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Submission to the Victorian Law Reform Commission
enquiry on the law of abortion

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The offences relating to termination of pregnancy in the *Crimes Act 1958* (Vic) have origins in English legislation which pre-dates the guarantees afforded by international human rights law. The maintenance of these anachronistic and unclear provisions is inconsistent with the realisation and respect for the human rights of Victorian women. The danger of criminal prosecution, even in an area of low policing priority,¹ undermines the promotion of women's health and stigmatises women and practitioners involved in the provision of essential health services.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) does not affect any present or future law applicable to abortion or child destruction². Accordingly, the Charter does not require the abolition, amendment or maintenance of the Crimes Act provisions. Nevertheless, the regulation of abortion as a medical procedure as opposed to a criminal act would promote the autonomy, dignity and rights of women.

¹ Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 Monash University Law Review 37-55.

² Section 48.

Decriminalisation would accordingly be consistent with the Victorian government's initiatives to promote human rights in the community.

Abortion and women's health

Abortion remains a highly contentious and controversial procedure coloured by intractable and passionately held views. Yet abortions are a fact of human existence. While the number of unwanted pregnancies can be reduced through education and access to sexual health services, restrictive abortion laws do not erase the universal reality that large number of women seek to terminate pregnancies every year. An estimated 19 to 20 million unsafe abortions are performed annually, resulting in some 68,000 deaths and high rates of ongoing medical complications.³ Women living in countries in which abortion is prohibited or available on the most narrow grounds have statistically lower levels of sexual and reproductive health and are in greater danger of complications resulting from unsafe or self-induced abortions.⁴ A majority of unsafe abortions are performed in developing countries with restrictive abortion laws and a lack of quality abortion services. A World Health Organisation report reveals that every year approximately five million women suffer temporary or permanent disability as a consequence of unsafe abortions. The report continues as follows:

Of these (five million women), more than 3 million suffer from the effects of reproductive tract infection, and almost 1.7 million will develop secondary infertility. Unsafe abortion accounts for 13% of maternal deaths; and 20% of the total mortality and disability burden due to pregnancy and childbirth...Altogether some 24 million women currently suffer secondary infertility caused by unsafe abortion.⁵

³ David A Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra, Friday E Okonofua, Iqbal H Shah. 'Unsafe abortion: the preventable pandemic', *The Lancet*, Vol 368 Issue 9550 at 1908-1919, November 2006.

⁴ Ibid; also World Health Organisation; '*Unsafe Abortion: Global and Regional Estimates of the Incidence of unsafe abortion and associated mortality in 2003*', Fifth Edition, Human Rights Watch; 'International Human Rights Law and Abortion in Latin America' at <http://hrw.org.backgrounder/wrd/wrd0106/index.htm>

⁵ Ibid, World Health Organisation.

Victoria's health system may appear far removed from the developing countries in which the majority of unsafe abortions take place. Yet maternal mortality and morbidity resulting from unsafe abortions flows from the 'universal risk factor' which is 'simply the fact of being female.'⁶ It is less than 40 years since judicial interpretation of the word 'unlawfully' facilitated the wide availability of safe abortion procedures to Victorian women. The experiences of Victorian women seeking abortions prior to this time remain a tragic chapter in our medical and legal history. Accounts of illegal abortions performed in Victoria during this period make extremely disturbing reading and paint a picture of systemic failure to deliver fundamental human rights to women.⁷ As long as abortion remains within the ambit of the criminal law, the rights of women will be vulnerable.

Fragmentary and incomplete law

The law governing abortion in Victoria remains fragmentary and incomplete. Section 65 of the Crimes Act makes it an offence for women to procure their own miscarriage, or for another person to procure a woman's miscarriage by unlawfully administering a substance or using any instrument or other means. Section 66 attaches criminal liability to a person who unlawfully supplies a substance or instrument knowing that it will be used with intent to procure a miscarriage. The destruction of a child capable of being born alive is prohibited by s 10 of the Crimes Act, attaching a maximum penalty of 15 years imprisonment. Section 10(2) contains a presumption that a child is capable of being born alive after 28 weeks of pregnancy but a lack of judicial interpretation of section 10 leaves an open question as to whether the provision may apply at an earlier stage of pregnancy in light of medical advances in caring for premature babies.

Justice Menhennit's ruling in *R v Davidson*⁸ lent a broad interpretation of 'unlawfully' in section 65, requiring that in order to attach criminal liability, a person terminating a woman's pregnancy did not honestly believe on reasonable grounds that the procedure was necessary to preserve the woman from serious danger to her life or to her physical or mental health or did not honestly believe that the abortion was

⁶ Rebecca Cook, 'International Protection of Women's Reproductive Rights' 24 NYU International Journal of Law and Politics 545- 727 at 647.

⁷ See for example Jo Wainer (Ed) *Lost: Illegal Abortion Stories* (Melbourne University Press, 2006).

⁸ [1969] VR 667.

proportionate to the danger to be averted. The word ‘unlawfully’ in ss 66 and 10 has not been the subject of judicial interpretation. It may be speculated that Justice Menhennit’s approach would be applied to s 66, but it is less likely to be applied to s 10 in light of the latter provision’s focus on the capacity of the child to be born.

Even though the Crimes Act provisions have not given rise to prosecutions in recent decades, the maintenance of these provisions leaves women and their doctors in a precarious position. The existing potential for prosecution is not fanciful. The impassioned views held by certain sectors of the community have led to a number of challenges to abortion practice. In 1998, two Western Australian doctors were charged with unlawful abortion offences. Tasmanian doctors declined to perform abortions in 2001 after a medical student complained that abortion was effectively available on demand.⁹ In Victoria, the vulnerability of women and medical practitioners has been highlighted by the case of a late term abortion performed in 2000. After a medical diagnosis of skeletal dysplasia, likely to lead to dwarfism, reduced a pregnant woman to a suicidal state, the woman was examined by an ultrasonologist, an obstetrician, a geneticist and a psychiatrist. An abortion was then performed at 32 weeks gestation. A federal government senator made statements in parliament to the effect that the case should be prosecuted under s 10 of the Crimes Act. A police investigation concluded that the conduct of medical staff was not unlawful. Nevertheless, the senator obtained the woman’s hospital file and made a complaint to the Medical Practitioners Board. The board’s report was released six and a half years after the procedure in question was performed and cleared medical staff of misconduct. The maintenance of the Crimes Act provisions is likely to lend encouragement to anti-abortion campaigners to attempt further incursions into doctor/patient confidentiality in their quest to discourage abortions.

The senator’s complaint which triggered the investigation also raises significant concerns about the availability of abortion in Victoria. The release of the woman’s hospital file containing confidential details of the most intimate nature raises interference with her right to privacy. The matter precipitated apprehension that the doctors involved might face prosecution in circumstances where the operation of the

⁹ Lachlan de Crespigny and Julian Savelescu, ‘Abortion: time to clarify Australia’s confusing laws’ *Medical Journal of Australia* 2004, 181(4), 201-203.

Crimes Act remains unclear, with a concomitant danger of compromising women's reproductive health. If doctors decline to perform abortions for fear of exposure to criminal liability, women may resort to more dangerous options such as self-induced or unsafe abortion, as evidenced by overseas trends documented by the World Health Organisation. Doctors who perform abortions continue to operate in an environment of legal uncertainty. Women may delay or avoid seeking medical advice, feeling ashamed of submitting to a procedure tarnished by the taint of illegality. Those who submit to abortions will remain stigmatised in a society that only grudgingly acknowledges their reproductive autonomy.

A further area of concern with respect to later term abortion is the common law offence concerning termination of a pregnancy after 'quickening in the womb' when foetal movements may be felt by the mother. The offence has remained dormant since the introduction of the Crimes Act provisions. It would appear that the common law offence has therefore been abolished, but its status remains uncertain.¹⁰ In the event that the Crimes Act provisions are repealed, as I believe they should be, the Parliament must address (and thereby remove) the possibility that the dormant common law offence may be revived.

In the following portion of this submission, I will outline the reasons why decriminalisation of abortion is consistent with standards of human rights applicable in Victoria.

Abortion and human rights law

Women's reproductive autonomy is inextricably linked with their ability to enjoy a range of human rights. At the United Nations Fourth World Conference on Women held in Beijing on 1995 and attended by representatives of 189 governments which included Australia, the following observation was made:

In most countries, the neglect of women's reproductive rights severely limits their opportunities in public and private life, including opportunities for education and economic and political empowerment. The ability of women to

¹⁰ See generally Waller, note 1 above.

control their own fertility forms an important basis for the enjoyment of other rights.¹¹

The prohibition on discrimination on grounds including sex is enshrined in most international human rights treaties.¹² The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)¹³ is concerned with the elimination of discrimination against women and the promotion of equality of rights and respect for the human dignity of women. Australia ratified CEDAW in 1983. The Convention recognises women's autonomy in decision-making affecting their own bodily integrity, sometimes referred to as reproductive self-determination. In prohibiting discrimination against women, article 1 of the Convention prohibits any distinction, exclusion or restriction on the basis of sex which has the effect or purpose of nullifying the recognition, enjoyment or exercise of human rights by women. State parties are required by article 3 to take all appropriate measures to guarantee the enjoyment and exercise of human rights and fundamental freedoms of women on a basis of equality with men. In order to eliminate discrimination against women, states are called on in article 2(g) to repeal all national penal provisions which constitute discrimination against women.

Like the Beijing Platform for Action cited above, CEDAW is underpinned by an understanding that the right of women to decide freely and responsibly on number and spacing of births is a necessary precondition to the recognition of other fundamental rights. To this end, article 16(1)(e) requires state parties to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women...[t]he same rights 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' while article 14(2)(b) requires state

¹¹The 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, paragraph 97.

¹² See for example article 2(1) of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child respectively.

¹³ Convention on the Elimination of All Forms of Discrimination against Women, entered into force Sept. 3, 1981.

parties to ensure that women in rural areas have access to adequate health care facilities, including information, counselling and services in family planning.

It is not difficult to appreciate why the right to control one's own fertility is a foundation for the enjoyment of other fundamental human rights. Women forced to continue with unwanted pregnancies are denuded of autonomy with concomitant denial of a range of human rights such as the right to enjoy privacy and family life. The profound and permanent consequences of continuing an unwanted pregnancy are furthermore likely to impact upon a range of economic and social rights. Women who resort to unsafe abortion because of restrictive laws or inadequate services are not extended the right to enjoy the highest attainable standard of physical and mental health in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴ considered below. Their right to enjoyment of family life may be compromised in addition to their right to be free from cruel and inhuman treatment and, in light of high mortality rates which flow from unsafe abortions, the right to life.

While state parties to CEDAW are called upon to provide safe medical services for women who experience unwanted pregnancies, an emphasis is placed upon prevention. Accordingly, state parties are required to take the following steps:

- To provide access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning: Article 10(h).
- To take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning: Article 12(1).

The United Nations Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) supervises the implementation of the Convention. The Committee scrutinises periodic reports from state parties and makes general recommendations which assist state parties in realising their obligations under

¹⁴ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, entered into force Jan. 3, 1976

the Convention. In its concluding observations on a number of states parties' reports, the Committee has recommended the repeal of laws which criminalise abortion.¹⁵ In its general recommendations, the committee has called on state parties to 'ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.'¹⁶ Restrictions on abortion leave women with the invidious choice of continuing pregnancies against their will or resorting to dangerous clandestine termination options.

In its general recommendation on women and health, the committee characterised laws that criminalise medical procedures only needed by women as barriers to appropriate health care which punish women who are able to access those procedures.¹⁷ The Committee stated that state parties should adopt the following approach to reproductive health:

Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.¹⁸

In considering constraints on reproductive freedom, the Committee has considered the refusal of some hospitals to provide abortions on the basis of the conscientious objection of doctors and concluded that such refusal is an infringement of women's reproductive rights.¹⁹ The committee has called upon states to secure the enjoyment

¹⁵ See for example Concluding Comments of the Committee on the Elimination of Discrimination against Women: Chile UN Doc CEDAW/C/CHI/CO/4, 25 August 2006, Concluding Comments of the Committee on the Elimination of Discrimination against Women: Zambia UN Doc A/49/38 (1994).

¹⁶ Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women (11th session 1992)

¹⁷ Committee on the Elimination of Discrimination against Women General recommendation 24, (20th session 1999), Women and Health, paragraph 14.

¹⁸ Ibid, paragraph 31(c).

¹⁹ Committee on the Elimination of Discrimination against Women, Concluding Comments on Croatia, UN Doc. A/53/38, Part 1 (1998) paragraph 103.

by women of their reproductive rights by, *inter alia*, guaranteeing them access to abortion services in public hospitals.²⁰

The Committee has thus characterised restrictions on abortion as discrimination on the basis of sex. Maintaining abortion as a crime qualified only by broad legislative interpretation and an aversion to policing the issue undermines the place of women in society by according no legal recognition to their autonomy, dignity and fundamental human rights.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)²¹ is the most influential of United Nations based human rights treaties. It forms the foundation of a number of domestic human rights statutes, including the New Zealand *Bill of Rights Act* 1990, the Australian Capital Territory's *Human Rights Act* 2004 and Victoria's *Charter of Human Rights and Responsibilities Act* 2006. 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 right to liberty and security of the person in article 9 of the ICCPR has received relatively little attention in the context of abortion. Article 9's equivalent in the Canadian Charter of Rights and Freedoms has been found by the Canadian Supreme Court to be breached by criminal laws restricting access to abortion.²² Cook considers the right to recognise a woman's freedom to exercise reproductive choice and 'an element of her personal integrity and autonomy, and not in any way solely dependent on health justifications.'²³

The ICCPR's supervisory committee, the Human Rights Committee, has expressed concerns about restrictive abortion laws. In its General Comment 28 on article 3 (which requires state parties to ensure equality of rights between men and women), the Committee has recognised the importance of reproductive health to women's right

²⁰ Ibid, paragraph 117.

²¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force Mar. 23, 1976

²² Morgentaler, 44 DLR 4th 385 (Sup Crt Can 1988) discussed in Cook, note 5 above at 696.

²³ Cook, note 6 above at 696.

to life. States are called upon to take a broad approach to the right to life in article 6 insofar as it concerns women in the following terms:

When reporting on the right to life protected by article 6, States parties should provide data on birth rates and on pregnancy- and childbirth-related deaths of women. Gender-disaggregated data should be provided on infant mortality rates. States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions....²⁴

The committee's concerns have been expressed with respect to the practices of a number of state parties. Kenya was called upon to review its prohibition on abortion in order to secure the right to life in article 6 in light of high rates of maternal mortality attributable to unsafe or illegal abortion.²⁵ In its concluding observations on Peru in 2000, the committee associated restrictive abortion laws with a breach of the right to life in article 6, the right to equality of men and women in article 3 and the prohibition on cruel and inhuman treatment in article 7.²⁶ Similar concerns have been made regarding Chile's 'unduly restrictive abortion laws'²⁷ and laws limiting access to abortion which are maintained by a number of other state parties.²⁸

The Committee has expressed particular concerns about lack of access to safe abortions by adolescent girls, who pursuant to article 24 of the ICCPR must be extended special measures of protection as minors. The following comments were made with respect to access to abortion in Ecuador:

The Committee expresses its concern about the very high number of suicides of young females referred to in the report, which appear in part to be related to

²⁴ Human Rights Committee, General Comment 28, Equality of Rights between Men and Women, 20 2000, CCPR/C/21/Rev.1/Add.10 at paragraph 10.

²⁵ Concluding Observations of the Human Rights Committee, Kenya CCPR/CO/83/KEN, 29 April 2005, paragraph 14.

²⁶ Concluding Observations of the Human Rights Committee: Peru CCPR/C/70/PER 15 November 2000, paragraph 20.

²⁷ Concluding observations of the Human Rights Committee: Chile, UN Doc. CCPR/C/CHL/CO/5, 18 May 2007 paragraph 6.

²⁸ See generally Sarah Joseph, Jenny Schulz and Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press, 2004) at 189-191.

the prohibition of abortion. In this regard, the Committee regrets the State party's failure to address the resulting problems faced by adolescent girls, in particular rape victims, who suffer the consequences of such acts for the rest of their lives. Such situations are, from both the legal and practical standpoints, incompatible with articles 3, 6 and 7 of the Covenant, and with article 24 when female minors are involved. The Committee recommends that the State party adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and education facilities.²⁹

A further ICCPR right which has not been invoked in the context of abortion but which underlies objections to decriminalisation is the 'right to freedom of thought, conscience and religion' enshrined in article 18(1). Objections to the availability of abortion based on religious belief do not authorise state legislative bodies to introduce or maintain laws which limit the rights of those who might hold different beliefs. The Human Rights Committee has made the following statement in its general comment on article 18:

If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.³⁰

With respect to abortion, the Human Rights Committee has expressed concerns consistent with those expressed by the CEDAW Committee about barriers to accessing abortions in Croatia as a consequence of doctors' conscientious objection to performing the procedure (see note 17 above). The Human Rights Committee has noted that abortion is practically unavailable in Poland even when the law permits it due to medical practitioners' refusal to carry out legal abortions, resulting in resort to illegal abortions which raise concerns about Poland's compliance with article 6. The

²⁹ Concluding observations of the Human Rights Committee: Ecuador. UN Doc CCPR/C/79/Add.92, 18/08/98 paragraph 11.

³⁰ Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) UN Doc CCPR/C/21/REV.1/Add 4 (30/07/93) paragraph 10.

committee urged Poland to liberalise its legislation and practice on abortion and provide further information on the use of the conscientious objection clause by doctors.³¹ The Committee did not challenge the right of medical practitioners to refuse to perform an abortion on the basis of conscience but called on Poland to ensure that such refusal did not compromise women's right to life by rendering safe, legal abortions unavailable. The decriminalisation of abortion is thus consistent with article 18. Women who object to the procedure on the basis of religious belief must not be required to submit to abortion while those who do not hold the same objection must not have their rights compromised on account of religious beliefs held by others.

Under the First Optional Protocol to the ICCPR,³² the Human Rights Committee has jurisdiction to determine complaints brought against state parties concerning alleged violations of the covenant. In 2005, the Committee determined a complaint concerning a Peruvian hospital's refusal to accede to a request for an abortion on the basis that it would contravene Peru's Criminal Code which permitted 'therapeutic abortion' only in circumstances where it was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.³³ The request was made by a pregnant 17 year old after a 12 week scan revealed that the foetus she was carrying was anencephalic, with the consequence that delivery would endanger her life and that the baby would die shortly after birth. In taking the decision to refuse the termination, the hospital in question appeared to pay little regard to the risk to the mother's life resulting from the continuation of the pregnancy. The mother was required to carry the pregnancy to term and gave birth to an anencephalic girl who survived for four days during which she was required to breast feed her. It was alleged in the complaint that the distress of being obliged to continue with the pregnancy, of witnessing the baby's marked deformities and knowing that she would die very soon led the mother to a state of ongoing deep depression.

The Committee noted the mother's vulnerability as a minor and concluded that the medical and psychological support necessary in the specific circumstances of the case

³¹ Concluding observations of the Human Rights Committee: Poland, UN Doc CCPR/CO/82/POL (02/12/2004) paragraph 8.

³² Optional Protocol to the ICCPR, 999 U.N.T.S. 302, entered into force March 23, 1976.

³³ Karen Noelia Llantoy Huamán v. Peru, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

were not provided, thus revealing a violation of article 24. The prohibition on cruel and inhuman treatment in article 7 of the ICCPR was found by the Committee to apply to mental suffering in addition to physical pain and that protection is particularly important in the case of minors. The deep depression suffered by the mother was foreseeable in light of the diagnosis of foetal anencephaly. The Committee accordingly concluded that requiring her to continue with the pregnancy amounted to cruel and inhuman treatment in contravention of article 7. This conclusion is consistent with the committee's concluding observations regarding Peru's Criminal Code.³⁴ It also accords with the committee's concerns about abortion remaining a criminal offence under Moroccan law unless it is carried out to save the mother's life. The Moroccan government was accordingly called upon to 'ensure that women are not forced to carry a pregnancy to full term where that would be incompatible with its obligations under the Covenant ...and should relax the legislation relating to abortion.'³⁵ The ICCPR provisions identified were the right to life in article 6 and the prohibition on cruel and inhuman treatment in article 7.

The complaint further alleged that the decision which obliged her to carry a pregnancy to term amounted to an arbitrary or unlawful interference with the young mother's privacy in contravention of article 17. Article 17(1) provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' It was argued that article 17 'protects women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives.'³⁶ The Committee did not refute this allegation and found that the decision taken on the mother's behalf relating to her life and reproductive health breached her right to privacy. This conclusion is not the first made by the Committee on the right to privacy in the context of abortion. In its general comment on article 3, the Committee had cited a number of examples of interferences with the right to privacy, including the situation where States impose a legal duty upon doctors and other health personnel to report cases of women who

³⁴ Concluding Observations on Peru, note 26 above.

³⁵ Human Rights Committee, Concluding Observations: Morocco CCPR/CO/82/MAR 1 December 2004, paragraph 29.

³⁶ Karen Noelia Llantoy Huamán v. Peru, note 33 above, paragraph 3.6.

have undergone abortion.³⁷ This conclusion is consistent with comments made by the CEDAW Committee, which has stated that lack of respect for patient confidentiality may deter women from seeking advice and treatment, with adverse consequences for their health and well-being. The committee concluded that '[w]omen will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence.'³⁸

The Llantoy Huamán complaint represented an opportunity to develop the right to life in the context of abortion, as foreshadowed in the committee's earlier pronouncements. The Committee's majority considered that its conclusion that the mother was the victim of cruel and inhuman treatment obviated to need to specifically address the right to life. In a dissenting opinion, Mr Solari-Yrigoyen agreed with the majority's conclusions about articles 7, 17 and 24 but also found that the circumstances of the case revealed a violation of the mother's right to life. The mother had claimed a violation of her right to life in article 6 on the basis that the refusal to provide her with a safe abortion 'left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk.'³⁹ Mr Solari-Yrigoyen placed significant emphasis on medical opinion regarding the latter option and concluded that '[i]t is not only taking a person's life that violates article 6 of the Covenant but also placing a person's life in grave danger, as in this case.'⁴⁰

The separate opinion is consistent with previous concerns raised by the committee about restrictive abortion laws and services in the context of article 6. Yet article 6 has been invoked in assertions that every foetus has the right to be born. This argument has been made in the context of submissions to the Australian Capital Territory Bill of Rights Consultative Committee⁴¹ and the Victorian Human Rights Consultation

³⁷ General Comment No. 28: Equality of rights between men and women (article 3), CCPR/C/21/Rev.1/Add10, 29 March 2000, paragraph 20.

³⁸ General Recommendation 24, note 17 above, paragraph 14.

³⁹ Karen Noelia Llantoy Huamán v. Peru, note 33 above, paragraph 3.3.

⁴⁰ Ibid, Dissenting Opinion By Committee Member Hipólito Solari-Yrigoyen.

⁴¹ See for example the submission of the ACT Right to Life Association at <http://www.actrla.org.au/submissn/billofrights.htm>.

Committee.⁴² It has also exacted an impact on attempts to introduce ICCPR-based legislation at the federal level. A bill introduced by Attorney-General Peter Durack in 1979 failed to pass after an amendment moved by John Martyr proposed that the right to life in article 6 be construed to apply before and after birth.⁴³ The *Australian Bill of Rights Bill* 1985 introduced by Attorney-General Lionel Bowen was opposed by Senator Brian Harradine on the basis that its attempt to incorporate article 6 into Australia's federal law did not extend the right to unborn children.⁴⁴ The bill failed to pass.

Assertions that article 6 applies before birth have been reiterated in the context of the introduction of the *Crimes (Decriminalisation of Abortion) Bill* 2007. In a recent opinion piece in *The Age* newspaper, it was alleged that the Bill 'seeks explicitly to disenfranchise children at risk of abortion from human rights protection' in a manner that is 'inadmissible under the provisions of the ICCPR.'⁴⁵ 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 which, like the ICCPR, operate to uphold the right of women to control their own fertility and thereby enjoy a range of human rights. In the following section, I will expand upon the reasons why the right to life enshrined in human rights treaties does not extend to a right to be born.

International interpretations of the right to life

In the abovementioned opinion piece, Rita Joseph asserts that the *Crimes (Decriminalisation of Abortion) Bill* 2007 is 'inadmissible under international human rights law' by invalidly limiting the unborn child's right to life. Yet debates surrounding the formulation of the ICCPR⁴⁶ (and the Universal Declaration of Human

⁴² See for example Festival of Light submission referred to in *Rights, Responsibilities and Respect: the Report of the Human Rights Consultation Committee* at http://acthra.anu.edu.au/victoria/HumanRightsFinal_FULLL.pdf

⁴³ For a discussion about the history of the Human Rights Commission Bill 1979 see Peter Bailey, *Human Rights: Australia in an International Context* (Butterworths 1990) also House of Representative Hansard, 10 February 1980 at 66, 28 February 1980 at 532-533, 4 March 1980 at 628-629, 2 April 1980 at 1616, Senate Hansard, 20 March 1980 at 879, 14 May 1980 at 2120.

⁴⁴ See generally, Peter Bailey, *Ibid.*

⁴⁵ Rita Joseph, 'The Right to Life is the Most Important of All', *The Age* 27 July 2007.

⁴⁶ 12 GOAR Annexes, UN Doc A/3764 at 12-13(1967).

Rights which preceded it⁴⁷) resulted in the rejection of proposals by a number of countries' representatives that the right to life should commence before birth. Article 6(1) states that 'every human being has the inherent right to life.' Live birth separate from the body of the mother has been recognised by law as marking the commencement of a human 'in being'.⁴⁸

Rita Joseph and others have alleged that abortion violates the Convention on the Rights of the Child in its failure to give regard to the best interests or well-being of the foetus. The Convention's preamble is comprised of thirteen paragraphs, the ninth of which reads as follows: *Bearing in mind that, as indicated in the Declaration on the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.* The drafting history of the Convention reveals that this preambular paragraph did not preclude the possibility of termination of pregnancy and was not intended to prejudice the interpretation of article 1 of the Convention.⁴⁹ Article 1's definition of a child is 'every human being below the age of 18 years' and does not extend to the children not yet born. In its jurisprudence on the Convention, the Committee on the Rights of the Child⁵⁰ has never extended article 1's ambit to the foetus. It has, however, found that access to safe abortion for adolescent girls is a concomitant of the right to the enjoyment of the highest standard of health enshrined in article 24. Noting the high rates of maternal mortality arising from unsafe abortion, the Committee has called upon state parties to prevent illegal abortion through decriminalisation⁵¹ and to ensure that termination procedures are conducted 'with all due attention to minimum standards of health safety'.⁵²

Article 2 of the European Convention of Human Rights and Fundamental Freedoms extends the right to life, somewhat imprecisely, to 'everyone'. A number of attempts

⁴⁷ UN Doc E/CN.4/AC.2/SR.3.

⁴⁸ See generally Cook, note 6 above, at 692-694; Waller, note 1 above, at 37-38.

⁴⁹ United Nations Commission on Human Rights, *Report of the Working group on a Draft Convention on the Rights of the Child*, 45th Session, E/CN.4/1989/48.

⁵⁰ Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989), entered into force Sept.2 1990.

⁵¹ Committee on the Rights of the Child, Concluding Observations on Chad, UN Doc CRC/C/15/Add107 (1999); Committee on the Rights of the Child, Concluding Observations on Nicaragua, UN Doc CRC/C/15/Add.108 (1999).

⁵² Committee on the Rights of the Child, Concluding Observations on Mozambique, UN Doc CRC/C/15/Add.172 (2002) para 47.

have been made to include the rights of foetus within the ambit of the provision, all of which have been unsuccessful. In *Paton v United Kingdom*⁵³, a husband challenged the United Kingdom's abortion legislation which permitted his wife to undergo a first-trimester termination. The European Commission of Human Rights rejected the application, finding that British legislation permitting abortion did not contravene the Convention. In its 1980 decision, the Commission considered that the general usage of the term 'everyone' and the context in which this term is employed in Article 2 tended to support the view that it does not include the unborn.⁵⁴ Furthermore, it would be contrary to the object and purpose of the Convention to prioritise the life of the unborn over a person's right to life. The Commission also found that the pregnant woman's right to respect for her private life was not limited by the husband's right to be consulted on the abortion which his wife intends to have performed.⁵⁵ In *Vo v France*, 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 do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests.'⁵⁶ 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.⁵⁷ These challenges have all been unsuccessful.

The American Convention on Human rights 1969 stands alone in contemplating the rights of the unborn, stating in article 4(1) that the right to have one's life respected 'shall be protected by law, in general, from the moment of conception.' In applying 'in general', the Convention has been seen to eschew prioritisation of the unborn over the life or health of born persons.⁵⁸ The Inter-American Commission on Human Rights considered the wording the article 4(1) in its determination of a complaint brought under the American Declaration of the Rights and Duties of Man 1948 by

⁵³ Application No. 8416/78, 3 EHRR 408 (1980).

⁵⁴ *Ibid*, paragraph 9.

⁵⁵ *Ibid*, paragraph 27. This is consistent with the CEDAW Committee's General Recommendation 24, note 17 above, which notes in paragraph 27 that State parties 'should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried or because they are women. In note 6 above at 697, Cook notes that courts in at least 8 countries have rejected applications to prevent specific abortions brought by the prospective father.

⁵⁶ (2005) 10 EHRR 12 at paragraph 80.

⁵⁷ See generally Cook, note 6 above.

⁵⁸ *Ibid*, p 694.

members of a Catholic lobby group on behalf of a foetus aborted in Massachusetts.⁵⁹ The 1948 Declaration protects the right to life without reference to life before birth and was relied upon in the case because the United States has not ratified the 1969 Convention. Article 4(1) of the Convention was nevertheless used by the petitioners to inform their interpretation of the right to life enshrined in the Declaration. It was alleged that the United States violated the Declaration by failing to protect unborn children as a consequence of Supreme Court decisions which included *Roe v Wade*.⁶⁰ The Commission found that the United States' authorisation of abortion did not violate the Declaration. It examined the drafting history of both the Declaration and the Convention. It concluded that in formulating article 4(1), the drafters of the Convention rejected an unqualified protection of the right to life before birth, which was incompatible with laws governing abortion in the majority of American states.⁶¹ The words 'in general' were inserted in anticipation of qualifications to the rights of the foetus.

Concerns about restrictions on abortion in the context of the right to life have also been raised by the CEDAW Committee. The Committee has expressed 'great concern' that abortion is the second cause of maternal deaths in Colombia and is punishable as an illegal act. Accordingly women who seek treatment for induced abortions, women who seek illegal abortions and the doctors who perform abortions are subject to prosecution. The Committee concluded that Colombia's abortion legislation constitutes a violation of the rights of women to life and health and constitutes discrimination in the field of health care in contravention of article 12 of CEDAW.⁶²

The jurisprudence of international human rights law has not followed an approach of subordinating the rights of pregnant women in favour of their unborn children. International human rights law proffers no basis for a right to be born through which women may be required to continue pregnancies against their will.

The question of involuntary termination of pregnancy

⁵⁹ *Baby Boy Case*, case 2141, Inter-Am. CHR. 25/OEA/ser.L/V/.54 (1981).

⁶⁰ 410 U.S. 113

⁶¹ Para 17(e).

⁶² Committee on the Elimination of Discrimination against Women, Concluding Observations: Colombia (1999) UN Doc CEDAW/C/SR, paragraph 393.

A concomitant of the reproductive freedom enshrined in CEDAW is the right of a pregnant woman to choose to continue with a pregnancy. In its General Recommendation on violence against women, the CEDAW Committee recommended the provision of fertility control services to ensure that women are not required to resort to illegal abortion⁶³ and considered that '[c]ompulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.'⁶⁴ The right to continue with or terminate a pregnancy lies with the mother. Involuntary abortions have been associated with China's population control policies and breach a range of provisions in CEDAW in addition to fundamental rights such as the right to liberty and security of the person in article 9 of the ICCPR.

Article 6(5) of the ICCPR provides that the death sentence shall not be carried out on minors or pregnant women. It has been argued this paragraph is authority for the proposition that abortion is a form of the death penalty with respect to the foetus and is therefore prohibited. Such arguments do not stand up to scrutiny. One of the aims of article 6 is the abolition of the death penalty or its limitation to all but 'the most serious crimes'.⁶⁵ The ICCPR's Second Optional Protocol of 1990⁶⁶ is aimed specifically at securing a universal commitment to the abolition of the death penalty. Article 6(5) of the ICCPR is drafted to protect pregnant women and children in states which have not abolished the death penalty. When the death penalty is carried out, all questions of reproductive autonomy or any other fundamental rights of freedoms are rendered redundant. The death penalty denudes its recipient of the ability to enjoy human rights by depriving them of life itself. For this reason, an overwhelming majority of democratic nations do not pursue the death penalty. But, as noted above, all proposals that the right to life should commence before birth were rejected in the preparatory debates surrounding the formulation of the ICCPR. Neither article 6(5) nor the ICCPR's Second Optional Protocol have the effect of broadening the ambit of the legal definition of a human 'in being'. Abortion has never been recognised under human rights law as a form of the death penalty. Neither article 6(5) nor the Second

⁶³ General Recommendation 19, note 16 above at paragraph 22.

⁶⁴ Ibid, at paragraph 24(m).

⁶⁵ Human Rights Committee General Comment 06, The Right to Life, 30/4/82, paragraph 6.

⁶⁶ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

Optional Protocol may operate as vehicles for forcing women to continue unwanted pregnancies.

Economic, Social and Cultural Rights

While discussions of abortion have focussed more readily on rights which may be classified as civil and political, reproductive choice may bear upon a range of economic and social rights. Being required to continue with an unwanted pregnancy may inhibit a woman's right to gain a living by work which she freely chooses (article 6, ICESCR) or her ability to participate in education (article 13, ICESCR). It may also amount to a denial of the right to enjoy the benefits of scientific progress (article 15(1)(b)). Resorting to unsafe termination procedures in circumstances where safe, legal abortions are unavailable raises serious concerns in the context of article 15(1)(b).

But the right most obviously engaged in this context is the right to the highest attainable standard physical and mental health is enshrined in article 12 of the ICESCR and article 24 of the Convention on the Rights of the Child. It is also accommodated within CEDAW in standards such as article 12(1) with its aim of access to health services on the basis of equality. At the 1993 World Conference on Human Rights, 172 states declared all human rights to be 'universal, indivisible and interdependent and interrelated' and to be treated 'globally in a fair and equal manner, on the same footing, and with the same emphasis'.⁶⁷ The indivisibility of human rights is nowhere more apparent than in the context of the right to health. In the absence of appropriate health care, an individual's ability to enjoy a range of fundamental rights may be compromised. In calling on states to report on pregnancy and child-birth related deaths and provide access to safe and legal abortions in the context of the right to life, the ICCPR's Human Rights Committee has clearly recognised the socio-economic dimension of article 6 and the importance of health services to human survival.⁶⁸

⁶⁷ World Conference on Human Rights, *Report of World Conference on Human Rights*, Vienna, 14-25 June 1993, , (Chapter III: Vienna Declaration and Programme of Action, paragraph 5), A/CONF.157/24(Part 1) 13 October 1993.

⁶⁸ See Human Rights Committee General Comment 06, note 65 above, at paragraph 5, where the Committee stated as follows: 'The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible

The ICESCR's supervisory committee has interpreted the right to health to accommodate sexual and reproductive freedom in the following terms:

The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.⁶⁹

The realisation of women's right to health has been seen by the Committee to require 'the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.'⁷⁰ In its consideration of State parties' reports, the Committee has, unsurprisingly, reached conclusions which accord with those of the CEDAW Committee and the ICCPR's Human Rights Committee and expressed concerns about restrictive abortion laws which have resulted in women submitting to unsafe illegal abortions which have compromised their health.⁷¹

Conclusion

The decriminalisation of abortion is consistent with norms of human rights which apply in Victoria. The unclear and anachronistic abortion provisions in the Crimes Act leave women and medical practitioners vulnerable to the possibility of prosecution and have the effect of de-legitimising reproductive choice. The repeal of

measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4, 11 August 2000

⁷⁰ Ibid, paragraph 21

⁷¹ See for example Concluding Observations of the Committee on Economic, Social and Cultural Rights: Chile, UN Doc E/C.12/1/Add 105 (2004) paragraph 25, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland, UN Doc E/C.12/1/Add 82 (2002) paragraph 29.

the Crimes Act provisions and regulation of abortion as a medical procedure would ensure that women can exercise reproductive choice free from stigmatisation and with society's acknowledgement that they are capable of making their own personal and moral decisions.