

focuses on the identity of each bidder. South Australia, on the other hand, requires all bids to be recorded — presumably in order to provide the maximum possible assistance to investigators trying to stamp out dummy bidding and collusive practices. While that appears to enhance consumer protection, the large amount of resultant data will make it more — rather than less — difficult for the Office of Consumer and Business Affairs to mount effective investigations. More investigators will be needed and the chance of a critical error occurring will increase. Is there something in South Australia which sets them apart from other jurisdictions, one of which has reviewed the operation of its legislation<sup>10</sup> and still saw fit not to require all bids to be recorded?

The South Australian government ought to abolish the requirement to record every bid at every auction. No other state has seen fit to provide for such a practice and I doubt if its Office of Consumer and Business Affairs believes that, by obtaining a record of every bid at every auction, it will be able to more effectively regulate the industry and stamp out dummy bidding. At the very least, the government ought to require that records be destroyed to a requisite standard after the mandatory five year retention period elapses. Anything less is a needless violation of its citizens' privacy for very little benefit.

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## HUMAN RIGHTS

### Victoria's Abortion Law Reform Act

RACHEL BALL explains the history of Victoria's ground-breaking abortion legislation

Victoria's *Abortion Law Reform Act* ('the Act') completed its passage through Parliament on 10 October 2008. This landmark legislation allows women to obtain an abortion at any time during the first 24 weeks of pregnancy, and later with the agreement of two doctors.

Unsurprisingly, the Act provoked a storm of controversy in Parliament and dominated the media cycle for days. One aspect of the debate that was somewhat unexpected was the extent to which the language of human rights and the provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') were invoked by both supporters and opponents of the Act.

Section 48 of the Charter — included on account of the Catholic Church's lobbying efforts — provides that the Charter will not affect any law applicable to abortion.<sup>1</sup> Nevertheless, human rights standards were used as a framework within which much of the debate was conducted. Unfortunately, the human rights analysis of the Act was often ill-conceived or incomplete. Contrary to some of the views expressed as the legislation made its way through Parliament, the Act complies with both the Charter and international human rights law.

The Act gives rise to two issues of contention: the availability of abortion services and the legal obligations of medical practitioners who hold a conscientious objection to abortion. While related, these two issues should be distinguished and addressed separately.

#### Availability of abortion services

In August 2007 the Victorian Law Reform Commission ('VLRC') was asked to provide advice on options

which would remove abortion offences from the Criminal Code when performed by a qualified medical practitioner and which would reflect current clinical practice and community standards. After widespread consultation the VLRC produced a final report including recommendations that formed the basis of the Act.<sup>2</sup>

The Act establishes a regime under which abortion is a private decision for a woman in consultation with her medical practitioner when she is 24 weeks pregnant or less.<sup>3</sup> After 24 weeks, abortion is only available where two registered medical practitioners believe that an abortion is appropriate in all the circumstances.<sup>4</sup>

Human rights jurisprudence has not yet recognised a right to access abortion services in all circumstances and at all stages of pregnancy. However, there is growing support for the argument that the full realisation of women's human rights requires legal and safe access to abortion on request. Of particular significance are the rights to life, health, privacy, liberty, freedom from torture and cruel, inhuman or degrading treatment or punishment and non-discrimination.<sup>5</sup> However, while these rights generally require the provision of safe and legal abortion services, human rights bodies have tended to grant some leeway (or a 'margin of appreciation') to states in this area.<sup>6</sup>

For example, while the Act restricts women's rights to the extent that it requires the consent of two doctors before a woman can obtain an abortion after 24 weeks of pregnancy, it is likely that a human rights body examining the provisions would find that they lie within an acceptable margin of appreciation.

Human rights jurisprudence has taken a more prescriptive approach to defining states' obligations in particular circumstances. For example, human rights

#### REFERENCES

1. ABC News, 'Catholic Maternity Wards 'Face Closure' if Abortion Law Passes', 24 September 2008, <abc.net.au/news/stories/2008/09/23/2372460.htm> at 16 October 2008.
2. Victorian Law Reform Commission, *Law of Abortion: Final Report*, Report No. 15 (May 2008).
3. *Abortion Law Reform Act 2008* (Vic), s 4.
4. *Abortion Law Reform Act 2008* (Vic), s 5.
5. See, generally, Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right — International and Regional Standards' (2008) 8 *Human Rights Law Review* 249.
6. See, eg, *Vo v France* (2004) Eur Court HR, No 53924/00, para 92; *Brualda Gómez de la Torre v Spain* (1997) VIII Eur Court HR 2955, para 33.

bodies have emphasised the need to provide access to safe and lawful abortion services in situations of rape, incest or fetal impairment and where the life and health of the mother is at risk.<sup>7</sup> There is also an increasing recognition that access to legal and safe abortion services is required to protect the life and health of women who would otherwise be endangered by unsafe abortion practices.<sup>8</sup>

Some anti-abortion advocates have attempted to use the right to life to support the criminalisation of abortion. However, the more widely accepted view is that the foetus is not protected by the right to life. In *Vo v France* the European Court of Human Rights did not make a final determination on this issue, but stated that:

at best, it could be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person . . . require protection in the name of human dignity, without making it a 'person' with the 'right to life'.<sup>9</sup>

The view of the current Australian government is that the right to life under the International Covenant on Civil and Political Rights ('ICCPR')<sup>10</sup> was 'not intended to protect life from the point of conception but only from the point of birth'.<sup>11</sup>

### Conscientious objection

Interestingly, it was not the access to abortion provisions in the Act that received the most fervent challenge and condemnation from the anti-abortion lobby in Victoria. Rather, the conscientious objection regime was more often the focus of debate.

Section 8 of the Act provides that a medical practitioner who holds a conscientious objection to abortion and is asked to advise on, perform, direct or supervise an abortion must inform the patient of their conscientious objection and refer her to another practitioner who is known not to hold a conscientious objection.<sup>12</sup> Medical practitioners who hold a conscientious objection must perform or assist in an abortion in cases of emergency.<sup>13</sup>

In some respects, the emphasis on the conscientious objection provision appears to have been a smokescreen for advocates who were, in fact, more concerned with access to abortion. Presumably, these advocates would not have been as zealous in their calls for the protection of the right to freedom of religion and belief on behalf of doctors whose beliefs required them to prioritise the will of the pregnant woman and perform abortions accordingly.

Nevertheless, the Act does, arguably, engage a doctor's right to practise and demonstrate his or her religion or belief. However, this right does not grant a person the right to manifest their religion or belief in any way they choose.<sup>14</sup> Nor does it grant them the right to impose their beliefs on others.<sup>15</sup>

Human rights law allows for limitations on the right to manifest religion and belief.<sup>16</sup> Therefore, any discussion of whether legislation is in breach of the right must consider whether a limitation is 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (under the Charter);<sup>17</sup> or 'prescribed by law and . . . necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others' (under the ICCPR).<sup>18</sup>

In this case the limitation on the rights of medical practitioners to manifest their religion or belief must be weighed against the rights of women. It was this limb of the analysis that was often missing in the Victorian debate. Disappointingly, in many cases the rights of women were ignored all together.<sup>19</sup>

Medical practitioners hold a powerful position and it is important to acknowledge the potential for a doctor to undermine or restrict a woman's right to lawfully access abortion services. The conscientious objection provisions are designed to ensure that women's rights are realised in practice. When women's rights are properly considered, the conscientious objection provisions can be seen to be not just permissible, but required by international human rights law.

The Committee on the Elimination of Discrimination Against Women has looked at this precise issue and stated that, where doctors refuse to perform abortion services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.<sup>20</sup>

### Reflections on the application of human rights standards

This flagship abortion legislation may not have been subjected to human rights analysis had it not been introduced in Victoria, which — along with the ACT — had legislatively entrenched human rights protection. The fact that notions of human rights were raised in the debate may be seen as a mark of early success for the *Charter*, which was designed to promote awareness and dialogue around human rights.

There are distinct advantages that flow from the application of human rights principles. Human rights law constitutes a coherent set of internationally accepted standards based on human dignity which, when properly applied, are sophisticated enough to guide complex debate. In cases where views are 'shaped by deeply personal, ethical, moral and religious values' a principled approach is necessary to ensure that the rights of all are respected and are not hijacked by powerful special interest groups.<sup>21</sup>

In this case, the tendency of some commentators to trumpet the rights of medical practitioners while remaining silent on women's rights threatened to undermine the advantages that should flow from applying human rights standards in analysis and debate around the Act. Ultimately, however, the common sense notions of balance and proportionality inherent in the human rights framework were considered and applied by Victorian Parliament and the Act was passed unamended.

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7. Zampas and Gher, above n 5, 255.

8. Every year more than 70 000 women die from unsafe abortion practices: World Health Organisation, *Unsafe Abortion: Global and Regional Estimates of Incidence of and Mortality due to Unsafe Abortion with a Listing of Available Country Data*, 3rd edition (Geneva, 1997), WHO/RHT/MSM/97.16, 3–14.

9. *Vo v France* (2004) Eur Court HR, No 53924/00.

10. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

11. Peter Arnaudo, Attorney-General's Department, Hansard — Joint Standing Committee on Treaties Reference: Treaties tabled on 14 May and 4 June 2008, 16 June 2008, 7. [aph.gov.au/hansard/joint-committee/J10940.pdf](http://aph.gov.au/hansard/joint-committee/J10940.pdf) at 6 November 2008.

12. *Abortion Law Reform Act 2008* (Vic), s 8(1).

13. *Abortion Law Reform Act 2008* (Vic), s 8(3) and s 8(4).

14. Human Rights Committee, *General Comment 22 on the Right to Freedom of Thought, Conscience and Religion*, 48th sess. [8] UN Doc. CCPR/C/21/Rev.1/Add.4 (1993).

15. *Ibid.*

16. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *International Covenant on Civil and Political Rights*, above n 10, art 18(3).

17. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

18. *International Covenant on Civil and Political Rights*, above n 10, art 18(3).

19. Phoebe Knowles and Rachel Ball 'My Body: My Right' *Herald Sun* (Melbourne) 9 October 2008.

20. Committee on the Elimination of Discrimination against Women, *General Recommendation 24 on Women and Health*, 20th session, 1999.

21. Victoria, *Second Reading Speech*, Legislative Assembly, 19 August 2008, 2951 (Maxine Morand, Minister for Women's Affairs).