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by H. A. Finlay

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THE IMPACT OF LAW ON FAMILY PLANNING IN AUSTRALIA

H. A. Finlay*

I. INTRODUCTION

A. *Character of the Population Problem*

The outstanding feature about Australia's population is its low overall density. In an area of almost three million square miles lives a population of about thirteen and a half million. This represents a density of 4.50 to the square mile, which is somewhat less than that of Canada. Yet, the Australian population is also one of the most highly urbanised in the world and is becoming more so. Over 50% live in the four largest urban centres of over 500,000, and another 10% live in five centres of between 100,000 and 500,000. Fewer than one-sixth are officially classified as rural, which is defined as comprising those living on the land or in centres having a population of less than 1,000.[1]

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This survey is based on a research project into Australian legislation related to family planning, which was carried out with the assistance of Mrs. Sandra Glasbeek and supported by a grant from the Family Planning Association of Australia. That project has now been published under the title "Family Planning and the Law in Australia" by the Family Planning Association of Australia (Sydney).

[1] This, and the following statistical data, except where otherwise indicated, are based on information published in the latest Official Year Book of the Commonwealth of Australia, (hereinafter referred to as Year Book) or supplied by the Department of Census and Statistics.

One of the reasons for this apparent contradiction stems from the unsuitability of large geographical areas for settlement. This is related to rainfall rather than to climate: less than 40% of the total area of Australia lies within the tropics; the rest is temperate. But a similarly large area receives under 10 inches of rain a year. The most populous areas are a crescent shaped, comparatively narrow coastal belt in the South-East corner of the Continent, and a similar although very much smaller belt in the South-West corner. All the large urban centres lie within these two areas. Except for Canberra, the federal capital, which is one of the fastest growing cities and now numbers about 150,000, inland centers are still considerably short of the figure of 100,000.

The six States of Australia were settled as six separate colonies from Great Britain, some of them originally serving the purpose of receiving transported convicts from the home country. This goes back to the arrival of the First Fleet in Botany Bay, now a part of Sydney in New South Wales, in 1788.

The character of Australia's population has always been of overwhelmingly British descent. While it remains so today, increasing numbers of other nationalities have immigrated since the end of World War II. The small overall numbers of the population, coupled with the great open spaces and the distance from Britain produced a sense of isolation and insecurity—characterised by the slogan "Populate or Perish"—which in the past has dominated Australian thinking on population. With it went a feeling of unease at the proximity, to the north, of large population masses of different ethnic and cultural character with whom no rapport existed or was thought to be possible. From this, and even more from economic considerations, was born in the last decade of the nineteenth century the Australian attitude toward immigration. Although it was deemed necessary to attract large numbers of settlers to fill the empty continent, it was also believed desirable to restrict the entry of persons of racial origins different from the predominantly British stock of the settlers. Thus a restrictive immigration policy became established towards the end of the nineteenth century. While it was undoubtedly ethnically oriented, its basis was primarily economic. The vision of an influx of large numbers of people, prepared to adopt a lower standard of living and to work at a much lower subsistence wage than were Australians, conjured up fears of the destruction of the traditional character of the Australian Colonies. The protection of a favourable wage structure and of industrial conditions acceptable to the worker was one of the principal aims of the Trade Union Movement, which has been a very powerful force in Australian political life. It is understandable therefore, that that movement, and the Labour Party which has been linked with it, has always taken a very keen and jealous interest in Australia's immigration policy.

During the preceding forty or fifty years there had indeed been some influx of non-European groups, caused or motivated in each case again by economic considerations. These groups were Indian hill coolies in the early forties, Chinese immigrants to the goldfields of Victoria and New South Wales in the 1850s, and indentured Kanaka labourers imported from the Pacific Islands to work in the Queensland sugar cane fields in the 1870s.[2] These population movements, although small, were accompanied by a growing sentiment of opposition, and a determination to prevent settlement in Australia of a non-white population. Such an attitude was not unique to Australia but found a counterpart in attitudes and conditions that had developed or were to develop on the west coast of the United States, in British Columbia and in New Zealand.[3]

When the Australian Colonies federated as the Commonwealth of Australia in 1901, there were then about 30,000 Chinese living in Australia, out of a total population of just under four million. They formed by far the largest single non-European population group, other non-Europeans numbering about 17,000. This proportion of non-Europeans to Europeans declined over the next 45 to 50 years, but in the last fifteen years or so there has been a gradual increase again. The figure of 25,000 foreign-born, non-Europeans in Australia is, in present day terms, of negligible impact. There has also been some recent immigration of Eurasians from Ceylon, India, Mauritius and some other countries, but again the numbers are comparatively insignificant.

But whereas all the foregoing comments apply to the Australian immigrant population, a small yet important group remains to be noticed: the aboriginal population. Today they number about 80,000. Their exact number at the time of original settlement in 1788 is not known, but an estimate of 300,000 is now accepted as being reasonably accurate.[4] It is not altogether easy to obtain accurate present-

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[2] *See* PALFREEMAN, THE ADMINISTRATION OF THE WHITE AUSTRALIA POLICY (1967).

[3] *Id.*

[4] D. MULVANY, THE PREHISTORY OF AUSTRALIA 40 (1969).

day figures, owing in part to past difficulties of communication in outback areas, and partly to uncertainties concerning persons of mixed blood, some of whom would describe themselves as "European," others as "Aboriginal." Official census figures show a total aboriginal population of 80,000.[5] Prior to the 1966 census attempts were made to distinguish between persons of over and under 50% aboriginal blood, and in the 1961 census they were stated as numbering 40,000 and 39,000 respectively.[6] Recent unofficial estimates have put the figure at about 130,000, based on persons who identified themselves as of Aboriginal descent.[7] Other estimates have put the number as high as 250,000-300,000.[8]

Socially, economically and educationally the Australian Aboriginal population has in the past been an underprivileged group. As such it has a higher infant mortality rate than the Australian average, but also a much higher birth rate.[9] Its numbers are consequently growing at a much higher rate, and it has been estimated that by 1981 they may reach 150,000 and by the end of the century 300,000.[10]

The following table shows the increases that have taken place in the Australian population since 1828, when the first census was undertaken in New South Wales. It must be realised that the early census counts proceeded independently of one another in the separate Colonies and there was no attempt at synchronisation until 1881. Since 1901 they have been conducted on a Commonwealth wide basis.

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[5] 1966 Census, Year Book, Canberra 137 (1971).

[6] 1966 Year Book at 225. This practice has now been abandoned because of doubts as to the accuracy of information formerly obtained on that basis. The 1966 figure of 80,000 relates to persons who described themselves either as "Aboriginal" or as "50% or more Aboriginal." 1971 Year Book, at 137.

[7] E.M. Eggleston, Aborigines and the Administration of Justice 1 (1970) (Ph.D. Thesis, Monash University).

[8] ABORIGINES & EDUCATION 61 (S. Dunn & C. Tatz ed. 1969).

[9] Moodie, *Mortality and Morbidity in Australian Aboriginal Children*, MEDICAL JOURNAL OF AUSTRALIA (1969). F.L. JONES, THE STRUCTURE AND GROWTH OF AUSTRALIA'S ABORIGINAL POPULATION (1970).

[10] F.L. JONES, THE STRUCTURE AND GROWTH OF AUSTRALIA'S ABORIGINAL POPULATION 36 (1970).

	Males	Females	Total
1828			36,598 (a)
1833			60,794 (a)
1841			130,856 (a)
1861 (b)			1,151,191
1871 (c)			1,663,039
1881	1,214,913	1,035,281	2,250,194
1891	1,705,835	1,471,988	3,177,823
1901	1,977,928	1,795,873	3,773,801
1911	2,313,035	2,141,970	4,455,005
1921	2,762,870	2,672,864	5,435,734
1933	3,367,111	3,262,728	6,629,839
1947	3,797,370	3,781,988	7,579,358
1954	4,546,118	4,440,412	8,986,530
1961	5,312,252	5,195,934	10,508,186
1966	5,841,588	5,757,910	11,599,498
1971	6,402,018	6,326,443	12,728,461

(a) New South Wales only, which at that time included what is now Victoria, Queensland and Tasmania. (b) 1859 in Western Australia. (c) 1870 in Western Australia and Tasmania.

The above table reveals another traditional characteristic of Australia's population: the excess of males over females. This excess has been directly linked with immigration and the proportion of foreign-born persons in the population. After 1900 there was a steady decline in the masculinity of the population until after World War II. Since 1947, when a vigorous resumption of immigration programmes was initiated, that downward trend has been arrested, but because of a decline in the masculinity of the overseas-born themselves, it has not been reversed.

Masculinity of Australian overall ponulation (excess of males over females per hundred) 1900-1970	
1900	110.55
1910	107.87
1920	103.47
1930	103.85
1940	101.81
1950	101.83
1960	102.22
1970	101.62

The geographical makeup of the above figures is also interesting and is shown, for 1970, in the next table. The "frontier areas" of the entire Northern Territory, and large areas of outback Queensland and Western Australia had a relatively high masculinity. (The high figure in the Australian Capital Territory relates to an almost entirely urban population, living in Canberra, most of whom have migrated there from elsewhere in Australia or from overseas). New South Wales has large outback areas, but that State also includes Sydney, the largest Australian city (2,800,000 in 1971), while Melbourne, the second largest city (2,500,000 in 1971) is situated in Victoria.

State or Territory	Proportion of total area—%	Density (per sq. mile)	Masculinity (number of Males per 100 females)
New South Wales	10.43	15.00	100.47
Victoria	2.96	40.17	99.93
Queensland	22.47	2.77	101.74
South Australia	12.81	3.12	99.72
Western Australia	32.88	1.07	105.11
Tasmania	0.89	14.88	101.17
Australian Capital Territory	0.03	160.41	105.00
Northern Territory	17.53	0.17	127.38
Total	100.00	4.34	101.04

Immigration figures in recent years have fluctuated. In 1971 these were as follows:

Total arrivals		Total departures	Excess of arrivals over departures
Males	625,066	581,510	43,556
Females	453,732	412,683	41,049
Persons	1,078,798	994,193	84,605

The above figures include of course Australians returning from overseas. As regards immigrants, the Commonwealth government, in order to encourage immigration, has borne a substantial portion of the fares of selected migrants. The number of assisted migrants in 1971 was 103,811.

The chief characteristic of Australia's population today is that it is "demographically 'young' ".[11] Appleyard points out that 72% of the population in 1966 were under 45; 38% were under 21 years of age. The high birth rate that went with a population of this character, together with a low death rate of eight per thousand, and a consistently high level of post war immigration have produced an annual increase on the order of over 2%. These factors favour an estimated projection of Australia's population of something approaching double the present figures by the year 2000.[12]

B. Social, Religious, Cultural and Ideological Elements

From what has been said it will be apparent that population policies have, in the past, been dominated by the need for augmentation rather than restriction of the population. This is a view which, to a large extent, still dominates official thinking in Australia. Limitation of families has been a matter for the individual. As such it has not been directly discouraged, but has not been officially encouraged either. For example, the importation of contraceptives has until very recently been subject to customs duties. But a residual effect of Victorian morality, in which subjects like birth control and abortion were taboo in polite conversation, also still hangs over the whole area.

Abortion of course is and always has been a criminal offence, except within strictly confined limits. But the propagation of birth control and contraception likewise has laboured under considerable difficulties. The attitude that found expression in the English Indecent Advertisements Act of 1889 had been transplanted into Australia by the end of the century. That legislation or its direct successors still prohibits publications, particularly advertisements, referring to certain venereal diseases and complaints or infirmities arising from sexual intercourse or abuse, pregnancy, or

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[11] Appleyard, *The Population*, in AUSTRALIAN SOCIETY (Davies & Encel ed. 1970).

[12] *Cf.* COMMONWEALTH BUREAU OF CENSUS AND STATISTICS, BULLETIN REF. 4.13 (1971).

"any irregularity or obstruction of the female system or [to] the treatment of any complaint or condition peculiar to females."[13] This kind of law, therefore, is capable of being applied to matters of birth control and contraception, and even if not actively invoked, forms an effective backstop to existing legislative controls specifically relating to these subjects. The attitude of the English courts that found expression in the cases involving Charles Bradlaugh and Mrs. Annie Besant,[14] and almost fifty years later Marie Stopes,[15] was mirrored by the Australian courts in such cases as *Bremner v. Walker*[16] and *Ex parte Collins*.[17]

Although *Ex parte Collins* was decided, by a two to one majority, favourably to the promoter of one of Mrs. Besant's works on birth control, the reason was less one of emancipation of Australian sentiments from traditional concepts of morality, than because the prosecution was based on a statute directed against obscene publications and not under the common law relating to obscene libel as in the cases involving Bradlaugh and Besant. The crucial test was therefore not whether the tendency of the book was to promote immorality, but whether it was obscene. The leading judgment of Windeyer J. has been described as "a classic of nineteenth century Australian liberalism."[18] The judgment contains this passage:

> The time is surely past when countenance can be given to the argument that a knowledge of any truth either in physics or in the domain of thought is to be stifled because its abuse might be dangerous to society. The guardianship of the eunuch and the seclusion of the harem were not necessary to build up the national character of Englishwomen for chastity, and it is an insult to them to argue that it is necessary to keep them in ignorance

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[13] Police Offenses Act 1958 (Vic.) § 167. It is believed that an amendment to this section has recently been under consideration.

[14] *See* Bradlaugh v. R., [1878] 3 Q.B.D. 607, *Re* Besant, [1879] 11 Ch.D. 508, Besant Wood, [1879] 12 Ch.D. 605.

[15] *See* Sutherland v. Stopes, [1925] A.C. 47; *cf.* M. Box, THE TRIAL OF MARIE STOPES (1967).

[16] [1885] 6 N.S.W. 276.

[17] [1888] 9 N.S.W. 497.

[18] COLEMAN, OBSCENITY, BLASPHEMY, SEDITION 71 (1962).

> on sexual matters to maintain it. Ignorance is no more the mother of chastity than of true religion.[19]

Nevertheless it seems that the sentiments expressed by the dissentient Judge have continued to dominate official thinking in these matters. That thinking regarded a work on birth control as obscene because "it suggested impure thoughts, it is offensive to chastity and delicacy, it expressed or represented to the mind something which delicacy, purity, and decency forbid to be expressed. . . ."[20]

It is suggested that the revolution in public morality and popular though that has taken place in recent years and that is still taking place, cannot much longer continue to allow legislation based on this philosophy to remain on the statute books. The need to restrain population growth has not by any means found general acceptance in Australia, but it is not consonant with the general attitude of the community to accept a restrictive, let alone coercive stance on the part of government. Restrictions have been more concerned with public morality, while the private individual has generally been permitted to act according to his conscience. There are, of course, opinion-forming sections of the community on a non-governmental level that have also exercised a strongly restrictive influence. Thus the Roman Catholic Church, whose restrictive attitude to contraception is well known, has played a dominant part in this development.[21]

C. *Brief History of Government Policies and Actions*

The general outline and trends of governmental attitudes toward population questions have already been indicated. It will be clear from what has been said that government policy has been dominated by the desire for promoting an augmentation of the population rather than any restriction of it. Apart from the sponsorship of immigration by both federal and state governments, such government pro-

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[19] [1888] 9 N.S.W. 515.

[20] *Id.* at 503.

[21] In the 1966 Census, out of a total population of 11½ million, three million described themselves as either "Roman Catholic" or "Catholic."

grammes as the provision of housing and of family allowances may appear to be directed towards encouraging population growth. It is debatable however, whether their primary impact is in that direction. The provision of government housing was at a high level in the years following World War II and was designed to overcome a considerable housing shortage existing at that time. Today it must be seen primarily as an economic measure, providing low cost housing for low income families. Similarly, family allowances are on such a comparatively low scale that their impact is most strongly felt by economically disadvantaged groups, such as widows or deserted wives, or families in which the principal breadwinner has become disabled. It must be seriously doubted whether these social policies would have any significant effect upon individual decisions concerned with the number of children in a given family.

D. Structure of Statehood and Government

The Commonwealth of Australia consists of six States and two federal territories and came into being as a Federation in 1901. All six States commenced as colonies of British settlement,[22] dating back to the establishment of New South Wales in 1788. By 1836 all colonies had been settled. The settlers brought with them the laws and institutions of their mother country, which became firmly established. In 1901 a federal constitution was adopted, borrowing some of its features from the Constitution of the United States, but remaining significantly different in most respects. There is, for example, no Bill of Rights in Australian constitutional law, although there are some minor constitutional guarantees embodied in the document. The protection of individual rights was left to the courts and to political processes, as had been the case under English constitutional principles and practice. As long as the problems that were encountered were

[22] There were some minority groups, such as the German settlers of South Australia or the Chinese who came to the goldfields, but none of these minorities affected the essentially British character of the laws and institutions that were to grow up throughout the Continent.

concerned only with the freedom of the citizen from arbitrary arrest, or with protecting the secrecy of the ballot, or with liberty of conscience, it worked well enough. It is perhaps only with the emergence in recent years of new demands that the need for a Bill of Rights has come to be asserted.[23]

With federation the States handed over to the new central government of the Commonwealth of Australia certain enumerated powers. These were either exclusive—for example defence or external affairs—or concurrent, with the proviso that in cases of inconsistency, Commonwealth legislation must prevail over State legislation.[24] Within their residual areas of competence, however, the States remained sovereign. Included were such matters as police and public order, agriculture, labour and industry, transport, and health and education. The great body of criminal justice in respect both of indictable and summary offences remained likewise in the hands of each State, the Commonwealth exercising criminal jurisdiction only over infringements of specific Commonwealth laws.[25]

Two factors served to make and to keep State laws generally uniform in broad outline, underlying concepts and guiding principles. One was their common origin in English laws and institutions. This influence was not confined to the period before Federation. It is true that after 1901 the competence of the mother country to legislate for its former colonies practically ceased. But the States continued to look to Britain as a model, and there remained a strong tendency to solve similar problems with similar legislation. This has been so in the area with which the present account is concerned, laws relating to population, in which legisla ive competence

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[23] *Cf.* Campbell, *Pros and Cons of Bills of Rights in Australia*, 1970 JUSTICE 1 (1970).

[24] Constitution of C'wealth of Australia § 109.

[25] In the two internal federal territories, the Australian Capital Territory where the federal capital is situated, and the large and sparsely populated Northern Territory, administration is controlled by the Commonwealth government, but administered locally and separately from the federal organs of government which reach, indiscriminately but selectively—in accordance with the powers entrusted to them—into every part of Australia.

is almost entirely a matter for State law, with some significant exceptions.

The other cohesive influence making for similarity if not uniformity, was the growing sense of nationhood that was to engulf the people of the Commonwealth. Increasing ease of communication, and mobility of population, assisted by a clause in the Constitution guaranteeing freedom of trade, commerce and intercourse between the States has tended to overcome the early insularity of the States. The centripetal tendency of accretion of power to the central federation, and the sense of nationhood characterised by the feeling of being an Australian first and a Victorian or South Australian second, have tended to dominate Australian Constitutional development. Thus, with some significant exceptions, the tendency has been, in making new laws, to legislate with one eye on British legislation and with the other on that of the other States.

II. Laws Dealing Directly with Birth

A. Birth Control: Use, Manufacture, Sale or Advertisement of Contraceptives

There are no laws directly regulating the use of contraceptives, which is generally left to the discretion of the individual. However, that use must be affected in varying degree by laws dealing with the availability of contraceptives, and with the dissemination of information concerning them. Manufacture, sale and advertising of contraceptives are all, broadly speaking, regulated by State laws. Importation and the levying of customs duties on the other hand are a matter for Commonwealth legislation through the federal power over customs. The federal government also controls the importation of printed matter by the device of exercising censorship over books, films and other like materials at the point of entry into the Commonwealth. These controls are administered by the Department of Customs. Matter which is regarded as obscene, or likely to corrupt public morals, may be excluded from importation into Australia or, having

been illegally imported, may be impounded.[26]

It appears that not many oral contraceptives are at present manufactured in Australia. Some mechanical devices such as condoms, however, are. The former are subject to supervisory legislation governing the manufacture of drugs generally, and there are no specific laws dealing with the manufacture of contraceptives. Most States require the manufacturers of drugs to be licensed under their respective Health, Poisons or Food and Drug Acts and Regulations.

There are laws requiring drugs manufactured or sold in Australia to comply with certain recognised standards, usually those specified in the British Pharmacopoeia (in two States, also those in the U.S. Pharmacopoeia). In addition, the Commonwealth enforces a similar standard.[27] Both the Commonwealth government and some of the States have advisory committees to which the evaluation of different drugs may be referred. As regards importation, therefore, the interest of the Commonwealth is threefold. It is concerned with technical questions of standard, with the levying of customs duties and with the control of printed matter relating to contraceptives imported into Australia.

The controls applying to the sale of contraceptives again are in most respects similar to the sale of drugs generally, but additional restrictions exist that are directed specifically to contraceptives. Two States have legislation prohibiting the sale or distribution of contraceptives in any public place or from house to house. Although a shop has been held by the courts to be a public place, this legislation is not intended to apply to chemists' shops. The Northern Territory also has laws prohibiting the sale of contraceptives by any person other than a registered pharmacist.

Oral contraceptives may only be dispensed by a chemist

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[26] However, matter produced, or arising in a State is subject to control under State law.

[27] For constitutional reasons, however, the Commonwealth is able to do so only in relation to drugs that are: (a) imported into Australia, (b) the subject of interstate trade within the Commonwealth, (c) supplied under the Commonwealth pharmaceutical benefit scheme, or (d) supplied to the Commonwealth.

upon a medical prescription. They are now included in the pharmaceutical benefits scheme administered and subsidised by the Commonwealth government, as a result of changes implemented by the Labour Government elected in December, 1972. They are also no longer subject to sales tax. Additionally, medical consultations required to secure the necessary prescription are not precluded from the partial reimbursement of fees generally available to persons insured with one of the government subsidised health insurance funds.

Legislation specifically prohibiting the sale of drugs by vending machines exists in most States; this applies as well to oral contraceptives. Prohibition of the sale of contraceptives in public places would further restrict sale by vending machines.

Advertising of contraceptives is restricted specifically by law in all States except in Queensland, South Australia, Western Australia, Australian Capital Territory and the Northern Territory. All jurisdictions can also prohibit advertising under their general legislation against obscene publications. Victoria and Tasmania have legislation directed at the advertisement of contraceptives, the maximum penalty in the former being $250 and in the latter $20 for a first and $50 for a subsequent offence. Similar provisions exist in the two federal Territories. In Victoria and Tasmania the police would be unlikely to resort to general anti-obscenity laws to prohibit the advertising of contraceptives, in the light of the availability of the specific legislation above referred to.

B. Dissemination of Birth Control Information

No legislation dealing directly with dissemination of birth control information exists. However, in disseminating such information care must be taken not to infringe laws dealing with the advertising of contraceptives, under the definition of indecent or obscene publications as already described. A problem may also exist in relation to supplying such information to females under the age of consent, which varies from State to State between sixteen and eighteen years. This kind of consideration could well have an inhibit-

ing effect upon members of the medical profession in some cases.[28] Similar considerations would apply to the supply of contraceptives by a pharmaceutical chemist, or of course any other person.

Another inhibiting factor stems not directly from any law but from ethical principles prevailing among the medical profession. Some doctors, from religious or conscientious scruples, may refuse to prescribe certain methods of contraception to their patients. Cases have been known also of doctors, upon being consulted by married women patients who wanted to limit their families, telling them that they were young, healthy, and capable of bearing children and that there was no reason for them to practise birth control. Objectionable as this kind of paternalism may seem to be, there is very little that can be done about it. It is of course always open to a patient to change her doctor, but this is not always easy, particularly in smaller country towns where the number of medical practitioners may be limited.

Recent times have seen the establishment of family planning clinics in all States and in the Australian Capital Territory. These clinics are usually conducted either by hospitals or by certain voluntary organisations. Family planning centres are also conducted by the Roman Catholic Church, but these confine themselves to methods approved by that Church, such as the ovulation method. As yet, family planning clinics are not numerous, nor do they extend much beyond the larger cities and towns. It seems likely, however, that their number will increase considerably over the next few years, and that their impact will spread to a much larger section of the population than is at present the case.

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[28] While there is no reason why a doctor should not supply the information to such persons, he could render himself liable as an accessory to an offense of carnal knowledge if the advice were given in joint consultation to a girl under age and her boyfriend. The boy would be committing an offense if he had intercourse with the girl, and the doctor would be guilty of aiding and abetting him. But if the girl came to see him alone, or in company with her parents, the doctor could not be said to be aiding or abetting in the commission of a specific criminal offense and would not be liable to prosecution.

C. Abortion

Subject to certain limited exceptions, abortion, including attempted abortion, is illegal in all States and Territories of Australia. This includes the abortion of a woman by another person, the abortion of a woman by herself and the supply by anyone to another person of the means for abortion, when the person supplying them knows the use to which they are intended to be put.

Each State and Territory has its own criminal law, three States operating under a Criminal Code, the other three as well as the two Territories under the common law based on English law. There is, however, no essential difference in principle in this branch of the law between these two bases of jurisdiction. The exceptions to the above stated rule are similar in all cases except in South Australia which introduced a more liberal abortion law in 1969. The Northern Territory followed suit in 1973.

The circumstances in which abortion is lawful are those which in England were enunciated in the case of *R. v. Bourne*.[29] That case laid down the proposition that an abortion might be lawful where it was necessary to preserve the life of the mother. The test was based on a reasonable and informed belief on the part of the doctor performing the abortion, "that the probable consequence of a continuance of the pregnancy [would] be to make the woman a physical or mental wreck." A substantially similar test was adopted in the recent Victorian case of *R. v. Davidson*.[30] While *R. v. Bourne* is not a binding precedent, and *Davidson's* case has that effect only in Victoria, it is likely that substantially similar considerations would be adopted in most of the other jurisdictions.

In South Australia the test is, however, less stringent and depends upon one of two factors: (a) if continued pregnancy is likely to involve a greater risk to the woman con-

[29] [1939] 1 K.B. 687.
[30] [1969] V.R. 667.

cerned than if the pregnancy were terminated, or (b) if the child would suffer from such physical or mental abnormality as to be severely handicapped.[31] In determining the risk of injury to the physical or mental health of the pregnant woman, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment."[32] This legislation, modelled directly upon its English equivalent, is a departure from the law in the other Australian States. It should be noted, however, that these considerations apply only to women who have been resident in the State for at least two months. This provision is no doubt intended to prevent women from resorting to South Australia for the purpose of abortion.

There is considerable evidence of a demand for liberalising the abortion laws in the other States, but it is difficult to assess the strength of that demand. There is equally strong evidence of resistance to such reforms and so far there has been little or no indication from governments that changes along the lines of the South Australian legislation are imminent. The restrictive stance of the law probably creates considerable hardship in some cases, particularly where pregnancy is the result of rape or of incest. It is also well known that many illegal abortions are performed, often at exorbitant cost. The present restrictive legislation further has the effect of encouraging so called backyard abortions, performed by unqualified persons in unsuitable and unhygienic circumstances, and attended by a comparatively high mortality rate.

D. Sterilization

There is no compulsory sterilization in Australia.

Voluntary sterilization is not prima facie unlawful, whether its purpose be therapeutic, eugenic or simply as a birth control measure. It is, however, not always easy to find a medical practitioner who is prepared to perform the opera-

[31] Criminal Law Consolidation Act 1935-1969 (S.A.) § 82A (1)(a)(i) and (ii).
[32] Criminal Law Consolidation Act 1935-1969 (S.A.) § 82A(3).

tion. In the case of a woman he may require evidence that continued child bearing is likely to endanger her health. Such restrictions are a matter of ethics or conscience on the part of the individual doctor concerned, not of law.

The reluctance in the past among doctors to perform such operations has been due, in part, to a state of some uncertainty as to the law. Thus there have been suggestions that such an operation might constitute an assault. There have been dicta by high judicial authority suggesting that sterilization, unless therapeutic or eugenic, is unlawful.[33] It seems certain now that these suggestions are not well founded, but they have helped to surround the operation with a certain aura of dubious legality which has not yet been entirely dispelled.

A further aspect of this matter is the effect that the sterilization of one spouse may have upon the other. Doctors generally insist upon the consent of the other spouse. For one spouse to have himself sterilized without such consent, or in defiance of the wishes of the other spouse, may justify that other spouse in leaving the matrimonial home without giving rise to a charge of desertion. This is of course a matter of private legal relationships and has no direct bearing upon the legality of sterilization as such.

III. Law on Family Planning Education and Services

There are no laws governing family planning education and services as such.

As previously noted, voluntary family planning clinics have been established and they operate subject to such restrictions as derive from the general law. There has been no concerted or systematic attempt to provide sex education through schools. The subject, moreover, is highly controversial and while there is evidence of a demand for such education, considerable opposition has been publicly expressed to its provision.

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[33] Bravery v. Bravery [1955] p. 129.

IV. Family Law Affecting Population

A. *Minimum Marriage Age*

The laws relating to marriage and divorce are matters for federal law, and thus prevail uniformly throughout the Commonwealth. Two restrictions involving age apply. The first relates to marriageable age, which is eighteen for a man and sixteen for a woman.[34] A marriage purportedly entered into in Australia by a person under marriageable age is void *ab initio*.[35] It is possible, however, for an exception to be made by a court order, extending the marriageable age of either one (but not both) of the parties by up to two years.[36] The ground on which a court may make such an order is that "the circumstances . . . are so exceptional or unusual as to justify the making of the order."[37]

The other provision involving age is that a person under the age of eighteen is required to obtain the consent of his parents or guardian before being able to marry.[38] If consent is refused unreasonably, a court may give its consent instead.[39] Failure to obtain such consent, however, does not invalidate a marriage, but merely renders persons contravening the law liable to a penalty.

The average age at first marriage in Australia has been going down progressively over the years. In 1966, it was 25.00 years for a man and 22.13 for a woman.[40] The following table shows the relative ages of bridegrooms and brides for 1971.[41]

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[34] Marriage Act 1961 (C'wealth) § 11.

[35] Matrimonial Causes Act 1959 (C'wealth) § 18(1)(e).

[36] Marriage Act 1961 (C'wealth) § 12. Thus, a woman aged between fourteen and sixteen may be granted permission to marry a man aged eighteen or over, or a man aged sixteen to eighteen may be granted permission to marry a woman aged sixteen or over.

[37] Marriage Act 1961 (C'wealth) § 12.

[38] Marriage Act 1961 (C'wealth) § 13.

[39] Marriage Act 1961 (C'wealth) § 16.

[40] Information contained in Demography Bulletin No. 84, 1966, Commonwealth Bureau of Census and Statistics.

[41] 1972 Year Book, at 163.

RELATIVE AGES OF BRIDEGROOMS AND BRIDES: AUSTRALIA, 1971

Age of bridegroom (years)	Age of bride (years)								
	Under 15	15-19	20-24	25-29	30-34	35-39	40-44	45 and over	Total bridegrooms
Under 20	6	7,658	1,416	48	3	3	..	..	9,134
20-24	3	24,040	37,590	2,447	228	51	9	4	64,372
25-29	..	3,511	14,642	5,089	812	168	47	18	24,287
30-34	..	478	2,754	2,473	1,098	352	117	68	7,340
35-39	..	91	631	1,002	832	500	256	140	3,452
40-44	..	32	194	411	528	539	488	377	2,569
45-49	..	8	76	165	260	287	403	693	1,892
50-54	..	4	23	47	92	154	304	80	1,426
55-59	..	1	11	26	41	62	136	802	1,079
60-64	..	1	5	11	15	29	56	768	885
65 and over.	..	..	1	8	5	15	24	1,148	1,201
Total brides	9	35,824	57,343	11,727	3,914	2,160	1,840	4,820	117,637

B. *Polygamy*

Polygamous marriages are not recognized under Australian law. A married person who goes through a form of marriage with another person, not his or her spouse, commits the crime of bigamy.[42] In addition, the second "marriage" will be void.[43]

By an amendment of the law in 1965, some limited recognition was, however, accorded to certain *potentially* polygamous marriages, provided the country or countries of the parties' domicile permitted polygamy on the part of the male party, and provided that neither party was already a party to such a union. The extent of the recognition given to such marriages by the amendment is to enable the parties to take proceedings for divorce under Australian law.[44]

C. *General Marriage and Divorce Laws*

A marriage, to be valid, presupposes capacity in the

[42] Marriage Act 1961 (C'wealth) § 94.
[43] Matrimonial Causes Act 1959 (C'wealth) § 18(1)(a).
[44] Matrimonial Causes Act 1959 (C'wealth) § 6A.

parties and requires compliance with certain formalities as prescribed. Two aspects of capacity have already been noted, *viz.* being of marriageable age and not being married already. Another is the requirement, that the parties to the intended marriage be not within a prohibited relationship of consanguinity or affinity.[45] Formalities are prescribed under the Marriage Act and relate to notices and to the qualifications of celebrants. The typical pattern here is that the government appoints authorised celebrants who may validly perform marriage ceremonies. Such authorised celebrants are generally either ministers of religion or civil registrars. By having a ceremony of marriage performed by a minister of religion who is also an authorised celebrant under the Marriage Act, a valid marriage is constituted by a religious ceremony. This device avoids the need for separate religious and civil ceremonies.

Legal proceedings to set aside a marriage may be of two kinds: nullity and divorce. A nullity decree may be made where a marriage is found by a court to be either void or voidable. If it is void, it is void *ab initio*, and a final decree is made upon the conclusion of the proceedings. If it is voidable it is set aside only as from the time of the final decree, which is usually made three months after the hearing.

The grounds on which a marriage may be declared void, apart from those involving capacity which have been previously described, are where the marriage was not valid by the law of the place of celebration for failure to comply with the necessary formalities required by the law of that place (this applies only to marriages performed outside Australia), or that the consent of one of the parties was not a real consent by reason of duress, fraud, mistake or mental incapacity

[45] These are set out in the Schedule to the Matrimonial Causes Act 1959. If the relationship is one of affinity, i.e. constituted by marriage and not by the blood, or if it is constituted by adoption, a court may, in exceptional circumstances, give permission for a marriage between persons so related unless that relationship is one of parent and child or of brother and sister. *Cf.* Matrimonial Causes Act 1959 (C'wealth) § 20; Marriage Act 1961 (C'wealth) §§ 23, 24.

to understand the nature of the marriage contract. A voidable marriage results where either party is incapable of consummating the marriage, or is of unsound mind or a mental defective, or is suffering from a venereal disease in a communicable form, or where the wife at the time of the marriage was pregnant by a person other than the husband. There are some restrictions upon proceedings for nullity of a voidable marriage relating to such matters as the petitioner's knowledge of the ground, or the time within which such proceedings must be brought. Furthermore, they will lie only at the instance of one of the parties themselves, and only during the lifetime of both parties, unlike nullity proceedings of void marriages which may be taken by third parties and at any time, e.g. in questions relating to succession to property of deceased persons.

Dissolution of marriage (divorce) is obtainable on the basis of one of fourteen grounds. They are set out in the following table, together with the number of divorces granted in Australia on these respective grounds during 1971. (The reference in brackets is to the relevant section of the Matrimonial Causes Act 1959).[46]

1.	Adultery (s.28(a))	3,977
2.	Desertion for two years (s.28(b))	5,076
3.	Wilful refusal to consummate the marriage (s.28(c))	29
4.	Habitual cruelty during 1 year (s.28(d))	983
5.	Having committed rape, sodomy or bestiality (s.28(e))	12
6.	Habitual drunkenness, or intoxication by drugs for 2 years (s.28(f))	169
7.	Frequent convictions and imprisonment, coupled with failure to support (s.28(g))	15
8.	Imprisonment for serious offence (s.28(h))	8
9.	Attempted murder or inflicting grievous bodily harm on spouse (s.28(i))	1
10.	Failure to support for 2 years (s.28(j))	1
11.	Non-compliance with decree for restitution of conjugal rights (s.28(k))	1
12.	Insanity (s.28(l))	3
13.	Separation for 5 years or more (s.28(m))	2,243
14.	Presumption of death (prima facie after 7 years) (s.28(n))	6
	Total divorces granted	12,524

[46] Commonwealth Bureau of Census and Statistics, Divorce Bulletin 1971. The

The law of divorce has traditionally been based on the commission of a matrimonial offence, but in recent years grounds based on breakdown of marriage have assumed an increasingly important role. Of the above fourteen grounds, separation, insanity and presumption of death do not depend upon fault at all. Two others, desertion and cruelty, may occur without fault being present. This is so in constructive desertion,[17] which has been specifically freed from the requirement of intention on the part of the expelling spouse as a necessary ingredient.[18] In cruelty a similar effect was achieved by two decisions of the House of Lords in 1963[19] which have been followed by the Australian courts.

The law also contains provisions encouraging marriage guidance and reconciliation between spouses, but these need to be strengthened if they are to play an important role in the Australian divorce situation.

Very few divorces nowadays are contested as to principal relief, but sometimes bitter disputes may occur in the area of ancillary relief. This involves custody of children, maintenance of wives (or husbands, but this, in practice, is not commonly asked for) and children, and settlements of property. The court in these matters exercises a wide discretion. Custody is decided on the merits of each case and a

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total figure is not quite complete, since it does not include a number of additional divorces granted on a combination of two or three of the above grounds. The most common of these combinations is cruelty and drunkenness, followed by desertion and adultery and desertion and separation. With the additional figures included, the total number of divorces granted in 1971 amounted to 12,947. The total number of nullity decrees was 43. With these figures may be contrasted a total of 117,637 marriages in the same year.

[17] An example of constructive desertion is where a spouse leaves the matrimonial home because of the other spouse's intolerable behavior, in which case the law stipulates that it is not the spouse who physically departed, but the one whose behavior was the cause of it, who will be in constructive desertion of the other.

[18] Matrimonial Causes Act 1959 (C'wealth) § 29. A new Family Law Bill, first introduced in December 1973 will, if passed, abolish all grounds of divorce except one: separation for 12 months. The fault concept will thus be entirely eliminated also in questions of ancillary relief. *See* Finlay, *Family Law, Family Courts and Federalism*, 9 MELBOURNE U. LAW REV. 567 (1974).

[19] Gollins v. Gollins [1964] A.C. 644, *and* Williams v. Williams [1964] A.C. 698.

spouse is not necessarily precluded from obtaining custody of a child of the marriage by reason of having committed adultery or other matrimonial misconduct. The interest of the child is regarded by the law as the paramount consideration. Where custody is awarded to one parent, provision for regular access by the other parent is commonly made.

Maintenance will depend on the economic circumstances of the parties, their conduct and their needs and other commitments. An order once made is never final in the sense that it is always open to either party to seek a variation from the court on the basis of changed circumstances. The same applies to custody orders. The question of settlements of property has been one of the most controversial. There is no principle of community property under Australian law. When the property of the parties to a marriage that has foundered is to be apportioned, the court will look at all the circumstances, including any contributions made to its acquisition by either party, as well as their needs, and their conduct on the basis that a property settlement may itself be a form of maintenance. Similarly the court may settle property of either or both parties upon the children of the marriage.[50]

V. Laws on Economic Factors Related to Family

A. *Maternity Benefits*

Under the federal Social Services Act 1947-1970, maternity allowances are payable to the mother, whether married or unmarried, of any child, provided she is a resident of Australia. These allowances are payable as of right and do not depend on any means test.[51] In addition to these federal benefits, supplemental benefits may be paid under State legislation, but this depends usually upon "necessitous circumstances."

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[50] For more detailed treatment of these matters, *see* Finlay & Bissett-Johnson, Family Law in Australia (1972), particularly Chapters X-XVI.

[51] The present weekly rate is: $30.00, where there are no other children; $32.00 where there are 1 or 2 other children; $35.00 where there are 3 or more other children; and $10.00 for each additional child where there is a multiple birth.

It is only proper to add that these payments do not approximate the actual costs associated with having a child—hospital, medical and delivery expenses, clothing and other necessities. These could be in the region of ten times greater than the amount of the benefit. Probably a majority of the public are covered by medical insurance. But ignoring the insurance premiums themselves, even after recoupment the net expenditure is still likely to be three or four times the amount of the benefit. At the discretion of the Director General of Social Services, unmarried mothers may be paid additional benefits not exceeding in amount the current rates of unemployment benefits. In practice, these may be paid for a period of twelve weeks before and six weeks after the birth, and exceptionally, for longer periods. The incongruity of linking this benefit to the unemployment rates is that the amount payable is related, not to the expenses of the unmarried mother, but to her age. If she is under sixteen she is not entitled to any special benefits.[52] Unmarried mothers, after the period associated with the birth of a child, may subsequently be paid a widow's pension.

It is not possible within the scope of the present survey to deal with the question of maternity leave for working mothers. This is a matter of some complexity, since such leave is not directly the subject either of federal or State legislation, but is dealt with under industrial awards. Such awards are quite considerable in number and cover many different occupations. They are made by various industrial tribunals, some operating under federal, some under State laws.

B. Child Allowances

Child endowment is payable to the mother of every child under the age of sixteen at similarly unrealistically low rates.[53] Again the comment may be made that these pay-

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[52] Sackville & Lanteri, *The Disability of Illegitimate Children in Australia: A Preliminary Analysis*, 44 A.L.J. 5, 51 (1971). This anomaly has now been removed.

[53] The first child receives $.50 per week; the second child receives $1.00 per

ments are in no way related to the actual expense of bringing up children. They are not likely, therefore, to have any effect upon population growth.

C. Other Allowances

Two other kinds of relevant allowances must be noted.

The Commonwealth government pays a housing grant to young married persons under 36 years of age towards the cost of the first home they own after marriage. The grant is made at the rate of $1.00 for every $3.00 saved by the grantees, subject to a maximum of $750. The savings must be held in an approved form, such as a savings bank account, over a period of at least three years. The value of the home (including the land) must not exceed $17,500 (this represents a house in the low to medium price range). This scheme is to be phased out and to be replaced by taxation concessions on mortgage interest payments.

The other allowance is made under one of the Commonwealth Scholarship Schemes. The two most important are the Secondary Scholarship Scheme, under which 10,000 scholarships are granted throughout the Commonwealth on a competitive basis covering the final two years at secondary school, and the University Scholarship Scheme, also competitive, which numbered 12,500 in 1971.[54] These scholarships provide a proportion of the expenses of education, and other allowances. In addition, awards at both secondary and post-secondary level may be made to Aboriginal students.[55]

Assistance is now also provided by the federal government for the establishment and operation of child care centres. This assistance is by capital or recurrent grants under the Child Care Act 1972.

There are also various secondary scholarships and bur-

week; the third child receives $2.00 per week; and, each additional child receives an amount equal to that of the prior child's rate increased by $.25. A student child, age 16-21, receives $1.50 per week.

[54] 1971 Year Book at 656.

[55] *Id.*

saries available under schemes operated by the various State governments.

D. Taxation Allowances

Under the income tax legislation of the Commonwealth (there is no State income tax in Australia), concessional deductions are allowable to taxpayers in respect of dependent spouses and children. In case of partial dependency, a proportion of the deduction is allowed. The effect is that a part of the taxpayer's taxable income equivalent to the amount of the deduction is exempt from taxation. The present rates are as follows:

Dependent	Amount of annual deduction ($)
Spouse	364
Daughter-housekeeper (where no spouse)	364
First child under 16	260
Each additional child under 16	208
Student child 16-21	260

E. Laws on Descent and Distribution of Property

Laws of succession are matters for state legislation and vary from State to State. If the deceased made a will, then generally speaking, the provisions of that will are followed, subject to the right of a spouse or child who has been insufficiently provided for, to apply to the court for a variation.

In cases of intestacy, a common provision of the succession laws is that the spouse will take the first $6,000 or $10,000, and that the balance, if any, of the estate will be apportioned between the spouse and the children, in the proportion of one-half to the spouse and one-half to the child where there is only one child, or one-third to the spouse and two-thirds to the children where there are more than one. Before distribution, an estate is first liable to both federal and State estate duty, except as regards small estates.

VI. General Observations and Possible Improvements in Laws Affecting Population

As has been seen, legislation in Australia has never been directed to a limitation of population, but on the contrary, to its augmentation. Although some of the restrictions have over the years been abolished or liberalised, the traditional attitude has been to regard any artificial measure of restriction, except on therapeutic grounds, as prima facie antisocial. The present wave of demands for antinatalist policies which is apparently gathering momentum in overseas countries, while gaining some ground in Australia also, has not so far created the necessary groundswell for any radical reorientation of laws and policies.

On the other hand, relevant social legislation has largely lost any impact it might have had on population growth, since the value of allowances and other benefits has not kept pace with the inflation of prices and wages, and is now too insignificant to act as an inducement to family increase. This leaves immigration as the most important factor in boosting Australia's population. It seems likely to remain government policy to assist and encourage immigration. Objections that have been raised to this policy on the ground that it fosters unacceptable increases in population have been countered by the argument that increased immigration does nothing to raise the overall world population, but merely assists in its redistribution.[56] It remains to be seen to what extent, or how soon the growing demand for increased liberty of choice in the area of the citizen's personal population policy will bring about a further liberalisation of the present restrictions, particularly on abortion and contraception.[57]

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[56] Statement of the Commonwealth Minister for Immigration, May 1972. Since then, owing to a deterioration in economic circumstances, government sponsored immigration has been, for the time being, drastically reduced.

[57] The Commonwealth Government has now set up an Official Commission of Inquiry into Relations between Men and Women which will consider some of the questions raised in this article. The work of the Commission is expected to be completed in 1976, and its report should make interesting reading.

International Advisory Committee on Population and Law

The Programme is under the general supervision of an International Advisory Committee on Population and Law, which is on the roster of non-governmental organizations accredited to the U.N. Economic and Social Council. The Committee meets annually in different regions of the world. Its members are:

Professor Georges Abi-Saab *(Institute of International Studies, Geneva)*

Professor Richard Baxter *(Harvard University)*

Professor K. Bentsi-Enchill *(University of Ghana)*

Mr. Robert Black *(Organization for Economic Cooperation and Development)*

Dr. Jean Bourgeois-Pichat *(Comité International de Coordination des Recherches Nationales en Démographie)*

Mr. Philander Claxton, Jr. *(U.S. Department of State)*

Lic. Gerardo Cornejo M. *(Fundación para Estudios de la Población, A.C., Mexico)*

Dean Irene Cortes *(University of the Philippines)*

Dr. Jean de Moerloose *(World Health Organization)*

Mr. Kailas C. Doctor *(International Labour Organisation)*

Mr. Carl M. Frisen *(U.N. Economic and Social Commission for Asia and the Pacific)*

Mr. Carl M. Frisén *(U.N. Economic Commission for Asia and the Far East)*

Mr. Robert K. A. Gardiner *(U.N. Economic Commission for Africa)*

Professor Richard Gardner *(Columbia University)*

Mr. Halvor Gille *(U.N. Fund for Population Activities)*

Professor Leo Gross *(Fletcher School of Law and Diplomacy)*

Dean Edmund A. Gullion *(Fletcher School of Law and Diplomacy)*

Miss Julia Henderson *(International Planned Parenthood Federation)*

Mr. Edmund H. Kellogg *(Fletcher School of Law and Diplomacy)*

Professor Dudley Kirk *(Stanford University)*

Dean Peter F. Krogh *(Georgetown University)*

Dr. Arthur Larson *(Duke University)*

Dr. Luke T. Lee *(Fletcher School of Law and Diplomacy)*

Mr. Thomas C. Lyons, Jr. *(U.S. Agency for International Development)*

Vice-Chancellor O. Roy Marshall *(University of the West Indies)*

Mr. Bertil Mathsson *(U.N.E.S.C.O.)*

The Reverend Arthur McCormack *(Vatican)*

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Mrs. Harriet F. Pilpel *(U.S. Planned Parenthood-World Population)*

Dr. Rafael Salas *(U.N. Fund for Population Activities)*

Mr. Marc Schreiber *(U.N. Human Rights Division)*

Mrs. Helvi Sipilä *(Assistant Secretary-General for Social and Humanitarian Affairs, U.N.)*

Mr. Leon Tabah *(U.N. Population Division)*

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