference between abortion and contraception, and the legitimate role which nurses may undertake in executing doctors' orders for termination of patients' pregnancies, have recently been significantly affected by administrative and judicial initiatives. Further, the performance of menstural therapies upon women of reproductive age has become separable from medical treatments which might uncritically appear to be analogous to termination of pregnancy.

The present subsection considers more static aspects of abortion law, addressing such issues as the rights of biological fathers under existing law, and the status in law of the fetus. The decisions have tended to conform to long-standing doctrine in regard to these matters. Judicial determinations have not so much taken the law into new areas, as reinforced its foundations. A further reinforcement exists, for instance, in the proposition that a mentally competent woman cannot be subjected to an abortion without her own independent consent having been given beforehand. This is so self-evident that very few enacted developed or advanced laws state this requirement in express terms. The body of legislation which regulates abortion also punishes criminal assaults, and imposing abortion upon an unwilling woman may be a grave assault indeed.

The issue did arise, however, in the Canadian case of Beasley v. McKellar General Hospital (1981) regarding a legal minor (aged under eighteen) who appeared ambivalent about an abortion for which she was eligible, and which her parents were pressing her to have. With the support of her boy-friend and his parents, (ex parte) litigation came before a High Court of Ontario judge, Osler, J., who restrained the hospital from acting upon her until it was clearly established that the patient was exercising her own free choice in the matter, unaffected by parental pressure. Preservation of a woman's right not to have an abortion is an important value essential for the law to protect. Commonwealth jurisdictions have different provisions, however, regarding mental competence which may be a condition of exercise of autonomy. Similary, the English high court has recently confirmed traditional legal doctrine regarding mature minors. It was held in the case of Re Shirley that a 15 year old girl could give legally effective autonomous consent to an abortion for which she was legally eligible despite her parents' opposition on religious grounds while the result might be different in these two cases, the rationale was the same.

A Canadian case showed that doctors owe patients legally enforceable duties to afford them the health benefits of laws, including those permitting abortion. In Zimmer v. Ringrose (1981), the Alberta Court of Appeal upheld an award of damages to a woman where an unsuccessful sterlization resulted in pregnancy the doctor should have helped the woman to have terminated in accordance with her wishes and the local law. The appeal court observed that:

> "The other aspect of the negligent after-care concerned the [doctor's] failure to provide his patient with reasonable standard of medical and hospital care. Upon discovering that the [patient] was pregnant, the doctor sent Mrs. Zimmer to the United States to undergo a proceudre [i.e. abortion] which could have been performed competently in Edmonton [Alberta] in a hospital setting with medical supervision. Although the hospitals at which the appellant had admitting privileges did not perform abortions for policy reasons, a reasonable practitioner in the [doctor's] position would have referred his patient to a colleague having privileges at one of the city hospitals which acccepted abortion cases. The [doctor], however, made no attempt to secure an abortion for the [woman] in a hospital in Edmonton. As a result of his failure to display the degree of care and concern dictated by the situation, the [woman] underwent a more painful and emotionally distressing experience than was necessary in the circumstances. Her suffering would have been substantially reduced if the [doctor] had discharged his duty by arranging hospital care." (p.226)

This establishes that women have rights to doctors' aid in using the provisions of local abortion law, and that doctors may be held legally negligent in failing or declining to facilitate abortions. Canadian law has no provision for conscientious objection to abortion, but where such provisions exist they often exclude objection in emergency cases, which may result from untreated pregnancies endangering life or health. The case of Zimmer v. Ringrose places abortion provisions within the law on health and welfare, and not just within the criminal law.

The English case of Sciuriaga v. Powell (1979) establishes that women have a right to competently and early done abortions. Watkins J. of the Queen's Bench Division held that the doctor had been in breach of contract in that be failed to exercise reasonable skill and care in carrying out the operation as soon as possible and had negligently omitted to conduct any following-up tests to establish the success of the procedure or to provide any follow-up care. The woman decided to have the child because once pregnancy was established at 22 weeks there was a reasonable risk to her health of having an abortion. The woman was awarded substantial damages for loss of earnings to trial, future loss of earnings, diminution of her marriage prospects on account of her unwed motherhood and pain and suffering.

ii. Spousal Consent

The 1977 Survey noted that "No Commonwealth abortion law requires the biological father's consent to an operation". That position has not changed, and it has indeed been confirmed at national and international levels. The underlying principle has been further compelled by increasing recourse to

artificial insemination by donor. Here, the biological father's indentity is usually not disclosed where it is reliably known. As against that however, improved techniques have made paternity testing in routine reproduction more reliable in positive identification of fathers.

Instances exist in which husband's threats of legal proceedings against doctors and hospitals who propose to terminate their wives pregnancies have deterred abortions (see the Canadian case of Re Simms and H (1979)). Since husbands very often have legal duties to provide their wives with health services, any such threats obstructing abortion indicated on therapeutic grounds could expose the husbands to the threat of legal proceedings, perhaps of a criminal nature. Further, doctors and hospitals accepting women as patients for abortion, but then declining to perform therapeutically indicated procedures, to which the patients have given an informed and autonomous consent when they are adults of competent understanding, would face legal consequences, and perhaps disciplinary proceedings, for abandonment.

No case exists in which a husband has been successful, except perhaps in obtaining a temporary injunction to delay a medical procedure for a very short time, such as 24 or 48 hours, so that the issue may be appropriately prepared and litigated. The cases that have gone to full trial, before the English High Court (Family Division) and, on appeal, before the European Commission of Human Rights, have been resolved against the father's claim. This is the more significant because the Abortion Act 1967, which was in issue in both cases, permits abortion not only upon a therapeutic indication, but also upon social, sociomedical or socio-economic reasons.

The English High Court case Paton v. Trustees of the British Pregnancy Advisory Service (1978) concerned a husband's application for an injunction to restrain his eight week pregnant wife's abortion since the husband's right to have a say in the destiny of the child he had conceived had not been respected. The husband alleged that his wife was being spiteful, vindictive and utterly unreasonable in seeking abortion, and that she had no proper legal grounds for seeking the procedure; he later accepted, however, that the provisions of the Abortion Act 1967 had been correctly observed. The case finally put to the court was that if doctors certifying satisfaction of the legislated conditions for abortion did not in fact hold the views they expressed, or had not come to their stated conclusions in good faith, there would be an issue triable by a court as to the propriety of the abortion procedure, and that in such a case an injunction might be issued to restrain the legally suspect abortion. The judge, Sir George Baker, President of the Family Division of the High Court considered this an academic issue, and observed that:

> "it would be quite impossible for the courts in any even to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by the law upon the shoulders of the medical profession."

Addressing the facts of the case, the applicant's admission that his wife's doctors had apparently acted conscientously and in good faith, the judge concluded that:

> "The two doctors have given a certificate. It is not and cannot be suggested that the certificate was given in other than good faith and it seems to me that there is the end of the

matter in English law. The Abortion Act 1967 gives no right to a father to be consulted in respect of a termination of pregnancy."

The judge further, noted that the Regulations made under the 1967 Act prohibited disclosure of information about abortions, with certain exceptions which did not, however, permit, disclosure to a husband or biological father without the woman's prior free consent. On declining to look behind the issued certificate, the trial judge noted that:

> "not only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the Abortion Act 1967, but I think he would really be a foolish judge who would try to do any such thing, unless, possibly, where there is clear bad faith and an obvious attempt to perpetrate a criminal offence."

This sets a high standard of proof to be met by one wishing to challenge a medical decision that abortion is appropriate according to the terms of an advanced law.

The woman had an abortion shortly after the decision in the case was made, rendering any regular appeal moot. The husband appealed, however, to the European Commission of Human Rights, contending that English law violated provisions of the European Convention on Human Rights on, inter alia, his "right to respect for his private and family life" (Article 8(1)). The Commission made a preliminary jurisdictional ruling that the husband's claim could be heard, since he could be considered a possible "victim of a violation of the Convention" due to his being so closely affected by the termination of his wife's pregnancy (Paton v. United Kingdom (1980)). The Commissioners considered the status of a fetus under the Convention (see IV. E.) and addressed the husband's claim to a right to family life rather more briefly. They concluded, however, that the wife's decision and the action proposed by her doctors, in so far as they may have interfered with the husband's right, were justified, because of the necessity to protect the rights of another person (see Article 8(2)), namely the mother herself. She was permitted to prevail in any conflict as to her medical management "being the person primarily concerned in the pregnancy and its continuation or termination." The husband's ancillary complaint about the procedural inadequacies of English law in not affording a right of spousal consultation was similarly dismissed.

The high level of rejection of the husband's assertion of a right to be consulted confirms a priori legal reasoning against a compulsory right not only of veto over abortion, but also of participation in decision-making. It follows that no stranger or third party enjoys a greater legal right of involvement. Some applicants have attempted, however, to assert alleged rights of a fetus to life, so as to prevent exercise of the woman's right to legal abortion. These attempts raise the issue of the present legal status of the unborn child.

iii. Legal Status of the Fetus

The 1977 Survey noted that the status of the fetus is not expressly raised in abortion laws in Commonwealth jurisdictions. Where the issue arises, it is pursued in terms of the general law on status and procedure,

and almost invariably is resolved by denial of legal status of the fetus. In the 1978 case of Paton v. Trustees of the British Pregnancy Advisory Service Sir George Baker, P. summarised the general Commonwealth law in his judgment, observing that:

> "The fetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country ... and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others".

This view, which is consistent with traditional common law jurisprudence regarding both civil law and criminal law, subject to the abortion prohibition itself, received support from the European Commission of Human Rights in the 1980 decision in Paton v. United Kingdom. The European Convention on Human Rights provides in Article 2(1) that:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction ....".

Concerning whether a fetus was included in this formula and so had a protected right to life, the Commissioners noted that no other use of the word "everyone" in the Convention indicated a possible prenatal application, and concluded that Article 2 does not inlcude the unborn. Turning to the question of whether the word "life" included unborn life, the Commissioners determined that a fetus does not have an absolute right to life, since to recognise such a right would place higher value upon unborn life than upon the life of the pregnant woman, so limiting her own right to life which is clearly protected by Article 2(1). Such recognition of unborn life would be contrary, it was observed, to the object and purpose of the Convention. The Commissioners confined themselves strictly to the facts of the case, however, which involved the initial stage of pregnancy, the woman being only eight weeks pregnant, and medical grounds of danger to the woman's life. This accordingly leaves open contrary arguments regarding fetuses of more advanced gestational age, and abortion indicated on other than medical grounds. It was unclear whether a viable fetus may found a more successful claim than was presented in Paton, although exclusion of even a viable fetus from the meaning of the word "everyone" in Article 2(1) may be significant evidence against such a claim.

Sir George Baker P. referred in his 1978 decision to Canada, which was appropriate in light of a number of recent challenges made before its courts to operation of the legal abortion provisions of the Criminal Code. The leading case albeit subsequent to the 1978 Paton decision was in 1979 before the Ontario High Court Dehler v. Ottawa Civic Hospital whose judgment was upheld by the Ontario Court of Appeal in 1980 for the reasons which the High Court had given earlier (Dehler (1980)). The Supreme Court of Canada refused leave for further appeal. The case concerned an applicant's action for injunctions and declarations whose effect would have been to prohibit therapeutic abortions from being performed in certain hospitals in Ottawa. The applicant claimed to act "as representative of those unborn persons or that class of unborn persons whose lives may be terminated by abortion in the defendant hospitals". The underlying concept was that legally protected

persons orginate at conception or shortly thereafter. It was further contended that that persons' lives cannot be ended, under the Canadian Bill of Rights (since superseded in part by the Canadian Charter of Rights and Freedoms) except by due process of law. Therapeutic abortion committees, which have power to authorise abortions under the Criminal Code, have no clear obligation to observe due process of law, nor to hear advocates on behalf of the unborn children.

The court dismissed the claim that the abortion provisions of the Criminal Code violated the Bill of Rights, on the authority of the Supreme Court of Canada decision in 1975 in the case of Morgentaler v. The Queen (1976). Regarding the applicant's status to maintain the action, the court reasoned that no such status could exist, since a representative cannot have greater power to act than the party claimed to be represented, and unborn persons have no power to have proceedings brought on their behalf. A representative cannot confer on those claimed to be represented status or rights which the law does not otherwise accord them. The judge Robins. J. observed that:

> "Since the law does not regard an unborn child as an independent legal entity prior to birth, it is not recognized as having the rights the plaintiff asserts on its behalf or the status to maintain an action. A foetus, whatever its stage of development, is recognized as a person in the full sense only after birth."

The decision drew support from the modern history of Canadian case law, and also the Paton case in England, and the plaintiff Dehler cited no cases supporting his arguments. The decision was also congruent with that of the High Court of New Zealand in Wall v. Livingston (1982), where a member of the public was denied legal standing to challenge on behalf of an unborn child a decision to terminate a pregnancy reached according to New Zealand's Contraception, Sterlisation and Abortion Act, 1977. This renders rather more exceptional a 1979 decision of a Family Court judge in the province of Nova Scotia, in the case In Re Simms and H (1979). The case involved interpretation of the provincial Children's Services Act, however, rather than of underlying Common law principles.

The case arose in the Family Court when a husband, upset at his estranged wife's successful application for therapeutic abortion, applied for an injunction from the provincial Supreme Court to restrain the abortion. The Supreme Court hearing was scheduled for a short time ahead, when the judge in the Family Court would have been unavailable after the day of hearing he was conducting. This hearing concerned not the father whose proceedings were pending in the Supreme Court, but a stranger who was locally active in opposing lawful abortion. She applied to the Family Court for an order under the Children's Services Act, 1976 of Nova Scotia appointing her guardian ad litem of the unborn child for the purpose of representing the unborn child in the proceedings to be brought by the father. The Dehler decision would indicate that Mrs. Simms' position was not superior to that of Mr. Dehler. However the Family Court Judge, bearing in mind the need for a speedy decision, read the provincial Act to apply to an unborn child, and granted the application permitting Mrs. Simms to appear as guardian ad litem in the Supreme Court proceedings scheduled for hearing four days later.

The case may appear similar to others where temporary injunctions have been granted for 24 or 48 hours to permit due preparation of proceedings, the order in this case being intended to cover the 96 hour period up to the High Court proceedings. In the event, the hospital yielded to the threat of litigation and cancelled the therapeutic abortion, so that the High Court proceedings were not pursued. When indeed the wife, having given birth, acted to have the intervenor's guardian ad litem status set aside, the Court ruled the issue moot, and declined to hear the action. The case has raised significant questions, however, not only upon the proper reading of the Children's Services Act, 1976, but also upon whether a Family Court can give status to participate in High Court proceedings. Accordingly, the case may have raised more questions than it answered. It does show an instance, however, of a judicial decision, admittedly of low authority and questionable effect and implications, giving legal status to a guardian on behalf of an unborn child.

Academic opinion considers this Family Court case to have been incorrectly decided and, being at the lowest level of the hierarchy of courts, it does not contribute very much to precedent. In any event, it is likely to be overshadowed by litigation challenging the operability of the Canadian Criminal Code provisions allowing lawful abortion in light of the Canadian Bill of Rights, now the Charter of Rights and Freedoms, which protects life against termination except by legal process. The matter may seem to have been addressed in the Morgentaler and Dehler cases but late in 1981, the Supreme Court of Canada permitted a federal tax-payer to have legal standing to seek a declaration that the Criminal Code provisions violate the Charter (Minister of Justice of Canada v. Borowski). This case may work its way up through Canadian courts during the next few years.

iv. Preparatory and Inchoate Offences

Although "abortion law" centres upon termination of a woman's pregnancy, the law relating to abortion includes supplying and acquiring drugs and instruments intended for unlawful use in achieving abortion. Further, while Commonwealth case-law on abortion itself is relatively sparse, the historic case-law on supplying and acquiring means of procuring abortion is comparatively well furnished, containing precedents on whether or not particular substances or herbs are drugs, and what may be an "instrument ... intended to be unlawfully used or employed with intent to procure the miscarriage of any woman whether she be or be not with child" (Section 59, Offences Against the Person Act, 1861, see below). The historic legal problem arose because instruments so employed were by no means confined to surgical instruments, but included commonplace domestic and household implements capable of insertion into the uterus. Similarly "any poison or noxious thing" (ibid) used with intent to achieve miscarriage, raised problems where ordinarily available poisonous and non-poisonous substances were intentionally consumed, perhaps in the case of the latter in excessive quantities. Although historic English law in particular has confronted a variety of uses of implements and substances supplied by and delivered to persons aware of their potential to be used for purposes of unlawful abortion, and a jurisprudence capable of systematic analysis has emerged, few Commonwealth jurisdictions pay distinctive regard to narrower aspect of abortion law.

It is notable that every few indeed of the responses to the questionnaire circulated by the Commonwealth Secretariat which were given by Commonwealth jurisdictions for the 1977 Survey and the 1982 Report addressed

this aspect of the law, beyond giving references to statutory provisions. This may appear perfectly appropriate, since while abortion may be a crime of distinctive components, the crimes related to it, either before it is or may be committed, or after it has been committed designed to prevent detection, trial or conviction, are not distinctive. They form part of a general pattern of preparatory and inchoate offences like aiding and abetting which surround every substantive offence such as theft and assault.

Conspiracy

Conspiracy to commit a crime is an important crime in itself, which the law punishes in order that the unlawful object should not be attained. Even if those who menace society by their agreement to do wrong actually take no action in furtherance of their common design, they remain punishable for their act of agreement to pursue an unlawful obejctive. Jurisdictional systems of criminal law differ on details of what constitutes and evidences agreement, and on what objectives of agreement, whether to commit a criminal or non-criminal act, render the agreement an unlawful conspiracy. The modern law of unlawful conspiracy was conditioned by its relation to labour and industrial relations, affecting trade unions and conspiracies in restraint of trade, and its earlier history intersects with the oppression practised in the Court of Star Chamber, confirming both the sensitivity of the crime of conspiracy, and its liability to be used in a setting which is political, or which can be politicised.

The aspect of conspiracy which raises problems peculiar to abortion arises from the fact that, under basic abortion law expressed in section 58 of the 1861 Act, a woman acting alone is guilty of committing a crime of abortion upon herself only if she is "with child." The question must therefore be asked whether a woman who is not in fact pregnant can be convicted of conspiring with another that the other should perpetrate an abortion upon her. Reasoning proceeding from first principles that, whether she is pregnant or not, her agreement is in itself harmful to society at large and should be deterred and punished, is confirmed in the historic English case of R. v. Whitchurch (1890). The inference that she could also be convicted of being an accessory to another's attempt to abort her is further confirmed in R. v. Sockett (1908). Questions remain, however, of whether a non-pregnant woman can be convicted for conspiring or being an accessory with another to her own commission of abortion upon herself. This may be where section 59 of the 1861 Act is applicable. Answers to such questions in the context of any particular jurisdiction will be governed, of course, by its peculiar statutory law and case-law, although the latter is likely to be influenced by the historic English cases. For instance, the New Zealand Crimes (Amendment) Act 1977 section 4(2) states that "the woman or girl shall not be charged as a party to an offence" of abortion. Section 5 of that same Act repeals an earlier provision making a woman liable for procuring her own abortion "whether she is wih child or not."

Incitement

A related problem arises regarding the preparatory crime of incitement. Incitement or solicitation at common law is committed when one person counsels, procures or commands another to commit a crime, whether or not the the other actually commits it, or is influenced in any way by the solicitation. If the incitment causes the proposed crime to result, the inciter becomes an accessory to that crime and may be charged as such. Incitement

requires a recipient to the counselling, and what is counselled must be an offence. It is possible in principle for a person to counsel another to do an act the counsellor thinks is not an offence but which actually is, since the counsellor's ignorance of the law in theory affords no defence; although in cases where expressly malicious intent is required, that ignorance may operate to prevent that intent from having been formed, so as to be exonerating. If a person incites another to do an act which that person thinks is an offence, conviction for incitement may be possible even though the act counselled or incited is not actually an offence, since the cousellor or incited is not actually an offence, since the counsellor may be judged as if what was believed was in fact true. Incitement may similarly be found and convicted, even though the act counselled is in fact impossible to commit.

These governing principles reduce the significance of statutory language where a woman, falsely believing herself pregnant, incites another to terminate her pregnancy, since that other is guilty of the crime of abortion by acting upon her whether she is pregnant or not. The woman would accordingly be convictable for incitement. Similarly where a person incites a woman believed to be pregnant to terminate her own pregnancy, the fact that she could not be convicted of abortion when she is not actually with child affords the person who counselled her so to act no defence, since the person counselled what was believed and intended to be a crime. This touches upon a rather complex and uncertain matter, however, namely incitement to commit an attempt. This issue is better considered in the context of the law of attempt, and requires a reiteration of basic Common law principles of criminal liability.

Attempt

A traditional crime, such as unlawful abortion (meaning abortion performed other than for the purpose determined in good faith to preserve a pregnant woman's life or her physical or mental health) has two elements, namely the wrongful act (actus reus) and the wrongful mind (mens rea) causing and evidenced by the wrongful act. A person is not punishable merely for possessing a malicious, vicious or otherwise culpable intention. It is a Common law offence in itself to attempt to commit an indictable offence. The mens rea of the attempt is the mens rea of the offence attempted, and the actus reus of the attempt is an act going beyond mere preparation which falls short of the full offence but which is proximate to the offence attempted. The line between criminal attempt and mere preparation cannot be stated in the abstract, but is a matter for determination on the facts of each case, influenced by advocacy and perceptions of different decision-makers of fact, namely jury members and judges.

A long-standing and unevenly resolved issue concerns an attempt to perform a criminal act which is impossible of completion. The classical example of this is an attempt to steal from an empty pocket, which translates into the abortion context as an attempt to procure the miscarriage of a woman who is not pregnant. Section 58 of the basic English law resolves this problem regarding a person dealing with a woman supposed to be pregnant, since it defines the offence as undertaking certain actions with the unlawful intent "whether she be or be not with child." The problem remains, however, regarding a woman who acts upon herself, since to commit the full offence she must be "with child." More significantly for Commonwealth jurisprudence, however, jurisdictions whose abortion law follows the Indian Penal Code of 1860 face a pervasive problem, since the Code defines abortion, whether by a

woman upon herself or by another person upon her, as committed only when she is "with child." If it cannot be proven that she is, the issue becomes critical of whether a person acting to achieve her abortion is convictable for the crime of attempted abortion.

Proof of pregnancy may become available after menstrual evacuation from analysis of the uterine contents. If a fertilized ovum is disclosed it may become necessary to determine whether or not it had achieved implantation, since modern practice is to regard a criminally terminable pregnancy to have commenced only at the point of implantation (see IV A below, the contraception-abortion distinction). Application of this analysis to Penal Code jurisdictions is not possible in the absence of relevant precedent. The presence of such an ovum whether fertilized or implanted is of no consequence when evacuation was undertaken for a legitimate purpose of contraception or menstrual therapy (see IV B below, Menstrual Therapies). In such a situation there is no intent to abort but only an intent to provide a therapy for a gynaecological problem. If after such a therapy it can be proven that there was a fertilized ovum, this can not alter the intent of the doctor to provide a therapy, and as a result he could not be criminally liable for an attempted illegal abortion. If it was undertaken expressly for the purpose of abortion, the procedure should have conformed to the local abortion law. If it did not and the uterine contents have been preserved and subjected to forensic or other examination disclosing a fertilized (and perhaps implanted) ovum, this may show that the wrongful act of the intended crime of abortion was present, since the woman was "with child." There then may be conviction not just for attempted abortion, but for the full offence, since it is shown that the intent for abortion coincided with the prohibited act. In terms of the classical analogy, it becomes clear that the pocket was not empty. The dilemma remains where such proof is not available.

Regarding analogous "empty pocket" cases, an English decision in R. v. Collins (1864), held that placing one's hand in another's pocket intending to steal its contents but failing because the pocket is empty clearly cannot be criminal larceny or theft, but also that it cannot be criminal attempt either. The reasoning is that there cannot be any more than a preparatory step or a proximate step towards an end which cannot be achieved; that is, towards an act which cannot be done. Reinforcing reasoning may distinguish between using impossible means towards achieving a possible end, which is convictable as criminal attempt, and using any means directed towards an end which cannot be achieved, which can be neither preparatory nor proximate, and so is not convictable. In the later case of R. v. Ring (1892), the court stated that R. v. Collins had been wrongly decided and that attempting to pick an empty pocket is convictable, although the court gave no reasons for considering the 1864 case incorrect.

The Ring case was nevertheless taken to represent the law, and was followed in Malaysia in Munah bt. Ali v. Public Prosecutor, (1958) where the Court of Appeal, Thomson C.J. dissenting, held that under an Indian Penal Code model law, a person could be convicted of attempted abortion even where it was not proven that the woman was "with child." This may accord to the good sense of the community at large, since it was clear that the defendant was in fact attempting abortion. The issue, however, is whether the defendent was guilty of an attempt in law. The defendant appeared without counsel as a litigant in person, and may not have prepared argument that she should not be convicted of criminal intent alone, and that she did not commit the actus reus of the offence under the Penal Code. Section 511 renders it

criminal to attempt "to commit an offence punishable by this Code," but Section 312 dealing with abortion punishes only causing "a woman with child" to miscarry.

English law was clarified on this issue when the House of Lords unanimously decided the case of Haughton v. Smith, (1975) which considered the pre-existing cases and favoured the approach of R. v. Collins, expressly rejecting the conclusion of R. v. Ring. The High Court of Malaysia applied the House of Lords' principles stated in Haughton v. Smith in 1979 in Public Prosecutor v. Kee Ah Bah. The Indian Penal Code 1860 contains an illustration, perhaps itself questionable in light of the 1864 decision in the Collins case, that placing one's hand inside an empty pocket is convictable as attempted larceny or theft. This is not necessarily incompatible with Collins and Haughton v. Smith, however, in that the precondition of placing a hand in a pocket is that the intended victim must have a pocket, and there can by inference be no such intended theft if he had not. By analogy, the preconditon of committing abortion under the Penal Code is that the woman be "with child", and if she is not proven so to be, acting upon her is not a criminal attempt. The equation of a pocket which is empty with a woman's uterus which is not pregnant is appealing, but also deceptive. The true equation may be that for attempted theft the intended victim must have a pocket, and for attempted abortion under the Indian Penal Code the woman must be "with child". In the absence of the proven presence of a pocket or a child, there can be no conviction for unlawful attempt in interfering with the person or woman, since intent alone is not convictable, and the action taken cannot be a proximate step towards commission of the offence. Similarly, in the context of the English 1861 Act, a woman acting to procure her own miscarriage when she is not pregnant can be convicted neither of abortion nor of attempted abortion.

The decision in Haughton v. Smith is difficult to analyse in view of different although concurring judgments handed down by their Lordships, and its interpretation in later cases has proven difficult. Its outcome, furthermore, has been a source of some dissatisfaction, related perhaps to the difficulty of understanding the decision's reasons. In England, the Criminal Attempts Act 1981 came into force late in August of the year, with the intended effect of reversing Haughton v. Smith in "empty pocket" cases. The Act leaves open, however, the position as it exists under Indian Penal Code model laws, since its approach concerns mens rea of defendants. Section 511 of the Penal Code, having no equivalent under non-codified laws and the Criminal Attempts Act 1981, may continue to accommodate an exonerating argument based upon absence of the specified actus reus of criminal attempt, since no attempt is made to commit "an offence punishable by this Code." The Code prohibits abortion only where the woman is "with child". Indeed, commentators have questioned whether the intention of the 1981 Act to reverse the effect of Haughton v. Smith may be frustrated by the Act's judicial interpretation, in view of the interpretation the New Zealand Court of Appeal has given to a comparable provision in New Zealand's Crimes Act 1961, section 72(1). It is interesting to consider whether Malaysian jurisdictions will continue to follow the case of Munah bt. Ali v. Public Prosecutor, since its basis in English precedents was rejected in Haughton v. Smith, and no local legislation appears which as reversed the effect of that decision. (But see Public Prosecutor v. Kee Ah Bah below, IV. B).

v. Supplying or Procuring Means of Abortion

While historic English Common law has constituted such preparatory offences as conspiracy, incitement and attempt, which apply to the crime of abortion no less than to other crimes, statute law since 1861 has created a specific offence of unlawfully supplying or procuring the means of performing abortion. Section 59 of the offences against the Person Act 1861 provides that ...

> "Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour ..."

This provision or a variant of it has tended to accompany the basic law expressed in section 58 of Commonwealth jurisdiction. The Code of Queensland and Western Australia, for instance, refer to use of force in the same knowledge. A body of case law on these provisions has arisen in a number of jurisdiction, often close to but not necessarily the same as that in England. The law is generally derived from and co-terminious with interpretations of the section 58 provision, and respond to the Bourne decision and the traditional techniques of statutory construction. Reciprocally, interpretations of such words as "poison", "noxious thing" and "instrument" in section 59 may be applied to the offence of the basic section 58. The resulting legal effect of the section 59 provision clearly relates to abortion. It is not central or sensitive, however, to the wider issue associated with abortion law as such. It is composed of "lawyers' law" which may be regarded as of some what secondary significance to the issues which in recent years have emerged as important to the future of abortion law.

The case of law of England, New Zealand and, for instance, the Australian jurisdictions has been interactive but not necessarily congruent upon such issues as whether a substance not noxious in its nature can be a "noxious thing" within the meaning of section 59. An historic English case has held that a substance not noxious in its nature can not be unlawfully supplied or procured against section 59 even if the woman taking it subsequently miscarries. In New South Wales it has been held, however, that an instrument can be supplied or procured unlawfully whether or not it is incapable of achieving a miscarriage. In R. v. Lindner, (1938) the South Australian court of criminal appeal reflected the view that prayer or witchcraft could be the equivalent of a "thing" under such a provision, and limited the section to "something that is, in the common experience of mankind and in some reasonable degree, capable of producing the result". (See p.415).

The 1939 Report of the (Birkett) Interdepartmental Committee on Abortion in England divided abortifacient drugs into two groups. The first group is composed of the many drugs which, in addition of such legitimate purposes as they may serve, have acquired a reputation of being capable of terminating pregnancy. Such drugs can usually be obtained without evidence of the purpose for which they are acquired. Even though the seller may suspect the purpose, for instance, from the quantity purchased or personal knowledge of the purchaser it can't be said that an ordinary open sale, and even less that a supply on regular prescription, will be an offence. The second group is composed, however, of special substances occasionally called such as "female

pills" or "female mixtures", which include among their ingredients drugs widely considered to have effective abortifacient properties which have few if any therapeutic qualities but which are ostensibly offered and advertised as remedies for "female irregularities", "women's ailments" or as "corrective medicines". The supply or procurement of such substances may violate the section 59 provision and perhaps other enactments on drugs or poisons.

The 1939 Report found that many drugs and preparations widely taken and perhaps sold in the beleif that they may terminate pregnancy are in common use for legitimate purposes. The Report observed that "it is clearly out of the question to attempt to impose a general restriction on the sale of all of these substances" (para 152). The Report made a number of restrective proposals but added that "it is clear ... that there will still be a great variety of abortifacient drugs and preparations untouched by any legislation, and we doubt whether any restrictive measures can be devised which would cope with the problem satisfactorily or adequately" (para 161). These words may remain particularly significant in jurisdictions where herbal or folk remedies may exist which are employed for the purpose of termination of pregnancy. Further, an analogy exists between substances and instruments, since many instruments in common use may be employed for unlawful abortifacient purposes. However strongly it may be wished to discourage their use upon moral, hygienic or therapeutic grounds, it is clear that the sale of such items as knitting needles, crochet hooks and hair pins cannot be restricted even when their intended use is strongly suspected to be unlawful.

Instances of "lawyers' law" arising under section 59 include the proposition that to be convictable for having acted to "procure" a poison, noxious thing or instrument, a defendent must have acquired it a proximate time before the unlawful attempt to use or empty it or achieve abortion. R. v. Mills (1963) a regular abortionist obtained instruments of abortion some time before the act charged and stored them in a cupboard. In quashing his conviction under section 59, the court held that to "procure" meant to obtain from another and one could not so procure against the section what was already a theft. Further, Australian jurisprudence holds that a defendant must be charged with supplying a prohibited means of abortion to a particular person or with procuring such means for use upon a particular women.

Thus, Commonwealth statutes based upon section 59 of the 1861 Act have produced an interesting but relatively minor jurisprudence of their own. The major interpretations of such provisions depend, however, upon matters more relevant to basic abortion law contained in section 58 and its equivalents. Acccordingly, acting with the legitimate intention of achieving contraception or menstrual therapy will create no offence against a provision modelled on section 59. A woman intentionally procuring means to achieve her own miscarriage may in principle be liable under section 59 "whether she be or be not with child", whereas she can be convicted under section 58 of using such means upon herself only when she is "with child". She may be convictable under section 58, however, for an attempt, in jurisdictions where attempting an end impossible to achieve is convictable. In jurisdictions where that is not a convictable attempt against section 58 it may be that procuring means is not unlawful against section 59. It remains possible in theory, of course, that a woman obtaining and using means upon herself when she is not pregnant who is convictable of neither a full offence nor an attempt based on a section 58 provision may be convictable of unlawfully procuring of means against a section 59 provision. However the latter provision's requirement for conviction of "unlawfully" procuring a means to be "unlawfully" used may make that an unlikely interpretation.