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Reply to 'The Other Abortion Myth—The Failure of the Common Law'

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My experience with academic lawyers when it comes to the law of abortion is that if there are five in a room, you'll have six different opinions about what the law says. Invite those who advise abortion service-providers working in clinics or public hospitals, and you'll get an even greater diversity of views.

So it is with wry amusement that I respond to the certainty of Kate Gleeson that my understanding of the law—that it is unclear and in need of reform—is wrong.

Gleeson asserts that that the common law regime operating in Victoria, New South Wales and Queensland is clear, certain and preferable to other regulatory regimes.

The Victorian Law Reform Commission (VLRC) disagrees. On page 16 of its 2008 Final Report on the *Law of Abortion* it notes that, "The law of abortion in Victoria is unclear." It notes further that, "it is not possible to describe the current state of Victorian law with reasonable precision." The report states that the law in both NSW and Queensland, the other common law states, is "broadly similar to the current Victorian law" and so, presumably, equally unclear and imprecise.

Gleeson dismisses the occasional prosecution of the increasingly few doctors willing to perform the procedure in this country as non-indicative of a need to improve the current common law regime.

I wonder if she has ever spoken to any of these providers? I have and so I know that even the threat of prosecution, still less the occasional charge or successful prosecution as has happened in Queensland in 1986, Victoria in 1987, West Australia in 1998 and New South Wales in 2006, is enough to stigmatise the procedure and drive doctors away from providing it. This has left a shortage of skilled providers across the country that makes insistent claims by academics that abortion is lawful, empty.

Gleeson says I am wrong to suggest that the absence of prosecution results from those in key positions of authority turning a blind eye. Again, I would refer her to the facts, this time the period leading up to reform of the law in WA, which was a presumed common law state.

In 1998 in West Australia, several surprise decisions by members of the police and the Director of Public Prosecutions (DPP) saw a doctor charged with violating S199 of the Criminal Code. In response, and led by Federal MP and former West Australian Premier Carmen Lawrence, a group of fourteen female parliamentarians sent a letter to the DPP John McKechnie, the Commissioner of Police, the Attorney General and the Minister for Health. The letter registered their "vehement objection" to the possible prosecution.

The DPP, after announcing that abortion was only legal in West Australia if a woman's life was at risk,

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replied to the women by accusing them of "hypocritical cant." He wrote that S199 and S259 of the criminal code were all those required to prosecute for the crime of unlawful abortion. He said that if they believed the law no longer "commanded general community support," they should change it, not ask him to look the other way.

My extended account of the campaigns in the Australian Capital Territory and West Australia in 1998 can be found on my website http://www.cannold.com/. A shorter version was published in Advocating for Abortion Access: Eleven Country Studies, (Women's Health Project, 2001).

Finally, it is said that my criticism of the law is "ideological rather than pragmatic." Actually, it is largely experiential: a consequence of interviewing and meeting those involved with abortion. Whatever the views of a small coterie of academics, abortion service providers and the lawyers that defend them, as well as professional bodies like the AMA, the Royal Australian and New Zealand College of Obstetricians and Gynecologists (RANZCOG) and the Law Institute of Victoria support current efforts to decriminalize abortion in Victoria because they do not believe existing law provides adequate clarity or certainty.

It is true that I believe that removing abortion from the criminal statutes and putting in place legal arrangements that assert women as the rightful decision-makers around unplanned pregnancy—the reverse of the current assertion in the common law—would elevate women's status as equal citizens, and competent, rational decision-makers worthy of respect. Insofar as this reveals my activism as evidence of my prosecution of the "greater goal of the moral characterization of abortion," I am happy to stand guilty as charged.