Appendices

Background Information

The commission has decided to include four appendices that contain background material and references, which may assist readers who wish to examine a particular issue in further detail. This material is provided for information only and, due to the nature of the terms of reference, did not directly influence the commission's recommendations.

Appendix A contains a brief history of abortion law policy in Australia and the UK. Appendix B contains a summary of some of the major ethical writings about abortion. Appendix C refers to a range of judicial statements about the status at law of a fetus and the nature of the relationship between a pregnant woman and a fetus. Appendix D consider some of the issues that arise in the area when abortion is considered from a human rights perspective.

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Appendix A
History of Abortion Law Policy

INTRODUCTION

A.1 Abortion has been practised since the earliest times. Throughout history, moral, religious, and ethical considerations have been engaged in the debate about the role of law in abortion. At various times abortion has been punished, tolerated, or hidden but at all times, the practice has remained.[1]

A.2 Grubb has suggested that public policy considerations of abortion have moved through three distinct phases. These phases can be described as the criminalisation of abortion, the acceptance of therapeutic abortion, and the regulation of abortion with the medical profession as gatekeepers.[2] The policy and ethical considerations of patient autonomy, and in particular women's reproductive autonomy, have recently emerged as policy values informing modern abortion laws.

A.3 The historical policy framework of abortion law is not lineal. Rather, a series of common themes has emerged over time. The history of abortion policy in Victoria 'suggests a dynamic interplay between protection of women, regulation of abortion practices, and tolerance of abortion'.[3] The ebb and flow of different policy considerations in Victoria is not dissimilar to the history of abortion policy and practice in Britain, upon which much of our criminal law is based.

A.4 This appendix considers the major policy drivers underpinning the development of abortion law in the UK and Australia.

EARLY HISTORY

A.5 'In most, if not all, the civilisations … abortion was regarded as contrary to the social ethos: in some it was criminal.'[4] The earliest surviving record of abortion law is over 3000 years old—Assyrian–Babylonian law provided that a woman who 'cast the fruit of her womb by her own act shall suffer impailment'.[5]

A.6 The policy basis for these laws, across the various civilisations and as far as they can be ascertained, was the suppression of social evils such as sexual promiscuity, and protection of adult life from the risks of taking **abortifacients** or using dangerous instruments. There appears to have been little concern for the fetus. By Roman times the criminal element of abortion related to depriving the father of his child rather than fetal protection.[6]

19TH CENTURY—CRIMINALISATION OF ABORTION

A.7 There is conflicting authority about the extent to which abortion was regulated by the common law before 1803.[7] Abortion was mentioned in Blackstone's *Commentaries on the Law of England* in the 18th century and in *Coke* before that.[8]

> *At common law abortion of a woman quick with child seems to have been a misdemeanour only, unless it resulted in the death of the mother … before quickening it was not punishable at all.*[9]

A.8 The development of abortion as a statutory offence in Lord Ellenborough's Act extended the offence to the entire gestational period. It also increased the penalty for post-quickening abortion from a misdemeanour to a capital offence; the pre-quickening offence attracted a penalty of transportation.[10] The 1803 statute did not make specific reference to the woman herself.[11]

A.9 Keown argues that parliamentary debate and amendments passed during the Bill's passage suggest that its primary purpose was to clarify the law because there was conflicted authority about the status of the common law offence.[12] A further aim was to punish and prevent what was seen as a too frequent social problem with resultant loss of fetal and maternal life.[13] A further purpose, according to Brookes, was the desire to protect women from the dangers of forced abortion.[14] Although there does not appear to have been any major public outcry over the issue at the time, there is evidence that the practice of abortion was widespread.[15]

A.10 The establishment of a statutory offence may also have enjoyed support from the emerging professionalised medical community. Although many abortions were self-performed, midwives also undertook abortion.[16] The criminalising of abortion may well have assisted in the medical profession's struggle in the 19th century for supremacy over 'irregulars'.[17]

A.11 From 1803 to 1861 the offence was gradually extended and attracted 'consistently severe punishment'.[18] The severity of the law was in part due to the generally harsh nature of the criminal law at that time but also reflected the increasing influence of the medical profession.[19] While successive legislative reforms in 1828, 1837, and 1861 were primarily in the interests of consolidating the criminal law, significant changes were made in response to criticisms by the profession.[20]

A.12 The *Offences Against the Person Act 1837* gave the offence of abortion its modern form.[21] It removed the distinction around quickening, which had been an irritant to the medical profession.[22] It also ended the death penalty for abortion. This was part of a broader intention to improve conviction rates by reducing the number of capital offences as juries were generally reluctant to deliver guilty verdicts when a death penalty applied. In making the law on offences against the person simpler and more lenient there was an expectation that both prosecutors and juries would be more likely to apply it. There was still no express provision regarding the woman; however, that was resolved in the next reform.[23]

A.13 The *Offences Against the Person Act 1861* enacted a specific provision to make it clear that the abortion offence applied to the mother. This was in keeping with medico-legal opinion that aborting a fetus was abhorrent to morality and that the woman should be punished.

A.14 The 1861 Act also specified that it was no longer necessary to establish that the woman was in fact pregnant. Throughout the 19th century the medical profession increasingly warned of the life-threatening risks of abortion techniques and this new offence aimed to act as a further deterrent. Thus, the medical profession increasingly characterised the problem of abortion in terms of maternal health.[24]

> *The reason assigned for the punishment of abortion is not that, thereby an embryo human being is destroyed, but that it rarely or never can be [e]ffected by drugs without sacrifice of the mother's life.*[25]

A.15 Previously, reformers had recommended that the offence of procuring a miscarriage should not be punishable when the act is done in good faith and with the intention of saving the life of the woman.[26] This was not acted upon; however, the 1861 Act did

1 Her Majesty's Stationery Office, *Report of the Committee on the Working of the Abortion Act*, Volume 1: Report (1974) 4.
2 Andrew Grubb, 'Abortion Law in England: The Medicalization of a Crime' (1990) 18 *Law, Medicine and Health Care* 146, 147.
3 Robyn Gregory, 'Corrupt Cops, Crooked Docs, Prevaricating Pollies and 'Mad Radicals': A History of Abortion Law Reform in Victoria, 1959–1974' (Unpublished PhD Thesis, RMIT University, 2004) 12.
4 Her Majesty's Stationery Office (1974) above n 1, 192.
5 Ibid 190.
6 Ibid 192.
7 John Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (1998) 3. See also Ian Kennedy and Andrew Grubb, *Medical Law* (3rd ed, 2000) 860–861.
8 Keown (1998) above n 7, 10.
9 Her Majesty's Stationery Office (1974) above n 1, 196.
10 Barbara Brookes, *Abortion in England 1900–1967* (1988) 24.
11 Some commentators argue that the woman was likely to have been included, see Ian Kennedy and Andrew Grubb, *Medical Law: Text with Materials* (2nd ed, 1994) 862. Cf with Barbara Brookes who argues the Act did not prohibit a woman from procuring self abortion: ibid 24.
12 Keown (1998) above n 7, 12.
13 Ibid 12.
14 Brookes (1998) above n 10, 24.
15 Keown (1998) above n 7, 21.
16 Ibid 24.
17 Grubb (1990) above n 2, 150.
18 Keown (1998) above n 7, 27.
19 Ibid 28.
20 Eg, *Lord Landsdowne's Act 1828* made more specific reference to instruments or other means to procure the miscarriage. This followed criticism by the medical profession of a loophole in the 1803 offence: ibid 28.
21 D Seaborne Davies, 'The Law of Abortion and Necessity' (1938) *Modern Law Review* 126, 135.
22 Brookes (1988) above n 10, 25.
23 Grubb (1990) above n 2, 148.
24 For discussion see Keown (1998) above n 7, 35–39.
25 'Trial of William Russell for the murder of Mary Wormsley' cited in Keown (1998) above n 7, 38.
26 Second report of Her Majesty's Commissioners Revising and Consolidating the Criminal Law, Parliamentary Papers (1846) 24, 42.

include the term 'unlawfully' which was to be used so creatively in *Bourne* some 77 years later. This point was made more explicit in the *Infant Life Preservation Act 1929* which provided a maternal life exception.[27]

A.16 These concerns for maternal health, expressed in the strongest of sanctions—the criminal law—also served the interests of medical practitioners keen to consolidate their status as a profession. In criminalising abortion the

> *regulars, perceiving a demand for abortion, were concerned that patients might be lost to unqualified competitors unless strict laws were enacted to suppress the practice.*[28]

Early Abortion Policy in Victoria

A.17 Here in Australia in the second half of the 19th century, there was a similar cultural shift in the meaning of abortion from a well-utilised means of fertility control to a crime with a moral equivalent of murder.[29] Nevertheless, the widespread practice of abortion continued.

A.18 Throughout the colonial period there were very high rates of illegitimacy and maternal mortality.[30] Although Victoria's illegitimacy rates were lower than NSW, unwanted pregnancy was still a major problem for women.[31] 'By the mid 1850's abortion and advertisements for abortifacients were widespread in Australia … while chemists were strongly linked to referrals to abortionists.'[32]

A.19 The practice of infanticide also grew in the late 19th century.[33] Indictment rates for abortion and infanticide were much lower in Victoria than NSW, but the conviction rate was higher.[34] Of defendants in abortion cases, 92% were unmarried women, the majority of whom were domestic servants or working class women.[35]

A.20 Nevertheless, 'the overall numbers of abortion related convictions were extremely low' compared to the practice.[36] This suggests that the police may have been reluctant to pursue charges, or juries to convict.

A.21 By 1907 the *Australian Medical Gazette* argued that abortionists were 'looked upon as a public benefit rather than a common nuisance by juries'.[37]

20TH CENTURY—THERAPEUTIC ABORTION

A.22 Both in Victoria and the UK, the late 19th and early 20th century saw a stronger focus on maternal health as the policy imperative underpinning abortion law and the emergence of the concept of the therapeutic abortion. While concern for the moral status of the fetus remained, the medical and legal communities increasingly considered notions of preserving the life and health of the mother as central to abortion law. This is given its most significant expression in *Bourne*, however, such concerns were raised before that famous case.[38]

A.23 Keown argues that abortion on the grounds of maternal health was more prevalent among the regular medical profession than is often thought. He cites an article in the 1898 *Lancet* which stated '[t]he fundamental principle … is this: when the patient's life is necessarily exposed to great danger if the pregnancy is allowed to continue it is proper to terminate it after adequate consultation'.[39] He argues that by the late 1930s 'it had become acceptable to preserve not only life but also health, both physical and mental'.[40]

A.24 In England in 1937 the Birkett Committee enquired into 'the prevalence of abortion, and the law relating thereto'. The committee was required to 'consider what steps might be taken by more effective enforcement of the law or otherwise to secure a reduction in maternal mortality and morbidity arising there from'.[41] This places the health of the woman front and centre in the policy-making framework, alongside a developing concern to bring the widespread practice of abortion under control.

A.25 That committee, reporting after the *Bourne* decision, recommended the law be amended to make it:

> *[u]nmistakeably clear that a medical practitioner is acting legally, when in good faith he procures an abortion of a pregnant woman in circumstances which satisfy him that continuance of the pregnancy is likely to endanger her life or seriously to impair her health.*[42]

A.26 The case of *Bourne* itself marks the first regulation of lawful abortion and in effect brought the common law into line with the clinical practice of registered practitioners.[43] From a policy perspective, Justice Macnaghten drew a clear distinction between 'the act of the professional abortionist and an operation openly performed by a qualified surgeon'.[44]

A.27 However, its effect in practice does not appear to have solved the problem of the backyard abortionist, at least for poorer women in England. In 1952, Glanville Williams wrote:

> *The decision in* Bourne *has ameliorated the law but has not yet taken full practical effect. The medical practitioner is said to be still chary to the act, except in the clearest of cases, partly because he fears that public opinion may not be in favour and partly because he is not certain how far the* Bourne *decision protects him.*[45]
>
> *[T]he attitude of the medical profession in general was hostile, and tragic cases continued to occur … Women who had been raped, women deserted by their husbands, and overburdened mothers living in poverty with large families, also failed to get a medical abortion … in general the mass of woman could only go to a 'back street abortionist', wielding a knitting needle, syringe or stick of slippery elm … Although illegal abortions ran into thousands each year, convictions were comparatively few …*[46]

A.28 Glanville Williams was particularly concerned about the inequity that enabled rich women to secure an abortion but poor women to risk the backyard operators. He argued that wherever there was a total prohibition this dilemma remained.[47]

A.29 A clear distinction also emerged in Victoria between the abortion experiences of the rich, who could access a network of midwives and doctors, and the experiences of the poor.[48] Both practices operated in the shadow of the law. While the policy aim of the criminal prohibition was to protect women, the effect was to drive the practice underground.[49]

A.30 At the Women's Hospital in Melbourne the percentage of patients admitted following abortions trebled between 1910 and 1920.[50] Between 1930 and 1933, 1069 women were treated at the Women's Hospital for septic abortion, 136 of whom died. By 1936 abortion-related deaths accounted for 31% of the maternal mortality rate at the hospital, which was the place many women ended up following a botched procedure.[51]

A.31 Robyn Gregory, in her thesis on the history of abortion law reform in Victoria, argues that post war

> *although abortion was publicly condemned, behind the façade of respectability there was societal acceptance ... but the continuing illegal status of abortion led to a subculture of corruption and collusion with chemists, taxi drivers, hotel keepers and hired touts forming a network of information for women.*[52]

A.32 By the 1950s the demographic profile of those seeking abortion had shifted towards married women.[53] Given the general acceptance of the Macnaghten ruling in *Bourne*, medical schools were teaching that an abortion performed in a hospital setting with the agreement of two medical practitioners was lawful. 'Despite the secrecy surrounding abortion, it played a necessary role in medical practice in 1950's Australia.'[54]

1960s—REGULATION OF ABORTION

A.33 Although abortion was almost universally illegal in the first half of the 20th century, laws were liberalised in almost all industrialised countries and several developing nations after the 1960s. In the vast majority of cases, abortion became lawful in some circumstances, with the medical profession performing a gatekeeping role. This served the dual function of regulating therapeutic abortion with subsequent improvements in public health while promoting respect for the rule of law.

A.34 This policy was given legislative expression in the UK in what has been described as the 'compromise measure' of the *Abortion Act 1967*.[55] This placed therapeutic abortion on a statutory footing and extended the grounds for which abortion is lawful. It maintained professional autonomy and the primacy of clinical decision making. However, '… the law provides a special regulatory scheme beyond that pertaining to medical treatment and procedures in general'.[56]

27 This suggests parliament may have meant to delegate the determination of the circumstances in which abortion is lawful to the judiciary. See Chapter 7 for further discussion of this as regards the Infant Life Preservation Act.

28 Keown (1998) above n 7, 40.

29 Lyn Finch and Jon Stratton, 'The Australian Working Class and the Practice of Abortion 1880–1939', (1988) 23 Journal of Australian Studies, 45–46, cited in Gregory (2004) above n 3, 27.

30 From 1788 to 1888 more women died in labour or from its after effects than from any other single cause. Gregory (2004) above n 3, 70.

31 Gregory (2004) above n 3, 78–79.

32 Ibid 79.

33 Ibid 81.

34 Ibid 81.

35 Ibid 81.

36 'Averaging about one every two to three years in Victoria between 1880 and 1939': ibid 84.

37 Editor, 'The Abortion-monger a Common Nuisance' (1907) 26(3) *Australian Medical Gazzette* 130: cited in ibid 84.

38 See, eg, *R v Collins* [1898] 2 *British Medical Journal* 59; 122 (Grantham J) cited in Keown (1998) above n 7, 52.

39 'The Legitimate Induction of Abortion' [1898] 1 *Lancet* 235 cited in Keown (1998) above n 7, 66 .

40 Keown (1998) above n 7, 69.

41 *Report of the Committee on the Working of the Abortion Act* (1974) cited in Kennedy and Grubb (2000) above n 7, 1418.

42 Ibid.

43 Sally Sheldon, 'Subject Only to the Attitude of the Surgeon Concerned: The Judicial Protection of Medical Discretion' (1996) 5 *Social and Legal Studies* 95, 99.

44 Ibid 98.

45 Glanville Williams 'The Law of Abortion' (1952) *Current Legal Problems* 128, 156 cited in Kennedy and Grubb (2000) above n 7, 1416.

46 Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 296.

47 Ibid 296.

48 It was estimated that about 8000 abortions occurred annually in Victoria in the 1920s and 1930s: Gregory (2004) above n 3, 104–105.

49 'one, and perhaps the chief evil which the Legislature wished to prevent was the possibility of harm being done to the woman': *R v Trim* [1943] VLR 109, 115 (Martin J).

50 Gregory (2004) above n 3, 92.

51 Ibid 102.

52 Ibid 116–117.

53 Based on the marital status of women who died from abortion, see ibid 123.

54 Ibid 123.

55 Williams (1983) above n 46, 296.

56 Kennedy and Grubb (2000) above n 7, 1409–1410.

Appendix A
History of Abortion Law Policy

End of the Backyard Trade

A.35 The policy aim of the UK legislation was to keep women away from the backyard abortionists and eliminate their practice. By 1975 it was felt this aim had been achieved.[57]

A.36 By 1960 it was estimated there were 10 000–30 000 abortions each year in Victoria. The introduction of the contraceptive pill in 1961 coalesced with growing calls for reproductive freedom and control by women. The influence of the UK Abortion Act was 'undeniable',[58] as public sympathy for women facing unplanned pregnancy increased.

A.37 Abortion gained more media attention in the second half of the 1960s when a police crackdown on medical practitioners commenced. After two decades of relative immunity the prosecution rate in 1965 was four times the rate than that in each of the previous six years.[59] By 1968 a much more zealous approach by the homicide squad had significantly increased the risk to doctors relying on the application of the *Bourne* precedent.

A.38 At the same time public opinion was moving towards patient autonomy. A Morgan Gallup Poll conducted in October 1967 found 64% in favour of liberalised abortion laws.[60]

A.39 While there were significant policy pressures, including the prevalence of backyard abortion and the dilemma over the gap between the criminal law and clinical practice, the Victorian Parliament did not amend the Crimes Act.[61] In Victoria, NSW, and Queensland, the courts rather than the parliaments determined the circumstances in which abortion was lawful.[62]

A.40 Victorian criminal law had always referred to the notion of 'unlawful abortion'. It was on this phrase that the Menhennitt ruling would turn, confirming the lawfulness of the practice of therapeutic abortion by a medical practitioner in some broadly defined circumstances.

A.41 However, 'in practice, doctors continued to be charged, and women found it just as difficult to access abortion after the ruling as before'.[63] Police corruption was subsequently exposed through the Kaye Inquiry.[64] This inquiry pointed to 'systemic police corruption, maintained in part, by a struggle for industrial control of a lucrative abortion industry'.[65]

A.42 It was only after the backyard industry was dismantled through the provision of abortion services in the private and public health sectors that the policy aims of protecting maternal health and safeguarding the rule of law could be realised.

A.43 By the end of the 20th century, Victoria, NSW, and Queensland had retained criminal laws that regulated abortion. Judicial interpretations of those laws allowed therapeutic abortions in some circumstances. Some states, such as South Australia, reformed their criminal codes broadly in line with the UK Abortion Act. In Western Australia, abortion became primarily a health law issue following law reform in 1998.[66] A few years ago, the ACT completely decriminalised abortion by removing all references to it from the Crimes Act.

LATE 20TH CENTURY—EMERGENCE OF PATIENT AUTONOMY

A.44 It has already been noted that the medical profession exerted a significant influence on the development of abortion law in the UK and Victoria, regarding the restriction of the law in the 19th century and in its subsequent relaxation in the late 20th century.[67] This 'medicalisation of a crime' makes doctors the gatekeepers of the law.[68] Thus 'a great social responsibility is firmly placed by the law on the shoulders of the medical profession'.[69]

A.45 Sheldon writes that since the Abortion Act women in Britain generally have access to safe, legal services; however, the legislation itself represents only a partial decriminalisation as decision-making power rests with the doctor rather than the woman:

> *In becoming constructed in a medical manner, abortion is removed from the public sphere into a private realm where it can be regulated by experts who can lay claim to specialist medical knowledge.*[70]

A.46 In Australia the public funding of abortion services meant women could better afford therapeutic abortion but because the approval of abortion remains in the hands of medical practitioners, the diversity of medical attitudes towards abortion has a 'profound influence' upon its provision.[71]

A.47 Medicalising abortion places it firmly within the general management of pregnancy and, as such, it is governed by ethical medical practice as a whole.[72] The gatekeeping role brings with it its own set of dilemmas. Kerry Petersen describes a 'wedge' in the therapeutic relationship:

> *the ethical values of respect for autonomy and beneficence are undermined when criminal laws require a doctor to make a medical assessment based on legal grounds rather than the needs and best interests of the woman.*[73]

A.48 In practice, the gatekeeping role allows for wide variation because some doctors may deny abortions on the basis of their personal moral values, while others may perform or refer for abortions on the basis of a woman's decision. Both of these circumvent the original policy intention.[74]

A.49 Medicalisation has particular significance for women, as they tend to use health services more frequently than men. Historically, medical discourse has treated women as biologically unstable, psychologically or socially vulnerable, and therefore in need of protection and control.[75] The practice of medicine and the ethical principles underlying doctor–patient relationships have moved on considerably in the past few decades.

A.50 The right to self-determination in the medical context is drawn from the broader ethical value of autonomy. Personal autonomy is one of the guiding principles of medical law.[76] Thus, any competent person has the right to make an informed choice to accept or forego medical treatment.

A.51 Reproductive autonomy has been slower to develop as an accepted ethical principle; however, since the 1970s, as abortion became a mainstream medical procedure rather than an illicit act, community attitudes further shifted towards reproductive autonomy. It is likely that this in turn meant that reproductive autonomy became more institutionalised within the medical profession.

A.52 With patient autonomy in the ascendancy, the past few decades have seen a stronger focus upon shared decisions between doctor and patient.[77] As Kerridge notes, shared decisions involve a subtle but important shift in the traditional doctor–patient relationship. 'Shared decision-making is difficult. Respect for patients' autonomy does not necessarily imply a value-neutral role for health workers; but it does require a delicate balancing of roles.'[78]

57 United Kingdom, Parliamentary Debates, House of Commons, 7 February 1975, 885, 1763–1764 (David Steele).

58 Gregory (2004) above n 3, 134.

59 Ibid 132.

60 Ibid 158.

61 There was, however, significant support for statutory reform among campaigners and professional bodies. Premier Bolte sent the matter to the Chief Justices Law Reform Committee in July 1968, who declined to report on whether laws should be amended. In November 1968 a private member's Bill, the Jenkins Bill, was introduced but there was no debate on it before parliament rose. For discussion see Gregory (2004) above n 3, 145–148.

62 Kerry Petersen, 'Classifying Abortion as a Health Matter: The Case for De-Criminalising Abortion Laws in Australia' in Sheila McLean (ed) *First Do No Harm: Law Ethics and Healthcare* (2006) 354.

63 Gregory (2004) above n 3, 19.

64 Board of Inquiry into Allegations of Corruption in the Police Force in Connection with Illegal Abortion Practices in the State of Victoria, *Report of the Board of Inquiry into Allegations of Corruption in the Police Force in Connection with Illegal Abortion Practices in the State of Victoria* (1971).

65 Gregory (2004) above n 3, 14.

66 Talina Drabsch, *Abortion and the Law in New South Wales* (2005) 17–18.

67 Keown (1998) above n 7, 84.

68 Kennedy and Grubb (2000) above n 2, 1405.

69 *R v Smith (John)* [1973] 1 WLR 1510 (Scarman LJ).

70 Sheldon (1996) above n 43, 96.

71 Kerry Petersen, 'Criminal Abortion Laws: An Impediment to Reproductive Health' in Ian Freckelton and Kerry Petersen (eds) *Controversies in Health Law* (1999) 33.

72 John Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (2007) 26.

73 Petersen (1999) above n 71 39.

74 National Health and Medical Research Council, *An Information Paper on Termination of Pregnancy in Australia* (1996) 28.

75 Sheldon (1996) above n 43, 97.

76 Mason (2007) above n 72, 24.

77 Eg, NHMRC Guidelines on Information to Patients contains the principle that 'patients should be encouraged to make their own decisions': National Health and Medical Research Council, *General Guidelines for Medical Practitioners on Providing Information to Patients* (2004) 9.

78 Ian Kerridge, Michael Lowe and John McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 50.

Appendix B
Ethics of Abortion

REVIEW OF MAJOR PHILOSOPHICAL AND THEOLOGICAL ARGUMENTS

B.1 Some people have strong ethical views about abortion. Those views range from absolute opposition to abortion in all circumstances to respect for women's autonomy, and various points in between. In Chapter 5 we summarised the various views expressed during our consultations.

B.2 The commission's task is to provide options to government on the decriminalisation of abortion and in particular the legal consequences of various options for reform. The commission has not been asked to form, and has not formed, its own view about the ethical issues surrounding abortion.

B.3 The following section describes some of the major philosophical arguments on abortion.[1] The commission has included this review to assist the reader with an overview of the ethical debates that may inform people's views about abortion.

B.4 The discussion first examines arguments about the ethical status of the fetus. It then discusses ethical views about whether abortion can be ethically justified. It concludes with a description of additional philosophical issues that arise in moving from a discussion about the ethics of abortion to one about the ethics of laws regulating abortion.

B.5 Some caveats are in order. First, the emphasis is on reporting and marshalling the leading arguments in the contemporary debate, and then identifying the major points of disagreement. The various positions are briefly summarised, an approach that will inevitably not capture all nuances. Secondly, there is a deliberate focus on the best-known analyses.[2] In a literature as vast as this one, the preference for highly visible scholarship may miss many thoughtful and more recent ethical arguments, including some from women who have experienced abortion directly and some from studies of the relationship between the pregnant woman and the fetus.[3]

B.6 Commentary in this area generally uses descriptors such as 'conservative', 'moderate', and 'liberal' to categorise different positions in the debate. We have not used those terms because they are not particularly helpful in a brief review of this nature. Just as the commission does not form any view about the relative 'progressiveness' of any position, it does not judge the merits of the ethical or moral positions discussed. Rather, we acknowledge that a range of views exists.

B.7 This section outlines a mix of views in that range and describes some of the main arguments that sit behind them.

KEY ETHICAL QUESTIONS

B.8 No issue in bioethics has attracted more public attention, passionate opinion, and ink than abortion. Abortion is an ethical issue primarily because it involves ending the life of a fetus. It therefore raises challenging questions about the status of a fetus and the interrelationship between a pregnant woman and a fetus. Three specific questions follow:

1. Is the fetus a person, in the sense of having ethical standing and rights?[4]

2. If the fetus does have ethical standing, what happens when its survival comes into conflict with the decision of the woman to have an abortion? In short, when is abortion ethically acceptable?

3. How do we characterise the relationship between a pregnant woman and a fetus?

B.9 Nearly all the ethical debate on abortion can be distilled into competing answers to those questions, or slight variations on them. Historically, the debate pits opponents of abortion against those who argue that abortion is a personal matter for the woman contemplating it. One line of argument is based on the belief that fetal interests are paramount; the other is based on the view that a woman's autonomy is paramount.

B.10 Another line of argument seeks to resolve these two, seemingly irreconcilable, views. Positions in this middle ground strive to explain how, if the fetus acquired a right to life at conception, it could ever be acceptable to end its life. Alternatively, if middle-ground arguments are premised on the view that the fetus does not have firm rights, they must attempt to provide a principled basis for justifying situations in which the woman's right to choose may be limited.

B.11 Some more recent scholarship focuses upon the unique nature of the relationship between the pregnant woman and the fetus. This is examined to find a possible answer to the question of whether abortion is ever ethically justified, and if so, under what circumstances. In particular, the relational approach aims to bridge the gap between maternal autonomy interests and ethical status of the fetus. Its success or otherwise is for others to assess.

B.12 An additional set of ethical questions concerns the justification for legislative intervention. There is an important distinction between assessments of the morality of abortion as a practice and arguments over the morality of laws that regulate abortion.

B.13 The ethical question here is: To what extent is it morally acceptable to limit the ability of pregnant women who request abortions to have them?

B.14 It is at this point that lawmakers confront fundamental policy decisions about the ordering of interests: women's autonomy, maternal–fetal relationships, fetal interests and the role of the State.

IS THE FETUS A PERSON?

B.15 The first ethical question entails three distinct issues:

- When does human life begin?
- When does a fetus become a person with all of the rights entailed in that status?
- Does a fetus acquire legal rights prior to birth?

B.16 The first is a biological question with ethical overtones. The latter two are ethical questions which may translate into legal policy decisions.

CONCEPTION AS THE PERSON-DEFINING STAGE

B.17 The Catholic Church has long taken the view that life begins at conception and so abortion is a grave ethical wrong.[5] A series of pronouncements by Pope John Paul II reinforced this stance: 'Life must be protected with the utmost care from the moment of conception'.[6] Abortion and infanticide are 'unspeakable crimes' because they are acts that 'violat[e] the integrity of the human person' and are 'hostile to life itself'.[7]

B.18 A person's religious belief might require them to delve no deeper. Others do not take theological teaching as the final word and take a more secular view. John Noonan, an American lawyer–philosopher, is perhaps the most prominent voice in this regard. In defending conception as the beginning of human life, Noonan sidesteps the contested notion of ensoulment[8] and opts for more secular logic. The criterion he lays out for humanity is that 'if you are conceived by human parents, you are human'.[9]

B.19 This assertion leads to the question of why we should regard conception as the decisive, ethically relevant moment at which a human being comes into existence. Noonan's position is rooted in two interrelated arguments. The first argument turns on the notion of the fetus as a potential person. The second claims that conception is a more convincing stage than any other in the continuum from **gamete** to **neonate** at which to draw the personhood line. Outlining these two arguments, and the counter arguments against them, is a useful way to track opposing views of the fetus's ethical status.

Potentiality

B.20 Although the basic cells and genetic material needed to form a walking, talking, and thinking human being exist at conception, for many, calling the zygote, embryo, or fetus a 'person' at its early stages may obscure the meaning of that word and defy common sense.

B.21 People who argue conception is the moment at which a ethically relevant person comes into existence tend to point to what the fetus is poised to become, rather than what it actually is, in mind and body. This type of argument is referred to as the 'potentiality' criterion. The substantial weight Noonan places on the first assembly of the genetic code becomes clearer in light of the potentiality criterion:

1 Professor David Studdert undertook a review of leading bioethical scholarship that informs this part of the report.

2 Much of this comes from American philosophers writing in the 1970s and 1980s, a particularly productive period for abortion scholarship.

3 See, eg, Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make* (2000).

4 Having moral standing is different to having legal rights. It is a long-standing legal rule that the fetus does not have legal rights until born. The legal status of the fetus is reviewed in Appendix C. A discussion of human rights law and the fetus, specifically, the right to life of the fetus is in Appendix D.

5 Across religions and faiths there is a range of positions, eg, the Anglican Diocese of Melbourne takes a gradualist view, ie, while the fetus is fully human from the time of conception, it accrues moral significance as it develops. For a discussion of the various religious perspectives put to the commission in consultations see Chapter 5.

6 Pope John Paul II, *Gospel of Life*, 1995, n 62 cited in submission 67 (Archbishop Denis J Hart, Catholic Archdiocese of Melbourne).

7 Pope John Paul II, *Veritatis Splendour: Encyclical Regarding Certain Fundamental Questions of the Church's Moral Teaching* (1993) <www.newadvent.org/library/docs_jp02vs.htm> at 13 February 2008.

8 In the 13th century, Aquinas argued that the fetus becomes a human being when ensoulment occurred—40 days after conception for males and 90 days after conception for females. However, there has been debate within the Catholic Church about when this occurs and its significance.

9 John T Noonan, 'An Almost Absolute Value in History' (1970) reproduced in James White (ed), *Contemporary Moral Problems* (2nd ed, 1988) [10].

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> *[I]t is this genetic information which determines [the fetus's] characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving being. A being with a human genetic code is man.*[10]

B.22 Marquis advances a slightly different version of the potentiality argument—what he calls his 'future-like-ours' theory. Marquis condemns abortion because the act deprives the fetus of 'all those activities, projects, experiences, and enjoyments' that are commonly the stuff of being human.[11] The salient feature of Marquis's argument is that, by emphasising one's future as a core element of ethical standing, he is able to appeal to a human characteristic that the fetus has *as a fetus*; his argument does not turn on some person-like characteristic, such as consciousness, that awaits late gestation or birth for its crystallisation.

B.23 Critics challenge the potentiality criterion on several grounds. First, critiques are levelled at the elastic nature of potentiality. Why stop at conception? this argument suggests; each sperm and ovum is also an organism with the potential for life. Does that mean ending the life of a gamete would be deeply unethical, as is abortion?

B.24 Noonan and Marquis respond by focusing on probabilities. Each sperm has a minute probability of realising its potential to form a person, whereas a fertilised egg has a much higher probability. In their view, the large leap forward at conception in the chances of producing a person is ethically meaningful, and makes it the correct point at which to define the coming into existence of a human being with much the same right to life as any other human being.

B.25 A second challenge to the potentiality argument is that it involves an error of logic. What follows from potential personhood, it is argued, is potential rights, not actual rights, and potential rights and actual rights are not equivalent.[12] In this view, potential personhood may give rise to some interests or claims to rights, but these are not fully-fledged rights of the kind we would ascribe to a living person.[13]

B.26 A third criticism focuses on the implications of the language used. Consider the sequence of logic that underpins the potentiality position: (1) it is wrong to kill an innocent human being; (2) the fetus is an innocent human being; and therefore (3) it is wrong to kill a fetus. Several scholars, most notably Mary Anne Warren, have argued that this equation conflates a physical or genetic human being (in proposition 2) with an ethical being (in proposition 1). This type of human being is a member of a 'moral community', someone who exists as a person and carries rights and duties by virtue of that person's place in society. Warren concludes that it is wrong to regard the fetus as a moral, rights-bearing person of this type.[14]

Conception—Better than the Rest?

B.27 The other main argument for conception as the correct stage at which to affix personhood is that it is a more compelling moment than any other in the continuum from zygote to neonate in which to do this. Governments, courts, and commentators who reject conception as the decisive point have attempted to defend later stages of gestation as ethically significant;[15] however, these positions have their own difficulties. Viability, for example, is a shifting concept that can change with advances in medical technology. It may also vary by place, with premature babies in many developing countries having lower chances of survival because of limitations in the medical care available.[16]

B.28 There is divergence within the medical community about the true meaning of the term 'viability'. It is used in two ways. First, it is used as a biological criterion. Secondly, it is used as an ethical category.[17] Englehardt argues that the use of viability as an ethical concept expresses the idea that the fetus is of a stage of development that, if brought ex-utero, it could be placed in the 'social role of a child'.[18]

B.29 Singer, who does not agree with the conception arguments, nonetheless acknowledges that the

> *search for a morally crucial dividing line between the newborn baby and the fetus has failed to yield any event or stage of development that can bear the weight of separating those with a right to life from those who lack such a right …*[19]

B.30 In the absence of such a dividing line, proponents of the conception argument therefore assert that 'we must either upgrade the status of the earliest embryo to that of the child, or downgrade the status of the child to that of the embryo'.[20] They maintain that as the latter makes little sense to most people, conception stands as the natural dividing line.

OTHER APPROACHES TO DEFINING MORAL PERSONHOOD

B.31 Some philosophers have sought to come up with more nuanced criteria for defining personhood. This enterprise is an important intellectual concern in other realms of bioethics besides abortion, such as end of life care and the status of permanently unconscious patients.

B.32 In the context of abortion, a range of criteria has been proposed as being decisive in determining ethically relevant personhood. The criteria favoured by various commentators include **segmentation**,[21] brain functioning,[22] rationality,[23] and a conceptual and temporal understanding of one's self.[24]

B.33 Mary Anne Warren has proposed five criteria: consciousness (particularly the capacity to feel pain); reasoning; self-motivated activity (relatively independent of either genetic or direct external control); communication and self-awareness. She acknowledges that there may be reasonable debate about whether all of these traits must exist, or just some, but considers it self-evident that if a being satisfies none then the being cannot be a person. The fetus, she concludes, at least in early life, does not satisfy any of the five criteria.[25]

B.34 A common challenge to these formulations of personhood is that the bar they set for ethical personhood is far too high. It is too high, the argument goes, because no neonate and possibly no infant (much less a fetus) could meet the specified criteria, particularly those that require reasoning and temporal understanding. Consequently, strict application of the criteria would lead us to the conclusion that infanticide does not involve the unethical killing of a being with rights to life.[26]

B.35 Critics also argue that if the fetus fails the personhood test, then that must mean anything goes.[27] Personhood proponents respond in a couple of ways to this challenge. One response is a utilitarian argument that runs as follows: society may be worse off by condoning late abortions that are motivated by inconvenience to the pregnant mother. In these circumstances limits should apply.[28]

10 White (1988) [10].

11 Don Marquis, 'Why Abortion is Immoral' (1989) 86(4) *The Journal of Philosophy* 183, 189.

12 Stanley I Benn, 'Abortion, Infanticide, and Respect for Persons', in Joel Feinberg (ed), *The Problem of Abortion* (1973) 102.

13 See Joel Feinberg, 'Chapter 6: Abortion' in Tom Regan (ed), *Matters of Life and Death* (1980) 183, 193–4.

14 Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) reproduced in White (ed) (1988) above n 9, 16.

15 For defences of viability, see, eg, Justice Blackmun's decision in *Roe v Wade* 410 US 113 (1973); Alan Zaitchik, 'Viability and the Morality of Abortion' (1981) 10(1) *Philosophy and Public Affairs* 18–24.

16 Viability is discussed in Chapter 3

17 See discussion in Kristin Savell, 'Is the 'Born Alive' Rule Outdated and Indefensible' (2006) 28 *Sydney Law Review* 625, 643. Some people equate viability with the capacity for any length of survival, or disability; others say viability requires a meaningful life.

18 Tristram Englehardt, 'Viability and the Use of the Fetus' in William Bondenson et al (eds), *Abortion and the Status of the Fetus* (1984), 196 cited by Savell (2006) above n 17, 644.

19 Peter Singer, 'Chapter 6: Taking Life: The Embryo and the Fetus' in *Practical Ethics* (2nd ed, 1993) 135, 142.

20 Ibid 138.

21 P Ramsey, 'Reference points in deciding about abortion', in JT Noonan (ed), *The Morality of Abortion: Legal and Historical Perspectives* (1970) 60–100.

22 Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (1975); Kenneth Himma, 'A dualist analysis of abortion: personhood and the concept of self qua experiential subject' (2005) 31 *Journal of Medical Ethics* 48.

23 See, eg, Singer (1993) above n 19.

24 Michael Tooley, 'A Defense of Abortion and Infanticide' in Joel Feinberg (ed) *The Problem of Abortion* (1973).

25 Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) in James White (ed), *Contemporary Moral Problems* (2nd ed, 1988) above n 9, 16.

26 The response to this challenge by some defenders of relatively demanding personhood criteria is that infanticide is wrong because it would have terrible consequences. They argue that such a practice would make society worse off and cause great unhappiness because of the high value most people place on the lives of very young children. This counter is based on consequentialist reasoning; it does not concede the personhood point. Warren adds a postscript accounting for the wrongness of infanticide on consequentialist grounds, eg, the unwanted baby could be adopted. See Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal—Fetal Conflict* (2002) 33.

27 Eg, anything can be done to a fetus or abortion can be allowed for any reason.

28 Critics are quick to label this an evasion. They argue that if a moral case is built on deontological foundations, temporarily applying consequentialist reasoning to fix a weakness in a deontological argument is not acceptable. In response, it might be argued that conception-based proponents make a similar switch in their rationale for why fetal rights to life supersede maternal rights to autonomy.

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B.36 A second response is to state that it does not follow from classification of the fetus as a non-person that anything goes. Non-persons may still be worth something, especially when they are living things, and cruel, wanton or reckless mistreatment of them can be ethically wrong.[29]

MIDDLE VIEW ON ETHICAL PERSONHOOD?

B.37 The descriptions so far have tended to pit those who define ethically relevant personhood at conception or soon thereafter, against those who fix it at late stages of fetal development, birth, or some time after birth. Some philosophers have attempted to situate themselves in the considerable space between these opposing viewpoints.

B.38 These philosophers criticise the tenor and tactics of the polarised nature of the debate. Jane English, an American philosopher, characterises the debate this way:

> *[f]oes of abortion propose sufficient conditions for personhood which fetuses satisfy, while friends of abortion counter with necessary conditions for personhood which fetuses lack. But these both presuppose that the concept of a person can be captured in a strait jacket of necessary and/or sufficient conditions. Rather, 'person' is a cluster of features, of which rationality, having a self concept and being conceived of humans are only part.*[30]

B.39 English goes on to criticise the struggle for binary outcomes in the fetus-as-person debate:

> *[T]here is no single core of necessary and sufficient features which we can draw upon with the assurance that they constitute what really makes a person; there are only features that are more or less typical. This is not to say that no necessary or sufficient conditions can be given. Being alive is a necessary condition for being a person, and being a U.S. Senator is sufficient. But rather than falling inside a sufficient condition or outside a necessary one, a foetus lies in the* ***penumbra*** *region where our concept of a person is not so simple. For this reason I think a conclusive answer to the question whether a fetus is a person is unattainable.*[31]

B.40 This argument appears to reflect the views of a large proportion of the general public about the ethical status of the fetus.[32] It does not permit any certain resolution of when it is ethically acceptable to end the life of a fetus.

RELATIONAL CONCEPTS OF PERSONHOOD

B.41 Some look to the unique relationship between the fetus and pregnant woman to answer the fundamental questions about the ethical status of the fetus, and the circumstances in which abortion is ethically acceptable. These approaches may be described as relying on relational concepts of personhood.

B.42 Savell argues,

> *a conception of personhood that pays due regard to the intrinsic and relational aspects of foetal being has greater potential to explain the existing criminal law, and to guide future developments, than does a theory based solely on the intrinsic properties of the foetus.*[33]

B.43 She reviews several approaches to the issue of ethical personhood.

B.44 Mackenzie argues that in early stages of pregnancy the ethical status of the fetus is defined in relational terms 'because it is a being with moral significance for the woman in whose body it develops and who acts as its moral guardian'.[34] As pregnancy develops the fetus becomes more differentiated from the woman. Thus the fetus's ethical standing 'is less and less dependent on its relational properties to the woman in whose body it develops and more and more tied to its own intrinsic value'. The fetus is never the ethical equivalent of the woman.[35]

B.45 Sherwin adds another dimension to relational notions of personhood. She sees personhood as a social category.[36] On her analysis 'persons are members of a social community that shapes and values them'.[37] Thus, in her view, a fetus is different to a newborn and cannot be a person in a ethically relevant sense. She argues that the responsibility for determining a fetus's ethical worth rests with the woman who is carrying it.[38]

B.46 Others, such as James, take a broader view of relationships. They look to the potentiality of relationships beyond the mother, identifying a 'potential web of social relationships prior to birth' in what is described as the 'pre-birth space'.[39]

WHEN IS ABORTION ETHICALLY ACCEPTABLE?

FETAL INTERESTS AS TRUMPS

B.47 It is a short step from understanding the position of the Catholic Church, and commentators who have a similar view of the ethical status of the fetus, to an understanding of their view about when abortion is permissible. Pope John Paul II wrote that 'direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave ethical disorder, since it is the deliberate killing of an innocent human being'.[40] In short, the same degree of moral turpitude that attaches to homicide applies to abortion.

B.48 Thus, when faced with the first question—What is the ethical standing of a fetus?; the answer—The same right to life as any other living person enjoys—is controlling. This leads inexorably to the answer to the next question—abortion is ethically wrong.

B.49 Adherents of this view do not necessarily ignore the notion that the abortion decision involves a conflict between fetal and maternal interests. They may even acknowledge that a pregnant woman sometimes has compelling reasons for not carrying her fetus to term. However, the substance of the response is that the woman's reasons for choosing abortion will rarely, if ever, prevail over the fetus's 'presumptively' strong right to life.[41]

B.50 Sumner characterises the reasoning here succinctly: 'Life is more basic than, and therefore morally prior to, autonomy. When values conflict, the lesser should be sacrificed'.[42]

Double Effect and Other Exceptions

B.51 '**Double effect**' is a term that has a number of uses in bioethics. In the context of abortion, the principle of double effect admits an exception, albeit a very narrow one, that recognises the ethical acceptability of abortion when it is undertaken in circumstances akin to self-defence. In Catholic theology, it refers to a fairly specific formula that enables one, in situations where one action will have both good and bad effects, to determine whether the action constitutes a sin. Four conditions must be met:

1. stripped of its context, the act must be good or, at worst, indifferent
2. the actor must directly intend only the good effect
3. the good effect must produce the bad effect, not the reverse
4. there must be proportionality; the act must serve a sufficiently grave need to warrant the risk of producing the bad effect.[43]

B.52 The Catholic Church regards abortion as ethically acceptable when, and only when, all four conditions are satisfied. The principal exonerating factor is that an abortion in those circumstances would not be intended, that is, the saving of a woman's life is allowed insofar as it does not include the deliberate destruction of the fetus.

B.53 Double effect is a high hurdle. In practice, only two clinical situations have been held to consistently fit the necessary conditions of double effect. One situation is an ectopic pregnancy, the other is a pregnant woman found to have a malignant uterine tumour, whose fetus is excised as part of a hysterectomy.[44]

MATERNAL INTERESTS

B.54 Commentators at the other end of the philosophical spectrum concerning the ethical status of the fetus regard abortion as ethically acceptable. As they conclude that the fetus does not possess rights or interests that may override a pregnant woman's autonomy, there is no conflict between maternal and fetal interests.

B.55 Sumner captures the essence of the argument: 'Although abortion results in the death of the fetus, it does no harm or injury because the fetus is not the sort of thing that can be harmed or injured. Abortion therefore lacks a victim'.[45]

29 Warren's 'anti-cruelty principle' see Scott (2002) above n 26, 36.

30 Jane English, 'Abortion and the Concept of a Person' (1975) 5 *Canadian Journal of Philosophy* 233, reproduced in White (1988) above n 9, 36.

31 Scott (2002) above n 26, 36–37.

32 See the discussion of community attitude survey evidence in Chapter 4.

33 Savell (2006) above n 17, 627.

34 Catriona Mackenzie 'Abortion and Embodiment' (1992) 70 *Australian Journal of Philosophy* 136, 146 cited in Savell (2006) above n 17, 652.

35 Ibid.

36 Susan Sherwin (1992) *No Longer Patient: Feminist Ethics and Health Care* cited by Ibid 653.

37 Ibid.

38 Ibid.

39 Wendy James, 'Placing the Unborn: On the Social Recognition of New Life' (2000) 7 *Anthropology and Medicine* 169, 176 cited by Ibid 654.

40 Pope John Paul II, *Evangelium Vitae: Encyclical Letter on the Value and Inviolability of Human Life* (1995) New Advent <www.newadvent.org/library/docs_jp02.ev.htm> at 13 February 2008.

41 Marquis (1989) above n 11, 183.

42 L Wayne Sumner, *Abortion and Moral Theory* (1981) 18.

43 See Kathy Rudy, *Beyond Pro-Life and Pro-Choice* (1996) 24–25.

44 Ibid 24.

45 Sumner (1981) above n 42, 15.

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Thomson's Famous Violinist

B.56 In her 1971 essay, *A Defense of Abortion*, Judith Jarvis Thomson argues that there is a difference between the claim that a fetus has a right to life and the claim that another person (the pregnant woman) is ethically obliged to do whatever is necessary to keep it alive.[46]

B.57 For the purposes of her argument, Thomson concedes that the fetus is an ethically relevant person with a right to life. Using an imaginary scenario, she then seeks to build a case that the ethical legitimacy of abortion survives this concession.

B.58 Thomson's argument has led to much spirited criticism. A common focus of the critics is the bizarre and dramatic circumstances of the scenario she uses to illustrate her theory.[47] In particular, because the ethical choice she depicts arises as a result of coercion, it is argued that the ethical relevance of the argument to the abortion context is undermined. Small tweaks to the scenario lead one away from the conclusion she draws. Although Thompson does not dwell on this problem, she does acknowledge in a general way that her argument is not that abortion is always ethically permissible.[48]

MATERNAL–FETAL CONFLICT

B.59 Presenting views from two ends of the philosophical spectrum throws key points of divergence into sharp relief. These approaches may be seen as simplifications of what is a nuanced and complex issue.

B.60 Save for an absolutist position, recognition of the fetus's ethical personhood at conception, or shortly thereafter, coexists with a variety of opinions about when abortion is ethically acceptable. The doctrine of double effect's highly circumscribed account of self-defence has been criticised, in relation to both abortion[49] and other end-of-life situations.[50]

B.61 Some people reject an approach based upon double effect and accept abortion's moral legitimacy in a broader range of circumstances. Common circumstances are to preserve the pregnant woman's life or health (in situations that extend beyond those that double effect would permit); when the pregnancy results from rape or incest; and when the fetus is known to have catastrophic disabilities.

B.62 Within autonomy circles, little scholarship would support the ethical legitimacy of abortion at every point up until birth for any reason whatsoever. The next two subsections review a selection of arguments that identify a conflict between a pregnant woman's decision-making autonomy and fetal interests. Some of these arguments consider how that conflict should be properly resolved.

Autonomy and Maternal–Fetal Relations

B.63 Some commentators' understanding of personal autonomy includes a woman being able to determine whether she will physically carry a fetus for nine months, how her life will be lived, and the social relations she will enter.[51]

B.64 Catriona MacKenzie argues:

> *It is because of … [the] psychic and bodily connectedness between the woman and the fetus that in pregnancy questions about the fate of the fetus cannot be separated from the issue of a woman's right to self-determination. What the abortion decision involves is a decision that this part of herself should not become a being in relation to whom … questions of parental responsibility and emotional attachment arise.*[52]

B.65 Some people argue that the relational interest of a woman in the outcome of her pregnancy may be just as important as her strictly biological interest. A pregnant woman has an emotional interest in the fetus and with the broader community, initially during her pregnancy, and thereafter if a child is born. The relational interest of a woman extends beyond pregnancy because once a woman gives birth to a child she enters a relationship—that of mother and child—which brings with it a large number of socially and individually determined responsibilities and expectations. Requiring a woman to continue with pregnancy forces her to enter and maintain

a relationship that involves those responsibilities and expectations. Cannold has argued that, 'the abortion decision is not essentially about ending a pregnancy but about choosing motherhood'.[53]

CENTRIST APPROACH

B.66 Philosophers who reject absolute positions hold a range of views about when and for what reasons abortion is ethically justified. Himma's personhood criteria define a point in the middle stages of pregnancy, but they are linked solely to fetal development.[54]

B.67 Mackenzie assigns a different ethical status to the late-term fetus. The fetus is never the ethical equivalent of the woman, hence maternal health grounds for abortion are justified.[55]

B.68 Callahan argues that respect for the sanctity of human life should cause every woman to have a strong moral bias against abortion.[56] He goes on to acknowledge that there are circumstances in which it is ethically right for a woman to have an abortion because of the responsibilities she believes she owes to herself, her family, or society. Callahan's point is that a narrow focus on protection of the life of the fetus constitutes a blinkered view of the sanctity of life; respect for the sanctity of life also dictates attention to the cost of having a child on the welfare of living children and adults.

B.69 Sumner is more specific. He advocates a policy that would allow abortion on request up to a specified time limit, and 'only for cause thereafter'.[57] Just cause may be established on several grounds: therapeutic (threats to maternal life or health), eugenic (risks of serious fetal abnormality), humanitarian (pregnancy due to commission of a crime such as rape or incest), or socioeconomic (poverty, family size).[58]

B.70 English is even more specific, linking the ethical acceptability of abortion to both fetal development and the woman's reasons for obtaining the abortion.[59]

B.71 Englehardt sees ethical significance in viability. At the same time, he considers abortion after viability ethically acceptable in some circumstances, including maternal health and fetal abnormality.[60]

B.72 The structure of each of these arguments highlights the formidable challenge associated with drawing a line. The avoidance of absolutist positions results in considerable complexity (some critics say impossibility) in resolving the overall ethical equation.

B.73 Many non-absolutist positions bring two inversely-related sliding scales to bear. One is linked to the development of the fetus, the other to the moral legitimacy of the woman's motivation for abortion and concepts of autonomy. On this analysis, at early stages of gestation, weak motivations will suffice. At late stages, when the fetus has moved closer to ethical personhood and has assumed substantive interests in survival, the woman's reasons need to be more compelling.

B.74 While lamenting the polarisation of the abortion debate, Scott provides the following summary:[61]

> *[T]he key to the project of reconciliation lies in attention to a woman's reasons for exercising her right, the ways these relate to her underlying interests in bodily integrity and in self-determination, to the moral claims of the fetus and to the values inherent in the right to refuse medical treatment on one hand and to abort on the other.*[62]

B.75 Scott highlights the moral and normative importance of viability. She sees this as a manifestation of how maternal and fetal interests interlock. In resolving ethical decisions about abortion she stresses 'the way in which the strength of each must be viewed in relation to and partly determined by the strength of the other, a point inherent in the viability benchmark'.[63]

B.76 For Scott, 'the critical issue of justification of harm to the fetus is developed from the woman's perspective by analysing her relationship with the fetus in two ways: first in terms of her rights, and second, in terms of her duties.[64] At the end of the day, though, because of the interlocking relationship between the woman and the fetus, Scott argues that we 'must place our faith or trust in the moral responsibility of the pregnant woman'.[65]

46 Judith Jarvis Thomson, 'A Defense of Abortion' (1971) 1(1) *Philosophy and Public Affairs* 47

47 Thomson asks the reader to imagine, 'You wake up in the morning and find yourself back-to-back in bed with a famous unconscious violinist. He has been found to have a fatal kidney ailment and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you and last night the violinist's circulatory system was plugged into yours … If he is unplugged from you now, he will die; but in nine months he will have recovered from his ailment and can safely be unplugged from you.' Thomson completes the story by imagining that the hospital director says you can't unplug yourself without killing the violinist, and you must remain like that for nine months.

48 'It would be indecent', she states, for 'the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month, and wants the abortion just to avoid the nuisance of postponing a trip abroad'. Thomson (1971) above n 46, 65–66.

49 Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect' (1967) *Oxford Review* 5, 5–15

50 Timothy E Quill, Rebecca Dresser and Dan W Brock, 'The role of the double effect—a critique of its role in end-of-life decision making' (1997) *New England Journal of Medicine* 337, 1768–71.

51 Reproductive choice can also be examined as an equality issue: see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002) 209–210 .

52 MacKenzie (1992) above n 34, 151–2.

53 Cannold (2000) above n 3, 118.

54 Himma (2005) above n 22, 48.

55 Mackenzie (1992) above n 34, 146.

56 Daniel Callahan, 'Abortion Decisions and Personal Morality' (1970) in White (1988) above n 9, 28.

57 Sumner (1981) above n 42, 27.

58 Ibid 155.

59 Jane English, 'Abortion and the Concept of a Person' (1975) 5 *Canadian Journal of Philosophy* 233, reproduced in White (1988) above n 9, 41.

60 Tristram Englehardt, 'Viability and the Use of the Fetus' in Bondenson et al (1984), cited in Savell (2006) above n 17, 644.

61 Scott is concerned with ethical and legal issues arising from a decision to refuse medical treatment when it may harm the fetus and examines ethical issues around abortion.

62 Scott (2002) above n 26, xxxi.

63 Ibid 30.

64 Ibid xxxii.

65 Ibid 102–103.

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ABORTION LAW MAKING

B.77 The issue of when it is appropriate for the State to intervene in the affairs of citizens is a separate ethical question to the morality of abortion laws. It juxtaposes independent ethical questions about abortion and about legal regulation.

B.78 The relationship between law and ethics has been a central preoccupation of jurisprudential philosophy. Limitations of space do not permit a discussion of the many schools of thought in this area.

B.79 In liberal pluralistic societies Australia, there is often a gap between the ethical views of segments, even majorities, of the population, and expressions of law.[66] Although some activities might be widely disapproved of, the State does not always intervene to prevent people from undertaking them. It permits people to make their own decisions about whether to engage in these activities. Many people, for example, frown upon adultery as an immoral act, but it is not illegal. A defining feature of Western liberal ideology is its willingness to reject certain forms of State interventions despite distaste for the acts those interventions would address.

B.80 How should the various ethical arguments about abortion be viewed from the perspective of public policy and law making?

B.81 For some there is fairly straight line between the ethics of abortion and the ethics of public policies toward the abortion. For those who regard abortion as a form of homicide, it is unethical for the State not to intervene to stop and punish people who engage in the behaviour.

B.82 Proponents of this view argue that it is compatible with fundamental liberal ideals. One circumstance in which it may be just for the government to disrupt a person's freedom is when the exercise of that freedom will adversely affect another person's rights and freedoms.[67] In the context of abortion, some, particularly those who look to conception as the person-defining moment, regard the fetus as that other person. Thus, in order to protect the fetus, the State is entitled to limit the pregnant woman's autonomy. For those who regard women's interests in autonomy as paramount, it is apparent that the State should not interfere with pregnant women's entitlement to make their own decisions.

B.83 There are some influential writers who occupy the middle ground. Dworkin argues that many of those who believe that abortion is never or almost never morally acceptable, 'nevertheless think that the law should leave women free to make decisions about abortion for themselves, that it is wrong for the majority or for the government to impose its view upon them'.[68]

B.84 A similar disjunction between ethical and legal positions may attract support among people who argue for women's unfettered autonomy in the early months of pregnancy, but believe the moral legitimacy of abortion in the later stages of gestation may depend upon the reasons for it. People who hold this view may still resist any law or legal process that would inhibit free choice.

B.85 A distinction between a person's views about the ethics of a practice and the ethics of making laws with respect to that practice is not necessarily contradictory. Many philosophers have followed in the footsteps of John Stuart Mill in arguing that the government should try, as a rule, to avoid dictating to individuals about matters of personal morality.[69] For instance, Callahan, although plainly uncomfortable with the ethics of abortion, nevertheless argues that the government should not enact rigid laws to prevent or reduce the practice because such private matters must constitute 'a clear and present danger to the common good' before they are candidates for State action.[70]

B.86 Thomson argues that while people may confront one another equally in the straight ethics debate, the State-action overlay shifts the burden of proof to those who support an absolute prohibition on abortion. She argues:

> *[O]ne side says that the fetus has a right to life from the moment of conception, the other side denies this. Neither side is able to prove its case … why should the deniers win? Why break the symmetry by letting the deniers win instead of the supporters? The answer is that the situation is not symmetrical. What is in question here is not which of two values*

we should promote, the deniers' or the supporters'. What the supporters want is a license to impose force; what the deniers want is a license to be free of it. It is the former that needs the justification.[71]

66 The term 'liberal' is used several times in this section. It refers to the branch of political philosophy known as liberalism, which prioritises individual rights, applauds pluralism, and demands a high degree of value neutrality from government.

67 For discussion of positive and negative freedom see Isaiah Berlin, 'Two Concepts of Liberty' *Four Essays on Liberty* (1969). For discussion of curtailment of liberty see Isaiah Berlin *The Power of Ideas* (2001) 111–114.

68 Ronald Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (1995) 24.

69 John Stuart Mill, *On Liberty* (1859).

70 Daniel Callahan, 'Abortion Decisions and Personal Morality' (1970) in James White (ed) (2nd ed,1988) above n 9, 29.

71 Judith Jarvis Thomson, *Abortion* (Summer 1995) Boston Review, <http://bostonreview.net/BR20.3/thomson.html> at 15 February 2008.

Appendix C
Legal Developments

INTRODUCTION

C.1 In Appendix B, the commission described some of the major ethical views about abortion. As part of that exercise, we considered how some prominent commentators have characterised the relationship between a pregnant woman and a fetus. In this part we consider how some senior members of the judiciary have characterised that relationship when it has arisen for determination in different legal contexts. A preliminary issue that emerges when undertaking this task is to consider the legal status of a fetus.

LEGAL STATUS OF A FETUS

C.2 The legal status of a fetus has been considered by courts on several occasions in a variety of contexts. The nature of the task of characterising the fetus for legal purposes was explained by the Supreme Court of Canada when it considered whether a fetus was a 'human being' for the purposes of the Quebec *Charter of Human Rights and Freedoms*:

> *[M]etaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties—a matter which falls outside the concerns of scientific classification.*[1]

C.3 The law has found it impossible, in numerous different contexts, to recognise a fetus as an entity with interests which are both separate and separable from those of a pregnant woman. In a few areas the common law has acknowledged that a fetus has an interest that merits legal attention, but in those cases the courts made it clear that legal rights do not accrue until birth. These cases have arisen in contexts where there has been no question of separate interests and where the decision reached by the courts has been supported by the pregnant woman in question.

C.4 Recent legislation, at both Commonwealth and state levels, has acknowledged fetal existence by regulating what may be done to embryos in various scientific contexts. This legislation regulates what may be done to an embryo in a laboratory rather than within a woman's uterus.

LEGAL PERSONHOOD COMMENCES AT BIRTH

C.5 The common law has always taken the view that **legal personhood**—possession of the legal rights and protections held by all people—does not arise until a fetus becomes a person by being 'born alive'. A fetus cannot be the victim of any form of homicide.[2] Over 50 years ago Justice Barry observed in a murder trial that, 'legally a person is not in being until he or she is fully born in a living state' and this occurs 'when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs'.[3] This rule was recently confirmed by the NSW Court of Criminal Appeal in *R v Iby* when Chief Justice Spigelman stated that 'the common law "born alive" rule is satisfied by any indicia of independent life'.[4] This rule is discussed in detail in Chapter 7.

C.6 This approach has been confirmed in different contexts, including in the abortion case of *Attorney General (QLD) (Ex rel Kerr) v T*, where Justice Gibbs stated 'a fetus has no rights of its own until it is born and has a separate existence from its mother'.[5] Justice Gillard pointed out in a recent case: 'Legal personality begins at birth and ends with death'.[6]

COMMON LAW FICTIONS

C.7 The common law has demonstrated its usual pragmatism by devising fictions to create limited exceptions to the general rule that only a person born alive can have interests protected by law. The fictions have been used in circumstances where the application of this general rule would produce an unjust result and the outcome has been supported by the woman in question.

C.8 Two clear examples of the fiction arise for injuries sustained by a fetus during pregnancy as a result of negligent conduct by a third party, and the entitlement of a fetus to acquire a contingent interest in property under a will or trust. In both instances the realisation of the fetal interest is dependent upon live birth.

C.9 Since the Full Court of the Victorian Supreme Court's decision in *Watt v Rama*, it has been clear that a person who sustained injury while still a fetus, as a result of the negligent act of a third person, has a good **cause of action**, upon birth, against the wrongdoer. This is despite the plaintiff not being a person and not having legal rights when the injury actually occurred.[7] The majority of judges held that even though the plaintiff could not acquire any legal rights or suffer any compensable damage until birth, she had a 'contingent interest' not to be injured by the negligence of another person, which could ripen or crystallise at the time of birth. This fiction permitted the plaintiff in that case to recover damages for the severe injuries she sustained, while still a fetus, when her mother was involved in a car accident. The common law principles that were identified and applied in that case have been followed by other Australian intermediate appellate courts[8] and were approved by the High Court in 2006.[9]

C.10 The same fiction has been applied when dealing with the entitlement of a fetus to acquire an interest in property under a will or trust.[10] In a recent Victorian case, *Yunghanns v Candoora No 19 Pty Ltd*, Justice Gillard held that a man could take action, on behalf of his unborn child and with the support of his pregnant wife,[11] to prevent the distribution of assets held in trust for the benefit of all his children.[12]

STATUTORY PROVISIONS

C.11 Some Victorian and Commonwealth statutes recognise the existence of embryos and regulate what may be done to them in the contexts of assisted reproduction, scientific research, and human cloning. The regulation of embryos by these statutes arises when an embryo has a separate existence outside of a woman's uterus.

C.12 The two major Commonwealth statutes are the *Research Involving Human Embryos Act 2002* (Cth) and the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth). The first Act prohibits the creation of a human embryo for a purpose other than achieving pregnancy. It also regulates the use of 'excess' human embryos created by assisted reproductive technology. Research involving embryos is prohibited unless a scientific body obtains a licence to undertake the limited research permitted by the legislation. As its title implies, the Prohibition of Human Cloning for Reproduction Act prohibits the cloning of human beings. The Victorian *Infertility Treatment Act 1995* contains mirror provisions because the Commonwealth lacks the constitutional power to regulate these activities throughout the entire community.[13]

C.13 There is one provision in the Victorian legislation that deals with embryos in utero. Section 38K prohibits collecting a viable human embryo from the body of a woman. There is a similar offence in Commonwealth law.[14] The aim of this provision is to prevent the harvesting of embryos from a woman for experimental purposes or for placement in another woman.[15]

RELATIONSHIP BETWEEN A PREGNANT WOMAN AND A FETUS

C.14 On occasions, the courts have sought to describe the relationship between a pregnant woman and a fetus when the issue has arisen in different contexts. Not surprisingly, there has been no consistency of view. There appears to have been a recent evolution of thinking, as the courts have been called upon to consider the issue more commonly than in the past.

C.15 Courts have sought to deal with the issue of the relationship between a pregnant woman and a fetus in a criminal law context when an assault upon a pregnant woman has caused injury to, or destruction of, a fetus. In some instances the fiction of deeming the physical element of the offence to have occurred at birth, when a child is born with injuries acquired as a result of an assault upon its mother before birth, has been used to ensure that the assailant is culpable. In others, the fiction has not been able to be usefully employed.[16]

C.16 In the course of some of these criminal cases, judges have sought to describe the relationship between a pregnant woman and a fetus. In *Attorney-General's Reference (No 3 of 1994)* Lord Mustill described the relationships as one of 'bond, not identity'.[17] He went on to suggest that a fetus was neither a person nor an adjunct of the mother but '[t]he mother and the foetus were

1 *Tremblay v Daigle* [1989] 2 SCR 530, 557.
2 *R v Hutty* [1953] VLR 338, 339.
3 *R v Hutty* [1953] VLR 338, 339.
4 (2005) 63 NSWLR 278, [56].
5 (1983) 46 ALR 275, 277.
6 *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524, [82].
7 *Watt v Rama* [1972] VLR 353.
8 See, eg, *X&Y v Pal* (1991) 23 NSWLR 26; *Lynch v Lynch* (1991) 25 NSWLR 411.
9 *Harriton v Stephens* (2006) 226 CLR 52, [245].
10 See, eg, *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524 (Gillard J).
11 The court accepted evidence that the plaintiff's wife was five months pregnant when the proceedings were heard.
12 The plaintiff asserted that the company, which was the trustee of a discretionary family trust, which he no longer controlled, might distribute the trust's assets to his existing adult children before the birth of his unborn child, thereby defeating its interest.
13 *Infertility Treatment Act 1995* pt 2A.
14 A person commits an offence if the person removes a human embryo from the body of a woman, with the intention of collecting a viable human embryo*: Prohibition of Human Cloning for Reproduction Act 2002* (Cth) s 16.
15 Explanatory Memorandum, Infertility Treatment Amendment Bill 2007 18.
16 The relevant cases are considered in Bernadette McSherry, 'Homicide and Antenatal Injury' (1998) 5 *Journal of Law and Medicine* 204.
17 [1998] AC 245, 255.

two distinct organisms living symbiotically'.[18] According to Lord Musthill, a fetus is 'a unique organism' and '[t]o apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead'.[19]

C.17 In *R v King,*[20] the NSW Court of Criminal Appeal considered whether an attack upon a pregnant woman by the father of the unborn child, which was designed to terminate the pregnancy, and resulted in the stillbirth of the fetus, could amount to grievous bodily harm to the woman. After referring to judicial statements which suggested that a fetus was, for various purposes, part of its mother, Chief Justice Spigelman stated:

> *I find this approach compelling for the law of assault and in particular for the forms of aggravated assault requiring as an element of the offence actual bodily harm, grievous bodily harm or wounding. The close physical bond between the mother and the foetus is of such a character that, for the purposes of offences such as this, the foetus should be regarded as part of the mother …*
>
> *Where such enhanced injury is inflicted on a foetus only, I can see no reason why the aggravated form of offence should depend on whether the foetus is born alive. The purpose of the law is best served by acknowledging that, relevantly, the foetus is part of the mother.*[21]

C.18 The Canadian Supreme Court reached a similar conclusion in *R v Sullivan*.[22] That case involved criminal charges against two midwives who had allegedly been negligent when assisting at a home birth which resulted in the stillbirth of the fetus. The midwives were charged with negligently causing death to another person and negligently causing grievous bodily harm to another person. The Supreme Court held that the death charge could not be maintained because a fetus was not a person; however, it held that the death of the fetus could constitute grievous bodily harm to the pregnant woman because of her connectedness with the fetus.

C.19 During the 1990s a number of so-called forced caesarean cases were decided by British courts.[23] In all of these cases court orders were sought because pregnant women refused to give birth by caesarean section against medical advice. In all of these cases it was held that a woman could not be forced to have a caesarean. When reaching these decisions the courts considered the relationship between a pregnant woman and a fetus.

C.20 In *In Re MB*[24] the Court of Appeal held:

> *[A] competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reasons at all, choose not to have medical intervention, even though, as we have already stated, the consequence may be the death or serious handicap of the child she bears or her own death. She may refuse to consent to the anaesthesia injection in the full knowledge that her decision may significantly reduce the chance of her unborn child being born alive. The foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a caesarean section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth.*[25]

C.21 The relationship between a pregnant woman and a fetus arose for consideration in broadly similar circumstances in *St George's Healthcare NHS Trust v S.*[26] The English Court of Appeal was asked to consider whether a woman who was 36 weeks pregnant could be forced to undergo a caesarean section because her own health, as well as the life of her fetus, was endangered by her refusal of medical treatment.[27] The Court of Appeal stated:

> *[I]n our judgment while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment. Although human, and protected by the law in a number of different ways set out in the judgment in* In re MB (An Adult: Medical Treatment) *[1997] 2 FCR 541, an unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally*

repugnant. The declaration in this case involved the removal of the baby from within the body of her mother under physical compulsion. Unless lawfully justified this constituted an infringement of the mother's autonomy. Of themselves the perceived needs of the foetus did not provide the necessary justification.[28]

C.22 The interconnectedness of the maternal–fetal relationship was also emphasised by the Canadian Supreme Court in a case regarding glue sniffing by the pregnant woman.[29] The majority of the Canadian Supreme Court stated:

[T]o permit an unborn child to sue its pregnant mother-to-be would introduce a radically new conception into the law; the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation. Such a legal conception, moreover, is belied by the reality of the physical situation; for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth.[30]

NEW APPROACHES

C.23 Traditionally, some commentators characterised abortion as an instance of maternal–fetal conflict because a pregnant woman and her fetus were seen as having separate interests, which could form the basis of that conflict.[31] Recent judicial statements and theoretical writings have suggested that this characterisation may not be useful or accurate.[32]

C.24 Some legal scholars and courts have recently explored a different approach. This focuses upon the interconnectedness of the relationship between the woman and the fetus, rather than upon maternal–fetal conflict. For example, Seymour has proposed an approach which 'seeks to combine a recognition of the potentiality of the fetus with an acknowledgment that the woman and her fetus are indivisibly linked'.[33] He describes this as the 'not-one-but-not-two' model.

C.25 On this view, the fetus does not have a uniform value or character in the eyes of the law. The law makes choices about the situations in which it will take account of actual or threatened antenatal harm.[34] Seymour argues that sensitivity to the not-one-but-two relationship better allows for 'discriminating answers to questions as to when the law should intervene to protect a fetus'.[35]

C.26 He uses the examples of assault upon a pregnant woman and abortion to illustrate this, arguing that the issues to be considered are fundamentally different because the context of the relationship is different when a woman chooses to have an abortion.[36] Seymour concludes that acceptance of the State punishing a person who assaults a pregnant woman causing harm to a fetus 'does not mean that the state should punish a person who performs an abortion with the woman's consent'.[37]

18 [1998] AC 245, 255.

19 [1998] AC 256.

20 (2003) 59 NSWLR 472.

21 (2003) 59 NSWLR 472, 491. This case is discussed further in Chapter 7.

22 [1991] 1 SCR 489.

23 *Re S (Adult: Surgical Treatment)* [1993] 1 FLR 26; *Re MB* [1997] 2 FLR 426; St George's Healthcare NHS Trust v S [1998] 3 WLR 936.

24 [1997] 2 FLR 426.

25 [1997] 2 FLR 426, [60].

26 [1998] 3 WLR 936.

27 The fetus had in fact been delivered by caesarean section because a judge had earlier made an ex parte declaration authorising the operation without the woman's consent. The case in the Court of Appeal, in which various declarations were sought, was effectively an appeal against the original ex parte declaration.

28 [1998] 3 WLR 936, 957.

29 *Winnipeg Child and Family Services (Northwest Area) v DFG* [1997] 3 SCR 925.

30 [1997] 3 SCR 925, [29].

31 See description of ethical debates in Appendix B.

32 See John Seymour, 'The Legal Status of the Fetus: An International Review' (2002) 10 *Journal of Law and Medicine* 28..See also Pam Stewart and Anita Stuhmcke, 'Legal Pragmatism and the Pre-Birth Continuum: An Absence of Unifying Principle' (2007) 15 *Journal of Law and Medicine* 272. For discussion of implications of abandoning the 'born alive rule' see Kristin Savell, 'The Legal Significance of Birth' (2006) 29 (2) *UNSW Law Journal* 200–6.

33 John Seymour, 'The Legal Status of the Fetus: An International Review' (2002) 10 *Journal of Law and Medicine* 28.

34 Ibid 39–40.

35 Ibid 38.

36 In the case of assault the State's interests are in protecting the woman and fetus from the wrongdoing of a third party. In the case of abortion, the State must consider whether it is justified or interferes with the woman's autonomy: ibid 39.

37 Ibid 38.

Appendix D
Human Rights and Abortion

INTRODUCTION

D.1 Many of the submissions received by the commission applied a human rights perspective to the question of abortion law reform. People mainly talked about the right to life, freedom from discrimination, and respect for privacy.

D.2 The abortion debate has the capacity to conflate two important sets of considerations that inform people's views about human rights. The first of these relates to ethical issues concerning abortion, including the moral status of the fetus and the freedom of action of the mother. These are discussed in Appendix B. The second involves the question of when legal personhood begins. This is discussed in Appendix C.

D.3 In this Appendix, we set out information about domestic **human rights instruments**, including the *Victorian Charter of Human Rights and Responsibilities Act 2006*. Australia's obligations under international human rights instruments are reviewed and implications for abortion law reform considered. Relevant case law from Australian and other jurisdictions is discussed, along with statements from United Nations human rights committees.

CURRENT VICTORIAN LAW

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

D.4 The Charter of Human Rights and Responsibilities Act established a legislative framework for the protection and promotion of human rights in Victoria. The charter includes a series of rights based largely upon the *International Covenant on Civil and Political Rights 1966* (ICCPR). Australia ratified this treaty in 1980.

D.5 The human rights potentially engaged by abortion include the right to life, privacy, and security of the person.[1] The Charter contains a section which specifically provides that it has no operation for current and future Victorian law concerning abortion and child destruction. This provision is intended to encompass statute law, judicial interpretation of statute law and the common law. Section 48 states: '(N)othing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2'.[2]

D.6 The Charter, therefore, has no effect upon the law of abortion in Victoria, and the rights contained in the Charter are not applicable in abortion cases.

OTHER DOMESTIC HUMAN RIGHTS PROTECTIONS

D.7 Australia's Constitution does not contain a Bill of Rights;[3] however, it does explicitly protect some human rights and has been found to contain some implied rights.[4] None of those rights are of direct relevance to abortion law reform.

D.8 At a domestic level, several human rights are recognised or protected, to varying degrees, by common law principles. These include the right not to incriminate one's self, the onus on the prosecution to prove a criminal offence, and principles of natural justice.[5]

D.9 The Australian Parliament has incorporated some aspects of international human rights instruments, such as the ICCPR, into domestic legislation. An example is the *Disability Discrimination Act 1992*.[6]

INTERNATIONAL HUMAN RIGHTS FRAMEWORK

GENERAL PRINCIPLES

D.10 International human rights are entitlements that belong to every human being. They are protected by international human rights treaties and long established principles of international law.[7] In Australia, human rights treaties do not create rights enforceable by individuals in domestic courts until they are incorporated directly into domestic law.[8]

D.11 The *Universal Declaration of Human Rights* (UDHR) sets out human rights as 'a common standard of achievement for all peoples and all nations'.[9] It is regarded as 'the modern genesis of international human rights law'.[10]

D.12 Australia has ratified several international treaties that aim to identify and protect human rights. These include the ICCPR; the *International Covenant on Economic, Social and Cultural Rights* (CESCR); the *Convention on the Rights of the Child* (CRC); and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).[11]

D.13 People need to be aware of international human rights standards 'because those norms … establish legal obligations for the government …'[12] Ratifying a treaty requires a government[13] to implement in good faith all the obligations in the treaty. Some obligations require immediate implementation; others are to be implemented by 'progressive realisation'.[14] Domestic laws are subject to scrutiny by the relevant UN human rights committees.[15]

INTERNATIONAL HUMAN RIGHTS POTENTIALLY ENGAGED

D.14 In this appendix we examine the rights potentially engaged by any law that regulates abortion.

RIGHT TO LIFE

D.15 The right to life has been described as 'the supreme right'.[16] It is guaranteed in major international human rights instruments, including the UDHR and the ICCPR. It is duplicated in many national bills of rights and in regional human rights instruments such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

D.16 The right to life is often invoked to support opposing claims about abortion. Some people argue that the right to life applies to both the fetus and the woman. This argument featured heavily in our consultations. The Catholic Archbishop of Melbourne, Denis J Hart, stated in his submission:

> *Declaring that unborn children are not legal persons does not change the reality that they are human beings endowed with a rational nature and inherent inviolable worth. They are natural persons in virtue of their rational human nature and also subjects of basic human rights.*[17]

D.17 Others say the scope of the right is limited to people after birth.[18] Responding to the argument that the right to life applies to the fetus, the Castan Centre for Human Rights Law stated:

> *Such an interpretation of the Covenant is not apparent from its wording and not supported by the Human Rights Committee's findings and conclusions. It is also contrary to the wording and* ***jurisprudence*** *of other key international human rights treaties.*[19]

1 *Charter of Human Rights and Responsibilities Act 2006* ss 9, 13, 21.

2 The inclusion of the **savings clause** in the Charter is significant. It contrasts with the ACT human rights legislation, which states that the right to life applies to a person from the time of birth.

3 Australia is the only Western democracy without a national Bill of Rights.

4 Rights protected by the Australian Constitution include the requirement that an acquisition of property by the Commonwealth must be on just terms: s 51(xxxi), and the right of individuals who believe that the federal government has acted unlawfully to seek review of such actions in the High Court: s 75(v). Under the Constitution, the Commonwealth cannot 'make any law for establishing any religion', impose 'any religious observance' or prohibit 'the free exercise of any religion': s 116. For discussion of implied constitutional rights see Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 335–336.

5 For discussion of common law and human rights see Nick O'Neill, Simon Rice, and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 106–114.

6 Human rights are defined in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to include the rights and freedoms in the ICCPR. The Human Rights and Equal Opportunity Commission may therefore undertake inquiries into systemic human rights issues. HREOC may also resolve complaints of discrimination or breaches of human rights under federal laws.

7 In addition to various human rights treaties, customary international human rights law also applies; however, the status of international customary law within Australian law is not settled.

8 Alison Duxbury and Christopher Ward, 'The International Law Implications of Australian Abortion Law' (2000) 23(2) *University of New South Wales Law Journal* 1, 9.

9 *Universal Declaration of Human Rights* (10 December 1948) UNGA Res 217A (III) (1948).

10 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) xiii.

11 Australia has signed, but not yet ratified, the *Convention on the Rights of Persons with Disabilities*. Australia has not signed or ratified the *Declaration on the Rights of Indigenous Peoples*.

12 Martin Flynn, *Human Rights in Australia: Treaties, Statutes and Cases* (2003) 5.

13 The term used in UN treaties and human rights discourse is 'state parties' in recognition that not all signatories to a convention are governments, eg, the Holy See.

14 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 2(1) (entered into force 3 January 1976).

15 The UN treaty system establishes two main accountability functions: individual complaints and country reports. An individual complaint can only be made when the person has exhausted all domestic remedies and the State party has ratified the Optional Protocol attached to the convention. Australia has ratified the First Optional Protocol to the ICCPR; it has not ratified the Optional Protocol to CEDAW.

16 Human Rights Committee General Comment 06, Article 6: The Right to Life, 16th sess 1982, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 127 (2003).

17 Submission 67 (Archbishop Denis J Hart, Catholic Archdiocese of Melbourne).

18 The right to life of the mother is not usually contested in the abortion debate. Very few people suggest that a woman's life should be sacrificed to preserve the fetus. Regardless, under international law it is very clear that the woman's right to life must be observed. There is debate about whether the right to life includes a positive duty to promote life, eg, by advancing safe and dignified motherhood. Under this 'positive duty' analysis, where states do not provide the means necessary to prevent women from dying of pregnancy-related causes, including access to safe abortion services, the right to life may be breached. See Rebecca Cook and Bernard Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1, 29.

19 Submission 383 (Castan Centre for Human Rights Law).

Appendix D
Human Rights and Abortion

D.18 These are hotly contested principles within the context of the abortion debate. However, decisions of the domestic courts and international human rights bodies provide guidance about the legal status of the fetus.

DOES THE FETUS HAVE A RIGHT TO LIFE UNDER INTERNATIONAL LAW?

Article 3—Universal Declaration of Human Rights

D.19 Article 3 of the UDHR states that 'everyone has the right to life'. It does not specifically mention the fetus and it does not define 'everyone'.

D.20 When the Commission on Human Rights was drafting this provision, several proposals to provide explicit protection for the fetus from the moment of conception were put forward. Although debated, these did not go to a vote, and were not included in the final text.[20]

D.21 Some commentators, including Fleming and Harris, argue that the UDHR nevertheless provides protection for the fetus because the term 'everyone' includes 'every member of the human family, that is, all human beings'.[21] They argue:

> *there is no agreed basis for dividing up the human family into persons and non-persons, but there is agreement from science that from fertilisation we all share a common humanity, that we are all members of the 'human family'*.[22]

D.22 Similar arguments were put forward in submissions to the commission.[23] Joseph Santamaria wrote: 'the unborn child or foetus is no less a human individual than someone who has been born'.[24]

D.23 The debate about the scope of the term 'everyone' and its specific application to the fetus also applies to other human rights instruments to which Australia is a party, including the ICCPR.

Articles 6 (1) and 6(5)—International Covenant on Civil and Political Rights

D.24 The right to life is protected by Article 6(1) of the ICCPR. This right is absolute and cannot be derogated. It is generally recognised that Article 6 is not applicable before birth.[25]

D.25 During preparatory debates on the ICCPR, proposals to include the words 'from the moment of conception' were rejected.[26] Since then, the right of every 'human being' has generally been seen to apply from birth. This is not to say there is no ethical interest in the fetus, but rather the rights arising under the treaty do not attach until birth. As noted by Liberty Victoria, this is consistent with the general approach domestic law takes to fetal rights.[27]

D.26 Article 6(5) of the ICCPR contains a prohibition on the death penalty for pregnant women. Rita Joseph argues the principal reason for this prohibition is to 'protect the child's inherent right to life'. She draws a corollary between the death penalty and abortion, which she considers a 'form of death penalty imposed on the unborn child'.[28]

D.27 The Castan Centre for Human Rights Law submitted that Article 6(5) was drafted to protect pregnant women in countries that have not abolished the death penalty.[29] They argued that human rights law does not recognise abortion as a form of the death penalty.[30]

Convention on the Rights of the Child

D.28 There are various provisions in the CRC that relate to the right to life. These include the preamble, Article 1 defining a child as aged up to 18 years, and Article 6, the right to life.

D.29 The preamble to the convention states: '[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth …'

D.30 Abortion opponents cite this preamble[31] to support their argument that international human rights protection applies to the fetus. For example, the Catholic Justice Agency states 'unquestionably those who developed, and those who adopted this Declaration … had an understanding of a "child" which included the unborn child'.[32]

D.31 Some also argue that Australia did not make a reservation on the preamble to protect current abortion laws, and so this represents Australia's acceptance that the CRC provides protection to the fetus.[33] However, a preamble alone does not create an obligation and so a **reservation** would not be appropriate.[34]

D.32 Examination of the debate over the wording of the preamble suggests that the preamble does not establish a positive obligation to extend rights to the fetus. For the preamble to equate to such recognition, it would have to revise the usual legal understanding of the term child. The drafters rejected such a revision. Former Chairperson of the United Nations Committee on Economic, Social, and Cultural Rights, Professor Phillip Alston,[35] concludes:

> *[W]hile the pre-ambular paragraph can be considered to form one part of the basis for the interpretation of the treaty, there is no obvious reason why the preamble would be resorted to in order to interpret what would otherwise be a natural and ordinary meaning of the term 'child' in international law. In international law, at least, there is no precedent for interpreting that term, or others such as 'human being' or 'human person' as including a fetus*.[36]

D.33 Alston points out that even if the preamble were binding, one needs to look at the wording, which includes *'appropriate* legal protection, before and after birth'. He argues there is neither an explicit nor implicit assumption that this includes an absolute right to life: 'What is "appropriate" in that regard is for each state to determine for itself'.[37]

D.34 It is also important to note that the operative part of the convention applies exclusively to children from birth up to 18 years (articles 1 and 6). If such a major revision of the definition of a child were envisaged then those articles would have included a clear statement to that effect.[38]

D.35 Some States have chosen to go down the path of either specifically protecting the fetus in domestic law[39] or making a reservation against Article 1 of the CRC.[40] Australia has not opted for either of these alternatives.

RIGHT TO LIFE, FETAL RIGHTS, AND ABORTION CASES

D.36 The Castan Centre for Human Rights Law notes

> *liberal abortion laws in France, Austria and the Netherlands have been subject to domestic challenges on the basis of alleged inconsistency with the right to life in article 2 of the European Convention. These challenges have all been unsuccessful*.[41]

D.37 Courts in the UK, Canada, and South Africa have also held that fetuses are not protected by right to life guarantees in human rights instruments because they lack legal personhood.[42]

20 Philip Alston, 'The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child' (1990) 12 *Human Rights Quarterly* 156, 157.

21 John Fleming and Michael Hains, Rights of the Unborn under International Law, Priests for Life <http://priestsforlife.org.articles/flemingpage2.htm> at 19 October 2007.

22 Ibid.

23 Eg, submission 100 (Rita Joseph).

24 Submission 516 (Joseph Santamaria).

25 'It would appear that international law … protects the child from the moment of birth, but without an express provision to the contrary, it does not provide the fetus with an absolute right to life': Duxbury and Ward (2000) above n 8, 20.

26 Fleming argues that toleration of abortion played no part in the debate over the words 'from the moment of conception' during negotiations over ICCPR. He argues that the reason it was rejected was because it was too hard to determine the moment of conception and it would involve impacting on the rights and duties of medical profession: Fleming and Hains, above n 21, at 19 October 2007.

27 Submission 501 (Liberty Victoria).

28 Submission 100 (Rita Joseph).

29 One of the aims of Article 6 is the abolition of the death penalty, however, this has not been achieved in all States: Human Rights Committee General Comment 06, Article 6: The Right to Life, 16th sess 1982, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 127 (2003).

30 Submission 383 (Castan Centre for Human Rights Law).

31 They also cite the preamble to its precursor, the 1959 *Declaration on the Rights of the Child.*

32 Submission 452 (Catholic Justice Agency).

33 Fleming and Hains also argue that both the *Declaration of Rights of the Child* (1959) and the CRC confer rights upon the fetus. Both contain the words 'before as well as after birth' in their preambles. The 1959 declaration was attached as a schedule to the *HREOC Act 1986* following discussions with the Right to Life Association. Fleming and Hains contend that as a consequence the declaration is part of Australian municipal law; however, the High Court has held that 'The ICCPR is now contained in Sch 2 of the HREOC Act. While the Act confers power on the Human Rights and Equal Opportunity Commission to investigate and conciliate alleged breaches of rights contained in the ICCPR, it does not create justiciable rights for individuals': *Dietrich v R* (1992) 177 CLR 292, 359–60 (Toohey J).

34 International declarations generally are not binding, nor are the preamble statements of treaties (conventions). but they contain important human rights principles and may be referred to when interpreting human rights treaties. In contrast, the articles (main text) of conventions are binding on State parties as these contain the substantive rights. For discussion of the non-binding nature of the CRC preamble see Duxbury and Ward (2000) above n 8, 16; Cook and Dickens (2003) above n 18, 24.

35 Professor Alston was UNICEF's legal adviser throughout the period of the drafting of the CRC.

36 Alston (1990) above n 20, 170.

37 Ibid 172.

38 Ibid 172.

39 Eg, Irish Constitution, art 40.3.

40 Eg, Argentina has lodged a declaration that Article 1 should be interpreted to mean a child is a human being from conception.

41 Submission 383 (Castan Centre for Human Rights Law).

42 In *Christian Lawyers Association of SA and Others v Minister of Health and Others 1998* (11) BCLR 1434(T) it was held that the task of properly classifying a fetus in law and in science were different pursuits. Ascribing personhood to a fetus in law was a fundamentally normative task, resulting in a recognition of rights and duties, a matter which fell outside the realm of scientific classification. See also *Tremblay v Daigle* [1989] 2 SCR 530.

Appendix D
Human Rights and Abortion

D.38 These courts, in common with Australian courts,[43] have held that fetuses do not have legally enforceable rights until they are born alive. Examples include: *Burton v Islington Health Authority*, [44] and *Paton v British Pregnancy Advisory Service Trustees*.[45]

D.39 In *Paton v British Pregnancy Advisory Service Trustees* the European Commission discussed the definition of 'everyone' and the right to life and said that all of the limitations contained in Article 2 'by their nature concern persons already born and cannot be applied to the fetus'.[46] The commission found that a termination at 10 weeks on physical and mental health grounds did not breach the right to life article.

D.40 In *Vo v France*, after reviewing previous decisions, the European Court of Human Rights found that the unborn child is 'not regarded as a "person" directly protected by Article 2 of the Convention, and that if the unborn child does have a "right" to "life", it is implicitly limited by the mother's rights and interests'.[47]

FREEDOM FROM DISCRIMINATION AND RIGHT TO EQUALITY BEFORE THE LAW

D.41 'Non-discrimination is a fundamental principle of international human rights law.'[48] Prohibitions on sex and disability discrimination are therefore included in the ICCPR and the CESCR. CEDAW defines what constitutes discrimination against women and establishes an agenda for action by States to end such discrimination.[49]

Prohibitions on Discrimination in the ICCPR and CESCR

D.42 Article 2 of the ICCPR and CESCR are general non-discrimination articles.[50]

D.43 Article 26 of the ICCPR establishes the right to equality before the law.[51] Equality principles include positive rights, as well as the freedom from discrimination.

D.44 The CESCR rights are particularly relevant to abortion, especially the right to health, including reproductive health.[52] **Reproductive rights** are illuminated further in CEDAW.

D.45 It should also be noted that specific age discrimination rights arise from the CESCR and CRC.[53] For example, mature adolescents suffer unjust discrimination when they are not able to obtain reproductive health counselling and services with the same confidentiality as adults.[54]

Definition of Discrimination

D.46 Article 1 of CEDAW defines sex discrimination as: 'Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women … of human rights and fundamental freedoms'.[55] Non-discrimination does not simply mean equal treatment. It also requires that different cases be treated according to those differences, recognising that discrimination may be multi-layered and intersectional.

D.47 Substantive equality means that differentiation must not be arbitrary. Therefore one must look to see if men and women are treated differently, and if so, why. Duxbury and Ward note that one example would be if laws criminalised abortion in all cases.[56] In this scenario, women making reproductive decisions would face criminal sanctions, while men exercising their rights over the number and spacing of children, or seeking a medical procedure,[57] would not face criminal penalties.[58]

Right to Equality—Transformative Equality, Autonomy, Women as Moral Agents

D.48 Some people argue that 'women's reproductive autonomy is inextricably linked with their ability to enjoy a range of human rights'.[59] Cook and Howard argue that 'transformative' equality requires that women are able to make their own reproductive decisions with dignity, free from stigma and stereotypes.[60] From this perspective, equality is not consistent with either forced abortion or compelling women to continue with a pregnancy. Instead:

> *[T]ransformative equality requires rethinking unintended pregnancy from the perspective of the woman affected, recognizing and remedying the disadvantages women face in making decisions to terminate or continue pregnancy, and removing barriers faced in seeking services*.[61]

D.49 This approach places abortion within a spectrum of health and support services to which women should have access. It views women as competent and conscientious decision makers in their own lives.[62] Liberty Victoria, among others, put forward this position in its submission.[63] It argued that women, in common with men, possess ethical agency, that is, the capacity to make and execute decisions about their own life.[64]

RIGHT TO HEALTH

D.50 Article 12(1) of the CESCR recognises the right of 'everyone to the enjoyment of the highest attainable standard of physical and mental health'.[65] This right, in common with all other obligations under the convention, is to be 'progressively' realised, in recognition of resource capacity and constraints.

Are Reproductive Health Rights Guaranteed by International Law?

D.51 The right to health, including reproductive health, is central to human rights protection and promotion.[66] The Beijing Platform for Action, arising from the United Nations Fourth World Conference on Women held in 1995, observed that the 'ability of women to control their own fertility forms an important basis for the enjoyment of other rights'.[67]

D.52 The United Nations Committee on Economic, Social and Cultural Rights has issued General Comments[68] on access to reproductive health services.[69] To fulfil the obligations, health services need to be available, accessible, acceptable, and adequate. Cook and Dickens suggest that laws and policies that unreasonably restrict safe abortion services would be unlikely to meet this standard.[70]

RIGHTS UNDER CEDAW

D.53 Australia ratified CEDAW in 1983. CEDAW is the only human rights treaty which specifically affirms the reproductive rights of women. In addition to its general non-discrimination provisions, several articles relate directly to reproductive rights. These include:

- Article 5, which examines maternity as a social function[71]
- Article 12(1) regarding elimination of discrimination against women in health care, including equality in access to health services relating to family planning
- Article 14, which contains the right to adequate health services, including family planning for rural women
- Article 16(1)(e), which affirms on the basis of equality with men 'the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'.

43 *In the Marriage of F* (1989) 13 Fam LR 189, 194 (Lindenmayer J).

44 [1993] QB 204.

45 [1979] 1 QB 276. A similar approach was taken in *Re F (in utero)* [1988] 2 All ER 193, where the English Court of Appeal held that it had no jurisdiction to make an unborn child a ward of the court because of the born alive rule. Cf with Heath J in *Re an Unborn Child* [2003] 1 NZLR 115, where the court held it could apply its ***parens patriae*** jurisdiction to a child in utero. The court held that having regard to the CRC and other provisions of New Zealand law which support the interests of the unborn child, the term 'child' in s 2(1) of the Guardianship Act could include an unborn child.

46 *Paton v United Kingdom* (1980) 3 EHRR 408, 415.

47 The court noted that the question of when the right to life begins comes within the margin of appreciation that States enjoy: *Vo v France* 53924/00 ECHR 326 (8 July 2004).

48 Duxbury and Ward (2000) above n 8, 14.

49 The CRPWD, although not yet ratified by Australia, contains specific protections for individual autonomy for women with disabilities. It does not establish any additional rights, but aims to ensure people with disabilities enjoy human rights on an equal basis with others: Convention on the Rights of Persons with Disabilities, United Nations <www.un.org/disabilities> at 1 November 2007.

50 People are entitled to the rights and freedoms within the covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

51 This broad norm extends beyond the treaty. Thus, all people have a right to equality before the law in all matters, not just the specific rights contained in the ICCPR.

52 Even in jurisdictions where abortion laws have been liberalised (eg, Canada) there remain significant barriers to accessing services.

53 Some people argue this age-based, non-discrimination principle applies to gestational status, thus conferring rights upon the fetus; however, in international and Australian law the fetus has no substantive rights until birth.

54 Cook and Dickens (2003) above n 18, 41.

55 This definition has also been adopted by the Human Rights Committee, see Human Rights Committee General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 146 (2003).

56 For discussion see Duxbury and Ward (2000) above n 8, 16.

57 Eg, vasectomy.

58 Unless they were charged as an accessory to the abortion, procuring, or performing an abortion.

59 Submission 383 (Castan Centre for Human Rights Law).

60 Rebecca Cook and Susannah Howard, 'Accommodating Women's Differences Under the Women's Anti-Discrimination Convention' (2007) 56 *Emory Law Journal* 1039, 1045.

61 Ibid 1045.

62 Cook and Dickens (2003) above n 18, 5.

63 Submission 501 (Liberty Victoria).

64 Thus, the right to equality is not seen as an absolute right to have a baby or an abortion, but rather the right to have those decisions respected: Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (2001) 9.

65 The UDHR also refers to health. Article 25.1 affirms that: 'Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services'.

66 Cook and Dickens (2003) above n 18, 21.

67 The United Nations Fourth World Conference on Women, Beijing, China, September 1995 Action for Equality, Development and Peace, Platform for Action; Part C Women and Health A/CONF.177/20, para 97 (1995): <www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en> at 13 February 2008.

68 A General Comment is an authoritative summary of the views of a human rights treaty body. General Comments amplify the meaning of the right and give guidance to State parties as to the implementation of the right.

69 Eg, the right to health specifically includes the 'right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference'. It also sets out the obligation to implement policies 'to provide access to a full range of high quality and affordable health care, including sexual and reproductive services': Committee on Economic, Social and Cultural Rights, General Comment No 14: The right to the highest attainable standard of health, 13th sess 1995, UN Doc E/1996/22 at 20 (1996).

70 'A law or policy requiring unnecessarily high qualifications for health service providers will limit the availability of safe abortion services. Such policies may be proposed in good faith to ensure excellence in health care. However, it is poor public health policy, and may be a human rights violation, to jeopardise health care by requiring standards that prevent delivery of medically indicated services': Cook and Dickens (2003) above n 18, 16.

71 That is, the role of motherhood and the impact it has upon women.

Appendix D
Human Rights and Abortion

D.54 CEDAW obliges governments to achieve formal and substantive equality through elimination of **direct** and **indirect discrimination**. The particular needs of women with disabilities are also addressed.[72]

D.55 The CEDAW Committee has made **general recommendations** regarding reproductive rights. These include recommendations that State parties take measures to prevent coercion in reproduction and to ensure women are not forced to seek unsafe abortion because of lack of appropriate services.[73] Central to the reproductive rights enshrined in CEDAW is the corresponding right of a pregnant woman to choose to continue with a pregnancy.[74]

D.56 The committee has explained the reasoning behind women's autonomy regarding the numbers and spacing of children. It requires 'all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice …'[75]

D.57 General Recommendation 24 explains in some detail the positive obligation to ensure, on a basis of equality between men and women, access to reproductive health care services.[76] This includes refraining from criminalising medical procedures only needed by women.[77]

D.58 The CEDAW Committee has criticised legal systems where abortion is subject to spousal, parent, or partner approval.[78] Governments may risk noncompliance when abortion provision is subject to excessively burdensome requirements.[79]

RIGHT TO PRIVACY

D.59 Privacy rights arise from traditional concerns about State interference with individual liberty. 'Any interference with privacy must be proportional to the end sought and be necessary in the circumstance of any given case.'[80]

International Instruments

D.60 Article 17 of the ICCPR protects the right to privacy. While Article 17 has not been interpreted specifically on the issue of abortion, a similar right contained in Article 8 of the European convention has been subject to judicial consideration.[81] In the most recent case, *Tysiaogonc v Poland*,[82] the European Court of Human Rights found a breach of Article 8 when a woman was denied an abortion within the lawful grounds for abortion in Poland. The European Commission previously held that not every restriction on abortion constitutes an interference with the right.[83]

D.61 The UN Human Rights Committee has confirmed that privacy includes autonomy over one's body.[84] The committee has specifically identified requirements for compulsory reporting of identifiable abortion information to authorities by medical practitioners as breaches of privacy.[85]

D.62 Privacy includes freedom from interference and a positive right.[86] Thus, 'the law must promote rather than hinder the right to privacy of a woman, including her right to a realm of protection in respect of her body'.[87]

D.63 The central question is, therefore, whether and when it is appropriate for the State to intervene in the private decision of a woman to have an abortion.

D.64 Some people argue that the State has no role beyond regulating the health system to ensure medical standards. This view assumes that reproductive decisions are best made by 'the person whose conscience is most directly connected to the choice and who has the greatest stake in it'.[88]

D.65 A majority of the people participating in this reference who were in favour of decriminalisation took this position. It was summed up by Reproductive Choice Australia in its submission:

> *[G]ranting women the right to decide in law does not deny that abortion is one of a number of medical procedures that also have moral implications. Instead it simply rejects the claim that anyone other than the woman … (is) better placed than the woman herself to negotiate the moral aspects of the decision well.*

D.66 Another view is that the legitimate role of government is to set the standards of justification 'that a woman is expected to interpret and define for herself as an exercise of personal responsibility'[89] and beyond which it is reasonable for the law to intervene. This approach has loomed large in the US.[90]

D.67 Others argue that the State has a clear role in setting moral standards, protecting the fetus, and regulating women's decisions by prohibiting abortion because the right to privacy is a qualified right.[91]

D.68 Australian courts, have suggested there are limits to which the law should intrude upon a woman's autonomy in pursuit of moral and religious aims.[92]

RIGHT TO LIBERTY AND SECURITY OF THE PERSON

International Instruments

D.69 Everyone has the right to liberty and security of person under Article 9(1) of the ICCPR. Generally, liberty has been treated as freedom from physical restraint, such as detention, while security of the person has been connected with freedom from interference with bodily integrity.[93]

International Cases

D.70 Article 9's equivalent in the Canadian *Charter of Rights and Freedoms* has been found to be contravened by criminal laws restricting access to abortion. These laws contained requirements of designated facilities and therapeutic committees to approve abortion.[94]

D.71 In *Morgentaler*[95] the Supreme Court of Canada struck down such provisions for failing to conform with principles of fundamental justice. Chief Justice Dickson stated:

> *[F]orcing a woman, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person.*[96]

D.72 In her concurring decision, Justice Wilson explicitly stated that requiring a woman to obtain a certificate from the therapeutic abortion committee violated the woman's right to liberty by 'deciding for her something that she has the right to decide for herself'.[97] She went on to state that 'liberty does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to protect them'.[98]

D.73 The case of *Morgentaler* has not been directly followed in any other jurisdiction but the Columbian Constitutional Court recently stated: '[A] woman's right to dignity prohibits her treatment as a mere instrument for reproduction. Her consent is essential to the fundamental life changing decision of giving birth to another person'.[99]

72 'States parties should take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity.': Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, 20th sess,1999, UN Doc A/54/38 at 5 (1999).

73 Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women, 11th sess 1992, UN Doc A/47/38 at 1 (1993).

74 These standards also link to other CEDAW articles protecting the rights of women who face particular disadvantage. Eg, art 14(2)(b), which requires State parties to ensure access for rural women to adequate health care facilities, including information, counselling and services in family planning.

75 Committee on the Elimination of Discrimination against Women, General recommendation 24: Women and Health, 20th sess,1999, UN Doc A/54/38 at 5 (1999).

76 This duty includes the obligation to respect, protect, and fulfil women's rights to health care and to ensure that law, policy and executive action comply with this duty.

77 The committee specifically mentions 'acceptable' services as those which are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives': Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, 20th sess, 1999, UN Doc A/54/38 at 5 (1999).

78 General Recommendation 21: Equality in marriage and family relations, 13th sess 1992, UN Doc A/49/38 at 1 (1994); Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, 20th sess,1999, UN Doc A/54/38 at 5 (1999).

79 This may include mandating 'bureaucratic approval procedures, such as medical specialist therapeutic abortion committees'. Cook and Howard (2007) above n 60, 1055.

80 *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992 (4 April 1994).

81 *European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221, art 8 (entered into force 3 June 1952).

82 *Tysiaogonc v Poland* (2007) 45 EHRR 42 ECHR.

83 *Bruggemann and Scheuten v Federal Republic of Germany* (1981) 3 EHRR 244.

84 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases and Commentary* (2nd ed, 2004) 480.

85 Human Rights Committee, General Comment 28, Article 3: Equality of Rights between Men and Women, 68th sess, 2000, UN Doc CCPR/C/21/Rev 1/Add 10 (2000).

86 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17(1) (entered into force 23 March 1976).

87 Duxbury and Ward (2000) above n 8, 22.

88 Ronald Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (1995) 15.

89 Ibid 64.

90 US cases were discussed in Chapter 2.

91 Submission 100 (Rita Joseph).

92 See Gibbs CJ in *Attorney-General (Qld) (ex rel Kerr) v T* (1983) 46 ALR 275, 277: 'There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be overstepped if an injunction were to be granted in the present case'. This case dealt with an application for an injunction restraining a woman from having an abortion. The injunction was refused.

93 Lord Lester and David Pannick (eds) *Human Rights Law and Practice* (2nd ed, 2004) 528.

94 Canadian Charter of Rights and Freedoms s 7.

95 *Morgentaler et al* [1988] 1 SCR 30.

96 *R v Morgentaler et al* [1988] 1 SCR 30, [22] (Dickson CJ).

97 *R v Morgentaler, et al* [1988] 1 SCR 30, [241] (Wilson J).

98 *R V Morgentaler, et al* [1988] 1 SCR 30, [229] (Wilson J).

99 Sentecia C-355/06, Corte Constitucional (10 May 2006) (Columb).

Appendix D
Human Rights and Abortion

Australian Law

D.74 The principle of autonomy is a basic feature of modern health law.[100] The concept of bodily integrity is central to self-determination.[101] This concerns a 'person's interest and right, derived from the value of autonomy, in reflectively making significant personal choices'.[102]

D.75 While Australian courts have not dealt directly with *Morgentaler*, there have been several cases where paternal applications for an injunction to prevent a proposed abortion have been refused as an unreasonable interference with the woman's 'liberty of action'. Thus, in Australian law, a husband or partner cannot legally stop a woman from proceeding with an abortion.[103]

FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION

D.76 This freedom is recognised in the UDHR and the ICCPR. It is 'far-reaching and profound',[104] encompassing freedom of thought on all matters. The right includes a freedom to hold a belief and to manifest that belief in public and in private.[105] It is recognised to include both freedom of, and freedom from, religion.

D.77 This freedom arises when medical practitioners refuse to perform an abortion due to religious or moral beliefs. It is expressed in medical ethics codes but with some limitations, for example life saving interventions, and a requirement that alternative care be available.[106]

D.78 The CEDAW Committee has recommended: 'if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers'.[107]

D.79 Some health care organisations make a claim for protection of conscientious objection to providing abortion, or other reproductive health services, for the organisation as a whole. This argument was strongly put in submissions from the Ambrose Centre for Religious Liberty, along with several Catholic organisations and individual submissions,[108] but human rights are generally regarded as residing in individuals rather than organisations.[109]

D.80 We consider conscience clauses in more detail in Chapter 8.

FREEDOM OF EXPRESSION

D.81 This well-known human right is contained in Article 19 of the ICCPR and other major human rights instruments. It includes the right to receive information, including medical information.[110]

D.82 A detailed review of freedom of expression is not possible here; however the freedom does touch on abortion law in two ways. First, some people claim this freedom and an associated right to freedom of conscience in the context of protesting outside abortion clinics. This was discussed in detail in Chapter 8.

D.83 Freedom of expression also relates to abortion in the context of women having access to information about abortion services.[111] This in turn relates to the operation of any proposed conscience clause and the obligation to make an effective referral. This was discussed in Chapter 8.

D.84 Freedom of expression is usually read widely by the courts. In a recent United Kingdom case, the High Court held that a woman who sent pamphlets containing images of aborted 21-week old fetuses to three pharmacists selling the morning-after pill could not manifest her religious beliefs (or freedom of expression) over the rights of people who did not wish to receive the material.[112]

FREEDOM FROM CRUEL AND DEGRADING TREATMENT

D.85 Various human rights instruments contain a right to freedom from cruel and degrading treatment.[113] It is a **non-derogating right**, also protected by **customary international law**.

D.86 In the European case of *H v Norway*[114] the applicant argued that during an abortion no measures were taken to prevent pain to a fetus of 14 weeks gestation, amounting to a violation of the (fetal) right to freedom from cruel and degrading treatment. The European Commission rejected this argument on the basis that there was no material evidence of fetal pain upon which to base it.

D.87 The Human Rights Committee considered the issue in 2003.[115] A Peruvian woman argued that her freedom from cruel and degrading treatment had been violated when she was refused an abortion after discovering that the fetus had anencephaly.[116] The committee found that the Peruvian prohibition on abortion in these circumstances did amount to foreseeable, cruel and degrading treatment.[117]

SPECIAL PROTECTION FOR MOTHERS BEFORE AND AFTER CHILDBIRTH

D.88 Article 10 of the CESCR provides that special protection should be accorded to mothers during a reasonable period before and after childbirth. This includes practical assistance such as paid maternity leave and adequate income support through the social security system. This article is aimed at protecting the mother, rather than affording specific rights to the fetus.

RIGHT TO FOUND A FAMILY

D.89 Article 23 (2) of the ICCPR (the right to marry and found a family) has been interpreted by the Human Rights Committee to prohibit coercive methods of family planning.[118] There is a similar provision in the European Convention.[119] However, in European law 'it is firmly established that Article 12 does not create an absolute right to procreate descendents'.[120] This suggests that a husband or partner cannot force a woman to continue with a pregnancy.

CONCLUSIONS

D.90 We have discussed how human rights law treats the issue of abortion. We have examined the various treaties, general comments of UN committees and leading cases to identify what impact, if any, international law has on domestic abortion laws.

D.91 In summary, the Charter of Human Rights and Responsibilities has no specific application to the law of abortion or child destruction in Victoria. Charter rights cannot be relied upon in legal cases about abortion in Victoria.

D.92 International human rights law does not preclude abortion, and does not establish a right to life of the fetus.[121] Nor does it guarantee a right to provision of abortion services beyond the general right to health which can be realised progressively.[122]

100 Eg, the right to refuse treatment.

101 Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal–Fetal Conflict* (2002) 15.

102 Ibid13.

103 See *In the Marriage of F* (1989) 13 Fam LR 189; *Attorney General (ex rel Kerr) v T (Qld)* [1983] 13 Fam LR 189.

104 Human Rights Committee, General Comment No 22, Article 18: The right to freedom of thought, conscience and religion, 48th sess, 1993, UN Doc CCPR/C/21/Rev 1/Add 4 (1993).

105 This right to manifest one's beliefs in public can only be limited by law and insofar as it is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others: Article 18 (3) ICCPR.

106 See, eg, Australian Medical Association, *Code of Ethics* (May 2003).

107 Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, 20th sess,1999, UN Doc A/54/38 at 5 (1999).

108 Submission 444 (Ambrose Centre for Religious Liberty).

109 Cook and Dickens (2003) above n 18, 50.

110 Article 10(h) CEDAW states that all women shall have 'access to specific educational information to help ensure the health and well-being of families including information and advice on family planning'.

111 *Open Door and Dublin Well Woman v Ireland* [1992] ECHR 68.

112 *Connelly v Director of Public Prosecutions* [2007] EWHC 237 (Admin).

113 See, eg, Article 7 ICCPR; Article 3 European Convention.

114 *H v Norway* Application No 17004/90 (1992).

115 *Karen Noelia Llantoy Huamán v Peru*, Communication No 1153/2003, UN Doc ICCPR/C/85/D/1153/2003 (2005). Case cited in submission 383 (Castan Centre for Human Rights Law).

116 The 17-year-old woman gave birth to a child with anencephaly, ie, a condition where part or all of the brain is missing. The child survived for four days, during which the mother was required to breastfeed her. It was alleged in the complaint that the distress of being obliged to continue with the pregnancy, of witnessing the baby's disability, and knowing the child would not survive precipitated the mother's depression.

117 The cruel and degrading treatment was also raised in argument in *Mortengaler* but was not considered by the majority decision. Justice McIntyre specifically rejected the argument in his dissenting judgment.

118 Human Rights Committee General 19, Article 23, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 39th sess 1990, UN Doc HRI/GEN/1/Rev 6 at 149 (2003).

119 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 12 (entered into force 3 June 1952).

120 David Hart, *The Impact of Human Rights on Medical Law* (21 October 2002) Human Rights Update <www.humanrights.org.uk/686> at 10 October 2007.

121 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5, Non Fatal Offences Against the Person*, Discussion Paper (1996) 160.

122 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec 1966, 993 UNTS 3, art 2(1) (entered into force 3 January 1976).

Appendix E
Consultations

NO	PARTICIPANTS	DATE (2007)
1	Fertility Control Clinic	1 October
2	Endeavour Forum Inc.	2 October
3	Association for the Legal Right to Abortion	3 October
4	Presbyterian Church of Victoria	4 October
5	Australian Christian Lobby	4 October
6	Women's Health Victoria	4 October
7	Right to Life Australia	5 October
8	Choices Clinic—Royal Women's Hospital	8 October
9	Croydon Day Surgery	9 October
10	Health Services Commissioner	9 October
11	Family Planning Victoria	10 October
12	Reproductive Choice Australia	10 October
13	Medical Indemnity Protection Society	11 October
14	Marie Stopes International	11 October
15	Dr Ian Freckleton	11 October
16	Women's Health Goulburn North East Region	12 October
17	Victorian Women's Trust	15 October
18	Dr Nicholas Tonti-Filippini	15 October
19	Royal Women's Hospital	16 October
20	Australian Family Association Victoria	16 October
21	Women's Electoral Lobby	16 October
22	Associate Professor Kerry Petersen	17 October
23	Victorian Women With Disabilities Network	18 October
24	Fetal Management Unit—Royal Women's Hospital	18 October
25	Respect Life Office, Catholic Archdiocese of Melbourne	18 October
26	Professor David Healy	19 October
27	Associate Professor Ian Pettigrew	22 October
28	Anglican Diocese of Melbourne	22 October
29	Youth Affairs Council of Victoria	22 October
30	Australian Medical Association Victoria	22 October
31	Royal Australian and New Zealand College of Obstetricians and Gynaecologists fellows	23 October
32	Associate Professor Lynn Gillam	24 October
33	Dr Lachlan de Crespigny	30 October
34	Jewish Community Council of Victoria and Rabbi Aviva Kipen	7 November
35	Women's Clinic on Richmond Hill	12 November
36	Jewish Community Council of Victoria and Rabbi Feitel Levin	13 November

Appendix F
Submissions

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
1	Fertility Control Clinic	22 August 2007
2	Mr David Kumnick	06 September 2007
3	Ms Margaret Ryan	24 September 2007
4	Ms Mary Doohan	02 October 2007
5	Mr Peter Robertson	02 October 2007
6	Endeavour Forum Inc.	02 October 2007
7	Anonymous	04 October 2007
8	Presbyterian Church of Victoria	04 October 2007
9	Mr Charles Francis AM, QC, RFD	05 October 2007
10	Mrs CD Crosbie Goold	05 October 2007
11	Ms Kate A Oldaker	09 October 2007
12	Mr Paul Johnson	09 October 2007
13	Mrs P Oldham	10 October 2007
14	Anonymous	10 October 2007
15	Dr Nicholas Tonti-Filippini	11 October 2007
16	Mr Mario Farrugia	12 October 2007
17	Ms Liz Olle	12 October 2007
18	Ms Dalrene Pompeus	12 October 2007
19	Mr Maurice White	15 October 2007
20	Ms Natasha Hamilton	15 October 2007
21	Mr Tony Howe	16 October 2007
22	Mr Michael W Houlihan	16 October 2007
23	Mary Smith	17 October 2007
24	Humanist Society Of Victoria Inc.	17 October 2007
25	Mr and Mrs Sinclair	23 October 2007
26	Coalition for the Defence of Human Life	23 October 2007
27	Mr Frank Gashumba	23 October 2007
28	Mr John Carter	23 October 2008
29	Ms Zoe Mathews	23 October 2007
30	Mr Paul Manser	23 October 2007
31	Ms Anne Webster	23 October 2007
32	Ms Jo-An M Partridge	23 October 2007
33	Dr D Ciarnette	23 October 2007
34	Mr Matthew Soo	23 October 2007
35	Mr Dennis and Mrs Cheryl Harold	23 October 2007
36	Ms Piera Cerantola	23 October 2007
37	Mr David and Mrs Ruth Cummings	23 October 2007
38	Festival of Light Australia	23 October 2007
39	Mr Paul Smithers	23 October 2007
40	Ms Gabrielle Cranny	23 October 2007
41	Mr Kevin McCormack	23 October 2007
42	EL Hyde	24 October 2007
43	Confidential	24 October 2007
44	Victims of Abortion Trauma Counselling & Info Services	24 October 2007
45	Confidential	25 October 2007

Appendix F
Submissions

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
46	Anonymous	25 October 2007
47	Mrs Joan Rigoni	25 October 2007
48	Anonymous	25 October 2007
49	Anonymous	25 October 2007
50	Anonymous	25 October 2007
51	Anonymous	25 October 2007
52	Anonymous	25 October 2007
53	Mr and Mrs Paton	25 October 2007
54	Mr and Mrs Scully	25 October 2007
55	Miss Maroa Shelton	25 October 2007
56	Ms Mary Fitzgibbon	26 October 2007
57	Mr Brian Tierney	26 October 2007
58	Mr and Mrs D'Souza	26 October 2007
59	Ms Karena Calpakam	26 October 2007
60	Mr D McMahon	26 October 2007
61	JD Reazy	26 October 2007
62	DC Coyne	26 October 2007
63	Fr S Arokiyadoss	26 October 2007
64	Ms Dorothy Moore	26 October 2007
65	Rev Dr Robert C Weatherlake	26 October 2007
66	Mr Greg Byrne	26 October 2007
67	Denis J Hart Archbishop of Melbourne—Catholic Archdiocese of Melbourne	26 October 2007
68	Les and Bev Jones	26 October 2007
69	Mr and Mrs Webber	26 October 2007
70	Mr and Mrs Pryor	26 October 2007
71	Unknown	26 October 2007
72	Mr and Mrs Calilhanna	26 October 2007
73	Mr Leo D Mahoney	26 October 2007
74	Mr Mark Simmonds	28 October 2007
75	Ms Jodie Simmonds	28 October 2007
76	Ms Tracey Lamprecht	29 October 2007
77	AH Griffiths FCPA	29 October 2007
78	Mornington Social Justice Group	29 October 2007
79	Confidential	29 October 2007
80	Hon Dr Bob Such MP	29 October 2007
81	Fr Joachim O'Brien OFM	29 October 2007
82	Women's Forum Australia	29 October 2007
83	Mr George Simpson	30 October 2007
84	Ms Rosemary Brown	30 October 2007
85	Mrs C Coleman	30 October 2007
86	Mrs Maria McCarthy	30 October 2007
87	Ms Carmel Collis	30 October 2007
88	Mr Paul Hayhoe	30 October 2007
89	Mrs Patricia	30 October 2007
90	Mrs Corrina Broomfield	30 October 2007

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
91	Mrs A Denbrok	30 October 2007
92	Mrs Catherina A Schelling	30 October 2007
93	Leo Morrissey and Moya Morrissey	30 October 2007
94	Women's Health Goulburn North East	30 October 2007
95	Ms Hilarie Roseman	31 October 2007
96	Ms Catherine Ludeman	31 October 2007
97	Mr Des O'Callaghan	31 October 2007
98	Mrs Marcia Wilkinson	31 October 2007
99	Anonymous	08 November 2007
100	Ms Rita M Joseph	01 November 2007
101	Mr James Hanrahan	01 November 2007
102	Mr Tom Scully	01 November 2007
103	Ms Florence McMahon	01 November 2007
104	Ms Margaret Butts	01 November 2007
105	Mrs Mary Harkin	01 November 2007
106	Mr Nicholas Joseph Sorenson	01 November 2007
107	Ms Joan McGrath	01 November 2007
108	VW Hickey	01 November 2007
109	Mrs Eileen V Hanrahan	01 November 2007
110	Ms Maureen Jongebloed	01 November 2007
111	Ms Margaret Noonan	01 November 2007
112	Ms Val Heltham	02 November 2007
113	Desmond and Josephine Kenneally	01 November 2007
114	Mr John and Ms Cheryl Hackett	02 November 2007
115	Mr Kevin Shannahan	02 November 2007
116	Canterbury Christadelphian Ecclesia	05 November 2007
117	Mr John Purcell	05 November 2007
118	Anonymous	05 November 2007
119	Ms Rebecca Carey	05 November 2007
120	Anonymous	05 November 2007
121	Mr Barry and Mrs Helen Lauritz	05 November 2007
122	Mrs Sandra Johnson	05 November 2007
123	Mr Richard Earle	03 November 2007
124	Catholic Women's League of Victoria Inc.	05 November 2007
125	Fr John Quinn	05 November 2007
126	Ashley Hughes	05 November 2007
127	Mrs Jackie Vandeligt	05 November 2007
128	Confidential	05 November 2007
129	Mr John Box	05 November 2007
130	Mrs Mary Flanagan	05 November 2007
131	Ms Mary McCormack	05 November 2007
132	Rev Stan and Mrs Katherine Fishley	02 November 2007
133	Mr Jerome Brown	02 November 2007
134	Women's Health West	02 November 2007
135	Dr Pieter Mourik	02 November 2007

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Submissions

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
136	EMILY's List Australia	02 November 2007
137	Mr Ronald Berchy	03 November 2007
138	Anonymous	04 November 2007
139	Mr Michael and Mrs Josephine Renehan	04 November 2007
140	Ms Michelle White	04 November 2007
141	Medicine with Morality	04 November 2007
142	M O'Rielly	05 November 2007
143	Ms Allana Moorse	02 November 2007
144	Mr Peter Olney	31 October 2007
145	Mr Roger McWhinney	31 October 2007
146	Ms Maria Anna Taylor	30 October 2007
147	Dr Leslie Cannold	30 October 2007
148	Mary-Anne Yang	02 November 2007
149	Michael Keane and Barbara Keane	03 November 2007
150	Frances B Ritchie	03 November 2007
151	Catholic Women's League of Victoria and Wagga Wagga, Social Questions Committee	05 November 2007
152	Professor Rebecca Albury	05 November 2007
153	Mr James Ward	05 November 2007
154	Ms Maryse Usher	05 November 2007
155	Mr David J Perrin	05 November 2007
156	Anonymous	05 November 2007
157	Mr Doug Felton	05 November 2007
158	Mr Matt Ritchie	06 November 2007
159	Ms Annette McDonald	06 November 2007
160	Mr Peter McDonald	06 November 2007
161	R Hill	07 November 2007
162	Mr Michael Casanova	06 November 2007
163	Ms Jennifer McDonald	06 November 2007
164	Ms Clare Power	06 November 2007
165	Mr Michael and Mrs Joan Cutajar	06 November 2007
166	Mr Peter Baker	07 November 2007
167	Mr John van Heuzen	07 November 2007
168	Pastor Noel Uebergang and Mrs Ros Uebergang	07 November 2007
169	Ms Diane Tay	07 November 2007
170	Rev Frank C Lees	07 November 2007
171	Ms Margaret Green	07 November 2007
172	Ms Gillian Taylor	07 November 2007
173	Mr Craig Manners	07 November 2007
174	Ms Erundina Fernandez	07 November 2007
175	Anonymous	07 November 2007
176	Ms Erica Grace	07 November 2007
177	Ms Christine Beveridge	07 November 2007
178	Anonymous	07 November 2007
179	Mr David Bernard	07 November 2007
180	Mr Jeremy Peet	07 November 2007

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
181	Mr Peter Kavanagh	07 November 2007
182	Anonymous	07 November 2007
183	Australian Education Union Victoria	07 November 2007
184	Mr Ron Edmonds	07 November 2007
185	Associate Professor Kerry Petersen	07 November 2007
186	Mr Christian Duin	07 November 2007
187	Mr John H Cooney	07 November 2007
188	Mr David Forster	07 November 2007
189	Dr Paul Egan	07 November 2007
190	Dr Peter McCleave	07 November 2007
191	Mr Anthony G Wright	07 November 2007
192	Ms Tess Natoli	07 November 2007
193	Confidential	07 November 2007
194	Ms Katie Lindorff	07 November 2007
195	Mr Simon Millie	07 November 2007
196	Confidential	07 November 2007
197	Professor Caroline deCosta	07 November 2007
198	Mr Patrick Sibly	07 November 2007
199	Anonymous	07 November 2007
200	Mr Kevin Guinane	07 November 2007
201	Parishoners of St Kevin's Templestowe Lower	07 November 2007
202	Mr James Jackson	07 November 2007
203	Anonymous	07 November 2007
204	Mrs Mary Jenkins	07 November 2007
205	Mrs Margaret Morrison	07 November 2007
206	Pat and Betty Bourke	07 November 2007
207	Mrs Catherine Ley	07 November 2007
208	Mrs MA van Dyk	07 November 2007
209	Mrs ML Rowlinson	07 November 2007
210	Mr Eric Neill Harvey	07 November 2007
211	Mrs Leanne Casanova	07 November 2007
212	Mrs Joan Drago	07 November 2007
213	Ms Josephine Kelly	07 November 2007
214	Ms Elizabeth McNamara	07 November 2007
215	Elwyn Sheppard	07 November 2007
216	Confidential	07 November 2007
217	Parish of St Fidelis	07 November 2007
218	Mr John A Gill	07 November 2007
219	Mr James Duggan	07 November 2007
220	Mr Michael Smith	07 November 2007
221	Anonymous	07 November 2007
222	Mrs Ann Fowles	07 November 2007
223	Mrs Connie Mirabella	07 November 2007
224	Ms Kathleen Richards	07 November 2007
225	Tangambalanga Catholic Women's League	07 November 2007

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NO	SUBMITTER / ORGANISATION	DATE RECEIVED
226	Women's Health Association of Victoria	07 November 2007
227	Reproductive Choice Australia	07 November 2007
228	Mr John S Parker	08 November 2007
229	Mr Bruce Bennett	08 November 2007
230	Mr Richard Grant	09 November 2007
231	Public Health Association of Australia Women's Health Special Interest Group	09 November 2007
232	Mrs Lucia Morham	09 November 2007
233	Mr Brendan Griffin	09 November 2007
234	Anonymous	09 November 2007
235	Youthlaw	09 November 2007
236	Mr Peter McGlade	09 November 2007
237	Ms Patricia M Guinan	09 November 2007
238	Anonymous	09 November 2007
239	Mrs Patricia Patton	09 November 2007
240	DA Cook, ET Cook, JM Cook	09 November 2007
241	Mr Phil Brabin and Mrs Susan Brabin	09 November 2007
242	Mr James Stiffle and Ms Dolly Stiffle	09 November 2007
243	Anonymous	09 November 2007
244	Ms Joan McKenna	09 November 2007
245	Ms Kath Andraczke	09 November 2007
246	Mr John Abraham	09 November 2007
247	Ms Kathleen M Chosich	09 November 2007
248	Pregnancy Counselling Australia	09 November 2007
249	Ms Anges-Mary Hanna	9 November 2007
250	Mr Peter Beriman	09 November 2007
251	Ms Anne B Buchan	09 November 2007
252	National Civic Council	09 November 2007
253	Mrs Mary Sayers	09 November 2007
254	Anonymous	09 November 2007
255	Waverley Catholic Deanery	09 November 2007
256	Redemptorist Community	09 November 2007
257	Mr and Mrs Birch	09 November 2007
258	Confidential	09 November 2007
259	Mr Michael Anstis	09 November 2007
260	Anonymous	09 November 2007
261	Gippsland Women's Health Service	09 November 2007
262	Victorian Women Lawyers	09 November 2007
263	Antony O'Brien	09 November 2007
264	Mr Ray Rus	09 November 2007
265	Dr JN Santamaria	09 November 2007
266	Mr Alan A Hoysted	09 November 2007
267	Anonymous	09 November 2007
268	Peter Rice for Anglicare South East	09 November 2007
269	Ms Stef Puszka	09 November 2007
270	Anonymous	09 November 2007

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
271	Anonymous	09 November 2007
272	Ms Desmond J Kelly	09 November 2007
273	Law Institute of Victoria	09 November 2007
274	Mr Justin Tan	09 November 2007
275	Ms Susan Juhas	09 November 2007
276	Family Council of Victoria	09 November 2007
277	Mrs Alison Stanley	09 November 2007
278	Mr Nathan Keen	09 November 2007
279	Ms Elyse Brown	09 November 2007
280	Mrs Fiona Roberts	09 November 2007
281	Ms Rhiannon Platt	09 November 2007
282	Women's Health in the North	09 November 2007
283	Mr Peter Phillips	09 November 2007
284	Fr John O'Connor	09 November 2007
285	Anonymous	09 November 2007
286	Anonymous	09 November 2007
287	Mr Peter Coventry	09 November 2007
288	Anonymous	09 November 2007
289	Victorian Centres Against Sexual Assault Forum	09 November 2007
290	Professor Loane Skene	09 November 2007
291	Ms Annaliese Wursthorn	09 November 2007
292	Mr Timothy Ginnane SC	09 November 2007
293	Ms Marita Gill	09 November 2007
294	Anonymous	09 November 2007
295	K and A Huggett	09 November 2007
296	AX Lyons	09 November 2007
297	Mr David Millie	09 November 2007
298	Anonymous	09 November 2007
299	Caroline Chisholm Centre for Heath Ethics	09 November 2007
300	Mr Bryan Roberts	09 November 2007
301	Spero Katos	09 November 2007
302	Mr John McClelland	09 November 2007
303	Fr Brendan Lane	09 November 2007
304	Mr Alexander White	09 November 2007
305	Mr K and Mrs H Harwood	09 November 2007
306	Mrs Atala Ladd	09 November 2007
307	Mr David Briggs	09 November 2007
308	Anonymous	09 November 2007
309	Ms Margaret Rush	09 November 2007
310	Mr Daniel Briggs	09 November 2007
311	Mr Matthew Briggs	09 November 2007
312	Mr Ivor Briggs	09 November 2007
313	Ms Naomi Briggs	09 November 2007
314	South West Community Legal Centre	09 November 2007
315	Confidential	09 November 2007

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Submissions

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
316	Westgate Catholic Deanery Social Justice Group	09 November 2007
317	Confidential	09 November 2007
318	Mrs Frances Dunlop	09 November 2007
319	Ms Tanya Mammone	09 November 2007
320	Ms Janice Adams	09 November 2007
321	Confidential	09 November 2007
322	Confidential	09 November 2007
323	Confidential	09 November 2007
324	Mr Rodney Schneider	09 November 2007
325	Anonymous	09 November 2007
326	Dr Ann Robertson	09 November 2007
327	Children by Choice	09 November 2007
328	Confidential	09 November 2007
329	Family Life International (Aust)	09 November 2007
330	Ms Maureen Jones	09 November 2007
331	Mr Matthew Grinter	09 November 2007
332	Pat Healy	09 November 2007
333	Ms Pauline Stoll	09 November 2007
334	Mr Anthony Krohn	09 November 2007
335	Mr Robert and Mrs June Mears	09 November 2007
336	World Federation of Doctors who Respect Human Life	09 November 2007
337	Confidential	09 November 2007
338	Dr Sally Cockburn	09 November 2007
339	Dr Lachlan de Crespigny	09 November 2007
340	ALP Brunswick	08 November 2007
341	Keith and Shirley Jeans	09 November 2007
342	Mr Graham Beasy	09 November 2007
343	Mrs Therese Parker	07 November 2007
344	Rev Dr Peter Barnes	08 November 2007
345	Mr David and Mrs Rebecca Field	07 November 2007
346	Ms Lynn Tan	07 November 2007
347	Mr Ivor Jenkins	08 November 2007
348	Anonymous	08 November 2007
349	Mr Michael Ryan	08 November 2007
350	Ms Joanne Switserloot	08 November 2007
351	Mr John Brancatisano and Miss Rosa Brancatisano	08 November 2007
352	Ms Patrica Costin	08 November 2007
353	Mrs Cathy Smit	08 November 2007
354	Radical Women	08 November 2007
355	Sacred Heart Newport and St Margaret Mary's Spotswood	08 November 2007
356	Dr Peter Ferwerda	08 November 2007
357	Anonymous	08 November 2007
358	Mrs Ann Hancock	08 November 2007
359	Mrs Anita M Toner	08 November 2007
360	Mr John F Hennessy	08 November 2007

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
361	Anonymous	08 November 2007
362	Mrs Rosaria M Righele	08 November 2007
363	Anonymous	08 November 2007
364	Ms Moya O'Keefe	08 November 2007
365	Echuca Branch—Catholic Women's League of Victoria & Wagga Wagga	08 November 2007
366	Mrs Win Kelly	08 November 2007
367	Anonymous	08 November 2007
368	Mr Des Ryan	08 November 2007
369	Fr Peter Carrucan	08 November 2007
370	Ms Cambria M Parkinson	08 November 2007
371	H Breach	08 November 2007
372	Ms Mary B McInerney	08 November 2007
373	Mr Peter Hancock	08 November 2007
374	Mr John Burke	08 November 2007
375	Mrs Julia Conlon	08 November 2007
376	Anonymous	08 November 2007
377	Mrs Maureen Federico	08 November 2007
378	Ms Mary Kirk	08 November 2007
379	Mr Patrick Jackson	08 November 2007
380	Ms Jane Munro	08 November 2007
381	Pastor Steve McNeilly	08 November 2007
382	Mr Richard J Reardon	08 November 2007
383	Castan Centre for Human Rights Law	08 November 2007
384	Victorian Women with Disabilities Network	08 November 2007
385	Mr Michael Twigg	08 November 2007
386	Mr Robin J Johnson	08 November 2007
387	Mr Damien Spillane	08 November 2007
388	Barbara Tregonning	08 November 2007
389	Dr Mark Jones	08 November 2007
390	Mrs Claire McManus	08 November 2007
391	Dr Mary Lewis	08 November 2007
392	Anonymous	08 November 2007
393	Ms Mary Schulberg	08 November 2007
394	Mrs Joan-Eileen Spee	08 November 2007
395	City Life Church	08 November 2007
396	Mr Mark Godfree	08 November 2007
397	Mr Steven Tudor and Ms Alison King	08 November 2007
398	Anonymous	08 November 2007
399	Confidential	08 November 2007
400	Mrs Lisa Brick	08 November 2007
401	Anonymous	08 November 2007
402	Mr John Breheney and Mrs Anna Breheney	08 November 2007
403	Mr Jose Morel	08 November 2007
404	Anonymous	08 November 2007
405	Mr Geoff and Mrs Helen Wells	08 November 2007

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Submissions

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
406	Ms Maria Lusby	08 November 2007
407	Mr John Keble	08 November 2007
408	Ms Natalie Grima and Ms Marlene Grima	08 November 2007
409	Anonymous	08 November 2007
410	The Key Centre for Women's Health in Society	08 November 2007
411	Right to Life Australia	08 November 2007
412	Anonymous	08 November 2007
413	Steven, Myrna and Tania Hengeveld	08 November 2007
414	Anonymous	08 November 2007
415	Dr FP Denton	08 November 2007
416	Mr DG Condon	08 November 2007
417	Anonymous	08 November 2007
418	Ms Monica Clark	08 November 2007
419	Mr John Casanova	08 November 2007
420	Ms Betty Gough	08 November 2007
421	Mr Alan and Mrs Lyn Manson	08 November 2007
422	Mr James and Mrs Aileen Hewat	08 November 2007
423	Mrs Adrian Micallef	08 November 2007
424	Mr GJ Keane	08 November 2007
425	Mr Garry Webb	08 November 2007
426	Anglican Diocese of Melbourne	08 November 2007
427	Ms Sally Jensen	05 November 2007
428	Jaime Jensen	07 November 2007
429	Mr Chris Jensen	05 November 2007
430	Pat P	31 October 2007
431	CB McAteer	21 November 207
432	Mr John Rouse	08 November 2007
433	Irene Flanily	09 November 2007
434	Mr Laurence Winkle	09 November 2007
435	Mr Brian Gleeson	09 November 2007
436	Ad Hoc Interfaith Committee	09 November 2007
437	Christian City Church Whitehorse	09 November 2007
438	Ms Hazel Sessarego	08 November 2007
439	Henricke	09 November 2007
440	Ms Marie McKinley	07 November 2007
441	Mr Peter O'Callaghan	31 October 2007
442	Mrs Sharon Duiker	10 November 2007
443	Mr Erik Werps and Mrs Elizabeth Werps	10 November 2007
444	Ambrose Centre for Religious Liberty	10 November 2007
445	Mrs Pauline Smit	10 November 2007
446	Shop, Distributive and Allied Employees Association	09 November 2007
447	Mr Maurie Conry	08 November 2007
448	M Buckley	31 October 2007
449	YWCA Victoria	09 November 2007
450	Victorian Young Labor	09 November 2007

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
451	Women's Health Victoria	09 November 2007
452	Catholic Justice Agency of the Archdiocese of Melbourne	09 November 2007
453	Young Labor Left Victoria	09 November 2007
454	Australian Christian Lobby	09 November 2007
455	Mr Peter Newland	11 November 2007
456	Mr Gerard McKernan	11 November 2007
457	Mr Peter Evans	12 November 2007
458	Caroline Chisholm Society	12 November 2007
459	Pro-Life Victoria	12 November 2007
460	Health Services Commissioner	13 November 2007
461	Association for the Legal Right to Abortion	12 November 2007
462	Family Planning Australia	12 November 2007
463	Fr Max Polak	12 November 2007
464	Anonymous	12 November 2007
465	Women's Health Grampians	12 November 2007
466	Mrs A Ogden	12 November 2007
467	Mr Suryan Chandrasegaran and Mrs Therese Chandrasegaran	12 November 2007
468	Anonymous	12 November 2007
469	Mrs Clare Snell	12 November 2007
470	Mr Francis Dwyer	12 November 2007
471	Mrs Josephine A Fogarty	12 November 2007
472	Confidential	12 November 2007
473	Ms Trudi Aiashi	12 November 2007
474	Mr Tony Hrkac	13 November 2007
475	Dr Katrina Haller	13 November 2007
476	Helpers of God's Precious Infants	14 November 2007
477	Mr Kevin James Brown	14 November 2007
478	Mario and Helena Hrkac	14 November 2007
479	Ms J Cushing	13 November 2007
480	Mrs Geraldine Scholter	15 November 2007
481	E Opray	16 November 2007
482	Ms Josephine Jones	16 November 2007
483	Ms Margaret Pekin	10 November 2007
484	Dr Philomene Joshua Tenni	12 November 2007
485	Ms Helen Wursthorn	12 November 2007
486	Mr Noel and Mrs Catharine Carpenter	12 November 2007
487	The Victorian Women's Trust	07 November 2007
488	Mr Peter Longshaw	31 October 2007
489	Mr Frank Maher	31 October 2007
490	Mr Robert Hamilton	31 October 2007
491	Mr Gordon Borlow	31 October 2007
492	Mr Paul Bak	31 October 2007
493	Mr William Curry	31 October 2007
494	Mr Ralph Cleary	31 October 2007
495	Mr Bernie Conroy	31 October 2007

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Submissions

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
496	Mr Ron A Coban	31 October 2007
497	Campaign for Women's Reproductive Rights	09 November 2007
498	Union of Australian Women Vic	09 November 2007
499	Knights of the Southern Cross Victoria	09 November 2007
500	Mr Scott Bloodworth	09 November 2007
501	Liberty Victoria—Victorian Council for Civil Liberties Inc.	09 November 2007
502	Youth Affairs Council of Victoria	09 November 2007
503	Australian Medical Association (Victoria)	09 November 2007
504	Fitzroy Legal Service	09 November 2007
505	Victoria Legal Aid	09 November 2007
506	Salt Shakers	09 November 2007
507	Royal Women's Hospital	09 November 2007
508	Ms Catherine Mayes	14 November 2007
509	Ms Annarella Hardiman	20 November 2007
510	Confidential	23 November 2007
511	Anonymous	26 November 2007
512	Marianne Glowe	27 November 2007
513	St John's Presbyterian Church Bendigo	1 November 2007
514	Baptist Fellowship Warragul	29 October 2007
515	Disability Discrimination Legal Service	27 November 2007
516	Joseph Santamaria	03 December 2007
517	Paediatric State Committee—Royal Australasian College of Physicians	10 December 2007
518	Anonymous	30 January 2008
519	Mr Chris Whelan	31 January 2008

Glossary

Abortifacient describes something used to produce abortion. It includes a drug or device.

Access and equity describes an approach to planning and delivering services. It strives to ensure people can use services regardless of their age, gender, disability, ethnicity, cultural background, religion, sexuality, socioeconomic background, or geographical location. Equity is a broad concept referring to the ability to access, participate and get results from a service. It requires services to be inclusive and respectful of diversity.

Adverse events are incidents which result in harm to a person receiving health care.

Antenatal means during pregnancy before childbirth. It is the same as prenatal.

Assisted reproductive technology (ART) facilitates the conception of children using laboratory or clinical technology. It includes techniques such as in-vitro fertilisation and assisted insemination and may involve the use of donated sperm, eggs, or embryos.

Autonomy is a principle in medical ethics that any competent person has the right to make an informed choice to accept or forego medical treatment. In human rights law it is the principle that a person has a right to control his or her own life and destiny.

Bioethics is the study of ethical choices faced in medical research and treatment of patients.

Born alive rule concerns proof of life and states that any sign of life after birth is sufficient.

Bubble zone laws establish a physical zone around an abortion clinic or hospital which protestors may not enter, and/or where their speech or action are restricted.

Care pathway describes the patient's journey through the health system, including all aspects of care (eg, seeing a doctor and then seeing a counsellor).

Cause of action refers to the legal rule that gives rise to a claim for redress.

Cognitive impairment includes, but is not limited to, impairment of mental functioning due to intellectual disability, mental illness, dementia, and acquired brain injury.

Common law is law created by decisions of the courts, rather than law created by parliament through legislation.

A common law offence is conduct treated as criminal by the common law instead of legislation.

Competency (or capacity) refers to a person's ability to understand and give legal consent (eg, consent to medical treatment).

Conscientious objection is the unwillingness to meet an obligation on the basis of deeply held beliefs, religious or ethical conviction.

Cooling-off period is a period of time or enforced delay between deciding to act and legally being allowed to do so.

Customary international law refers to legal standards that have become settled practice in international law even though they have not been written down in treaties. To amount to customary law it must be widely practised and countries must follow the legal standard in a way that shows they consider it to be obligatory.

Demographic characteristics is a term often used in statistics to describe features of the population or group of people (eg, age and gender).

Denominational hospitals are hospitals funded by the Department of Human Services under Health Service Agreements that are run by faith-based organisations. A list of denominational hospitals can be found in Schedule 2 of the *Health Services Act 1988*.

Diagnostic tests include tests such as amniocentesis.

Direct discrimination occurs when a person with a particular attribute is treated (or is proposed to be treated) less favourably than another person because of that particular attribute. Attributes are listed in legislation and include gender, disability, age, pregnancy, religious belief, sexuality, etc.

Double effect is an ethical doctrine that allows for circumstances where a fetus may die as an unintended consequence of a medical intervention aimed at saving the life of the mother.

Duty of care refers to the obligation of a person within a particular relationship to take reasonable care in their conduct towards others in that relationship. If they fail in that duty and it causes harm, a claim for negligence may arise.

Encephalitis is an inflammation of the brain.

Ectopic pregnancy is one outside the womb (eg, in a fallopian tube).

Fetal screening refers to a range of tests that take place during pregnancy to identify possible conditions or fetal disability. Screening includes ultrasound and maternal serum samples.

Glossary

Framing bias occurs when the design or wording of survey questions may influence the answer a survey participant gives to the question.

Gametes are cells involved in reproduction. The male sperm and the female ovum (egg) are gametes that unite to produce a cell zygote that may develop into an embryo and then a fetus.

General recommendations are guidelines issued by United Nations human rights committees which explain the meaning of rights contained in international human rights treaties or conventions.

Gestational limits are sometimes included in abortion laws. They set a fixed point in the pregnancy after which abortion is either prohibited or subject to specific legal rules or conditions.

Human rights instruments is the general term for laws that contain human rights. They include international treaties (sometimes called covenants) and declarations. At a national or state level they may be called a charter, a human rights Act or a bill of rights.

Hydrocephalus means an increase in fluid around the brain which may cause an enlargement in the skull and compression of the brain.

Indictable offences are the more serious criminal offences, sometimes dealt with by a judge and jury.

Indirect discrimination occurs when a specific requirement, condition, or practice that applies to everyone results in it being harder for a person with a particular attribute (ie disability) to meet the requirement and it is not reasonable. For example, a height requirement may indirectly discriminate against women or ethnic groups who tend to be shorter, unless being that height is necessary to perform the job.

Infanticide is an offence where a woman kills her child and her state of mind was so disturbed by the effect of giving birth to that child within the previous two years or from a disorder following birth within the previous two years, that the law treats her as if she were guilty of manslaughter rather than murder. Infanticide is an alternative verdict to murder. In a trial for murder, the jury may therefore give a verdict of infanticide.

Intervention orders restrain the behaviour of a person in some way, usually for a set period, though sometimes indefinitely. Breaching an intervention order is a criminal offence.

Jurisprudence generally refers to the philosophy of law or legal theory.

Legal personhood refers to the time when a person has rights and duties under the law. Human beings do not have legal personhood until birth.

Mature minor is a legal principle used to describe a young person aged under 18 years who has sufficient understanding and intelligence to understand what is proposed and so can give valid, lawful consent to medical treatment.

Medical abortion is where drugs are used to induce abortion instead of having surgery.

Neonates are newborn children.

Non-derogating rights are human rights that must be fully met, they cannot be watered down or avoided. An example is freedom from torture.

Non-response bias refers to a problem with using results from a small and possibly unrepresentative sample of people surveyed to generalise to the wider population.

Notification schemes are sometimes included in abortion laws. They require medical practitioners or other health professionals to send information or data about abortions to the government, usually the health department.

Onus of proof refers to the responsibility of proving a case or argument to the court. It is the obligation to prove what is alleged.

***Parens patriae* jurisdiction** refers to the power of a superior court to make a decision for a person who is unable to make the decision for themselves because of lack of capacity. For example, decisions about medical treatment for people who are unable to make their own decisions because of disability or age.

Penalty units. Many offences are punishable by a fine. Rather than setting a monetary amount, laws refer to numbers of penalty units. The unit is an amount of money, set by the government each year and published in the *Government Gazette*. To calculate the fine, you multiply the number of penalty units by the value of the unit (one penalty unit is currently worth $110.12).

Penumbra refers to something being uncertain or unclear, in partial shadow.

Prenatal means during pregnancy but before childbirth. It is the same as antenatal.

Prima facie is a Latin term meaning at first appearance, before investigation.

Proximity refers to people being so closely and directly involved in an act that they are part of it. For example, a nurse is part of the medical team in abortion but a hospital receptionist is not. Proximity also relates to the law of negligence but has a different meaning in that context.

Quickening is an old word used to describe the stage of pregnancy when the fetus begins to be felt moving in the womb.

Recall (or reporting) bias occurs when the way a survey respondent answers a question is affected by the gap in time between the event they are being asked to recall and the time of the survey question.

Regulatory framework is used to describe the total set of laws, rules, policies, and institutions that organise or control an activity.

Reproductive rights is used in human rights law to describe rights that relate to people's ability to control their fertility and reproductive health.

Reservation can be made by a country on an international treaty when it wishes to excuse itself from meeting the obligation created by the treaty.

Sampling is the statistical process of selecting a group of people to be used as a representative or random example of the wider population.

Savings clause is a provision in legislation which preserves a legal rule or right existing before the legislation. For example, the Charter of Human Rights and Responsibilities Act includes a savings provision that means the Charter does not affect the existing law of abortion.

Schedules are located at the back of an Act of Parliament.

Segmentation is the point at which it is no longer possible for a single fertilised egg to divide and create identical twins.

Substitute decision making is a means of making decisions on behalf of other people who are unable to make decisions for themselves.

Surgical abortion ends a pregnancy by surgically removing the contents of the uterus, most commonly by suction and curettage.

Therapeutic abortion is an abortion within the law, performed by or under the supervision of a registered medical practitioner.

Truth in advertising refers to a legal requirement that when people advertise their services the advertising is not misleading or deceptive.

Zygote is the cell that is produced when an egg (ovum) is fertilised by a sperm.

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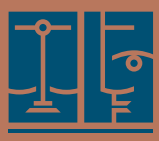

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