ABORTION LAW REFORM: THE IMPORTANCE OF DEMOCRATIC CHANGE

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I INTRODUCTION

This article explores recent parliamentary reform of the law concerning abortion in Victoria.[1] While the focus is Victorian, the article also touches on the situation in a variety of Australian states and territories as well as some of the history of abortion regulation. The article is particularly concerned with the *processes* of law reform, and the role of parliament as a law reform body; it thus has relevance beyond both the Australian and abortion contexts. While courts in Australia, as elsewhere, have widened access to abortion, the example pursued here shows that parliaments are certainly capable of enacting progressive reform legislation on abortion, and having an informed and engaged debate on the issue.

Abortion provides a particularly fascinating area to examine from the perspective of an exploration of law reform processes. It is, or at least was until the recent reforms in Victoria, an area where the law on the books – the criminal law – was apparently draconian,[2] but judicial interpretation had substantially increased access.[3] Notwithstanding, the law was perceived by many members of the medical profession as uncertain,[4] and indeed, occasional prosecutions of

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1 See *Abortion Law Reform Act 2008* (Vic).

2 See the then ss 65–6 of the *Crimes Act 1958* (Vic), reproduced below at Part II.

3 The decision of Menhennitt J in *R v Davidson* [1969] VR 667 is discussed below at Part II.

4 Lachlan de Crespigny and Julian Savulescu, 'Abortion: Time to Clarify Australia's Existing Laws' (2004) 181(4) *Medical Journal of Australia* 201. Lachlan de Crespigny was one of the doctors at the Women's Hospital involved in the termination of a pregnancy of a woman who was 32 weeks pregnant, 'with severe psychological issues' and carrying a 'baby with dwarfism. The woman was distressed to the point of being suicidal. … There was no doubt that the continuing of this particular pregnancy would have been injurious to the mother's physical and mental health. Associate Professor Lachlan de Crespigny was sacked and then reinstated, only to be suspended, along with five other doctors, by the Royal Women's Hospital administration. … The doctors concerned were eventually exonerated, but the entire stressful process took eight years': Victoria, *Parliamentary Debates*, Legislative Council, 7 October 2008, 3925–6 (Andrea Coote).

doctors have occurred around Australia.[5] In 2009–10 a young woman was charged with procuring her own abortion[6] and her partner with supplying drugs to her to procure an abortion.[7] They were charged when police visited their home on an unrelated matter and 'found empty packets of RU486 (also known as Mifeprostone), Misoprostol, painkillers, and instructions written in Ukrainian. Misoprostol is a drug commonly used with RU486 to induce a miscarriage'.[8] Additionally, while abortion may be perceived as politically controversial,[9] data from public opinion surveys show there is now a remarkable consensus supporting the ready availability of safe abortion services.[10] Abortion in Australia has, since the commencement of Medicare, been publicly funded, initially without controversy and, despite occasional attempts, has never been successfully removed from the Medicare scheme.[11] When issues about abortion reach Parliament, they are, at least in Australia, traditionally subject to a conscience vote, rather than the more typical vote on party lines, so the parliamentary process holds particular interest.

Reform to the laws of abortion has, however, sometimes been part of party policy, of both conservative,[12] and Labor parties.[13] Sometimes reform legislation

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5 For discussions of some recent examples in Western Australia and Tasmania, see Cheryl Davenport, 'Achieving Abortion Law Reform in Western Australia' (1998) 13 *Australian Feminist Studies* 299; Barbara Baird, 'The Futures of Abortion' in Elizabeth McMahon and Brigitta Olubas (eds), *Women Making Time: Contemporary Feminist Critique and Cultural Analysis* (University of Western Australia Press, 2006). See also *R v Sood (No 3)* [2006] NSWSC 762 and *R v Sood* [2006] NSWSC 1141.

6 *Criminal Code 1899* (Qld) s 225.

7 *Criminal Code 1899* (Qld) s 226.

8 Katharine Betts, 'Attitudes to Abortion: Australia and Queensland in the Twenty-First Century' (2009) 17(3) *People and Place* 25, 25. See also Heather Douglas, 'Abortion Reform: A State Crime or a Woman's Right to Choose?' (2009) 33 *Criminal Law Journal* 74; Kerry Petersen, 'Abortion Laws and Medical Developments: A Medico-Legal Anomaly in Queensland' (2011) 18 *Journal of Law and Medicine* 594. Note that the woman and her partner were acquitted at trial: see Kirsty Nancarrow and Melinda Howells, 'Couple Not Guilty in Abortion Trial', *ABC News* (online), 14 October 2010 <http://www.abc.net.au/news/2010-10-14/couple-not-guilty-in-abortion-trial/2298224>.

9 This is, of course, an understandable perception. Even if they are not likely to be successful in their campaigns, the 'Right to Life' continues to threaten polling retribution on abortion advocates: see, eg, Carol Nader, 'Anti-Abortionists to Target 10 Seats', *The Age* (Melbourne), 17 April 2010, 9. See also Helen Pringle, 'Urban Mythology: The Question of Abortion in Parliament' (2007) 22 *Australasian Parliamentary Review* 5, which explicitly identifies the belief that election or re-election of Australian politicians is at risk, depending on how they vote on abortion reform, as a mythology.

10 Some of these survey results are discussed below.

11 Rebecca Albury observes: 'in Australia, the Medicare rebate … was instituted as one among many items in the original Medibank tables in 1975. The feminist desire for abortion to be treated like an ordinary medical procedure was established by bureaucratic fiat': Rebecca Albury, *The Politics of Reproduction: Beyond the Slogans* (Allen and Unwin, 1999) 113. This public funding was unsuccessfully challenged in 1979 via the so-called Lusher Amendment: Karen Coleman, 'The Politics of Abortion in Australia: Freedom, Church and State' (1988) 29 *Feminist Review* 75, 90–1. Contrast this with the situation in the United States: see *Harris v McRae,* 448 US 297 (1980); K A Petersen, 'The Public Funding of Abortion Services: Comparative Developments in the United States and Australia' (1984) 33 *International and Comparative Law Quarterly* 158.

12 See, eg, the South Australian reform legislation of 1969, discussed briefly below.

13 For example, reform of abortion law was part of the 2006 State ALP policy in Victoria: Victorian Branch, Australian Labor Party, *Rising to the Challenges* (2006) 49 [3.38].

is introduced by way of a private member's Bill.[14] The existence of a conscience vote and the fact that access to safe, publicly funded abortion has been of particular interest to women, have led to the formation of coalitions of women across party lines agitating for reform.[15] Finally, abortion law reform has yet to occur in the populous states of Queensland and New South Wales, so this study may be of especial interest to those States.

This article commences by briefly outlining the early history of abortion regulation, to provide a context for the discussion of institutional law reform. I canvass why reform might have been necessary, despite the decision in *R v Davidson*, which carved out a space, at common law, for 'lawful termination'.[16] I then articulate some of the advantages I see in the utilisation of a parliamentary process for reform of abortion law. I go on to describe the reform process in Victoria, noting in particular the unusual nature of the role of the Victorian Law Reform Commission ('the Commission' or 'VLRC'). The final Part assesses the parliamentary debate in Victoria, examining a series of themes in that debate. In particular, I am interested in the extent to which access to safe publicly funded termination is seen as an issue about women's claims for equality and/or autonomy.

II EARLY HISTORY

There is some doubt as to whether abortion was an offence at common law in England. A statutory prohibition was introduced in 1803 and in 1861 it was amended to include a woman who induced an abortion on herself.[17] This amended form of the law was effectively enacted in all Australian states and remains broadly the statutory law in New South Wales and Queensland.[18] It was also the form of the criminal law until 2008 in Victoria. The *Crimes Act 1958* (Vic) provided:

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14 See, eg, the Western Australian reforms, where a private member's Bill was introduced by Cheryl Davenport in 1998 (and discussed further below); and the Bill in Victoria, introduced by Legislative Council Member Candy Broad, which preceded the ultimately successful reform introduced by the Labor government: see Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2007, and also discussed further below.

15 See the vote in Victoria discussed below. A similar cross-party coalition formed in order to secure a conscience vote which led to the passage of the *Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Act 2006* (Cth), and thus removing the effective ban on RU486. For the history of this cross-party coalition, see ABC Radio National, 'Remembering International Women's Week', *Perspective*, 28 March 2007 (Lyn Allison) <http://www.abc.net.au/radionational/programs/perspective/lyn-allison/3399958>. See also John Warhurst, 'Conscience Voting in the Australian Federal Parliament' (2008) 54 *Australian Journal of Politics and History* 579; Pringle, above n 9.

16 [1969] VR 667.

17 Much of this early history is discussed in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 199–202.

18 See *Crimes Act 1900* (NSW) ss 82–4; *Criminal Code 1899* (Qld) ss 224–6, 282.

> Section 65. Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent shall be guilty of an indictable offence, and shall be liable to imprisonment for a term of not more than fifteen years.
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> Section 66. Whosoever unlawfully supplies or procures any poison or other noxious thing or any instrument whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether with child or not, shall be guilty of an indictable offence, and shall be liable to imprisonment for a term of not more than three years.

Women have, despite the existence of such laws, always sought and obtained abortions. Brookes, describing the situation in England in the early part of the 20th century, suggests that, for many working-class women, abortion, at least before quickening, was not perceived as a crime and the practice of abortion was not intensively policed.[19] Similarly, McCalman, writing about Victoria observes that abortion, usually via 'powerful emetics and drugs like ergot' was 'the one form of fertility control that *was* widely broadcast and within the reach of even the poorest'.[20] Gideon Haigh documents some of the prosecutions for abortion, but also notes the difficulty of doing so. He quotes a 'distinguished medico Dr Herbert Moran', writing in 1910:

> It was only when a woman died that any real action was ever taken, and even then it was rare to establish a proof that an illegal operation had been performed. The dead cannot bear witness and the evidence of the dying is hobbled with legal difficulties. Furthermore, some of the jury feel sympathy for a woman who is trying to help another out of trouble.[21]

At this time, midwives were largely responsible for medical terminations. However, after the Second World War, doctors became the predominant providers.[22]

Haigh goes on to document the corrupt relationships between the police and abortion providers, suggesting that by the 1960s 'the fortunes of Melbourne's

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19 Brookes documents the trade in 'women's pills' and various remedies for procuring a miscarriage that were passed amongst women; likewise women traded information on where an abortion could be obtained: Barbara Brookes, *Abortion in England, 1900–1967* (Croom Helm, 1988) 2–7.

20 Janet McCalman, *Sex and Suffering: Women's Health and a Women's Hospital: The Royal Women's Hospital, Melbourne, 1856–1996* (Melbourne University Press, 1998) 128. See also Shurlee Swain with Renate Howe, *Single Mothers and Their Children: Disposal, Punishment and Survival in Australia* (Cambridge University Press, 1995); Stefania Siedlecky and Diana Wyndham, *Populate and Perish: Australian Women's Fight for Birth Control* (Allen and Unwin, 1990).

21 Quoted in Gideon Haigh, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, 2008) 23. Haigh also observes that juries were exclusively male (until 1970) and were selected to minimise the numbers with an Irish name, thus reducing the number of Catholics, and to maximise the number of *young* men, thus 'guarantee[ing] at least a few jurors with personal experience of girls "in trouble"'. This, Haigh argues, together with the harsh punishment available for a conviction for murder, contributed to a reluctance to convict: at 23–4.

22 Ibid 51. As put by Haigh: 'To move into abortion was to go with the flow: to take advantage of the power of antibiotics to cure infection, which had been the procedure's gravest risk. The chief beneficiaries of the illegality of abortion would henceforward be doctors, able to extract super profits'.

abortion rackets and police were now inextricably linked'.[23] But in the mid-1960s, an activist Catholic, Francis Holland, took over as Police Commissioner, and determined to act against abortion.[24]

One of the prosecutions that arose out of this activity was that of Charles Davidson in 1969 for four counts of using an instrument to procure the miscarriage of a woman and one count of conspiring to unlawfully procure the miscarriage of a woman. Until the changes introduced in 2008, the direction given by Menhennitt J to the jury in the Davidson prosecution governed the lawfulness of abortion in Victoria. Justice Menhennitt focused on the principle of necessity and the inclusion of the word 'unlawful' in the statutory provisions and directed the jury that abortion was not unlawful in the following circumstances:

> For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.[25]

This direction thus allowed an abortion to be performed not only where a doctor formed a view, on reasonable grounds, that there was a danger to a woman's life, but also where the doctor considered that there was a danger to a woman's physical or mental health (and the action would be proportionate to the risk). Haigh reports that the case received no newspaper coverage: '*The Age*'s front page on 26 May thought that the most pressing question for contemporary women was "Are Ladies in Trousers Respectable?"'[26] He goes on to describe the judgment in the following way:

> Precise in some places, vague in others, the Menhennitt Ruling [sic] offers almost nothing legally objectionable. It is not adventurous, stopping short of abortion on demand. It is not prescriptive, making no specific requirement regarding the number and nature of medical or psychiatric opinions. The lack of excitement it stirred is itself a kind of tribute.[27]

The jury found Davidson not guilty. Haigh speculates that this was not necessarily a result of Justice Menhennitt's direction, but rather he draws attention to Davidson's 'intriguing' evidence that the women concerned had imagined themselves pregnant, because this was their 'inborn desire'. Hence, they had merely imagined they had been aborted: 'The all-male jury was probably as influenced by masculine delusions about the female psyche as by the judge's fine-grained arguments'.[28] However, he also quotes from Sir John Young, a former Supreme Court judge: 'We were all rather amazed there was no

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23 Ibid 82.

24 Ibid 84–5. Siedlecky and Wyndham, above n 20, 79, state that in the 12 months after his appointment, 'he was responsible for more prosecutions for abortion than in the previous 30 years'.

25 *R v Davidson* [1969] VR 667, 672 ('*Davidson*').

26 Haigh, above n 21, 135. A later newspaper included front page coverage of the Government's rejection of the Opposition's call for a Royal Commission on the issue: Lionel Dunk, 'No Social, Economic Abortion Says Rylah', *The Age* (Melbourne), 23 July 1969, 1.

27 Haigh, above n 21, 136.

28 Ibid.

appeal … Cases on such issues can usually be relied on to be appealed. In the end, Cliff [Menhennitt]'s decision satisfied everyone. Had it been against community standards, an appeal would have been certain. But he got it exactly right'.[29]

The decision of Menhennitt J was followed in New South Wales in *R v Wald*.[30] The District Court judge there, Levine DCJ, made it clear that a doctor could also take account of economic and social grounds in assessing the danger to a woman's physical or mental health. Given the (then) strong similarities in the statutory prohibition on abortion in the two jurisdictions, it was assumed that these factors could also be considered in Victoria.[31]

These two legal decisions were the foundations of abortion regulation in Victoria and remain the foundations in New South Wales. These are apparently flimsy foundations, as they are decisions of single judges and neither has been subject to direct appellate scrutiny. However, they have been effectively approved in a series of decisions.[32]

III WHY REFORM THE LAW OF ABORTION?

It could be argued that adequate reform of the law had occurred in Victoria with the Menhennitt ruling and the later clarifications. After all, at least in Australian cities, access to abortion is quite easy and nationally there are some 80 000 terminations performed each year that are paid for through the Medicare system.[33] Indeed, were there not some risks if attempts were made to get explicit reform through Parliament?[34] Might we end up with a more, rather than less, restrictive regime?[35] Arguably, this is what occurred in South Australia, the first

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29 Ibid.

30 (1971) 3 DCR (NSW) 25.

31 See the discussion in Victorian Law Reform Commission, *Law of Abortion: Final Report*, Report No 15 (2008) 20–1.

32 Many of these are discussed in Graycar and Morgan, above n 17, 202. See especially *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, the first appellate level decision that effectively endorsed *R v Davidson* [1969] VR 667 and the NSW equivalent, *R v Wald* (1971) 3 DCR (NSW) 25.

33 See Victorian Parliamentary Library Research Service, 'Abortion Law Reform Bill 2008' (Current Issues Brief No 4, Parliamentary Library, Parliament of Victoria, 2008) 33, quoting figures from the National Perinatal Statistics Unit, which estimated that there were 79 448 abortions in 2004 funded by Medicare and an estimated 83 210, when estimates of those not claiming Medicare were added in. See also Angela Pratt, Amanda Biggs and Luke Buckmaster, 'How Many Abortions Are There in Australia? A Discussion of Abortion Statistics, Their Limitations, and Options for Improved Statistical Collection' (Research Brief No 9, Parliamentary Library, Parliament of Australia, 2005); VLRC, above n 31, 32–4.

34 Note that Michael O'Brien (Liberal), expresses a similar concern: 'Personally, I have grave concerns that this bill will disturb the community consensus that has developed around the 1969 ruling of Mr Justice Menhennitt in *R v Davidson*, which set out circumstances under which abortion may be lawfully performed in Victoria. … One of the beauties of the common law is that it is eminently adaptable': Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3370.

35 For suggestions that this is what happened in Western Australia, see Margaret Kirkby, 'Western Australia's New Abortion Law: Restrictive and Reinforcing the Power of the Medical Profession and the State over Women's Bodies and Lives' (1998) 13 *Australian Feminist Studies* 305.

State to legislate for 'legal abortion', which it did in 1969. The South Australian reform legislation, in articulating the circumstances in which abortion is not unlawful, requires *two* doctors to form the opinion that continuing the pregnancy would involve a greater risk to the physical or mental health of the woman than if the pregnancy was terminated.[36] Additionally, abortion can only be carried out in a prescribed hospital.[37] To borrow a turn of phrase from Louis Waller, perhaps we would do best by 'letting sleeping legislators lie'.[38]

On the other hand, there are a number of reasons why reform of the law was required. First, the previous state of the law was, to say the least, anomalous.[39] Prima facie, it is odd that the law of abortion appears typically in criminal law textbooks in the section on homicide; while they usually go on to describe the Menhennitt ruling, and the defence of necessity,[40] it remains confusing. Additionally, the continuing illegality of (unlawful) terminations did lead to substantial uncertainty in the law. This was of particular concern to doctors.[41] Arguably, the Menhennitt ruling only applied to surgical abortion, and the increasing availability of medical abortion via drugs that induce a miscarriage, for example RU486, meant that medical termination might have remained

36 *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(i).

37 *Criminal Law Consolidation Act 1935* (SA) s 82A(1).

38 Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, 53.

39 A number of politicians commented on this anomaly in the course of the debate on the Abortion Law Reform Bill 2008 (Vic). See, eg, the statement by Peter Batchelor (Labor): 'As strange as it may seem the offence of abortion remains in the Crimes Act despite the 1969 ruling by Justice Menhennitt … The Bill we are debating in Parliament today seeks to address that anomaly': Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3325 (Peter Batchelor, Minister for Community Development). See also, at 3331 (John Brumby, Premier, Labor); at 3353 (Joanne Duncan, Labor): 'This legislation removes the anomaly between the Crimes Act and the law'; at 3381 (Ann Barker, Labor): 'Of particular interest to me have been the comments of local residents that this current debate has surprised them because they believe that abortion is legal. When told that it is still included in the Crimes Act, they have clearly indicated to me that this should no longer be the case'.

40 See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2009) ch 9.

41 de Crespigny and Savulescu, above n 4. Again this is echoed in Ted Baillieu's (Liberal) speech: 'This is a debate about whether we provide clarity and certainty to women or preserve doubt and uncertainty': Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3312. See also at 3321 (Daniel Andrews, Labor, Minister for Health); Louise Asher (Liberal) noted the particular uncertainty for doctors: at 3326; additionally, Asher noted that it was also put to her that the decriminalisation legislation would assist women in rural Victoria. John Pandazopoulos (Labor) observed: 'Justice Menhennitt stopped the undergrounding of the horror of the illegal abortions that members have talked about, but we still have a sort of underground discussion because we have a Crimes Act that does not allow for a proper informed discussion to give members of the medical fraternity the confidence they need to be able to genuinely deal with these sorts of things and not fear that maybe some time in the future someone might change their mind about these things and might want to enforce the Crimes Act': at 3368; or, '[t]his bill will clarify the ambiguity for women and doctors, who are at present at risk of prosecution under the Crimes Act': at 3371 (Jude Perera, Labor). Note also the suggestion by Kevin, that during the height of the Howard era debate on abortion in 2004, abortion providers reported that 'some women became unsure whether the procedure was legal, and worried about the risk of being caught entering abortion clinics': Catherine Kevin, 'Great Expectations: Episodes in a Political History of Pregnancy in Australia since 1945' in Catherine Kevin (ed), *Feminism and the Body: Interdisciplinary Perspectives* (Cambridge Scholars Publishing, 2009) 60.

especially vulnerable.[42] Finally, and most importantly, the implicit or discursive message sent by a continued apparent criminalisation of abortion is of concern: women are constructed as incapable of making their own thoughtful decisions, as either unworthy to do so, and/or at the mercy of the all-powerful doctor.[43] The strong message is one of women's incapacity and inequality.[44]

IV INSTITUTIONS OF CHANGE: HOW OR WHERE TO REFORM THE LAW ON ABORTION?

I have noted above the temptation to leave sleeping dogs, or legislators, lie, and yet as I have also outlined there are difficulties both practical and philosophical with keeping the offence of abortion on the statute books. If reform of the law on abortion is to occur, by what process should that happen?

Clearly the courts have been one forum for legal change in Victoria, and indeed elsewhere in Australia. And yet the shape and form of that reform can be somewhat haphazard, seemingly dependent on apparently random prosecutions[45] or civil litigation on civil liability of doctors,[46] attempts by men to stop their partners having terminations,[47] or minors seeking access to terminations.[48]

In countries with constitutionally entrenched Bills of Rights, there is the possibility of challenging the constitutionality of restrictions on the availability of abortion, as occurred famously in *Roe v Wade* in the United States,[49] and in Canada in *Morgentaler v The Queen*.[50] However, Australia has no national Bill of Rights, and only two states or territories – the ACT and Victoria – have

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42 See Caroline de Costa and Naomi de Costa, 'Medical Abortion and the Law' (2006) 29 *University of New South Wales Law Journal* 218, 220; *Queensland v B* [2008] 2 Qd R 562.

43 See, eg, Mark Rankin who argued, prior to the recent reform in Victoria, that the 'liberalisation' or 'decriminalisation' wrought by *Davidson* and related decisions had 'not conferred any rights upon women with regard to abortion, but has simply resulted in the medicalisation of abortion': Mark J Rankin, 'Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion' (2001) 27 *Monash University Law Review* 229, 231. Rankin makes a similar point about the 'reform' of the SA legislation in 1969:

> The only "right" granted is to the medical practitioner to form an opinion in good faith [that the continuance of the pregnancy would involve a greater risk to the physical or mental health of the woman than termination or a substantial risk that the child if born would be seriously handicapped], and to perform the abortion on the basis of this opinion: at 245.

44 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3371 (Jude Perera): 'The Bill will remove the stigma surrounding women having abortions and abortion providers in today's enlightened and caring society. The Bill will encourage medical practitioners to be trained in the area and improve women's access to reproductive and family planning health care'. See also Rankin: 'while abortion remains a subject for Australian criminal law, it can never be a right possessed by Australian women': at 252.

45 See generally Haigh, above n 21.

46 See, eg, *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

47 See, eg, *In the Marriage of F* (1989) 13 Fam LR 189.

48 See, eg, *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311.

49 410 US 113 (1973) ('*Roe*').

50 [1988] 1 SCR 30.

statutory Bills of Rights. (And, interestingly, laws concerning abortion are explicitly excluded from the purview of the Victorian Charter of Rights).[51]

In Australia, a more fruitful route for reform has been via legislative change. As noted, South Australia was the first jurisdiction to change its laws in 1969. In 1998, Western Australia removed abortion from its *Criminal Code*; the ACT moved similarly in 2002, and in the most recent wholesale reform, Victoria removed abortion (almost completely) from the *Crimes Act* in 2008. In the remainder of this section the institutional locus of these reforms is the focus, that is why Parliament might be a suitable (or unsuitable) forum for legal change. I then move on to the language of reform.

A Parliamentary Reform and Democratic Participation?

In 1938, John Barry, a barrister, developed a version of the legal argument that prevailed in *Davidson*, in an address to the Medico-Legal Society.[52] What is of more interest in this context is his view of *where* legal reform should occur. Barry took the view that abortion law reform was not a suitable topic for a legislative body and should be left to the judges because 'on a subject such as this the reaction of the average person … is not intellectual but emotional' and thus 'not a fit subject for debate in popular assemblies or the Parliaments we have'.[53] Whatever the merits of his observations at the time – and Gideon Haigh suggests that despite the apparent 'legal elitism, he had some evidence for his conclusion'[54] – I certainly think it underestimates the potential of modern parliaments. It contrasts sharply with the statement by then Attorney-General Robin Millhouse in South Australia in 1969, when he introduced Australia's first successful abortion law reform legislation:

51 The Charter provides that '[n]othing in this Charter affects any law applicable to abortion or child destruction': *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 48. Note that this provision was stated to be included in order to ensure that, given the 'range of strong community views on this issue' the Charter could not 'be used as a vehicle to attempt to change the law in relation to abortion': Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1292 (Rob Hulls, Attorney-General). See also George Williams, 'The Victorian *Charter of Human Rights and Responsibilities:* Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 896.

52 See John V Barry, 'The Law of Therapeutic Abortion' (1939) 3 *The Proceedings of the Medico-Legal Society of Victoria* 211 (lecture delivered 26 November 1938). Note that Kerry Petersen states that the paper was 'very important', with 'three hundred editions … printed and distributed to influential people. As a consequence, the content of this paper became the *de facto* law in Victoria for three decades': Kerry A Petersen, *Abortion Regimes* (Dartmouth Press, 1993) 133.

53 Cited in Haigh, above n 21, 43.

54 Ibid.

> I strongly believe that Parliament is the place in which issues of controversy and of significance in the community should be decided, and if Parliament for any reason shirks its responsibility to debate and decide these things it is failing in one of its greatest functions; if it continues to do this, eventually it will be discredited in the eyes of the community. Therefore, I have no regrets whatever about the interest, lobbying, discussion and debate that have taken place in the community on this matter.[55]

An editorial in *The Age* soon after the Menhennitt ruling berated the government for failing to clarify the law:

> After months of consideration, the Government of Victoria has finally decided to do nothing whatever about abortion law reform. It has chosen to ignore the wishes of the majority and the advice of the medical profession. Rather than abdicate its responsibilities openly, it has attempted to shelter behind a judge's wig and robes. … The State Government cannot be allowed to dodge its duty so easily. If it is happy about the common law as interpreted by Mr Justice Menhennitt, what possible reason (apart from political expediency) can it have for refusing to alter the statute law to bring it into line?[56]

Or, as put by Robin Scott (Labor) in the Victorian Parliament in 2008:

> As a general principle I regard parliaments in a democratic society as being the appropriate vehicles where possible to resolve complex issues of morality within society. While courts have an important role in protecting the rights of individuals they should not be the primary mechanism for resolving complex issues of morality and of how society functions. Parliament is the supreme body that has the pre-eminent role in this matter.[57]

Australian Parliaments have debated abortion law reform since at least 1966, when a private member's Bill to decriminalise abortion was introduced in the Western Australian Parliament.[58] However the first successful legislative reform was in South Australia in 1969. While the development of abortion law via the common law was somewhat haphazard, that should not imply that the parliamentary process is necessarily replete with transparent logic and reason. For example, Jill Blewett notes that the South Australian reform originated in proposals from the Young Liberals early in 1968, notwithstanding that the then Labor Premier, Don Dunstan, had stated in 1967 that the Criminal Law Revision

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55 South Australia, *Parliamentary Debates,* House of Assembly, 21 October 1969, 2319 (Robin Millhouse, Attorney-General). Millhouse indicated his commitment to time for community consideration: 'In introducing the Bill, I said that the Government intended to take it to a certain stage during last session and then allow adequate time for members of Parliament and people outside to consider the matter and make up their minds'.

56 Editorial, 'Dodging Their Duty', *The Age* (Melbourne), 23 July 1969, 7.

57 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3382. Note also the argument by Naomi Oreb that 'the exercise of parliamentary discretion regarding morality can be considerably more transparent [than judges] as politicians can reveal their personal values when exercising conscience votes': 'Worth the Wait? A Critique of the *Abortion Act 2008* (Vic)' (2009) 17 *Journal of Law and Medicine* 261, 264.

58 On 25 November 1966, JG Hislop introduced a private member's Bill into the WA Legislative Council: Western Australia, *Parliamentary Debates,* Legislative Council, 2899. This was not pursued further at the time. A later Bill was fully debated in 1970 and defeated: see Siedlecky and Wyndham, above n 20, 81–101, for a description of reform efforts up to 1990, state by state, including WA.

Committee might well examine the matter.[59] And it was the Liberal Country League Party which introduced the reform Bill after the Dunstan government lost office in 1968. Blewett goes on to observe that Robin Millhouse, the then Attorney-General, had complex motivations for his move:

> As a lawyer, but also as a deeply moral and religious man personally antipathetic to abortion, he was anxious to avoid by legalisation both the kind of graft and corruption obtaining in the eastern States, and the social problems engendered by restrictive laws. As a politician, he saw abortion law reform as a key element in the long overdue process of modernising his party, while on the personal level abortion was possibly the one issue which would allow him 'to leave a mark on law reform as distinctive as [that of] his rival and predecessor, Dunstan'.[60]

While human motivations, including those of parliamentarians, may be complex, parliamentarians do at least provide a target for lobbyists. That is, there is a chance to affect, influence, persuade, convince or manipulate a politician, in a way that judges are not amenable to. Indeed, it is interesting here to reflect on the views of Scalia J, a conservative member of the United States Supreme Court. Justice Scalia enunciated this scathing critique of both lobbyists and his colleagues on their failure to overturn *Roe*:

> Alone sufficient to justify a broad holding is the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us – their unelected and life-tenured judges who have been awarded these extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will – to follow the popular will. Indeed, I expect we can look forward to even more of that than before, given our indecisive decision today.[61]

That sort of public 'engagement' with the court process is much less likely to happen in Australia; with the possible exception of the regular 'Fathers' Rights' demonstrators outside the Family Court,[62] court protests are rare in Australia. In addition, as Scalia J points out, protest is arguably not a very useful tool as judges are not meant to be responsive to public opinion.

In some limited circumstances, there is room for 'the public interest' to be presented in court proceedings, via an intervener or as an amicus curiae – friend of the court. However, Australian courts have comparatively restrictive rules on standing,[63] and these certainly do not ensure a right to represent the views of

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59 Jill Blewett, 'The Abortion Law Reform Association of South Australia: 1968–73' in Jan Mercer (ed), *The Other Half: Women in Australian Society* (Penguin, 1975) 379.

60 Ibid 379–80, quoting Neal Blewett and Dean Jaensch, *Playford to Dunstan: The Politics of Transition* (Cheshire, 1971) 188. Blewett and Jaensch quote Millhouse: 'we who are engaged … in trying to bring our own party out of the nineteen-thirties into nineteen-seventy … had the opportunity to tackle matters which in our view should have been tackled gradually over the twenty years which we lost and [abortion] is perhaps the prime example of that'. The reference to the lost twenty years, is a reference to the 27 year rule of (Liberal) Sir Thomas Playford as Premier of South Australia.

61 *Webster v Reproductive Health Services,* 492 US 490, 535 (1989).

62 See, eg, Caroline Milburn, 'Angry Middle-Aged Men', *The Age* (Melbourne) 9 December 1998, 13.

63 See, eg, Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159.

women's organisations, or the Abortion Law Reform Association in, say, the prosecution of a doctor. Interestingly, in one of the very few pieces of litigation about abortion to reach the High Court of Australia, *CES v Superclinics*, the Court granted leave to appear in the case as amici curiae to the Catholic Bishops Conference and the Catholic Health Care Providers' Federation. The granting of such leave was contested, and the court split 3:3, with the casting vote of Brennan CJ deciding the matter.[64] The Abortion Providers Federation was also granted amicus curiae standing, and it remains unclear whether such standing would have been granted to the Women's Electoral Lobby ('WEL') as the case settled before that issue could be decided.[65] So while it is possible for groups with a particular interest in an issue to intervene in a court case to argue those interests, participation is by no means assured. By contrast, the parliamentary forum is quintessentially one in which representations from constituents are expected and made, and can have a substantial influence, for both good and ill, on the way politicians vote.[66]

It is interesting to reflect on what the effect of representations on abortion by constituents might be.[67] A recent article by Katherine Betts analyses the opinion data from a regularly administered survey, the Australian Election Studies ('AES'), which have been conducted after each federal election since 1987. As well as gathering data on the particular election, there are a small number of questions on social issues. One of these is on abortion, and we thus have data spanning more than 20 years and asking the same question of constituents. That question is:

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64 Note that when the application for leave to intervene was made, Brennan CJ said: 'I have asked the Senior Registrar to inform counsel that I know Father McKenna, a deponent to one of the affidavits in support of the application for leave to intervene, or to appear amicus curiae, and a number of members of the Australian Catholic Bishops' Conference': Transcript of Proceedings, *Superclinics (Australia) Pty Ltd v CES* (High Court of Australia, No S88 of 1996, Brennan CJ, 11 September 1996) a 4.

65 See Jo Wainer, 'Abortion before the High Court' (1997) 8 *Australian Feminist Law Journal* 133; Rosemary Owens, 'Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy' (1998) 20 *Adelaide Law Review* 193.

66 Politicians in the Victorian debates frequently refer to the representations from constituents they had received; they also frequently presented petitioners from voters. So, for example, Bob Cameron, the Member for Bendigo, presented a petition from 66 voters opposing the decriminalisation of abortion, urging the Parliament 'to abstain from carrying forth the proposal of the decriminalisation of abortion thereby absolving itself of innocent blood': Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3523. And, in the South Australian context, on 18 February 1969, three petitions on the abortion issue were presented, one from 253 electors 'who viewed with concern any efforts to extend the grounds on which abortion was at present legally allowed and prayed that the House of Assembly do not pass the Bill relating to abortion', one from 1018 electors and another from 902 electors 'suggesting that the present law was inhuman and anachronistic in the light of present-day attitudes and medical knowledge, and requesting that the law be amended to enable a legally qualified medical practitioner to terminate pregnancy': South Australia, *Parliamentary Debates*, House of Assembly, 18 February 1969, 3632.

67 See also Pringle, above n 9.

> Which of these statements comes closest to how you feel about abortion in Australia? Women should be able to obtain an abortion readily when they want one; Abortion should be allowed only in special circumstances; Abortion should not be allowed under any circumstances.[68]

In 1987, 38 per cent of people agreed that abortion should be readily available; that figure moved to 50 per cent by 1990, and stood at 57 per cent after the 2007 federal election. In parallel, the proportion suggesting that abortion should only be available 'in special circumstances' decreased from 54 per cent in 1987, to 39 per cent in 1990, and 33 per cent in 2007.[69]

Somewhat earlier, the South Australian parliamentary debates on abortion reported the following attitudes as extant in 1969, citing a then recent Australian Gallup poll conducted in February of 1969, interviewing 2000 people:

> About two out of three Australians would make abortion legal on four grounds. They are when: a woman's mental and physical health is threatened [73 per cent]; the child is likely to have serious mental or physical deformities [68 per cent]; pregnancy is the result of rape or incest [70 per cent]; or the woman is intellectually defective or mentally ill [65 per cent]. More than two out of three people would oppose making abortion legal because another child would gravely disturb the economic state of the family. … Only 17 per cent said that none should be legal.[70]

The data from surveys of the population thus tend to suggest that if politicians voted responsively to the views of their constituents, they would be voting in favour of law reform which made abortion more freely available.[71] However, this does not factor in the views and indeed the work of activists, alluded to in the views of Scalia J in the United States Supreme Court. As Betts observes:

> Perhaps the stumbling block to reform in a situation such as has now occurred in Queensland lies with the influence of special interest groups. Small groups may be especially mobilised around the anti-choice position and thus might in some fashion prevent the election of candidates who support reform.[72]

On the other side, the various state-based Abortion Law Reform Associations have been active in lobbying politicians for progressive law reform. However, the fact remains that, whatever the outcome, it is appropriate that politicians are

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68 Betts, above n 8, 28.

69 Ibid. Note also that the proportion saying that abortion should not be allowed in any circumstances has remained fairly steady, with 6 per cent choosing this option in 1987 and 1990, and 4 per cent so choosing in 2007. The proportion of don't knows or missing data has increased from 2 per cent in 1987 to 7 per cent in 2007: at 28. These and other surveys are canvassed in VLRC, above n 31, 58–68.

70 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2319–20 (Robin Millhouse), citing a report of the Gallup organisation.

71 Indeed, Betts suggests that the views of candidates, at least at the federal level, hold *more* progressive views than electors: Betts, above n 8, 32. Note however that candidates are not asked precisely the same question as voters. The variety of questions asked of candidates over the years is described by Betts at 31–2.

72 Ibid 33. The situation in Queensland that Betts refers to in this quote is the prosecution of two young people in relation to possession of RU486 described in Part I, above n 8. See also Pringle, above n 9, who argues that the view that many politicians seem to hold that it is electorally risky for a politician to support abortions reflects a mistaken belief.

lobbied, and indeed not inappropriate that activists have an influence on politicians.

There is one other aspect of the participation of politicians in abortion law reform debates and votes that should be highlighted: the potentially transformative nature of such participation.

In his account of law reform in the United States, Lawrence Lader describes the following incident in the New York legislature in 1970. There was a proposal essentially to provide abortion on demand, up until 24 weeks, being considered. The vote was tied 74:74, when George Michaels, a Democrat member of the Assembly, rose to speak:

> Those sitting nearby saw his face contorted, his eyes filled with tears. … A prosperous, reserved, 59-year old lawyer, Michaels seemed to be talking about his firm. 'My law firm may suffer from what I am doing,' he mumbled. His sentences were fragmented, coming in bursts. Still, everyone had finally realized that Michaels was about to switch his vote, and a slow rumble of whispers, like a flood damned too long, began to build throughout the chamber. …
>
> Michaels was talking about his family, his three sons, a devout Jewish family … 'My own son called me a whore for voting against this bill', he explained, his voice breaking with sobs. 'He said for god's sake don't let your vote be the one that defeated the bill.'
>
> His words slurred and broke. Often it seemed he could not go on. 'I had nothing prepared,' Michaels recalled. 'I had only a few minutes to think what I was doing. I had spent thirty seven months in the Marines in World War II, much of it in combat in the Pacific, under mortar fire. This was worse than anything. It was the summit of my life.'
>
> Michaels, representing a heavily Catholic district … [concluded]: 'What's the use of getting elected if you don't stand for something. I realize, Mr Speaker, that I am terminating my political career, but I cannot in good conscience sit here and allow my vote to be the one that defeats this bill – I ask that my vote be changed from 'No' to 'Yes'.'[73]

This sort of responsibility is also possible in Australian parliamentary votes on abortion, as they are traditionally conscience votes, rather than a vote strictly along party lines. This was the case in Victoria in 2008, notwithstanding that decriminalisation of abortion was Australian Labor Party ('ALP') policy prior to the 2006 election. Ian McAllister observes that contentious social issues are often avoided by the major political parties:

> To ensure their own survival, parties must avoid issues that could jeopardize internal party unity or divide the social basis of support upon which they depend for electoral success. Political parties deal with this problem by restricting conflict along an economic dimension, usually arranged from left to right, which presents voters with two clear political choices – collectivism versus the free market. Immigration, along with other non-economic issues like abortion … represents an issue which cross-cuts established patterns of party competition and has the potential to threaten party unity.[74]

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73 Lawrence Lader, *Abortion II: Making the Revolution* (Beacon Press, 1973) 142–3.

74 Ian McAllister, 'Immigration, Bipartisanship and Public Opinion' in James Jupp and Marie Kabala (eds), *The Politics of Australian Immigration* (Australian Government Publishing Service, 1993) 162–3. I am grateful to an anonymous reviewer for drawing McAllister's work to my attention.

The Victorian debates contained some interesting observations on parliamentarians' obligations under a conscience vote. For instance, what should the role of the views of electors be in influencing or determining the votes of politicians? Both those who opposed and those who were in favour of the legislation suggested that the views of electors were relevant: for example, Helen Shardey (Liberal), who voted in favour of the legislation, says: 'Naturally as parliamentarians, even if we have a conscience vote, we seek the views of those we represent when contemplating the decision about how we will treat this very sensitive matter'.[75] Or, more proactively, Craig Ingram (Independent) undertook his own straw poll of his electors, and noted that the overwhelming majority took the view that it was the woman's choice, and only nine per cent were completely opposed to making abortion freely available.[76] He observed: 'as a member of this place, I am here to represent the majority and not necessarily the minority even though their views are very passionately held'.[77] While there was nothing quite like the experience of Assemblyman Michaels in New York in 1970, Daniel Andrews, the Minister for Health, suggests that he may have voted contrary to his own personal moral views when he said:

> In so many facets of my life, both personal and professional, I am guided by my upbringing, my core values, my beliefs – indeed, my faith – but in consideration of these matters in my capacity as both a member of this place and as the Minister for Health, it is my considered view I must take a broader approach.[78]

And in a vivid articulation, Martin Pakula (Labor) stated:

> I consider abortion to be a topic which morally is very problematic. It is something that I find entirely unappealing on a personal level. … I have never been in a position where abortion has been an option, a reality or a consideration in my life. If I were to be honest, I would say that if I had been in that position, … I suspect I would have opposed my wife having an abortion.
>
> Having said that, I also recognise that it would not have been up to me. It would have been a matter on which my wife would have made a decision … Even though … I am exercising my conscience … [d]o I as a legislator, as a member of Parliament, believe I have the right to tell every woman in Victoria whether she has the right to make this decision for herself. I do not believe I do, and I do not believe we as a Parliament do.[79]

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75 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3319.

76 Ibid 3336. Interestingly, the only mention of large scale survey data on attitudes to abortion was by Candy Broad, when introducing her private member's Bill in 2007: Victoria, *Parliamentary Debates,* Legislative Council, 19 July 2007, 2145 (Candy Broad).

77 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3336 (Craig Ingram). Cf the statement of Robin Scott, also a supporter of the Bill: 'This is not a matter where members of Parliament should act simply as delegates of the majority view in the community. It is about fundamental life issues where they make a decision on how they view the world and what their fundamental morality is': at 3382.

78 Ibid 3322. Note also Maxine Morand's observation on the debate on a matter of conscience: 'we truly get to know each other and understand better the values and beliefs that motivate and guide us in our thinking': Victoria, *Parliamentary Debates,* Legislative Assembly, 10 September 2008, 3473. See also Wendy Lovell, a member of the Legislative Council, who said: 'Very early on in the consultation process for this bill I distanced myself from my personal views and religious beliefs in making a decision as to whether I supported the bill': Victoria, *Parliamentary Debates,* Legislative Council, 7 October 2008, 3907.

79 Victoria, *Parliamentary Debates,* Legislative Council, 7 October 2008, 3923.

Another interesting aspect of this conscience vote was the cross party support for the decriminalisation option, and in particular the overwhelming majority of women members of Parliament who voted in favour of that option. Close to 80 per cent of women parliamentarians voted in favour of the reforms, compared to some 53 per cent of male politicians.[80]

While I have argued in this section that parliament is an appropriate forum for debating, and settling on, the nature of the legal regulation of access to abortion, there remains the question of how well parliamentary fora handle this task. I thus go on to consider the language in which the Victorian debates were conducted. However, before doing so I very briefly outline changes in other Australian jurisdictions. I then describe the way in which the particular reform legislation came before the Victorian Parliament, a process which itself had many unusual features.

V THE REFORM PROCESS

Legislative activity in Victoria had been preceded by relatively radical reform in both Western Australia and the ACT.[81] In 1998, the Western Australian Director of Public Prosecutions had charged two doctors with performing an unlawful termination, which led to Cheryl Davenport introducing legislation into the Western Australian Parliament which would have removed abortion from the *Criminal Code Act 1913* (WA). After a long debate, the *Criminal Code Act 1913* (WA) was amended instead to provide that performing an abortion is unlawful unless it is 'performed by a medical practitioner in good faith and with reasonable care and skill' and is justified under section 334 of the *Health Act 1911* (WA).[82] The *Health Act* in turn specified that performing an abortion required the woman's informed consent.[83] Informed consent is consent freely given after being informed of the medical risks of both termination and carrying a pregnancy to term; a doctor must also offer referral to counselling.[84] Termination effectively requires the involvement of two medical practitioners, as the information must be offered by a practitioner other than the one who performs the termination.[85] In 2002, the ACT removed abortion from the *Crimes Act 1900* (ACT), and introduced some limited regulation under health legislation, including providing that an abortion can only occur in an approved facility.[86]

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80 See Warhurst, above n 15, where he analyses, amongst other things, the RU486 vote.

81 And of course earlier reform in South Australia discussed above.

82 *Criminal Code Act 1913* (WA) s 199.

83 *Health Act 1911* (WA) ss 334(3)(c), 334(3)(d), 334(4).

84 *Health Act 1911* (WA) s 334(5).

85 *Health Act 1911* (WA) s 334(6). Note that in addition where a woman has been pregnant for more than 20 weeks, a termination cannot be performed unless two doctors from a government appointed panel of at least six doctors form the view that the abortion is justified because of the 'severe medical condition' of the 'mother' or the 'unborn child': s 334(7). There are also further restrictions on minors seeking a termination: ss 334(8)–(11).

86 *Health Act 1993* (ACT) s 82. See also *Crimes (Abolition of Offence of Abortion) Act 2000* (ACT).

In 2007 Candy Broad, a Victorian Labor Member of the Legislative Council, introduced a private member's Bill to remove the two unlawful termination offences described above from the *Crimes Act*.[87] Unlike Western Australia, this action had not been preceded by a prosecution of a health practitioner, and unlike both the Western Australian and ACT models, there were to be no concomitant changes to health legislation, the view being taken that the ordinary common and statutory law on matters like informed consent or the safety of medical procedures were sufficient to govern the safe regulation of terminations. The amendments in the Broad Bill would have left intact the offence of child destruction, then in section 10 of the Act.[88] The Premier who allowed the private member's Bill to be placed on the notice paper had resigned by the time the Bill was introduced.[89] The then new Premier, John Brumby, declined to support proceeding with the private member's Bill, and announced that the matter was to be referred to the VLRC.[90]

While referral to a law reform body can be a way of taking the heat out of an issue, and deferring a controversial decision, there were aspects of this referral which were unusual, and indicated a commitment to reform of some nature. In particular, the terms of reference of the Commission's inquiry were circumscribed in the following way:

> The Commission is to provide advice on options to:
>
> 1. Clarify the existing operation of the law in relation to terminations of pregnancy.
> 2. Remove from the *Crimes Act 1958* offences relating to terminations of pregnancy when performed by a qualified medical practitioner(s).
>
> In providing this advice the commission should have regard to the following:
>
> ….
>
> C. The Victorian Government's desire to modernise and clarify the law, and reflect current community standards, without altering current clinical practice.[91]

As the Commission stated:

> This reference is designed to provide the government with recommended options to have in place clear laws which reflect current clinical practice and community

87 The Bill was introduced on 18 July 2007: see Victoria, *Parliamentary Debates*, Legislative Council, 18 July 2007, 2120, and was read for a second time on 19 July 2007, where a statement of compatibility with the Charter was also made: see Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2007, 2143–4.

88 *Crimes Act 1958* (Vic) s 10(1) provided that '[A]ny person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes such child to die before it has an existence independent of its mother shall be guilty of the indictable offence of child destruction, and shall be liable on conviction thereof to level 6 imprisonment' [15 years maximum]. Section 10(2) provided that evidence that a woman had been pregnant for 28 weeks or more was prima facie proof that the child was 'capable of being born alive'.

89 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3384.

90 Candy Broad withdrew her Bill on 21 August 2007 after this announcement: Victoria, *Parliamentary Debates*, Legislative Council, 21 August 2007, 2480.

91 VLRC, above n 31, 5, quoting the terms of reference given to the Commission by the then Attorney-General, Rob Hulls.

> standards. The government's aim is that reform should neither expand the extent to which terminations occur, not restrict current access to services.[92]

In short, the Commission could make recommendations that were neither too 'radical' nor too 'conservative'. Abortion was to be decriminalised, and in making their recommendations, the Commission was to be guided by current practice and attitudes.

It is worthwhile re-emphasising how unusual this referral was. Abortion law reform was part of the ALP policy platform for the 2006 state election and the terms of reference given to the Commission indicate that the government was now committed to reform of that law. Typically, in that circumstance, the task of formulating the required changes to the law would be given to a government department. Independent law reform agencies are characteristically given a thorny social policy issue (or sometimes more narrowly a legal issue with policy implications) and asked to come up with a policy solution that can be implemented in a legally defensible way, usually via legislation. Perhaps the referral to the Commission was designed to distance the government from the changes; certainly the parliamentary debates, discussed in detail below, make repeated reference to the recommendations and consideration of the VLRC. That is, there may well have been an attempt to take the heat out of the issue and defer a controversial decision, as I noted above. However, a decision was in fact intended; the process was not meant to perpetuate what might cynically be described as the usual outcome of such referrals – endless deferral. It may also be that the Commission was perceived to have a level of independence not possessed by the public service, again a distancing mechanism for the government. It may also be the case that the government was keen to draw on the Commission's expertise in community consultation, a process which was of necessity constrained, as noted below. Finally, one might ask why the Commission accepted a reference that was constrained in the way described.[93] In an area of law reform like abortion, with all the complexities I have adverted to – the apparent contradiction between the law on the books and the law in practice, where there is widespread support for relatively free access to termination, yet opponents of abortion are active and loud, and the issue is perceived as highly controversial – a Commission might well see itself as needing riding instructions in order to come up with recommendations that had any chance at all of being enacted.

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92 Ibid.

93 Despite the strictures in *Victorian Law Reform Commission Act 2000* (Vic) s 5, which provides that the Commission is to 'examine, report and make recommendations on ... any matter ... relating to law reform ... that is referred to the Commission by the Attorney-General', in practice terms of reference are often negotiated with commissioner(s) in such agencies: see Reg Graycar and Jenny Morgan, 'Law Reform: What's in It for Women?' (2005) 23 *Windsor Yearbook of Access to Justice* 393, 406; Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39 *Federal Law Review* 161, 164, 171. I have no direct knowledge of the process used on this occasion.

The Commission was required to report within six months, a very short period of time for a VLRC inquiry.[94] The Commission released an information paper, laying out the law on abortion in Victoria and other Australian states and territories. It stated that the time frame did not allow an issues paper or consultation paper to be released, but did engage in consultation meetings with '36 groups and individuals with different views about abortion'.[95] It received 519 submissions, '[m]any … from people who disagreed with the decision to decriminalise abortion and called for a change to the terms of reference to allow the commission to consider retaining and strengthening the criminal regime'.[96] It also established a medical advisory panel, to advise it on current practice and on how various models of law reform might affect the medical profession.[97]

The Commission ultimately came up with three models for reform, all of which they said would comply with the strictures noted above. It did not express a preference amongst the three, again an unusual approach for a law reform commission. Model A was a mere codification of the Menhennitt ruling in legislation so that 'a medical practitioner determines that the abortion is necessary because of the *risk of harm* to the woman if the pregnancy is not terminated'.[98] Model B involved a two part approach, one applying to terminations prior to 24 weeks gestation, where no special rules at all would govern termination of pregnancy, the general rules applying to medical treatment would apply and thus the decision would be one for a woman alone to make; after 24 weeks, the decision would be governed by a codified Menhennitt approach. Thirdly, under Model C the decision would be one for the woman at all stages of pregnancy. Perhaps unsurprisingly, the government opted to implement Model B.[99]

VI THE BILL INTRODUCED

The VLRC had not included draft legislation in its proposals for reform. One assumes the Office of Parliamentary Counsel drew up the legislation, aiming to

94 An anonymous reviewer suggested that the short time frame was a product of the timing of the next election.

95 VLRC, above n 31, 12.

96 Ibid 13.

97 Ibid 13.

98 Ibid 87 (emphasis in original). This option contained three internal choices which effectively concerned what factors could be taken into account by the doctor – under the first, an essential restatement of the Menhennitt ruling, no factors were specified that the doctor should take into account, and the abortion needed to be proportionate to the risk; under the second, a medical practitioner should have regard to 'economic, social or medical matters that may affect the woman's physical or mental health if she continues with the pregnancy' and the abortion was proportionate to the risk; or thirdly, again with no specification of the risks to be considered by the doctor, but no requirement of proportionality: at 87–8.

99 For a description of the tendency for feminist lawyers intervening in legal policy debates to include amongst options for reform conservative alternatives, and the ability of decision-makers to ignore the more radical arguments in favour of the least radical, see Elizabeth A Sheehy, 'Feminist Argumentation before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: The Sound of One Hand Clapping' (1991) 18 *Melbourne University Law Review* 450.

implement 'Model B'.[100] The *Abortion Law Reform Act 2008* (Vic) covered both surgical and medical abortion.[101] It aimed to remove abortion from the *Crimes Act 1958* (Vic)[102] and, out of abundant caution, enact that any common law offence of abortion was also abolished.[103] It creates an offence to cover the situation of an unqualified person performing an abortion.[104] It provides that in the case of a pregnancy greater than 24 weeks, two doctors have to come to the view – a reasonable belief – that abortion is appropriate 'in all the circumstances'. Their discretion is further fettered in section 5(2) such that in deciding whether abortion is appropriate, regard must be had to 'all relevant medical circumstances' and 'the woman's current and future physical, psychological and social circumstances'. The intention was that any breach of this provision would be a matter for professional disciplinary bodies and not for the criminal law.[105] The offence of child destruction was also repealed.[106]

In addition, in what was probably intended as a salve to those who oppose access to termination, section 8 provides that where a woman seeks advice on or requests the performance of an abortion, and the registered health practitioner has a conscientious objection to abortion, s/he is required to inform the woman of that and, in what turned out to be the most contentious aspect of the legislation, to: 'refer the woman to another registered health practitioner in the same

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100 An anonymous reviewer says that what happened was that parliamentarians decided they wanted Model B+, and began to change what had been recommended by the VLRC.

101 See definition of abortion in *Abortion Law Reform Act 2008* (Vic) s 3.

102 *Abortion Law Reform Act 2008* (Vic) s 9. The complete removal of the criminal law from the field may not have been achieved: see below n 105.

103 See *Abortion Law Reform Act 2008* (Vic) s 11, inserting new ss 65–6 into the *Crimes Act 1958* (Vic).

104 Ibid.

105 Explanatory Memorandum, Abortion Law Reform Bill 2008 (Vic) stated: 'A registered medical practitioner who performed an abortion on a woman who was more than 24 weeks pregnant without considering the relevant circumstances, or without seeking the opinion of a second registered medical practitioner will be liable to be found to have engaged in professional misconduct under the *Health Professions Registration Act* 2005'.

106 See the old offence of child destruction, above n 88. The Act probably did not completely remove the criminal law from this field, because of the effect of the provision abolishing child destruction. The Commission recommended amending the *Crimes Act 1958* to abolish s 10 and including injury to the foetus in the definition of serious injury. The definition inserted reads: 'the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm'. However Parliament did not adopt the Commission's recommendation to follow NSW in not restricting the definition of 'medical procedure'; instead, it was limited to 'an abortion performed by a registered medical practitioner in accordance with the *Abortion Law Reform Act* to cause an abortion': s 15. The Scrutiny of Acts and Regulations Committee ('SARC') observed: 'if a doctor forms an unreasonable belief that an abortion on a woman … over 24 weeks pregnant is appropriate, clauses 5 and 7 appear to render the abortion unlawful and, therefore, may prevent that doctor from relying on any defence of "lawful excuse" to a charge of intentionally causing serious injury': SARC, Parliament of Victoria, *Alert Digest*, No 11 of 2008, 9 September 2008. Some months after the legislation passed, the Minister responded that this hypothetical was extremely unlikely: the Act requires two medical practitioners to come to the view that a termination was appropriate and it seemed very unlikely both would come to an unreasonable view. The Minister conceded that a more likely scenario, of performing the termination without seeking the opinion of a second practitioner, could in some circumstances mean a medical practitioner lacked a lawful excuse for their behaviour, and thus could be liable – a situation she appeared happy with: SARC, Parliament of Victoria, *Alert Digest*, No 13 of 2008, 28 October 2008).

regulated health profession who the practitioner knows does not have a conscientious objection to abortion.'[107]

In recognition of the Commission's terms of reference requirement – that it should maintain current clinical practice – the Commission had recommended that if legislative provision was made to cover those with a conscientious objection, it should reflect the Australian Medical Association ('AMA') Code of Ethics. 'That code requires medical practitioners to inform patients of their refusal. The code also requires practitioners to provide women with sufficient information so they may seek and find treatment elsewhere.'[108]

The Commission went on to recommend that legislation should include a requirement to inform of the conscientious objection, and to 'make an effective referral to another provider'.[109] So, it could be argued that the VLRC recommendation went beyond the AMA's code. On the basis of the public record, it is not possible to discern the origin of the precise terms of the referral clause or provision that was enacted. Perhaps it indicates a parliamentary drafter acting out of abundant caution to ensure that a doctor made an 'effective referral' as recommended by the VLRC.[110] This clause was to prove particularly

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107 *Abortion Law Reform Act 2008* (Vic) s 8(b). Section 8 also provides for an emergency exception, that is, it imposes a duty on a health practitioner to perform an abortion in an emergency if it is necessary to preserve the life of the woman. This was less controversial, perhaps because of the principle of double effect, accepted by Catholics, which allows that a medical treatment performed for a purpose seen as legitimate or proper 'does not create moral responsibility for a known, unintended, but unavoidable secondary effect': Bernard M Dickens, 'Conscientious Objection: A Shield or Sword?' in Sheila A M McLean (ed), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate Publishing, 2006).

108 VLRC, above n 31, 115. The AMA Code of Ethics says: '[W]hen a personal moral judgement or religious belief alone prevents you from recommending some form of therapy, inform your patient so that they may seek care elsewhere': at 113. Note that the Code also provides that medical practitioners 'should refrain from denying treatment to your patient because of a judgement based on discrimination': Australian Medical Association, *Code of Ethics* (November 2006) cl 1.1(j) <http://ama.com.au/codeofethics>.

109 VLRC, above n 31, 7–8, 115.

110 It appears that the AMA thought the legislation at least went beyond the AMA Code. It was cited in the parliamentary debates as arguing: 'The bill infringes the rights of doctors with a conscientious objection by inserting an active compulsion for a doctor to refer to another doctor whom they know does not have a conscientious objection': Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3306 (Mary Wooldridge). The Royal Australian and New Zealand College of Obstetricians and Gynaecologists ('RANZCOG') have a more robust provision, which provides: 'No member of the health team should be expected to perform termination of pregnancy against his or her personal convictions, *but all have a professional responsibility to inform patients where and how such services can be obtained*': RANZCOG, 'Termination of Pregnancy' (College Statement C-Gyn 17, March 2005, re-endorsed March 2012) (emphasis added); RANZCOG apparently previously provided in general guidelines that its members should 'offer or arrange a further opinion and/or ongoing care with another *suitable* practitioner if the therapy required is in conflict with (your) personal belief/value system': Leslie Cannold, 'A Conscience Vote Is Meaningless unless It Is a Two-Way Street', *The Age* (Melbourne), 10 September 2008 (emphasis added). Note that the AMA website also now contains a pro forma template, which can now only be accessed by members, for Victorian doctors with a conscientious objection, which provided: 'Due to Dr [INSERT NAME]'s personal beliefs s/he is not able to offer you abortion services including information on abortion. If you require abortion services or information about abortion, please ask for an appointment with Dr [INSERT NAME] or refer to www.betterhealth.vic.gov.au/'. The latter web site provides information on abortion, including where abortion services are available.

controversial. However it, and the rest of the Bill, was ultimately passed unamended.

VII THE LANGUAGE OF REFORM

The final aspect of the process of parliamentary reform I want to draw attention to is the language used in the parliamentary debates. That is, how do parliamentarians construct the issue of access to safe termination of pregnancy? El-Murr suggests that the dominant framing of the abortion issue in the Legislative Council was as a law reform problem.[111] My focus is more on how women were configured in the debates.

A close examination of the language used allows for a more qualitative assessment of the claims I have made above for the benefits of a parliamentary process. It is one thing to identify the virtues of vigorous parliamentary debate, but if that debate positions women as lacking capacity or as mere incubators for a foetus, one might, like John Barry in the 1930s, continue to hesitate to entrust the question to politicians.

In this context, it is worth briefly mentioning the language within which the 'right' to abortion is often articulated in courts. In *Roe*,[112] the United States Supreme Court articulated the abortion right as an aspect of the right to privacy. This is a narrow basis on which to articulate the right to abortion, and the reasoning of the Court has been widely criticised by those who support an expanded understanding of women's reproductive rights.[113] The emphasis on privacy in *Roe* arguably fed into a discourse, which facilitated the Supreme Court's endorsement of restrictions on the public funding of abortion.[114] Others have suggested that articulating access to abortion as an aspect of the right to privacy 'fosters debate in the pernicious terms of the rights of the foetus versus the rights of women'.[115]

The social and biological implications of pregnancy are fundamentally different for women and men, and thus access to safe publicly funded abortion raises issues of equality for women, and many feminists have argued that equality provides a much more fruitful language in which to articulate access to

111 Alissar El-Murr, 'Representing the Problem of Abortion: Language and the Policy Making Process in the Abortion Law Reform Project in Victoria, 2008' (2010) 33 *Australian Feminist Law Journal* 121.

112 410 US 113 (1973).

113 For an overview of that criticism, see Jack M Balkin (ed), *What Roe v Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (New York University Press, 2005).

114 See Catharine A MacKinnon, 'Privacy v Equality: Beyond Roe v Wade' in Catharine A MacKinnon (ed), *Feminism Unmodified* (Harvard University Press, 1987) 101–2; Catharine MacKinnon, 'The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion' (1983) 17 *Radical America* 23. See also Wendy Brown, 'Reproductive Freedom and the Right to Privacy: A Paradox for Feminists' in Irene Diamond (ed), *Families, Politics and Public Policy: A Feminist Dialogue on Women and the State* (Longman, 1983) 322.

115 Jennifer Nedelsky, 'The Practical Possibilities of Feminist Theory' (1993) 87 *Northwestern University Law Review* 1286.

abortion.[116] However, it is not a language frequently found in court decisions on abortion. Indeed, the only one of which I am aware is that of the Constitutional Court of Colombia, which recognised in 2006 that tight restrictions on abortion discriminated against women in their access to health care and were consequently a breach of women's equality rights.[117]

In this section, I explore the extent to which a rights discourse, especially one concerning the rights of women was used by parliamentarians. Do women's rights to equality appear in the parliamentary debates, or only the right to autonomy, the language in which medical decision-making is usually articulated? I then go on to consider whether women are configured as 'passive and in need of protection',[118] and particularly whether abortion is presented as hurting women. I also consider whether foetuses are treated as imbued with rights in the debates and then examine the very broad consensus that emerged to the effect that the number of terminations performed ought to be reduced. Finally, I touch on what proved to be the most controversial aspect of the legislation, the duty imposed on doctors who have a conscientious objection to refer on to a doctor who does not have such an objection.

A Women's Rights: Autonomy, Equality and Dignity?

Michael Thomson, writing of the United Kingdom Parliament when it was debating the 1967 abortion reform legislation, observed that: 'The question of abortion and women's rights did not enter the discourse until after the enactment

116 See, eg, Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, 1995); Ruth Colker, *Abortion and Dialogue: Pro-Choice, Pro-Life and American Law* (Indiana University Press, 1992); Ruth Bader Ginsburg, 'Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade*' (1986) 63 *North Carolina Law Review* 375; Reva Siegel, 'Abortion As a Sex Equality Right: Its Basis in Feminist Theory' in Martha Albertson Fineman and Isabel Karpin (eds), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia University Press, 1995); Lynn Smith, 'An Equality Approach to Reproductive Choice: R v Sullivan' (1991) 4 *Yale Journal of Law and Feminism* 93; Priscilla J Smith, 'Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation' (2011) 34 *Harvard Journal of Law and Gender* 377; Cass R Sunstein, 'Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)' (1992) 92 *Columbia Law Review* 1.

117 *Sentencia C-355/2006* (Corte Constitucional [Constitutional Court of Colombia], 10 May 2006) (Rentería and Hernández JJ) [Women's Link Worldwide trans, *C-355/2006: Excerpts of the Constitutional Court's Ruling That Liberalised Abortion in Columbia* (2007) Women's Link Worldwide, 58 <www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf>]. All references are to this English translation. The decision is discussed in Emilia Ordolis, 'Lessons from Colombia: Abortion, Equality, and Constitutional Choices' (2008) 20 *Canadian Journal of Women and the Law* 263; Verónica Undurraga and Rebecca J Cook, 'Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006' in Susan H Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009).

118 Lise Gotell, 'Litigating Feminist "Truth": An Antifoundational Critique' (1995) 4 *Social and Legal Studies* 99, 109.

of the 1967 provisions.'[119] This was certainly different by 1969 in South Australia where Don Dunstan, then Leader of the Opposition, stated: 'a woman should have a right to determine whether she proceeds with a pregnancy or not and, if required to vote on this, I would vote in favour of abortion on demand'.[120] And rights remained very much part of the 2008 Victorian debate.

There is a tendency evident in that debate to tie access to abortion to more general claims about women's equality. So, for instance, Judy Maddigan (Labor) ties together the right to vote and the right to access to abortion:

> I must say I find it somewhat ironic that we are debating this bill this year, in which we celebrate 100 years since women got the vote – when women first got the right to have a say in the laws that affect them. ... I would find it ironic if, 100 years later, this still male-dominated house made the decision that this house has the right to tell women in this state what they should do.[121]

Or Richard Wynne (Labor) argued: 'In conclusion, in my view the passing of this bill will ensure that Victoria is a better and fairer place for women'.[122] Or, in the words of Jude Perera (Labor): 'As legislators we need to consider historical developments, understand the realities of the present and take a pragmatic approach to deliver justice to society in general and women in particular'.[123]

Edward O'Donohue (Liberal), in the Legislative Council, was even more explicit: 'The equality of women in our society has been greatly aided by equal access to education and opportunities and *the ability to manage fertility'*.[124]

By contrast, Colleen Hartland, a Greens Member of the Legislative Council, referred to anti-choice literature, including quite personally directed leaflets she had received which, amongst other things, 'says that women of reproductive age should not be in the workforce'.[125] No such blatant assertion was made by those opposing the Bill in the parliamentary forums.

The 'right to dignity' was a strong theme in the debates. Even those who voted against the Bill called on this language: 'I also understand in order that women are provided with the dignity of control over their own bodies and the

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119 Michael Thomson, *Reproducing Narrative: Gender, Reproduction and Law* (Ashgate Publishing, 1998) 69–70. Thomson argues that instead of women's rights, there were two images of women circulating in the parliamentary discourse; for proponents women were victims: 'abortions were sought by women who were pushed to their limits, having already fulfilled their maternal role. She was Angel, Wearied Mother and Tired Housewife'. Opponents on the other hand constructed women seeking terminations as 'indulgent, selfish and immoral … eschewing their maternal and familial obligations, … The discourse of opponent and proponent shared the commonality of a presumption of motherhood as the primary role for women': at 69. See also Laura Riley and Ann Furedi, 'Autonomy and the UK's Law on Abortion' in Sclater et al (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, 2009) 240: 'introducing legal abortion was primarily seen as a solution to a persistent public health problem'.

120 South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1969, 2325–6.

121 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3341. This parallel was also drawn by Mary Woolridge: at 3303.

122 Ibid 3339.

123 Ibid 3371.

124 Victoria, *Parliamentary Debates,* Legislative Council, 7 October 2008, 3941 (Edward O'Donohue) (emphasis added). O'Donohue stated he was opposing the Bill: at 3942.

125 Ibid 3916.

preservation of their own wellbeing, and for a variety of other reasons, they should be entitled to make that choice'.[126]

Women do appear as competent decision-makers; so, in reference to arguments put by constituents about 'the instance of post-abortion trauma and depression in women who choose to have an abortion', Martin Pakula (Labor) stated that it was not so much the failure to mention that some women who have children also suffer from depression, 'but that the argument presumes that no woman is capable of assessing the risk for herself and that no woman is capable, having so assessed that risk, of making appropriate judgements for herself'.[127]

In opposition to a proposed amendment to the legislation as introduced that would have required a doctor to offer counselling, Lily D'Ambrosio (Labor) stated, explicitly connecting dignity and equality:

> When we talk about women and we talk about choice let us not forget about the issue of dignity. When we look to legislation to deal with programmatic service issues in the community we are saying that we are removing choice or we are raising the bar on choice for women. That is what we are doing – we are saying that women somehow have less understanding of or less ability to exercise their rights than others.[128]

B 'Abortion Hurts Women'

A relatively new phenomenon in the Victorian debates was the introduction of arguments about abortion harming women, rather than, or in addition to, the focus on harming the foetus. Reva Siegel has identified a deliberate shift in arguments by those who oppose abortion in the US, from arguments that focus exclusively on the 'right-to-life' of the foetus, to those that emphasise the 'rights' of women, or claim that 'abortion hurts women'.[129] Thus women undergoing terminations are 'misled or coerced',[130] and it is argued that abortion is 'dangerous to the psychological or physical health of the pregnant mother [sic]',[131] and, ultimately, that 'abortion violates women's nature as mothers'.[132] This tendency is somewhat evident in the Victorian parliamentary debates, but is

126 Victoria, *Parliamentary Debates,* Legislative Assembly, 10 September 2008, 3472 (Andrew McIntosh).

127 Victoria, *Parliamentary Debates,* Legislative Council, 7 October 2008, 3922.

128 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 2008, 3540.

129 Reva B Siegel, 'The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions' [2007] *University of Illinois Law Review* 991, 1015. She also tracks their appearance in the United States Supreme Court: see Reva B Siegel, 'Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*' (2008) 117 *Yale Law Journal* 1694. I am grateful to an anonymous reviewer for pointing out to me an article from 2002 by Leslie Cannold, which the reviewer suggested was the first discussion of the shift from foetus-centred to women-centred argument: Leslie Cannold, 'Understanding and Responding to Anti-Choice Women-Centred Strategies' (2002) 10(19) *Reproductive Health Matters* 171.

130 Siegel, 'The New Politics', above n 129, 1009–11.

131 Ibid 1011, citing the Task Force report leading to the introduction of the legislation. Siegel summarises the research literature which establishes that the scientific consensus is that abortion does not have 'lasting or significant [mental] health risks' nor lasting or significant physical risks: at 1010–12.

132 Ibid 1013.

not an overwhelming theme. It is expressed very clearly by Christine Campbell (Labor):

> When my interest in human rights began it was focused on the unborn and pregnancy support for the mother and child. That interest remains, but decades later, after witnessing the effects of abortion on women I know and have counselled, it is clear that denying the unborn its human rights has many more profound detrimental effects on women that decades ago were unknown.[133]

And Tamara Lobato (Labor): 'Decisions made about abortion are not necessarily the signifying of women's independence but rather may be an indication of their reliance on men, and their responses, to determine the outcome of a pregnancy'.[134]

This so-called pro-woman anti-abortion argument was first evident in parliaments in Australia when in 1998 the ACT Legislative Assembly debated abortion legislation, eventually enacting some of the most draconian 'informed consent' provisions in Australia. This legislation provided that where an abortion was contemplated, a medical practitioner should give the woman information about, among other things, the medical risks of abortion and carrying a pregnancy to term, any risk peculiar to her, and 'the probable gestational age of the foetus at the time the abortion will be performed'.[135] Additionally, appropriate counselling had to be offered. Furthermore, the Act provided that the information which could be provided to women could include 'materials which present pictures or drawings and descriptions of the anatomical and physiological characteristics of a foetus at regular intervals'.[136] A termination could only be performed 72 hours after the information had been provided.[137]

One explanation of this ostensible pro-woman language appearing in the ACT debates might relate to the type of legislation being debated: where the proposed legislation constrains the giving of informed consent in the way described above, it seems more likely that it will be justified by being presented as a pro-woman stance. However, this sort of debate was also present in the ACT in the 2001–2 debate which culminated in the repeal of the informed consent legislation noted above, *and* the removal of unlawful termination from the *Crimes Act 1900* (ACT).[138] Hence Vicki Dunne stated: 'Even if you believe, hand

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133 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3317.

134 Ibid 3356.

135 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 8. Siegel observes of the South Dakota Bill of which she was writing, that the very name of the legislation – the 'South Dakota Women's Health and Human Life Protection Act' – 'announced a concern with the regulation of women as well as the unborn life they might bear': Siegel, 'The New Politics', above n 129, 1007. By comparison, the title of the ACT legislation evinces a concern *only* with women's health.

136 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 14(4).

137 *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 10. Note that a failure to provide information or failing to get informed consent was an offence (ss 7 and 10). However, non-compliance (or indeed compliance) with the legislation did not affect the lawfulness of the abortion performed under the *Crimes Act 1900* (ACT). See *Health Regulation (Maternal Health Information) Act 1998* (ACT) s 4.

138 See *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT), *Health Regulation (Maternal Health Information Repeal) Act 2002* (ACT) and *Medial Practitioners (Maternal Health) Amendment Act 2002* (ACT).

on heart, that it is not really a child, can you imagine the effect it would have on a woman if she came to the conclusion that she had killed her child'.[139] She continued: 'The patient is not even an individual – she is reduced to the status of an inconveniently occupied womb. None of the rest of her matters – not her head and not her heart'.[140] It is worth noting that this sort of rhetoric did not go without direct challenge. Thus Ted Quinlan argued: 'If you wish to say that abortion is a bad thing because it is against your fundamental beliefs, I respect that. But to interweave selective statistics and virtually say "And I am also doing it for a woman's own good" is heading towards the hypocritical'.[141] The existence of this ostensibly pro-women rhetoric in both the later ACT debate and in 2008 in Victoria, suggests that there has been a subtle shift in the emphasis of anti-abortion advocates in Australia as well as the United States.

C 'Foetal Life' Arguments

A much more common argument in the Victorian debates by those opposing the legislation was the repeated emphasis on foetal life. A recognition of foetal life does not necessarily lead to the conclusion that women should not have access to safe publicly-funded freely available terminations. As put most pithily by Catharine MacKinnon: 'Why should women not make life or death decisions'?[142] However, the explicit raising of foetal life in the Victorian debates certainly seemed directed to restricting access to abortion.

For example, Peter Ryan, the National Party Leader states:

> The bill seeks to legalise the killing of the innocents. …This is a discussion about life and death. It is about the dignity and sanctity of life and the fact that life is sacrosanct. … [My concern is with] those unborn who are going to be lost because of the application of this legislation. … I do not believe women's choice extends so far as being able to take the life of a foetus.[143]

And James Merlino (Labor): 'this bill disregards the most vulnerable, the little boy or girl in the womb',[144] or Christine Campbell: 'there are two lives at stake under this bill: one, the unborn, the other, the mother'.[145] And Terry Mulder (Labor) opined: 'this bill is a retrograde step for our society, and points to a lack of respect and dignity that should be afforded to the unborn – those who cannot represent and speak for themselves'.[146] However, note that Terry Mulder refers throughout his speech to the 'child or foetus', rather than truncating the debate by referring to the foetus as a child, as others do. So, for instance, Marlene Kairouz (Labor) says: 'the unborn child is the most vulnerable human being … The

139 ACT, *Parliamentary Debates,* Legislative Assembly, 21 August 2002, 2519.
140 Ibid 2520. See also at 2553, 2571–5, 2581, 2582.
141 Ibid 2598.
142 MacKinnon, 'Privacy v Equality', above n 114, 94.
143 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3307–9.
144 Ibid 3313 (Minister for Sport, Recreation and Youth Affairs, and Minister Assisting the Premier on Multicultural Affairs).
145 Ibid 3317.
146 Ibid 3322.

intentional destruction of an unborn child is a clear breach of human rights'.[147] Or, Robert Clark (Liberal): 'the unborn child should be accorded the rights and status of a person … from the point of conception it should be treated as a separate human being with moral equality to the rest of us'.[148]

D 'Too Many Abortions' and the Absence of Personal Experience

There were clear limitations to the extent of the recognition of women's autonomy. There seemed to be a remarkable consensus on the fact that there were too many abortions occurring, with many commentators from each 'side' noting this, and condemning especially the high rate of abortion for teenagers. Peter Hall (Liberal) stated: 'I agree … that we should be trying to do everything possible to reduce the number of abortions in this state'.[149] And Candy Broad (Labor), who had introduced the private member's Bill preceding the government legislation:

> [C]an I particularly endorse the objective, referred to by Mr Hall, of action to reduce the number of unplanned and unwanted pregnancies, and as a consequence of that, the objective of reducing the number of abortions. I think we would all like to see that; I certainly would. I see this bill … as a first step towards achieving that objective.[150]

Barbara Baird has commented on this trend, which she has identified in all state and territory abortion debates between 1998 and 2002: 'the reality that is hardly ever represented is that of many, many women having abortions, in more or less unproblematic ways as part of their everyday lives'.[151] Weitz has analysed a similar trend in the United States, where the mantra, for supporters of access to abortion, has become 'safe, legal and rare'.[152] Weitz suggests that promoting a view that abortion should be rare has a number of unintended ill effects. For example, it 'suggests that abortion is happening more than it should … [and] it presupposes that abortion is wrong and somehow different than other health care'.[153] Additionally, she argues, 'it legitimizes efforts to restrict its use'.[154] While these effects may not be so pronounced in an Australian context, it is

147 Ibid 3334.
148 Ibid 3378.
149 Victoria, *Parliamentary Debates*, Legislative Council, 7 October 2008, 3912.
150 Ibid 3916.
151 Barbara Baird, 'Maternity, Whiteness and National Identity: The Case of Abortion' (2006) 21(50) *Australian Feminist Studies* 197, 207. Baird also observed: 'Various studies of the representation of abortion in literature, on film and television, in parliamentary debate, and in medical literature show that legitimating representations of a woman who actively desires abortion are rare unless she is poor or her foetus is "flawed"': Barbara Baird, 'The Futures of Abortion' in Elizabeth McMahon and Brigitta Olubas (eds), *Women Making Time: Contemporary Feminist Critique and Cultural Analysis* (University of Western Australia Press, 2006) 133.
152 Tracy Weitz, 'Rethinking the Mantra That Abortion Should Be "Safe, Legal and Rare"' (2010) 22(3) *Journal of Women's History* 161.
153 Ibid 164.
154 Ibid 165.

certainly the case that women making unconstrained choices is rarely talked about in the Victorian debates. [155]

In addition, as Baird observed of the earlier national, Tasmanian and ACT debates: 'women who have had abortions rarely identify themselves in abortion debates and pregnant women considering abortion and/or currently seeking them are completely absent'.[156] Once again, this was largely true of the Victorian parliamentary debates. One Greens MP in the Legislative Council said she had had a termination 27 years earlier.[157] Ironically perhaps, one of the more personal experiences, and used in favour of an amendment which would have required counselling to be offered to women seeking abortions, came from a male politician, and talking of the past:

> About 30 years ago my then partner – now my lovely wife – and I conceived a child. It was a most traumatic time back then. We needed all the counselling we could get because it was a very emotional time. We were young, we did not have a lot of life experience, and we needed counselling. We went through the agony of talking about adoption, and we touched on the possibility of abortion among many other options. Thankfully we kept our child, but that was a very difficult experience in our lives.[158]

Many spoke of the experience of a good friend. Tim Holding (Labor), in supporting the Bill, said he did so 'guided by the experiences of women – some close friends – who have sought these services in the course of their lives'.[159] Marsha Thomson (Labor) said, in response to an amendment to lower the gestational limit for unfettered decision making from 24 weeks to 20 weeks:

> I think I might have supported this amendment a few years ago. … But my views have changed … someone very close to me had to go through the trauma of finding out that a much-loved baby was severely deformed and that if it went to full term, it would probably not live very long anyway – it might, but probably it would not.

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155 In this context, Baird notes the fact that while a large majority of Australians 'support women's "right to choose" *broadly defined*', that supports drops to a little over 50 per cent to those supporting it outside the circumstances of 'threats to mental health, foetal deformity, poverty or unmarried status': Baird, 'Maternity', above n 151, 207, citing Katharine Betts, 'Attitudes to Abortion in Australia: 1972 to 2003' (2004) 12 *People and Place* 22. Obviously, reported attitudes depend in part on the way the question is asked – see the discussion of Betts' more recent work, text above n 71.

156 Ibid.

157 Victoria, *Parliamentary Debates,* Legislative Council, 7 October 2008, 3913 (Colleen Hartland). Hartland also gave an interview to *The Age*: Carol Nader, 'MP's Emotional Story May Help "Shatter Taboo"', *The Age* (Melbourne) 19 August 2008, 2. This (almost complete) lack of mention of direct personal experience contrasts the (admittedly extra-parliamentary) 1971 French experience of 'Le Manifeste des 343 Salopes' – the manifesto of the 343 'bitches' or 'sluts'. In this statement, 343 prominent women – including Simone de Beauvoir, Catherine Deneuve, Marguerite Duras, Jeanne Moreau and Monique Wittig – admitted that they had had abortions, and called for an end to its criminalisation. See 'Le Manifste des 343 Salopes', *Le Nouvel Observateur* (Paris), 7 April 1971 <http://tempsreel.nouvelobs.com/actualite/societe/20071127.OBS7018/le-manifeste-des-343-salopes-paru-dans-le-nouvel-obs-en-1971.html>.

158 Victoria, *Parliamentary Debates,* Legislative Assembly, 11 September 2008, 3538 (Hugh Delahunty).

159 Victoria*, Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3384.

> I know how traumatic that decision and the naming of the baby and the burial were for this mother. I do not want to see anyone have to go through more trauma than making that decision.
>
> If a woman wants a second opinion she will get it. If she wants a third opinion she will get it. No woman at that stage in a pregnancy makes that decision lightly – none do. I think we are demeaning women if we believe we cannot leave it to them to make that decision as to how many opinions they need to get before they make that decision. So I cannot support the amendment before the house.[160]

E Freedom of Conscience and the Duty to Refer

While somewhat outside the scope of my argument in this article, this final section addresses the issue of 'conscientious objection' to performing abortions. I canvass this argument briefly here because the duty of an objecting practitioner to refer a patient seeking a termination to a practitioner known not to have a conscientious objection to abortion was one part of the Victorian reform legislation that generated surprising, and tenacious, controversy. A detailed consideration of the moral, ethical and legal implications of the duty to refer is beyond the scope of this paper and will be canvassed elsewhere. Here I want to focus on the parliamentary debate on this issue.

The language used in the parliamentary debates when discussing this provision was more extreme than in much of the remainder of the debate. So, for instance, Robert Clark (Liberal) opined:

> The proponents of this bill either have no comprehension of what it means to have a conscientious objection to abortion or else they are introducing a measure designed to force those with conscientious objections out of the health professions. The so-called conscientious objection clause is in fact a compulsory participation clause.[161]

James Merlino (Labor) quoted from a letter sent by a group of doctors to the Scrutiny of Acts and Regulations Committee:

> The … clause is extreme and unprecedented. It is not in keeping with the codes of ethics of every major professional health body in Australia. This clause should be strongly rejected as an affront to the concept of freedom of conscience and as an attack on the moral integrity and autonomy of health professionals.[162]

And earlier: 'Such a provision is unprecedented. Never before has a conscientious objector been forced to actively source another professional'.[163] While I have suggested the language in which debate was conducted on this issue was more robust than in other areas, it was also the case that some members proposed various half-way house 'solutions'. For instance, Colin Brooks (Labor) proposed that the Department of Human Services create a schedule which lists family planning and pregnancy support services which could be provided to a

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160 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 September 2008, 3512. Contrast this with one politician, Martin Dixon, who supported the amendment, and spoke of losing a child who was born at 22 and a half weeks and who died after a day of life: at 3508.

161 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3379.

162 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 2008, 3597.

163 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3314. Note however the text of the College Statement by RANZCOG, above n 110.

woman rather than necessarily a direct referral.[164] Others pointed out that the legislation did not require referral to 'an abortionist': referral to a Family Planning Agency complied with the obligation under the legislation.[165]

The VLRC had, of course, canvassed the issue at some length, noting that: 'it is important to balance the rights of individuals to operate within their own moral and religious beliefs with the equally important ethical consideration doctors have to act in the best interest of patients'.[166]

While the Commission's consideration does at least recognise that there is a need to engage in a balancing exercise, it balances two interests or duties of doctors, rather than explicitly factoring in the interests of women. However, parliamentarians were able to clearly acknowledge the interests of women. Martin Foley (Labor) argued: 'The bill respects such beliefs [moral objections to abortion] but respects even more the decision of a woman as she seeks to then have that abortion in a timely and safe manner. That is an appropriate balance.'[167]

This brief discussion illustrates that parliamentary law reform exercises are not necessarily straightforward; that this provision would prove so controversial was not predictable. In any event, as we know, the legislation passed unamended, and even on this contentious issue the importance of women's rights was affirmed.[168]

VIII CONCLUSION

The Victorian *Abortion Law Reform Act 2008* configures women as responsible decision-makers, at least until the foetus is at 24 weeks' gestation. After that time, their responsibility is constrained by the requirement to consult with two doctors. Doctors have been given a great deal more certainty, with the (almost) complete removal of abortion from the *Crimes Act*. At least some doctors were concerned that the obligation on conscientiously objecting doctors 'went too far'; my own view is that it strikes a reasonable balance between the interests of women and doctors.

164 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3380.

165 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 2008, 3613 (Maxine Morand).

166 VLRC, above n 31, 114 [8.27].

167 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3374; see also, Victoria, *Parliamentary Debates,* Legislative Council, 7 October 2008, 3919 (Candy Broad): 'Clause 8 is carefully constructed to provide a balance between the right of health practitioners to conduct themselves in accordance with their religion or belief and the right of a woman to receive the medical care of her choice'.

168 For further discussion of this clause, see Wendy Larcombe, 'Rights and Responsibilities of Conscientious Objectors under the *Abortion Law Reform Act* 2008 (Vic)' (Paper presented at the Law and Society Association Australia and New Zealand Conference, University of Sydney, 10–12 December 2008).

On the basis of the Victorian debates, I would make a strong claim about the worth and benefits of pursuing access to abortion via the parliamentary process.[169] In 1999 Rebecca Albury argued:

> In the public debates the analysis of … [the pregnant woman's] social context is frequently expressed in abstract and often gender-neutral truisms about moral or religious 'values', economic 'situations', social 'pressures' or health 'conditions'. When particulars are introduced it is usually as a specific 'case history' to justify a particular element in the argument. In these examples the pregnant woman is portrayed as unable to be a proper mother for some reason that might be alleviated by an abortion. In either case, the pregnant woman as an active social agent disappears and becomes visible only as an object of knowledge – an overburdened mother, an unwed teenager, a woman with a defective foetus, a sexual risk taker, a misguided or selfish woman – about whom experts can debate.[170]

By contrast, I think the pregnant woman as an 'active social agent' was very much present in the Victorian debates. This is in part precisely because the legislation as introduced (and passed) did provide for abortion for unrestricted reasons up until 24 weeks gestation. So even when proponents of the legislation do mention women as victims of rape or incest, or as poor or overburdened, a presentation which is relatively uncommon in the debates, that victim figure was usually accompanied by the figure of the independent decision-maker. For example, Mary Woolridge (Liberal) states: 'I have heard harrowing stories of women who have been victims of incest, rape or domestic violence. Some of these were particularly vulnerable women who went on to become pregnant as a result'.[171] However, in the next paragraph, she notes that the legislation 'gives women the power to choose. It empowers women to make decisions about their own fertility'.[172] Or from Fiona Richardson (Labor): 'I cannot in good conscience tell an incest or rape victim to carry on with their pregnancy or dictate to a woman faced with harsh life circumstances or feelings of utter despair that she must carry on with her pregnancy'.[173] This was preceded by the statement: 'I cannot in good conscience dictate to a woman what she must do when faced with a decision of whether or not to terminate her pregnancy for whatever reason'.[174]

Interestingly, opponents of the legislation were much more likely to invoke the poor overburdened woman or rape or incest victim, usually in support of an amendment to, for example, provide for compulsory counselling[175] or to support only limited access to termination services.

In the context of a consideration of the role of Parliament in Canada, which now has an entrenched Charter of Rights, exposing legislation to challenge in court for non-compliance with the Charter, Hiebert writes in defence of the role of Parliament:

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169 See also Robin West, 'From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights' (2009) 118 *Yale Law Journal* 1394.

170 Rebecca M Albury, *The Politics of Reproduction: Beyond the Slogans* (Allen and Unwin, 1999) 106–7.

171 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2008, 3306.

172 Ibid.

173 Ibid 3383.

174 Ibid.

175 See, eg, ibid 3330 (Kim Wells).

> [I]t is Parliament, and not the judiciary, that is best situated to decide how complex legislative goals are best achieved. Policy development is necessarily a discretionary exercise. Those responsible must address multiple objectives, make distinctions about who will benefit or be affected by the policy decision, and anticipate circumstances that may undermine or influence the realization of the objectives. Policy decisions are based upon specialized expertise, relevant information and data, previous trials and failures, comparative experience and informed best estimates. The discretionary qualities inherent in this process are incongruent with what are presented as objective rules for after-the-fact judicial decisions about whether the means chosen were rational …[176]

In 2008 in Victoria, politicians demonstrated the capacities Hiebert described. The Victorian debates showed that parliamentarians could move beyond the 'sidestep' that Pesce, the President of the AMA, depicted,[177] and explicitly deal with the issue of abortion. They demonstrated that they were not only capable of enacting legislation that recognised women as responsible decision makers, they were willing to do so via a recognition of 'women's rights'. While politicians were clearly prepared to use the language of choice, they also articulated abortion as about women's equality claims, or at least linked to them.[178] That this understanding was infrequent is hardly surprising: as noted above in the context of court considerations of the constitutionality of restriction on abortion, equality based analyses of reproductive rights are not necessarily common in public debate. That they appeared as much as they did in the Victorian parliamentary context is a matter for commendation. And of course the discussion of equality and other rights, and the configuration of women as responsible decision-makers in Victoria, occurred in the absence of a constitutional Bill of Rights or an applicable Charter, an indication of the political salience of this language, if not the legal salience. This augurs well for future debate in New South Wales and Queensland, states that have yet to substantially reform the law on abortion.

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176 Janet Hiebert, 'Parliament and Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights* (Oxford University Press, 2003) 240. Or, as Sunstein put it in the United States context, commenting on *Roe*:

> The Court would have done far better to proceed slowly and incrementally … The Court might have ruled that abortions could not be prohibited in cases of rape or incest … Such narrow grounds would have allowed democratic processes to proceed with a degree of independence – and perhaps to find their own creative solutions acceptable to many sides: Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996) 180–1.

177 Andrew Pesce, 'Abortion Laws in Australia: Time for Consistency' (2006) 29 *University of New South Wales Law Journal* 224, 224.

178 See also the discussion of this issue in the context of the 1998 Western Australian debates in Lisa Teasdale, 'Confronting the Fear of Being Caught: Discourses of Abortion in Western Australia' (1999) 22 *University of New South Wales Law Journal* 60, 90–8.