

Opinion

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REALPOLITIK: THEOLOGY & THE CULTURE OF DEATH: ABORTION, POLITICS AND LAW IN THE AUSTRALIAN CAPITAL TERRITORY

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Introduction

In the early hours of the morning of Thursday 26th November, after a debate spanning more than 26 hours, the Legislative Assembly of the Australian Capital Territory ("the ACT") passed legislation, pertaining to abortion, which must be described as significant. The new Act is the *Health Regulation (Maternal Health Information) Act* 1998. The proposer of the new legislation is an independent member of the Legislative Assembly, Paul Osborne. He is a young politician, a committed Catholic, with a large, and very young, family. He was a detective in Sydney, and a prominent rugby league football player in Sydney and Canberra. In local parlance, the legislation is referred to as "the Osborne Bill."

Some of the reasons for the significance of the new legislation, not the least being its likely – and intended – impact on reducing the number of abortions in the ACT, are the subject of this note. Given that the legislation is primarily concerned with the provision of information, it is apposite that some background be provided to place the discussion in context.

Background: Legal & Political Realities

1. *Abortion & the Law:* The eight legal jurisdictions within Australia can be divided between three (South Australia, Northern Territory & Western Australia) which have enacted statutory regimes to regulate abortion practices, and those jurisdictions which are predicated upon the common law (code or statute). Whatever regime is in place, and notwithstanding that criminal statutes generally provide that 'abortion is unlawful', the effective result has been that since the most prominent judicial ruling on abortion in Australia in 1969, known as *R v Davidson*¹, there has been abortion on demand. This is because courts have consistently held,

¹ [1969] VR 667. The case is also known as "the Menhennitt ruling" after the name of the presiding Supreme Court Justice.

following a 1938 English decision², that the word “unlawful” in criminal statutes in relation to abortion implies that there is a legal entity of “lawful abortion.” A “lawful abortion” has been invariably held to be an abortion which is performed because it accords with a legal principle, albeit a problematic one, called “necessity”.³

2. The only appellate court ruling on abortion in Australia remains the majority judgments of Kirby A-CJ and Priestley JA in the New South Wales Court of Appeal in *CES v Superclinics Australia Pty Ltd*. That ruling accepted unquestioningly and applied (and attempted to extend) the Levine ruling in the *Wald* case (1972) in NSW, which had earlier followed (and extended) the Menhennitt ruling in Victoria. The Menhennitt ruling has been followed in Queensland in the judgments of Maguire J in *R v Bayliss & Cullen* (1986) and de Jersey J in *Veivers v Connolly* (1994). These cases, and the discussion of them in the text books referred to in the notes below, set out the state of the law as it has been practised and taught for almost three decades throughout Australia. Although there has never been a prosecution in relation to abortion in the ACT, and therefore no decided case in this jurisdiction, the principles of precedent suggest that, in the event of a prosecution, an ACT court would inevitably follow the Menhennitt ruling, as courts in other Australian jurisdictions have done as a matter of course since 1969. In the absence of any ruling to the contrary from an appellate court, the accepted legal regime on abortion, according to custom and precedent more so than principle – prevails.

3. Notwithstanding its suspect legal foundation, in thirty years of abortion practice throughout Australia, with a current national rate of more than 80,000 abortions per year⁴, there have been very few prosecutions. Indeed, police journals confirm that in the most populous State, New South Wales, there have been no prosecutions for abortion since the early 1970s.⁵ In that same period, there has been only one successful, non-interlocutory, attempt at the highest appellate level to challenge the suspect jurisprudential foundation of abortion in this country.⁶ One

² *R v Bourne* [1939] 1 KB 687, [1938] 3 All E.R. 617. For a detailed consideration of this critical case, see J. Keown, *Abortion, doctors and the law* (Cambridge: Cambridge University Press, 1988), *passim*.

³ A detailed critique of the jurisprudence of abortion in Australia is set out in the formal submission filed with the High Court on behalf of the Australian Catholic Health Care Association and the Australian Bishops' Conference in a successful application to be heard as *amicus curiae* in what is known as the *Superclinics* litigation in 1996 (see *CES v Superclinics Australia Pty Ltd* [1995] 38 NSWLR 47). That case was a claim for wrongful birth. The application to be heard was granted by the High Court. However, before the High Court could deliver judgment, the original parties to the case settled the claim.

⁴ On the incidence of abortion, *Australia's Health 1998*, (Canberra: Australian Institute of Health and Welfare, 1998) says (p.52):

National information on fertility patterns and induced abortions is lacking because only South Australia and the Northern Territory collect population-based data on induced abortions. In South Australia in 1996, there were 5,535 induced abortions and 18,784 confinements; thus 29.5% of all pregnancies (excluding miscarriages) ended in abortions... More than half (51.0%) of all teenage pregnancies were terminated. On the reasons for abortion, which are overwhelmingly social (and economic), see the study by Family Planning apologists published in the *Medical Journal of Australia*, “A survey of women seeking termination of pregnancy in New South Wales,” (1995) 163 *MJA* 419.

⁵ See *NSW Police News* (November 1994), “The flourishing abortion industry of the 50s and 60s.”

⁶ See footnote 4 and W. Neville. “Abortion Before the High Court – What next? Caveat Interventus: A Note on *Superclinics Australia Pty Ltd v CES*” *Adelaide Law Review* [1998] (forthcoming).

would be very brave to predict that any further challenges to the jurisprudence on abortion, via the judicial process, will occur in the near future.

4. The only recent attempt, in any jurisdiction, to prosecute doctors for an abortion occurred in Perth earlier this year. That prosecution became the vehicle for sufficient political pressure to be brought which resulted in the passing of 'liberal' abortion legislation by the Western Australian Parliament.

5. One final matter must be mentioned. The legal 'weapon' used throughout the passage of the Osborne Bill was an important High Court case, unrelated to abortion, decided in 1992. That case, *Rogers v Whitaker*⁷, requires that information concerning any material risks must be provided to a patient by his or her doctor before any medical procedure is undertaken. A risk estimated at 1;14,000 has been held to be sufficiently material to require disclosure; failure to provide such information will result in a medical practitioner being liable in negligence. The legislation in the ACT is aimed at the significant lacunae in information given to women who are considering an abortion, especially its critical, and wide-ranging, effects (e.g. breast cancer).

6. It is against this long-standing permissive legal regime, according to custom and precedent⁸, political inertia, violent media opposition to abortion being treated by criminal statute (rather than as a women's health issue), and significant public

⁷ [1992] 175 CLR 479. Generally, see B. Bennett, *Law and Medicine*, (Sydney: LBC information Services, 1997) 33-50 & L. Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences*, (Sydney: Butterworths, 1998) 139-165.

⁸ The following criminal law text books consistently present the law on abortion in significantly liberal terms: *Howard's Criminal Law* (Fifth Edition), B. Fisse, (Law Book Company, 1990) pp. 165-168; Brett, Waller and Williams, *Criminal Law: Text and Cases* (8th Edition), (Butterworths, 1997) pars. 5.13-5.16 & 12.7-12.10; *Criminal Law* (Fourth Edition), P. Gillies (LBC Information Services, 1997), pp. 616-618; *Abortion Regimes*, K Petersen, (Aldershot, 1993); *Halsbury's Laws of Australia*, Vol.9 "Criminal Law", (Butterworths – Loose-Leaf Service), pars[130-1265] – [130-1310], *The Laws of Australia*, Vol.10, "Criminal Offences" (Law Book Company – Loose-Leaf Service), pars. [159]-[181]. The Commonwealth Parliamentary Library has issued a Research Paper (dated 31 August 1998) entitled "Abortion Law in Australia" which reflects the position presented in the texts referred to. The Paper was written by Natasha Cica who also authored perhaps the most widely quoted article in recent times on abortion "The Inadequacies of Australian Abortion Law." *Australian Journal of Family Law*, (1991) 49-51.

The following texts on law for various branches of the health care professions consistently present the law on abortion in significantly liberal terms: *Law for the Nursing Profession and Allied Health Care Professionals*, (2nd Edition) (CCH Australia Limited, 1992) pars. 452-464 ("R v Davidson has come to provide the test to be applied in all Australian jurisdictions to determine whether an abortion is legally justified."); *Law for the Medical Profession*, (Second Edition), Dix, Errington, Nicholson, Powe, (Butterworth, 1996) pp.357-368; *Health Care and the Law*, (Second Edition), M. Wallace, (The Law Book Company, 1995) pars.14.128-14.154 ("Other States and the Australian Capital Territory follow the common law, therefore looking to precedent ([Davidson and Wald]...which is persuasive."); *Health Law: Commentary & Materials*, (Second Edition) P. MacFarlane, (The Federation Press, 1995) pp.174-185 ("What distinguishes a legal from illegal abortion depends upon the interpretation given by the courts to the words of the statute."); *Law and Medicine*, Belinda Bennett (LBC Information Services, 1997) pp. 119-127; *Australian Health & Medical Law Reporter* (CCH – a practitioner's loose-leaf text, updated six times each year) pars. ¶21-700 - ¶21-750 ("...there is a substantial degree of uniformity across Australia in the actual interpretation of the law because the conditions laid down in the Victorian case [Davidson] have largely been followed in all other Australian jurisdictions."); *Medical Law: Text, Cases and Materials*, J. Devereaux (Cavendish Publishing, 1997) pp.152-167; *Law and Medical Practice: Rights, Duties, Claims and Defences*. L Skene (Butterworths, 1998) pp.264-276.

opinion manipulation in favour of abortion, that the recent ACT legislation must be seen.

The Health Regulation (Maternal Health Information) Act

1. *The Health Regulation (Maternal Health Information) ACT* (“the Act”) began life in another guise – partly for political reasons. When introduced the legislation was entitled the *Health Regulation (Abortions) Bill*. The original Bill comprised two parts: the first prohibited abortions after the first trimester and severely limited those which could be performed legally in the first twelve weeks of pregnancy.⁹ The second part of the Bill concerned the provision of certain kinds of information to women contemplating abortion, a mandatory cooling-off period, the provision of public reports from any “health facility” which performed abortions, and some other matters.

2. While most parties were focussing exclusively on the first part of the Bill, further refinement of the important provisions concerning information and other matters was taking place. The political assessment was that the only likely legislative option which had any serious prospect of being passed concerned the provision of information. The strategy devised was to keep attention on the more dramatic sections of the Bill. Those sections would be dropped without notice, only at the very last minute, thereby assuaging nervous politicians who could, in such circumstances, vote for less problematic provisions of the Bill. As it happened this is exactly what transpired.

3. In summary form, the Act contains the following provisions: (a) although those provisions of the *Crimes Act* which relate to abortion are never enforced, there are express provisions which prevent the Act having any effect on those sections of the *Crimes Act* which relate to abortion; (b) information pertaining to the risks of abortion (e.g. the possible link between abortion and breast cancer) must be provided, and the information must contain photographs of the unborn at regular stages of gestation; (c) the information must be determined by an independent panel comprising obstetricians and paediatricians from the two public hospitals in Canberra (one of which is Catholic); (d) there is a mandatory cooling-off period of 72 hours between a woman presenting for an abortion and the performance of it; and (e) any health care facility which performs abortions must provide quarterly reports to the Parliament concerning the number of abortions (and other matters). Provisions relating to independent counselling and parental consent were voted down by the Assembly.

⁹ The abortion industry in Canberra complained that only a small handful of the 2000 abortions performed annually in the ACT could satisfy the criteria outlined in the original Bill. On the latest available figures, there is one abortion for every 2.1 births. And this is out of a total population of approximately 300,000 persons.

Theological Considerations

In addition to the plethora of legal and political considerations, Mr Osborne faced a number of theological matters which required attention.

1. First and foremost is the significant last paragraph of *Evangelium Vitae*,⁷³ concerning the responsibilities of pro-life politicians in situations where, as in all jurisdictions in Australia, there is abortion on demand and no possibility to abolish or otherwise to abrogate it. Although the encyclical is silent as to strategies and such matters, Mr Osborne took the view that there was more than an arguable case that, given that abortion is practised in the ACT without any restriction whatsoever, the introduction of a Bill, even in its original form, was a licit exercise in 'harm limiting' legislation.¹⁰ Its original form proved an excellent foil in keeping the pro-abortion forces off-guard. Their focus, understandably, was on what they saw as the 'repressive provisions' of the first half of the Bill which, on their face, would severely restrict the practice of abortion in a jurisdiction where it was not possible to abolish or otherwise abrogate abortion.

2. In accordance with the provisions of *Evangelium Vitae*, 73, Mr Osborne stated publicly (and often) that he would, if possible, abolish all abortions because he holds abortion to be an abominable crime. In all his legislative actions, his sole intention was to save the lives of the unborn. Of course, he was equally concerned for the lives and well-being of all mothers also. His reasoning was predicated upon the critical subject of intention. In this regard, it is instructive to consider, for a moment, the Church teaching in relation to the administration of pain-relieving medication in the debate on euthanasia.

a) In the debate over euthanasia, as a matter of law and of moral theology, much discussion centres around whether the provision of pain relieving drugs, which may expedite the death of the patient, is euthanasia. The provision of such drugs with the sole intention to relieve pain is both licit in law, sound medical practice, and equally licit as a matter of moral theology, even if an unintended (and foreseeable) consequence of their administration is that the patient's death may be hastened. The intention of the health care professional is all important. This is because it is possible to provide the same drugs with the express intention of killing the patient. Such an intention is culpable conduct in law, abhorrent to principles of moral theology, and anathema to sound medical practice. (Of course, those from the pro-euthanasia camp deliberately dissemble the standard and basic distinctions between intention, foresight and motive.) Thus, the same conduct (the administration of pain-relieving drugs) may be culpable or it may not depending on the intention of the person responsible for the doing of the act. The determining factor is the intention of the person. I note the following from the Pontifical Council

¹⁰ The Encyclical is silent as to the introduction of legislation. However, a Symposium under the auspices of the Pontifical Council for the Interpretation of Legislative Texts, the Pontifical Council for the Family, and the Pontifical Academy for Life in 1995, *Evangelium vitae e Diritto*, (Roma: Liberia Editrice Vaticana, 1997) suggest that a wide interpretation ought to be given to the final paragraph of *Evangelium Vitae*, 73

for Pastoral Assistance to Health Care Workers' *Charter for Health Care Workers* (1995) with special reference to the situation I have just described.¹¹

b) "When "proportionate reasons" so require, "it is permitted to use with moderation narcotics which alleviate suffering but which also hasten death." In this case "death is not intended or sought in any way, although there is a risk of it for a reasonable cause: what is intended is simply the alleviation of pain in an effective way, using for that purpose those painkillers available to medicine." Similar comments are found in the *Catechism of the Catholic Church* (par.2279) where a distinction is made between actions intended either as a means or as an end and matters unintended but "foreseen and tolerated as inevitable."

c) Despite the restrictive provisions of the *Crimes Act*, and because of the common law provisions which would certainly have been applied in the ACT, the Osborne Bill, in all its forms, together with the political strategy which accompanied it, was directed to the attenuation of judicially entrenched permissiveness towards abortion with the foreseen but unintended effect that it would not eliminate all abortions. In its final form it removed the possibility of any ill-informed public perception that Osborne's means to achieving his goal was morally problematic. Neither his intended end or goal, nor his means, involve killing or permitting the killing of additional unborn babies.

Conclusion

The passage of the "Osborne Act" is significant. It is the first pro-life legislation concerning abortion in this country. Its gestation and birth were problematic. It is a modest attempt to assist in saving as many lives of the unborn as is possible, and to protect their mothers from the predatory abortion industry. Please God, may it do so.

¹¹ One may also profitably consult, among a plethora of writings on this and related topics, John Finnis, "Object and Intention in Moral Judgments According to Aquinas," *The Thomist* 55 (1991) 1 and more generally his *Moral Absolutes: Tradition, Revision, and Truth* (Washington DC: The Catholic University of America, Press, 1991), as well as Germain Grisez's discussion in relevant sections of Chapter Eight "Life, Health, and Bodily Integrity" in his *The Way of the Lord Jesus: Living a Christian Life*, Vol.2 (Quincy: Franciscan Press, 1993).