

THE INTERNATIONAL LAW IMPLICATIONS OF AUSTRALIAN ABORTION LAW[#]

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I. INTRODUCTION

Australian abortion law has been described as inadequate, uncertain, inappropriate and out of date.¹ Indeed the term 'law' is somewhat of a misnomer given that currently Australian abortion law is composed of a number of statutory and common law principles, the degree of regulation being dependent on the State or Territory in which the procedure is being performed. In suggesting any reform to the existing law, there are tensions between those who advocate legislative certainty and those who believe in a policy of "letting sleeping legislators lie".² In addition, the moral debate between pro-choice and right to life adherents continues, as was evidenced by the applications to intervene in the High Court case of *Superclinics (Australia) Pty Ltd v CES*³ by the Australian Catholic Bishops' Conference and the Abortion Providers' Federation.⁴

More recently, the issue of the legality of abortion in Australia has again been thrust into the media spotlight. In 1999, an American doctor arriving in Australia to attend an international conference on abortion was detained at Sydney airport and asked to sign a statement that he would not "advocate any activities which would be in breach of Australian law, in particular, activities in relation to abortion".⁵ There have also been legislative developments in abortion law. In the west, the arrest of two doctors in Perth in February 1998 for violations of the

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1 See for example, N Cica, "The Inadequacies of Australian Abortion Law" (1991) 5 *Australian Journal of Family Law* 37.

2 L Waller, "Any Reasonable Creature in Being" (1987) 13 *Monash Law Review* 37 at 53.

3 (1995) 38 NSWLR 47. Special leave to appeal in that case was granted but the proceedings were settled following the commencement of the hearing.

4 See J Wainer, "Abortion Before the High Court" (1997) 8 *Australian Feminist Law Journal* 133.

5 "Airport Quiz for Abortion Doctor" *The Age*, 3 November 1999, p 1.

Criminal Code for the first time in over thirty years⁶ prompted amendments to the West Australian law. While in the east, the Health Regulation (Abortions) Bill 1998 was presented before the ACT Legislative Assembly and was subsequently replaced by the *Health Regulation (Maternal Health Information) Act 1998 (ACT)*.

The controversy is not only confined to Australia. In the United States, the execution-style killing of an abortion provider by a sniper in New York in October 1998 demonstrated the length to which opponents of abortion in the United States are prepared to go to prevent lawful abortions taking place.⁷ While this background is important, the purpose of this discussion is not to enter the on-going debate between supporters of pro-choice and right to life policies. Instead this article will examine the existing Australian law and determine the extent to which it conforms to Australia's international obligations, in particular the obligations undertaken by the ratification of numerous human rights treaties. Given the increasing influence of international law on the High Court and state superior courts, and Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights, such an analysis is important in determining the outcome of future efforts to reform the law.

II. THE STATUS OF ABORTION IN AUSTRALIAN LAW

A. Abortion Related Offences

Despite the frequency with which abortions are performed in Australia, the procedure is still largely regulated by the criminal law in each of the States and Territories.⁸ At present there are three offences recognised under Australian law: procuring an abortion, procuring another's abortion and the supply of substances and instruments for the purpose of procuring an abortion. Some jurisdictions have also created the offence of child destruction to deal with acts performed in the process of birth.⁹ The legislative provisions in each jurisdiction are substantially similar and provide that it is an offence to unlawfully procure an abortion by drugs or an instrument.

In the common law jurisdictions of Victoria, New South Wales and the Australian Capital Territory the prohibition on unlawful abortion is modelled on the *Offences Against the Person Act 1861 (UK)*.¹⁰ These strict legislative prohibitions have been partially mitigated by the ruling of Menhennitt J in the

6 N Cica, "Ordering the Law on Abortion in Australia's 'Wild West'" (1998) 23 *Alternative Law Journal* 89.

7 "Sniper Murders Abortion Doctor" *The Australian*, 26 October 1998, p 9.

8 In this context, 'abortion' refers to assisted, as distinct from spontaneous, termination of pregnancies. It is estimated that approximately 80 000 abortions are performed each year in Australia; see National Health and Medical Research Council ("NHMRC"), *An Information Paper on Termination of Pregnancy in Australia*, 1996 at 3.

9 L Waller, note 2 *supra* at 41.

10 See N Cica, note 1 *supra* at 38. The relevant provisions are the *Crimes Act 1958 (Vic)*, ss 65-6, *Crimes Act 1900 (NSW)*, ss 82-3, and *Crimes Act 1900 (ACT)*, ss 42-4.

Victorian Supreme Court decision of *R v Davidson*,¹¹ a decision which has never been subject to appellate review. Justice Menhennitt held that a therapeutic abortion would not be unlawful if the person performing the abortion held an honest belief on reasonable grounds that the act in question was both necessary and proportionate. 'Necessary' was interpreted to include not only a danger to life, but also "danger to physical or mental health provided it is a serious danger not merely being the normal dangers of pregnancy and childbirth".¹² 'Proportionate' was defined to mean that the abortion was "in the circumstances not out of proportion to the danger to be averted".¹³ The Menhennitt ruling was considered in the New South Wales Case of *R v Wald*¹⁴ where Levine J widened the test to include:

any economic, social or medical ground or reason which...could constitute reasonable grounds upon which an accused could honestly and reasonably believe that there would result a serious danger to [the woman's] physical or mental health.¹⁵

The New South Wales Court of Appeal in *CES v Superclinics (Australia) Pty Ltd*¹⁶ restated these traditional tests as the applicable law in relation to lawful abortions. In addition, Kirby A-CJ (as he then was) stated that there was no "logical basis for limiting the honest and reasonable expectation of such a danger to the mother's psychological health to the period of the currency of the pregnancy alone".¹⁷ Thus it is also relevant to consider the effect on the woman's psychological condition after the birth of the child, due to the economic and social circumstances in which she would then find herself.¹⁸ It remains to be seen whether this aspect of Acting-Chief Justice Kirby's judgment is repeated in subsequent cases. Devereux has warned of the problems of forcing doctors to be "crystal ball gazers" in a fluctuating economic climate.¹⁹ The applicability of the *Wald* test to Victoria and the ACT has also not been tested in the courts.²⁰

The law in Australian jurisdictions is by no means static. In 1998, a private member introduced the Health Regulation (Abortions) Bill 1998 before the ACT Legislative Assembly. The original Bill attempted to limit the circumstances in which an abortion may be performed in the ACT. The Bill provided, firstly, that an abortion may be performed at any time during a pregnancy if the woman is subject to a grave medical risk.²¹ Secondly, cl 5(3) provided that an abortion may be performed on a woman who is subject to a "grave psychiatric risk", but only

11 [1969] VR 667.

12 *Ibid* at 671.

13 *Ibid* at 672.

14 (1972) 3 DCR (NSW) 25.

15 *Ibid* at 29.

16 (1995) 38 NSWLR 47.

17 *Ibid* at 60.

18 *Ibid*.

19 J Devereux, "Action for Wrongful Birth - *CES v Superclinics (Aust) Pty Ltd*" (1997) 4 *Journal of Law and Medicine* 222 at 223.

20 L Skene, *Law and Medical Practice - Rights, Duties, Claims and Defences*, Butterworths (1998) p 268.

21 Health Regulation (Abortions) Bill 1998 (ACT), cl 5(1). Clause 3 defined a 'grave medical risk' as "a medical condition of a pregnant woman that makes it necessary to perform an abortion to avert substantial and irreversible impairment of a major bodily function".

where the foetus is no more than 12 weeks gestational age. Thirdly, cl 7 required that certain information be provided to the woman, including the probable age of the foetus at the time the abortion will be performed and the medical risks associated with the procedure to be used, including “risk of infection, hemorrhage, breast cancer, danger to subsequent pregnancies and fertility”. Additionally, cl 7(2) required that the woman be provided with pamphlets to include “pictures or drawings and descriptions of the anatomical and physiological characteristics for a foetus at intervals of 2 weeks from conception to full term”. These conditions were not to apply in the case of a medical emergency. The Bill placed the primary onus of compliance on medical practitioners.

The Bill was subsequently replaced by the *Health Regulation (Maternal Health Information) Act* 1998 (ACT). The main features of the final legislation ensure that abortions are performed in approved facilities by qualified doctors, and that information is given to women seeking an abortion to ensure that their decision is “carefully considered”.²² Although the detailed description of the type of information to be provided in cl 7(2) of the Bill was omitted from the final Act, by executive action pamphlets of that type were printed.²³ At the time of writing the distribution of the pamphlets was the subject of dispute. The Act as passed also removed the requirements as to grave medical and psychiatric risk. Instead, s 8(1)(a) of the Act provides that the woman must be “properly, appropriately and adequately” advised about the medical risk of continuing and terminating the pregnancy and the probable gestational age of the foetus at the time the abortion will be performed.

Queensland and Tasmania also provide for the three abortion related offences in their respective Criminal Codes.²⁴ However, each Code also contains a statutory defence to the crime: Section 51(1) of the *Tasmanian Criminal Code* provides that a person can perform a surgical operation upon another, “with his consent and for his benefit, if the performance of such an operation is reasonable, having regard to all the circumstances”.²⁵ In Queensland, s 282 of the Criminal Code allows an abortion to be performed “for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all circumstances of the case”. These provisions have not received extensive judicial interpretation.²⁶ There are suggestions that, at least in Queensland, the Menhennitt J formulation will apply when defining the limits of the statutory test.²⁷

22 *Health Regulation (Maternal Health Information) Act* 1998 (ACT), s 3(b).

23 See for example the *Maternal Health Information Regulations* 1999 (ACT).

24 *Criminal Code Act* 1899 (Qld), ss 224-5; *Criminal Code Act* 1924 (Tas), ss 134-5.

25 In addition, s 165(2) of the Tasmanian Criminal Code provides that “[n]o one commits a crime who by any means employed in good faith for the preservation of its mother’s life causes the death of any such child before or during its birth”.

26 N Cica, note 1 *supra* at 40.

27 In *K v T* [1983] 1 QD R 396 at 398, Williams J stated that the issue of whether or not there has been a criminal abortion under the Code is an issue to be left to the jury, and “[a]t such a trial the jury would be instructed in accordance with *R v Bourne* [1939] 1 KB 687, as applied by Menhennitt J in *R v Davidson* [1969] VR 667”.

Although legislation in the Northern Territory, South Australia, and Western Australia criminalises unlawful abortion,²⁸ provision is also made for lawful medical terminations. A medical termination may be carried out in South Australia if two medical practitioners are of the opinion that either the continuance of the pregnancy would involve a greater risk to the life of the pregnant woman, or her physical or mental health than if the pregnancy were terminated, or, if the child would be seriously handicapped.²⁹ In relation to the first ground, the doctor may take into account the pregnant woman's actual or reasonably foreseeable environment.³⁰ To obtain an abortion under these provisions, the woman must have been resident in South Australia for a period of at least two months before the termination.³¹ In the case of a termination which is immediately necessary to save the life or prevent grave injury to the physical or mental health of the woman, the requirements of residency and a second opinion do not need to be fulfilled.³² In the Northern Territory, a gynaecologist or obstetrician may perform an abortion provided the woman is not more than 14 weeks pregnant on the same grounds as are provided in the South Australia legislation.³³ But if the termination is "immediately necessary" to prevent grave injury to a woman's physical or mental health, then it may be performed up to 23 weeks of pregnancy.³⁴ An abortion may be performed at any time if given in good faith for the purpose of preserving the woman's life.³⁵

In 1998, the Western Australian Parliament enacted the most liberal abortion laws in Australia.³⁶ The *Acts Amendment (Abortion) Act 1998 (WA)* removed the offences relating to procuring an abortion in ss 199-201 of the *Criminal Code 1913*.³⁷ The new s 199 provides that an abortion is unlawful unless it is performed by a medical practitioner acting in good faith and with reasonable care and skill, and is justified under s 334 of the *Health Act 1911 (WA)*. According to this section, an abortion is justified on the following grounds:

- (a) the woman concerned has given informed consent; or
- (b) the women concerned will suffer serious personal, family or social consequences if the abortion is not performed; or
- (c) serious danger to the physical or mental health of the woman will result if the abortion is not performed; or

28 *Criminal Code Act 1983 (NT)*, ss 172-3; *Criminal Law Consolidation Act 1935 (SA)*, ss 81-2; *Criminal Code 1913 (WA)*, s 199.

29 *Criminal Law Consolidation Act 1935 (SA)*, s 82A(1)(a)(i) and (ii).

30 *Ibid.*, s 82A(3).

31 *Ibid.*, s 82A(2).

32 *Ibid.*, s 82A(1)(b).

33 *Criminal Code Act 1983 (NT)*, s 174(1)(a).

34 *Ibid.*, s 174(1)(b).

35 *Ibid.*, s 174(1)(c).

36 For an analysis of the parliamentary debates which led to the passage of this legislation see L Teasdale, "Confronting the Fear of Being 'Caught': Discourses on Abortion in Western Australia" (1999) 22 *UNSWLJ* 60.

37 The *Acts Amendment (Abortion) Act 1998 (WA)* also amended the *Health Act 1911 (WA)* (to regulate the performance of abortion), the *Evidence Act 1906 (WA)* and the *Children's Court of Western Australia Act 1988 (WA)*.

(d) the pregnancy of the woman concerned is causing serious danger to her physical or mental health.³⁸

Paragraphs (b)-(d) of s 334(3) do not apply unless the woman has given informed consent, or in the case of paras (c) and (d), it is impracticable for her to do so.³⁹ The concept of ‘informed consent’ is given detailed consideration in the new provisions. The consent must be “freely given” and is subject to the medical practitioner having “properly, appropriately and adequately” provided the woman with counselling about the medical risks of termination and carrying a pregnancy to term, has offered her the opportunity of counselling about other matters relating to the termination or continuation of the pregnancy and has informed her that counselling will be available to her if she either terminates the pregnancy or carries it to term.⁴⁰ If the woman is 20 weeks pregnant, then the performance of the abortion is not justified unless two medical practitioners have agreed that the mother or the unborn child has a severe medical condition that justifies the procedure and the abortion is performed in an approved facility.⁴¹ The Western Australian amendments represent a move towards treating abortion as a health issue rather than as a crime.

While the legislatures across Australia have united in criminalising the practice of unlawful abortion, there are inconsistencies among the relevant provisions. In the Australian Capital Territory, Tasmania and Victoria the woman must be pregnant for the offence of self-abortion to be committed. However, in Queensland and Western Australia, the prohibition against unlawful abortion applies, whether or not the woman is pregnant.⁴² There is some disparity between the offences of abortion and self-abortion in this regard. For instance, in New South Wales and Tasmania, the woman must be pregnant in order to be found guilty of abortion, however, another can be found guilty of an attempt to procure an abortion whether or not the woman is pregnant.⁴³ The penalties are also somewhat varied. Under the new Western Australian provisions, a person who unlawfully performs an abortion is subject to a \$50 000 fine and a prison term of five years if the person is not a medical practitioner.⁴⁴ In New South Wales and the ACT, the penalties include ten years for the offences of self-abortion and abortion, and five years for procuring drugs or an instrument with the intention that they be used for an unlawful abortion. In South Australia, the offences of abortion and self-abortion are subject to life

38 *Health Act 1911* (WA), s 334(3).

39 *Ibid*, s 334(4).

40 *Ibid*, s 334(5).

41 *Ibid*, s 334 (7). The two medical practitioners must be members of a panel of at least six practitioners appointed by the Minister for this purpose. There are also a number of provisions relating to dependant minors.

42 *Criminal Code Act 1899* (Qld), s 225; *Criminal Code Act 1913* (WA), s 199(5).

43 *Crimes Act 1900* (NSW), ss 82-3; *Criminal Code* (Tas), s 134(1) and (2).

44 *Criminal Code Act 1913* (WA), s 199(2)-(3). Section 199(3) is subject to a defence based on treatment performed in good faith and with reasonable care and skill which is necessary in all the circumstances of the case (s 259).

imprisonment, whereas the offence of procuring drugs or an instrument is subject to a maximum prison term of three years.⁴⁵

The law has also been criticised due to the gap created between the letter of the law and its practice. In some areas, women are denied lawful abortions, although at the other end of the spectrum it is recognised that the criminal law is generally not enforced.⁴⁶ Additionally, there are complications in relation to modern techniques of pregnancy termination, including the ‘morning after’ pill and IUDs and their regulation under the current regime.⁴⁷ Doubts exist about the policy aims behind the law, as to whether it attempts to protect the rights of the pregnant woman, the foetus, the father or the medical profession.⁴⁸ Nor does Australian law take into account developments in other jurisdictions. For instance, the United Kingdom’s *Offences Against the Person Act 1861*, upon which much of the Australian law is based, has now been superseded by the *Abortion Act 1967*.

B. Child Destruction

In addition to the abortion related offences, the offence of child destruction is found in most Australian jurisdictions.⁴⁹ For example, in Victoria, the *Crimes Act 1958* provides that:

Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act unlawfully causes such child to die before it has an existence independent of its mother shall be guilty of the indictable offence of child destruction.⁵⁰

In Victoria and South Australia, it is prima facie proof that a child is capable of being born alive if the woman is at least 28 weeks pregnant,⁵¹ although it may be possible for a child to be born alive at an earlier period. In *Rance v Mid-Downs Health Authority*,⁵² Brooke J found that a child has reached that stage if “after birth, it exists as a live child, that is to say, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living through any connection with its mother”. In *C v S*,⁵³ the English Court of Appeal held that a foetus between 18-21 weeks gestational age was not a child capable of being born alive within the *Infant Life (Preservation) Act 1929*, because on the medical evidence before the Court it would be incapable of breathing either naturally or with a respirator. In other jurisdictions there is no such requirement that the child must be capable of being born alive. In

45 *Criminal Law Consolidation Act 1935* (SA), ss 81-2.

46 N Cica, note 1 *supra* at 47. However, the recent prosecutions in Western Australia certainly demonstrate that the possibility of enforcement still exists.

47 See L Waller, note 2 *supra* at 50.

48 N Cica, note 1 *supra* at 54-66.

49 *Criminal Code Act 1983* (NT), s 170; *Criminal Code Act 1899* (Qld), s 313; *Criminal Law Consolidation Act 1935* (SA), ss 82A(7)-(8); *Criminal Code Act 1924* (Tas), s 165; *Crimes Act 1958* (Vic), s 10(1); *Criminal Code 1913* (WA), s 290; *Crimes Act 1900* (ACT), s 40.

50 *Crimes Act 1958* (Vic), s 10(1).

51 *Ibid*, s 10(2) and the *Criminal Law Consolidation Act 1935* (SA), s 82A(8).

52 [1991] 1 QB 587 at 621.

53 [1987] 1 All ER 1230 at 1238. See also L Skene, note 20 *supra*, p 269.

Queensland, the Northern Territory and Western Australia, the crime of killing an unborn child occurs when the woman is “about to be delivered of a child”.⁵⁴ While in Tasmania, the crime of causing the death of a child before birth is committed when “any person causes the death of a child which has not become a human being in such a manner that he would have been guilty of murder if such child had been born alive is guilty of a crime”.⁵⁵ It appears that the offence of child destruction would also be subject to the defence of necessity. For instance, in South Australia the crime is not committed if the act was done in good faith for the purpose of preserving the life of the mother.⁵⁶

III. THE RELEVANCE OF INTERNATIONAL LAW TO AUSTRALIAN ABORTION LAW

Variations in the law relating to abortion and child destruction among the different jurisdictions within Australia indicate that abortion is viewed essentially as a concern of State or Territory criminal law, rather than a federal or even international issue. But challenges to abortion legislation in the European Commission and Court of Human Rights⁵⁷ demonstrate that what may at first appear to be a local concern can be subject to international scrutiny and comment. While Australia is not a party to the European Convention on Fundamental Human Rights and Freedoms (“ECHR”), the effect of international law and decisions by international bodies cannot be ignored by our parliaments when legislating with respect to abortion. First, international law in the form of treaties and customary international law may impact on the interpretation of domestic abortion law. Secondly, domestic abortion laws may be subject to the scrutiny of international bodies either through the Optional Protocol to the International Covenant on Civil and Political Rights (“the Optional Protocol”), or through the reporting requirements pursuant to other treaties that Australia has ratified.

A. The Impact of International Law on Australian Law

As has been stated by Perry J, the fact that treaties do not form part of Australian law unless separately implemented by legislation, does not reduce the interaction between international law, international instruments and Australian domestic law “to a state of sterility”.⁵⁸ Australia is a party to all major human

54 *Criminal Code Act* 1983 (NT), s 170; *Criminal Code Act* 1899 (Qld), s 313(1); *Criminal Code* 1913 (WA), s 290.

55 *Criminal Code Act* 1924 (Tas), s 165(1).

56 *Criminal Law Consolidation Act* 1935 (SA), s 82A(7).

57 For example, *Brüggemann & Scheuten v Federal Republic of Germany* Application No 6959/75 (1978) 10 DR 100; and *Open Door Counselling and Dublin Well Woman Centre v Ireland* Series (Ser A) No 246, (1993) 15 EHRR 244.

58 J Perry, “At the Intersection - Australian and International Law” (1997) 71 *Australian Law Journal* 841.

rights conventions.⁵⁹ A number of these treaties have been annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), although this process does not have any formal effect in relation to the legal status of the treaties for the purposes of domestic law.⁶⁰ Although treaties do not create rights in the hands of private individuals,⁶¹ recent decisions have clarified and extended the impact of international law on domestic law. It is accepted that treaties may be referred to by courts in the course of the interpretation of legislation, to clarify ambiguities in the common law, or to fill lacunae in the common law. In *Jago v Judges of the District Court of New South Wales*, Kirby P proposed that in cases where the common law was uncertain or ambiguous, it would be legitimate for a court to look to the international obligations of Australia in developing that area of the common law.⁶² In *Mabo v Queensland [No 2]*,⁶³ Brennan J substantially predicated his refusal to maintain the Australian common law doctrine of *terra nullius* on changed conceptions in international law and on the basis that:

international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.⁶⁴

More controversially, international treaties have been held to be relevant in the context of the exercise of administrative discretions. This is derived from the decision of the High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*,⁶⁵ where a majority held that there was a legitimate expectation that the administrative arm of government would take into account the effect of Australia's treaty obligations when making decisions. If a decision-maker is to make a decision contrary to that legitimate expectation, then procedural fairness requires that the person affected should be given an opportunity to be heard.⁶⁶ The continuing efficacy of *Teoh's Case* is somewhat mitigated by statements issued by both Labor and Coalition Ministers purporting

59 In the context of abortion law the following are particular relevant: International Covenant on Civil and Political Rights, GA Res 2200 (XXI) A, UN Doc A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, GA Res 2200A, 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966); Convention on the Elimination of All Forms of Discrimination Against Women, GA Res 34/180, UN GAOR Supp (No 46), UN Doc A/34/49 (1979); Convention on the Rights of the Child, GA Res 44/25, 44 UN GAOR, Supp (No 49), UN Doc A/44/736 (1989).

60 See *Minister for Foreign Affairs & Trade v Magno* (1992) 112 ALR 529 at 570.

61 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; and *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273 at 287.

62 (1988) 12 NSWLR 558 at 569. In *Dietrich v The Queen* (1992) 177 CLR 292 at 306, Mason CJ and McHugh J suggested that the view expressed in *Jago* was a "common-sense approach".

63 (1992) 175 CLR 1.

64 *Ibid* at 29.

65 (1995) 183 CLR 273 ("*Teoh's Case*").

66 *Ibid* at 291-2, per Mason CJ and Deane J.

to negate the effect of the High Court's ruling.⁶⁷ However, the legal effect of the statements themselves is open to doubt.⁶⁸

There have been suggestions that there is a customary international law right to abortion.⁶⁹ At present, there is some uncertainty as to the legal status of customary international law as a source of, or part of, Australian domestic law. The uncertainty is complicated by the fact that only a relatively small number of cases have considered the question of whether customary international law is a part of the common law of Australia. In *Polites v Commonwealth*, Dixon J stated that "unless a contrary intention appears, general words occurring in a statute are to be read subject to the established rules of international law...".⁷⁰ That case was followed by the decision of the High Court in *Chow Hung Ching v The King*, in which Latham CJ stated, somewhat confusingly, that "[i]nternational law is not as such part of the law of Australia...but a universally recognised principle of international law would be applied by our courts...".⁷¹ However, the authority of that statement is affected by the failure by Latham CJ to distinguish between treaty law and customary international law.

In *Koowarta v Bjelke-Petersen*, Gibbs CJ suggested that the question of whether international law is incorporated into Australian law, or whether it becomes part of domestic law only after being "accepted and adopted by the law of Australia" was not necessarily settled, although he did not need to consider the question for the purposes of his decision.⁷² The status of customary international law in Australian law was one of the issues canvassed by the Federal Government in 1995 in a public inquiry held by the Senate Legal and Constitutional References Committee.⁷³ In the course of that inquiry, the Hon Elizabeth Evatt made the following statement:

Quite apart from conventions that Australia ratifies, some parts of that international law can, as a matter of common law, apply in Australia without any further action on the part of anyone. . . Naturally as such, they can be overruled by legislation, as any part of the common law can. But we should not think of international law as being an entirely separate thing from the law of Australia.⁷⁴

67 Joint Statement by the Minister for Foreign Affairs and the Attorney-General, "International Treaties and the High Court Decision in *Teoh*", 10 March 1995; and Joint Statement of the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, "The Effect of Treaties in Administrative Decision-Making", 25 February 1997. Two Bills (now lapsed) were also presented before Parliament: the Administrative Decisions (Effect of International Instruments) Bill 1995 and 1997. Both Bills were subject to reports by the Senate Legal and Constitutional Legislation Committee dated 1995 and 1997. In 1999 this Bill was again presented before Parliament.

68 In *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALD 517 at 522, Hill J suggested that when Mason CJ and Deane J in *Teoh's Case* referred to "executive indications to the contrary", their Honours may have "intended to refer to statements made at the time the treaty was entered into, rather than to statements made after the treaty came into force".

69 For example, N Klashorny, "Ireland's Abortion Law: An Abuse of International Law" (1996) 10 *Temple International and Comparative Law Journal* 419 at 436.

70 (1945) 70 CLR 60 at 77.

71 (1948) 77 CLR 449 at 462.

72 (1982) 153 CLR 168 at 203-4.

73 Senate Legal and Constitutional References Committee ("SLCRC"), *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 1995.

74 SLCRC, *Hansard*, 16 May 1995, p 379; quoted in SLCRC, *ibid* at 87-8.

Most recently, the Federal Court considered the question of whether the offence of genocide at customary international law was known to the common law of the ACT. In concluding by majority that it was not, each of the members of the Court in *Nulyarimma v Thompson*⁷⁵ demonstrated a variety of views: Wilcox J considered that it may be that some rules of customary international law formed a part of the common law whilst others did not; Whitlam J considered that although genocide attracted universal jurisdiction it was not necessarily a punishable offence at common law; and Merkel J in dissent held that rules of customary international law formed a part of the common law to the extent that they did not conflict with the pre-existing statute and common law of the jurisdiction. At best, the various formulations are confused, and certainly the decision does not clarify to any significant extent the question in Australia.

B. Scrutiny by International Bodies

In *Mabo's Case*, Brennan J stated that:

The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.⁷⁶

Thus, there is a clear suggestion that the availability of access to an international tribunal itself raises the domestic status and applicability of treaties associated with such a tribunal. Apart from this domestic effect, the Optional Protocol enables individuals who believe that Australia has breached their rights under the International Covenant on Civil and Political Rights ("ICCPR") to submit a communication to the United Nations Human Rights Committee, after first exhausting local remedies.⁷⁷

This process was the basis of the Human Rights Committee's findings against Australia in *Toonen's Case*⁷⁸ and *A's Case*.⁷⁹ The Committee's views on the Tasmanian Criminal Code in *Toonen's Case* led to the enactment of the *Human Rights (Sexual Conduct) Act* 1994 by the Commonwealth Parliament and ultimately the repeal of the offending State legislation by the Tasmanian Parliament.⁸⁰ Although Australia has demonstrated by its response to the Human Rights Committee's views in *A v Australia* that it will not always follow the Committee's decision and is prepared to exercise its own judgment as to the interpretation of the Covenant,⁸¹ notwithstanding that prevailing view in government, the decisions of international bodies and tribunals are a significant influence on a range of domestic actors and participants in Australia, and as a

75 [1999] FCR 1192.

76 (1992) 175 CLR 1 at 29.

77 Optional Protocol to the International Covenant on Civil and Political Rights (1966) art 2. Australia acceded to the Optional Protocol on 25 September 1991.

78 *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992.

79 *A v Australia*, UN Doc CCPR/C/59/D/560/1993.

80 *Criminal Code Amendment Act* 1997 (Tas) amended s 122 and repealed s 123 of the *Criminal Code Act* 1924 (Tas).

81 Response by the Australian Government to the Views of the Committee in Communication No 560/1993 *A v Australia*.

result have the ability to change and influence laws of the various Australian jurisdictions.

Any challenge to the current state of Australian abortion law would be most likely to proceed under the procedure outlined in the First Optional Protocol to the ICCPR, as at present there is no comparable international procedure open to Australians on this issue.⁸² In 1999, the General Assembly adopted an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.⁸³ This enables individuals to complain to the Committee on the Elimination on All Forms of Discrimination Against Women for breaches of CEDAW. Article 2 of the new Protocol enables the Committee to receive communications by or on behalf of individuals and by groups of individuals, if they are under the jurisdiction of a State Party to the Protocol. As the Australian Government has stated that it will not sign or ratify the Optional Protocol to CEDAW, and indeed the Protocol is not in force as yet,⁸⁴ it is not a procedure currently available to Australian women seeking remedies at the international level.

Additionally, the ICCPR and CEDAW make provision for periodic reports to relevant treaty Committees.⁸⁵ The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) also provides that State Parties must submit reports under this Covenant to the Secretary-General to be transmitted to the United Nations Economic and Social Council. Those reports are then the subject of comment and review by the relevant Committees in a process of dialogue which is intended to place emphasis on those areas of domestic law which are in breach or which potentially breach treaty obligations. The Commonwealth is responsible at international law for the actions of the States and Territories and their legislation is subject to examination by the treaty committees. The efficacy of reporting mechanisms as a means of monitoring and implementing human rights has been subject to criticism,⁸⁶ as is indicated by the Committee’s response to Australia’s most recent report on its obligations pursuant to CEDAW.⁸⁷

82 Australia has accepted procedures enabling individuals to bring complaints for violations of protected rights under art 14 of the Convention on the Elimination of All Forms of Racial Discrimination (1966) and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. However, these procedures are not relevant when challenging Australian abortion laws.

83 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (1999) GA Res A/RES/54/4 (“CEDAW”).

84 Article 16 provides that the Protocol will enter into force three months after the deposit of the tenth instrument of ratification or accession with the Secretary-General. On 29 August 2000, the Minister for Foreign Affairs, the Attorney-General and the Minister for Immigration and Ethnic Affairs issued a joint media release, “Improving the Effectiveness of United Nations Committees” in which it was stated that Australia would not sign or ratify the Optional Protocol to CEDAW.

85 See ICCPR art 40; CEDAW art 18.

86 See, for example, H Charlesworth, “Australia’s Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights” (1991) 18 *Melbourne University Law Review* 428.

87 See Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Report of the Government of Australia, CEDAW/C/1997/II/L1/Add8.

IV. INTERNATIONAL LAW AND ABORTION

In international human rights law, debates concerning the status of abortion have considered the perspectives of women, the rights of the unborn child and the rights of the father. But the difficulties in utilising rights discourse in the debate on reproductive freedom have been noted, seemingly pitting the rights of women against the foetus. Much of rights discourse speaks in terms of an individualizing, competitive value system, effacing connectedness and mutuality.⁸⁸ However, Graycar and Morgan believe that the most crucial questions for women involve issues about the relationship between women's autonomy and their essential "connectedness".⁸⁹ From the feminist perspective, the central issue in abortion law reform is the status of the woman, rather than the foetus.⁹⁰ "[A]ccess to safe publicly-funded abortion has been a central demand of recent feminism."⁹¹ A number of writers view the availability of abortion services in the context of a broad woman's right to reproductive freedom, or reproductive choice, a right which is constituted by a number of civil and political, and social and economic rights.⁹² While not discounting this overarching approach, this article will examine the current Australian law in the context of individual human rights obligations located in the numerous human rights instruments to which Australia is a party.

Australia is bound to implement in good faith all obligations provided in human rights treaties to which it is a party.⁹³ Some of these obligations require immediate implementation, while other are subject to guarantees of progressive realisation. For instance, parties to the ICCPR are bound to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant".⁹⁴ A party to the ICESCR undertakes to take steps "to the maximum of its available resources, with a view to achieving progressively the full realization"⁹⁵ of the rights articulated. Additionally, CEDAW imposes a duty on state parties to "eliminate discrimination against women by any person, organization or enterprise"⁹⁶ as well as by the state itself.

88 See K De Gama, "A Brave New World? Rights Discourse and the Politics of Reproductive Freedom" (1993) 20 *Journal of Law and Society* 114 at 115.

89 R Graycar and J Morgan, *The Hidden Gender of Law*, Federation Press (1990) p 198. In R West, "Jurisprudence and Gender" (1988) 55 *University of Chicago Law Review* 1 at 14, the author explains the "connection thesis" as "[w]omen are actually or potentially materially connected to other human life".

90 C Tricker, "Sex, Lies, and Legal Debate: Abortion Law in Australia - Note on *CES v Superclinics Australia*" (1995) 17 *Sydney Law Review* 446 at 455.

91 R Graycar and J Morgan, note 89 *supra*, p 198.

92 This approach is taken by R Cook, "International Protection of Women's Reproductive Rights" (1992) 24 *New York University Journal of International Law and Politics* 645; B Hernández, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right" (1991) 17 *Brooklyn Journal of International Law* 307; and A Hendriks, "Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and Women's Convention" (1995) 44 *The American University Law Review* 1123.

93 See Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, art 26.

94 ICCPR, art 2(2).

95 ICESCR, art 2(1).

96 CEDAW, art 2(e).

Despite the differences in implementation mechanisms between different treaties, as is highlighted by Sullivan in the context of women's health rights, a state party is bound to comply with the terms of instruments it has ratified.⁹⁷ In this article consideration is given to the following rights in the Australian context:

- the rights to non-discrimination and equality before the law;
- the right to life;
- the rights to liberty and security of the person;
- the right to privacy;
- the right to health;
- adequate information about health;
- the right not to be subjected to cruel and inhuman and degrading treatment; and
- the rights of the father.

Finally, consideration will be given to the issue of whether or not a customary international law right to abortion services exists. This is not an exhaustive list of human rights which may be offended by laws which deal with reproductive self-determination in other countries, or even Australia,⁹⁸ but they are the most relevant in the context of Australian abortion law.

A. The Rights to Non-Discrimination and Equal Treatment Before the Law

Non-discrimination is a fundamental principle of international human rights law. The United Nations Charter highlights that one of the purposes of the organisation is to promote and encourage respect for "human rights and fundamental freedom for all without distinction as to race, sex, language or religion".⁹⁹ Of all the categories of discrimination, distinctions on the basis of race and sex have received the greatest amount of international scrutiny, with two treaties dedicated to these grounds.¹⁰⁰ Additionally, the norm of non-discrimination on the basis of sex is provided in the Universal Declaration of Human Rights ("UDHR"), the ICCPR and the ICESCR. A common article in these instruments provides that everyone is entitled to the rights and freedoms set out in the particular instrument, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".¹⁰¹ These provisions have been described as subordinate equality norms as they prohibit discrimination only in relation to the rights set out in the relevant instrument.¹⁰² Furthermore, the ICCPR

97 D Sullivan, "The Nature and Scope of Human Rights Obligations Concerning Women's Right to Health" (1995) 1 *Health and Human Rights* 369 at 377.

98 See the discussion in R Cook, "Human Rights and Reproductive Self-Determination" (1995) 44 *The American University Law Review* 975.

99 Charter of the United Nations, art 1(3).

100 A Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 *Human Rights Law Journal* 1 at 20.

101 UDHR, art 2; ICCPR, art 2(1); ICESCR, art 2(2).

102 A Bayefsky, note 100 *supra* at 4.

guarantees equal treatment before the law, article 26 providing that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." This is an autonomous equality norm and is not dependent on other rights contained in the Covenant.¹⁰³

CEDAW provides a comprehensive definition of discrimination as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁰⁴

The Human Rights Committee has adopted this definition in its General Comment on Non-Discrimination made under art 40(4) of the ICCPR.¹⁰⁵ A law that criminalises a practice which focuses only on women is potentially discriminatory on the basis of sex. However, not every distinction on the basis of sex is a violation of the norm of non-discrimination. Equal treatment does not necessarily mean the same treatment, and thus criteria have been established for distinguishing warranted, as distinct from unwarranted, discrimination. The Human Rights Committee has stated that a "differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26" of the ICCPR.¹⁰⁶ Such statements are supported by the European Court of Human Rights, which has held that:

the principle of equality of treatment is violated if the distinction has no reasonable and objective justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard having being had to the principles which normally prevail in democratic societies.¹⁰⁷

In the Canadian case of *R v Morgentaler, Smoling and Scott*,¹⁰⁸ the accused physicians were charged with unlawfully procuring a miscarriage in violation of s 251 of the Canadian Criminal Code, which set out a detailed and complex procedure for legal abortions. It was argued in the Ontario Court of Appeal that the provision violated a guarantee against discrimination on the basis of sex in the Canadian Charter of Rights. In response, the Court of Appeal found that an argument that the legislation was discriminatory or caused inequality because it did not require men seeking an abortion to comply with s 251 would be without substance.¹⁰⁹ Consistent with this statement, as self-abortion is an offence which can only be committed by women, Australian criminal laws would not appear to infringe the prohibition on discrimination.

The European Court of Human Rights, in relation to violations of art 14 of the European Convention, has found that there must be a reasonable proportionality between the means employed and the aim sought to be realised when justifying

103 *Ibid.*

104 CEDAW, Art. 1.

105 Human Rights Committee, General Comment 18 (1989), para 7. See also A Bayefksy, note 100 *supra* at 3.

106 *See Zwaan-de Vries v The Netherlands*, Communication No 182/1984, para 13.

107 *Case Relating to the Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits)*, (1968) 6 Eur Ct HR (Ser A) 34.

108 (1986) 22 DLR (4th) 641 at 683.

109 *Ibid* at 683.

discriminatory treatment.¹¹⁰ Equally, the doctrine of the ‘margin of appreciation’,¹¹¹ according to which States are accorded a certain discretion in their implementation of international norms, may be applicable. It could be argued that the severity of the penalty imposed for the offence of self-abortion may infringe this notion of proportionality. In Australia, a number of jurisdictions impose large maximum penalties for the offence of self-abortion, including, in the case of South Australia, life imprisonment. The only other crimes providing such a maximum penalty in that State are treason and homicide. This suggests a lack of proportionality between the means employed and the aim sought to be realised (the preservation of the life of the unborn child, who is not recognised as a person for the purposes of homicide). Although such a penalty is rarely, if ever, imposed, this does not prevent a person from being personally and actually affected by its existence on the statute books.¹¹²

Australian abortion law may also offend the prohibition against discrimination in CEDAW, as it subjects women to differential treatment in relation to the enjoyment of their right to health (guaranteed in art 12 of CEDAW and ICESCR). Cook argues that laws restricting access to abortion are potentially discriminatory against women because only women are able to become pregnant and thus require those services. Men, on the other hand, are not liable for criminal penalties for medical procedures that preserve any aspect of their health.¹¹³ Justice Menhemmit’s ruling in *R v Davidson*¹¹⁴ enables an abortion to be performed where the woman’s life or health are in “serious danger”. Proportionality is an additional element of the test, although most recognise that if the abortion is necessary it will also be proportionate.

On the other hand, in the Northern Territory and South Australia an abortion may be performed if the continuation of the pregnancy would involve a greater risk to a woman’s physical or mental health than if it were terminated (suggesting a lesser standard of risk than a “serious danger”). In the Northern Territory, an abortion may only be performed after 23 weeks if the woman’s life, as distinct from her physical or mental health, is in danger. Tests that rely upon the concept of a serious danger (undefined) suggest that a woman’s right to health is to be enjoyed differently (and adversely) to that of men. Whether or not that would be held to be discriminatory treatment would depend on whether the differentiation can be justified. The Committee on the Elimination of Discrimination Against Women has noted that one barrier to women’s access to appropriate health care are laws that criminalise medical procedures only needed by women and that punish women who undergo those procedures,¹¹⁵ suggesting an unlawful differentiation.

110 Note 107 *supra*.

111 See for example, *Barfod v Denmark* (Ser A) No 149 (1991) 13 EHRR 493 at 499.

112 See *Toonen’s Case*, note 78 *supra*, para 6.3, where Tasmania conceded that although Tasmania’s anti-gay laws had not been enforced since 1984 this fact did not prevent Toonen being “personally and actually affected by the Tasmanian laws”.

113 R Cook, note 98 *supra* at 1007.

114 Note 11 *supra*.

115 Committee on the Elimination of Discrimination Against Women, General Recommendation 24, 1999 at [14].

B. The Right to Life

One of the fundamental human rights recognised at international law is the right to life. It is notable that even societies in which access to abortion is severely restricted it is generally recognised that the right to life of the mother is equal to that of the unborn foetus.¹¹⁶ The right to life has been described by the United Nations Human Rights Committee as the “supreme right”.¹¹⁷ Article 6 of the ICCPR provides that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The right to life has not been the subject of any detailed consideration in the context of abortion, other than in the decision of the European Commission of Human Rights in *Paton v UK*,¹¹⁸ which considered the potential existence of a right to life of an unborn foetus. This aspect of the case is considered below.

Although it is only in the most severe cases that a woman’s right to life would be threatened by abortion laws, there remain some risks. For example, there was a possibility that the combined operation of cll 5(1) and 5(2) of the original ACT Bill could have placed a woman at risk. Clause 5(1) effectively limited abortion in the absence of a risk of substantial and irreversible impairment of a major bodily function. Clause 5(2) required the medical practitioner to take all reasonable steps to ensure a live delivery, thus potentially requiring the medical practitioner to equate the safe delivery of the foetus with the alleviation of the grave medical risk to the mother. However, these provisions were omitted from the final Act. Both common law and code jurisdictions in Australia currently do protect the life of the mother. For instance, under Justice Menhennitt’s ruling in *R v Davidson* it is clear that a threat to the mother’s life would constitute a lawful defence to an abortion.¹¹⁹ In Queensland, the Northern Territory, South Australia and Western Australia an abortion may be performed under legislative conditions designed to protect the life of the mother.

In considering the right to life of the woman, attention must also be given to the question whether the foetus has any competing right to life under international law. It has been suggested that international law does recognize the right to life of the unborn child and therefore domestic cases should be argued with that international obligation in mind.¹²⁰ However, at present it would appear that international human rights law does not recognise the absolute right to life of the unborn child.¹²¹ The Preamble to the Declaration on the Rights of the Child, a non-binding international instrument, provides that the child “needs special safeguards and care, including appropriate legal protection, before as

116 For example, the *Constitution of Ireland*, art 40.3.3.

117 Human Rights Committee, General Comment 6, 1982 at [1].

118 Application No 8416/79 (1980) 19 DR 244.

119 Note 11 *supra* at 671.

120 J Fleming and M Hains, “What Rights, If Any, Do the Unborn Have Under International Law?” (1997) 16 *Australian Bar Review* 181 at 198.

121 See P Alston, “The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child” (1990) 12 *Human Rights Quarterly* 156 at 178.

well as after birth".¹²² This safeguard is also found in the Preamble to the Convention on the Rights of the Child. While this would suggest that the foetus is entitled to protection, a statement was included in the Travaux Préparatoires to the Convention that in "adopting the preambular paragraph, the Working Group does not intend to prejudice the interpretation of art 1 or any other provision of the Convention by State Parties".¹²³ Article 1 of the Convention provides that:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

The effect of the Preamble, read together with the statement of the Working Group, is that states may extend their definition of a child to the foetus, but this cannot be seen as an obligation under either customary international law or treaty law.¹²⁴ States have entered reservations and declarations to art 1. For instance, Argentina lodged a declaration upon ratification of the Convention that art 1 should be interpreted to mean that a child is a human being from the moment of conception. However, Australia has not lodged such a reservation or declaration. Under the common law, the traditional position is stated in *R v Hutty*:

legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother.¹²⁵

Statutory definitions to the same effect are provided in Queensland, Western Australia and Tasmania.¹²⁶ Williams J in the Supreme Court of Queensland confirmed this approach in *K v T* when he held that an unborn child did not have legal rights which could be enforced prior to and not dependent upon its birth.¹²⁷ There are decisions which support a child's right of action for negligence in respect of prenatal injuries.¹²⁸ Similarly, the English Court of Appeal in *Attorney-General's Reference (No 3 1994)*¹²⁹ held that a defendant could be liable for the murder or manslaughter of a baby where he stabbed the child's mother when she was 23 weeks pregnant. The child was subsequently born alive, but later died as a result of the defendant's assault. It was held that there was no legal requirement that a child was a person in being when the act which caused death occurred, provided she was a person in being when she died.¹³⁰ While a

122 Declaration on the Rights of the Child, GA Res 1386, UN GAOR, 14th Sess, Supp No 16 at 19, UN Doc A/4354 (1960).

123 UN Doc E/CN.4/1989/WG.1/L.4.

124 G Van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff (1995) p 35.

125 *R v Hutty* [1953] VLR 338 at 339.

126 *Criminal Code Act 1899* (Qld), s 292; *Criminal Code Act 1924* (Tas), s 153(4); *Criminal Code* (WA), s 269. The *Crimes Act* (1900) NSW, s 20 provides that on a charge of child murder "such child shall be held to have been born alive if it has breathed, and has been wholly born into the world whether it has had an independent circulation or not".

127 *K v T* (1983) 1 Qd R 396 at 401. This view was confirmed on appeal to Full Court of the Supreme Court of Queensland in *Attorney-General (ex rel Kerr) v T* (1983) 1 Qd R 404.

128 For example, *Watt v Rama* [1972] VR 353.

129 [1996] 1 All ER 10.

130 *Ibid*. If the defendant had intended to kill or cause grievous bodily harm to the mother then the doctrine of transferred malice would operate to provide the necessary mens rea for the death of the child.

recent report of the Joint Standing Committee on Treaties on the Convention on the Rights of the Child recommended that the Government “investigate the adequacy of support services to enable women to contemplate alternatives to abortion”,¹³¹ the Committee did not state that the unborn child has an absolute right to life.

The wording of art 1 of the Convention on the Rights of the Child can be distinguished from the American Convention on Human Rights which provides in art 4(1) that the right to life “shall be protected by law and in general from the moment of conception”. Although this would appear to protect every foetus’ right to life, the words “in general” were included by states in recognition of the need for exceptions in the case of rape or in order to save the mother’s life.¹³² This interpretation is reinforced by the Inter-American Commission of Human Rights in the *Baby Boy Case*,¹³³ in which a majority found that United States abortion laws did not contravene art 1 of the American Declaration on Human Rights which provides that “every human being has the right to life”. In addition, the Commission relied on statements made during the drafting of the American Convention on Human Rights to suggest that, in its view, the arguably more extensive protection guaranteed in art 4(1) of the Convention did not affect the legitimacy of abortion laws.¹³⁴

The European Commission on Human Rights has considered the right to life of the unborn child in the context to abortion legislation. In *Paton v United Kingdom*,¹³⁵ the European Commission considered whether the foetus was protected by art 2(1) of the European Convention which provides that “[e]veryone’s right to life shall be protected by law”. In this case, the partner of a pregnant British woman challenged her ability to terminate her pregnancy without his consent. The Commission held that a 10-week-old foetus could be aborted under English law in order to protect the physical or mental health of the woman.¹³⁶ Thus, art 2 does not recognise the absolute right to life of the unborn child, although the question of whether the unborn child is protected at all by the Convention was left open. However, the protections in the remainder of art 2 and the other articles of the European Convention would appear only to apply to persons already born. This interpretation of the right to life was again upheld in *H v Norway*,¹³⁷ where it was decided that a 14 week old foetus could be aborted where the “pregnancy, birth or care for the child may place the woman in a difficult situation of life” (as provided in the relevant Norwegian statute). However, the European Commission would not exclude that in certain circumstances there may be protection for the unborn under art 2, although these circumstances were not elaborated upon.¹³⁸

131 Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, 1998, Recommendation 16.

132 *Inter-American Yearbook* (1968) p 321, quoted in G Van Bueren, note 124 *supra*. 35.

133 (1981) 2 HRLJ 110.

134 *Ibid* at 119.

135 Application No 8416/79 (1980) 19 DR 244.

136 *Ibid* at 252-3.

137 Application No 17004/90 (1992) 73 DR 155.

138 *Ibid* at 167.

There are instances where protection is extended to the foetus in international instruments: for instance art 6(5) of the ICCPR prevents death sentences being carried out on pregnant women. But these would appear to be exceptions, and in any effect, the protection is expressed in terms of the pregnant mother, rather than the unborn child.¹³⁹ It would appear that international law, like Australian law, protects the child from the moment of birth, but without an express provision to the contrary, it does not provide the foetus with an absolute right to life.

C. The Right to Liberty and Security of the Person

Breaches of the internationally protected rights to liberty and security of the person are not immediately obvious when considering the lawfulness of abortion provisions. The rights are included in numerous human rights treaties, with both 'liberty' and 'security' usually incorporated in the same provision.¹⁴⁰ A typical example is art 9(1) of the ICCPR, which provides that "everyone has the right to liberty and security of the person". The concept of 'liberty' is defined in the ICCPR and the ECHR in terms of procedures governing arrest and detention. In both treaties, the guarantee of liberty of the person is followed by a number of provisions to ensure that a person's rights are respected in arrest procedures, and that any form of detention is not arbitrary. Thus, liberty is generally viewed in terms of possible deprivations of liberty due to the power of the state and its police force in criminal law procedures.

The Canadian Charter of Human Rights contains a similar guarantee of "liberty and security of the person". When *Morgentaler, Smoling and Scott v The Queen*, went on appeal to the Canadian Supreme Court, one judge explicitly found that laws criminalising abortion violated the guarantee of liberty.¹⁴¹ The analysis by Wilson J was predicated on the idea that although liberty "does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them".¹⁴² The right to reproduce or not to reproduce is a right "properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being".¹⁴³ Wilson J held that s 251 of the Canadian Criminal Code, which required the woman to obtain a certificate from a therapeutic abortion committee, took the decision on whether or not to have an abortion away from the woman. This arrangement violated "the woman's right to liberty by deciding for her something that she has the right to decide for herself".¹⁴⁴ Interestingly, similar language was used in the judgment of Lindenmayer J in the Family Court of Australia's decision, *In the Marriage of F.*¹⁴⁵ In determining whether a husband's request to prevent the termination of his wife's pregnancy should be granted, Lindenmayer J stated:

139 G Van Buerens, note 124 *supra*, pp 35-6.

140 See ECHR art 5; American Convention on Human Rights, art 7.

141 *Morgentaler, Smoling and Scott v The Queen* (1988) 44 DLR (4th) 385.

142 *Ibid* at 487.

143 *Ibid* at 491.

144 *Ibid*.

145 [1989-90] 13 Fam LR 189.

To grant the injunction would be to compel the wife to do something in relation to her own body which she does not wish to do. *That would be an interference with her freedom to decide her own destiny.*¹⁴⁶

No other judge in the *Morgentaler Case* adopted the broad approach to the right to liberty. However, the right to security of the person was the basis of the majority's decision that the relevant provision of the Canadian Criminal Code limiting abortion did infringe the Charter. The Court held that:

Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person.¹⁴⁷

The increased risks to the woman (including the risk of psychological injury) due to the delay caused by the need to obtain committee approval was a separate infringement of the right to security of the person.¹⁴⁸ In addition, the requirement that at least four physicians be available to authorise an abortion meant that abortions would be unavailable in almost one quarter of Canadian hospitals (a further cause of delay).¹⁴⁹ To date, this decision does not appear to have been followed by any other international or national tribunal. Although the decision in *Morgentaler* was derived from the guarantee contained in the Canadian Charter of Rights and Freedoms, it is in accordance with the modern, liberal view of the right.

The United Nations Human Rights Committee has considered the right to security of the person in terms which suggest that it extends beyond arrest and detention to economic and social contexts.¹⁵⁰ It extends to the right of an individual to be free from unreasonable interferences with their body and mind. Obviously, the enforced carriage of a child is a significant interference with the personal security of the mother. In determining whether such an interference is justifiable, international law will take account of the circumstances of the interference, including the public health benefits that may arise. It has been recognised that the regulation of public health frequently leads to conflicts with internationally protected individual rights, including the right to security of person.¹⁵¹ Generally, the position has been taken that individual rights may only be circumscribed on medical grounds for the protection of public health, and not for other ends. Examples of potentially legitimate regulation would include isolation of persons with contagious diseases.¹⁵² It would be difficult to characterise abortion in these terms.

Following the decision in *Morgentaler*, the Human Rights Committee may find that in certain situations Australian abortion laws infringe the right to

146 *Ibid* at 198 (emphasis added).

147 Note 141 *supra* at 402, per Dickson CJC.

148 *Ibid* at 404-5.

149 *Ibid* at 409.

150 *Delgado Páez v Colombia*, Communication No 195/1985.

151 See K Tomaševski, "The Right to Health" in A Eide, C Krause and A Rosas (ed), *Economic, Social and Cultural Rights: A Textbook* (1995) 139.

152 See WHO Submission to *The Individual's Duty to the Community and the Limitations of Human Rights and Freedoms under Article 20 of the Universal Declaration of Human Rights*, 1983.

security of the person. Apart from the ACT, no waiting periods are specified in Australian legislation legalising abortion.¹⁵³ Despite this absence of statutory constraints, reports suggest that delays are experienced in some jurisdictions, particularly by women who are dependent on the public health system, or who have to travel from rural areas or interstate to obtain abortion services.¹⁵⁴ In South Australia, the requirement that abortion services be provided in hospitals has made timeliness a particular issue.¹⁵⁵ A 1994 study concluded that waiting times imposed on public patients caused “widespread and unnecessary physical and psychological costs to women”. This was exacerbated where multiple appointments were required in the process of determining eligibility for abortion.¹⁵⁶ While the *Morgentaler* decision acknowledged that Parliament is justified in requiring a second medical opinion as to the woman’s life and health in order to protect the state’s interest in the foetus, certain aspects of the legislation which caused significant delays were still found to be invalid. In these circumstances, it is arguable that an international tribunal, using *Morgentaler* as a guide, could hold that if the practical effect of Australian law imposes too long a waiting period in some jurisdictions, then this may constitute an unreasonable restriction on the right to security of the person.

D. The Right to Privacy

Privacy rights protect an individual’s personal autonomy and capacity for decision-making against the power of the state exercised in the public interest.¹⁵⁷ The notion of privacy has not been comprehensively articulated, but does include an individual’s identity, integrity, autonomy and sexuality.¹⁵⁸ However, the notion of privacy must also be weighed against the community interest. The right to privacy is contained in numerous international instruments, such as the ICCPR, the UDHR, and the European and American Human Rights Conventions.¹⁵⁹ Article 17(1) of the ICCPR provides that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Additional protection is provided by art 17(2), which states that “[e]veryone has the right to the protection of the law against such interferences or attacks”. Thus the law must promote rather than hinder the right to privacy of a woman, including her right to a realm of protection in respect of her body.

153 *Health Regulation (Maternal Information) Act* 1998 (ACT), s 10 provides that a person shall not perform an abortion unless her consent has been obtained in writing not less than 72 hours after making a declaration that all advice and referrals have been offered or provided to the woman.

154 NHMRC, note 8 *supra* at 7.

155 *Ibid.*

156 L Ryan, M Ripper and B Butfield, *We Women Decide – Women’s Experience of Seeking Abortion in Queensland, South Australia and Tasmania 1985-1992*, Flinders University Press (1994) p 203.

157 D Feldman, *Civil Liberties and Human Rights in England and Wales*, Clarendon Press (1993) p 354.

158 See M Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, Hannes Tretter (1993) pp 294-9.

159 UDHR, art 12; ICCPR, art 17; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8; American Convention on Human Rights, art 11.

Australia was found to have breached art 17 by the United Nations Human Rights Committee in relation to the criminalisation of homosexuality in ss 122 and 123 of the Tasmanian Criminal Code (now repealed). The Committee stated that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'".¹⁶⁰ In relation to Tasmania's contention that the laws were morally justified, the Committee would not accept that for the purpose of art 17, moral issues were exclusively a matter for domestic concern.¹⁶¹ It was clear from the Committee's findings, that they were influenced by the evidence of a general acceptance of homosexuality in Australia and the fact that with the exception of Tasmania, all laws criminalising homosexuality had been repealed throughout Australia. Utilising the same approach in the context of abortion, at present it is clear that most legislatures throughout Australia continue to view abortion as a criminal law issue, subject to certain defences or legislative exceptions. This may be at odds with the views of women who have sought an abortion and reject the legal situation in which the procedure is regulated as a crime rather than a health issue.¹⁶² Given the range and diversity of exceptions in legislation and case law it may be difficult to arrive at a similar moral consensus as was apparent in *Toonen's Case*.

Article 17 has not been interpreted in the light of anti-abortion laws. Nevertheless, the Human Rights Committee has shown itself ready to look to other international and national tribunals in reaching its decisions. Therefore guidance as to the scope of the right to privacy in this context can be gained from both domestic and international case law. In *Roe v Wade*,¹⁶³ the United States Supreme Court held that the constitutional right to privacy created a realm of protection for the autonomy of women in respect of their bodies. This right was not absolute and had to be set against the State's legitimate interest in preserving the life and health of both the women and the child. In this respect, the State could legislate to regulate abortions, but the interests protected would change as the pregnancy progressed. In the first trimester, the decision on abortion could be left to the mother and her doctors; in the second trimester the State could intervene in the interests of the life and health of the mother; and, by the third trimester, the State had a compelling interest in the protection of the foetus.¹⁶⁴ The same approach is evident in the Northern Territory's Criminal Code which permits a medical termination in the first 14 weeks of pregnancy if the risk to the physical and mental health of the woman would be greater if the pregnancy were continued than if it were terminated. At 23 weeks an abortion may only be authorized if immediately necessary to prevent grave injury to a woman's health. However, these provisions do not prevent an abortion being carried out at any time to save a woman's life.

The decision in *Roe v Wade* has been subject to qualification in later Supreme Court decisions. For instance in *Webster v Reproductive Health Services* the

160 *Toonen's Case*, note 78 *supra*, para 8.2.

161 *Ibid*, para 8.6.

162 L Ryan, M Ripper and B Buttfield, note 156 *supra*, p 153.

163 (1973) 93 S Ct 705.

164 *Ibid* at 732.

Court upheld a Missouri statute which prohibited the use of public funds, employees and facilities for performing an abortion unless necessary to save the woman's life.¹⁶⁵ The Court appeared to reject the trimester analysis in *Roe v Wade*, although it did not explicitly overrule the decision.¹⁶⁶ The question again arose for consideration in *Planned Parenthood of South-Eastern Pennsylvania and others v Casey and others*,¹⁶⁷ where the Court had to consider the validity of the State's *Abortion Control Act*. The Act provided that a woman should give informed consent and be provided with information at least 24 hours prior to the abortion, that she should give notice to her husband if married, and if a minor, the parent's consent had to be obtained prior to the abortion being performed. Although the central holding in *Roe v Wade* survived, the provisions of the Pennsylvania statute were upheld (apart from that requiring spousal consent).¹⁶⁸ The decision does leave open the possibility of other restrictions on an American woman's constitutional right to privacy in the context of abortion legislation.

In the international arena, the reconciliation of the right to privacy and abortion legislation has been considered in light of art 8(1) of the ECHR. Article 8(1) provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". However, this right may be limited where necessary in the interests of "national, security, public safety . . . for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". In *Brüggemann & Scheuten v Federal Republic of Germany*,¹⁶⁹ two West German nationals mounted a challenge in the European Commission of Human Rights to a decision of the German Constitutional Court which invalidated an amendment to the German Criminal Code which permitted non-therapeutic abortion within the first 12 weeks of conception. The European Commission interpreted art 8 as encompassing the possibility of an individual "establishing relationships of various kinds, including sexual, with other persons".¹⁷⁰ However, the Commission found that pregnancy does not pertain uniquely to the sphere of private life as when a woman is pregnant her private life becomes closely connected with the life of the foetus. The majority of the Commission rejected the contention that the restrictive abortion laws would constitute an interference with private life. The Commission held that "not every regulation of the termination of unwanted pregnancies constitutes an interference with the *right to respect* for the private life of the mother".¹⁷¹ In coming to this conclusion, the Commission did take into account the restrictive abortion laws of state parties to the ECHR when they first became parties to the Convention, as indicative of their intention not to permit non-therapeutic abortions.

165 (1989) 109 S Ct 3040.

166 *Ibid* at 3056-8.

167 (1992) 112 S Ct 2791.

168 *Ibid* at 2829.

169 Application No 6959/75, (1978) 10 DR 100.

170 *Ibid* at 115.

171 *Ibid* at 116.

In dissent, Commissioner Fawcett stated that “it would be hard to envisage more essentially private elements in life” than pregnancy, its commencement and its termination.¹⁷² While this view is widely supported by scholars, neither the European Commission nor the European Court has explicitly ruled that the right to privacy guarantees a right to legal abortion. Taking into account these domestic and international interpretations the Human Rights Committee may also find that Australian abortion laws are not an ‘unlawful’ or ‘arbitrary’ interference with a woman’s private life.

E. The Right to Health

The World Health Organization (“WHO”) has described health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.¹⁷³ Additionally, ‘reproductive health’ has been defined to require “that people have the ability to reproduce as well as to regulate their fertility with the fullest possible knowledge of the personal and social consequences of their decisions, and with access to means of implementing them”.¹⁷⁴ The right to health is recognised in the UDHR, the ICESCR and the CEDAW. Article 12(1) of the ICESCR provides that everyone has the right to enjoy the “highest attainable standard of physical and mental health”. In order to promote this right, States Parties must create conditions “which would ensure to all medical services and medical attention in the event of sickness”. The Economic Covenant also recognises the right of everyone to “enjoy the benefits of scientific progress and its application”.¹⁷⁵ Article 12(1) of CEDAW gives greater definition to this right, providing that:

State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those relating to family planning.

These binding treaty obligations are confirmed by statements in a number of non-binding international human rights documents. For instance, the Vienna Declaration and Programme of Action, arising from the 1993 Vienna Conference on Human Rights, recognises “the importance to the enjoyment by women of the highest standard of physical and mental health throughout their life span”.¹⁷⁶ The Beijing Platform of Action, drafted at the Fourth World Conference on Women, includes a detailed section on women and health. The Platform repeats the definition of health in WHO’s Constitution.¹⁷⁷ Additionally, paragraphs 95-7 of the Beijing Platform of Action deal with more specific reproductive rights. Reproductive rights are based on the “basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their

172 *Ibid* at 118.

173 Constitution of the World Health Organization (1946), Preamble.

174 M Fathalla, in WHO, *Research in Human Reproduction, Biennial Report, 1986-7, 1988* at 30.

175 Article 15(1)(b).

176 Conference on Human Rights, *Vienna Declaration and Programme of Action*, 1993 at [41].

177 Fourth World Conference on Women, *Platform for Action*, 1995 at [89].

children".¹⁷⁸ The Platform also states that unsafe abortions threaten the lives of a large number of women and thus represent a grave public health problem.¹⁷⁹ These conference documents and programmes may be dismissed as non-binding, 'soft' law instruments with no formal legal effect. However, Chinkin has highlighted that:

Soft law instruments . . . may harden into binding legal obligations through the generation of sufficient state practice for the assertion of customary law or by preparing the ground for a subsequent treaty.¹⁸⁰

Data demonstrates that the denial of reproductive freedom, including the availability of safe and effective pregnancy termination services, affects the fundamental right to health.¹⁸¹ For example, a 1966 Romanian prohibition on abortion resulted in an initial increase in the birth rate, followed by a five-fold increase in the abortion mortality rate, to the extent that abortion deaths constituted over 80 per cent of all maternal deaths, due to the practices of illegal abortion providers. (In Australia, there is no evidence of current 'backyard' abortion provision.)¹⁸² Article 12(2) of CEDAW provides that "States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary". The reference to "access to appropriate services" could be used to found an argument to the effect that abortion services are a recognised aspect of pregnancy-related health, and as such the minimum of regulation should be placed on access to abortion facilities. However, this proposition has been considered unfavourably by some international jurists.¹⁸³

It is quite clear under Australian law that if a woman's health is in serious danger, then an abortion is permissible. Justice Levine in *R v Wald* directed the jury that it was not required that a woman's health be "in serious danger" when she was interviewed by the doctor, provided that her health could reasonably be expected to be seriously endangered during the pregnancy if not terminated.¹⁸⁴ Both physical and mental factors can be taken into account in making a decision on the woman's health.¹⁸⁵ The importance of the woman's health is also apparent in child destruction legislation, which discourages more dangerous late-term abortions.¹⁸⁶ However, certain aspects of Australian law do not appear to favour the health interests of the woman. For instance, the availability of the RU486 pill could further reduce the availability of non-surgical techniques.¹⁸⁷ From a health perspective, legal sanctions should only exist to reduce any risks that exist. For instance, restricting abortions to qualified doctors (as is specifically legislated in

178 *Ibid* at [95]; a similar provision is found in art 16(1)(e) of CEDAW.

179 *Ibid* at [97].

180 C Chinkin, "Global Summits: Democratising International Law-Making?" (1996) *Public Law Review* 208 at 210.

181 See B Hernández, note 92 *supra* at 337-9.

182 NHMRC, note 8 *supra* at 51.

183 For example, Kingston in Gearty and Tomkins *Understanding Human Rights*, Mansell (1996) p 466.

184 (1972) 3 DCR (NSW) 25 at 29.

185 *R v Davidson*, note 11 *supra* at 671.

186 N Cica, note 1 *supra* at 63.

187 *Ibid* at 64.

South Australia, the Northern Territory, Western Australia and the ACT), confining abortions to medical centres which meet certain standards, and the provision of proper counselling services.¹⁸⁸ Examples of such regulation can be found in the *Health Act 1911* (WA) and the *Health Regulation (Maternal Health Information) Act 1998* (ACT). It has been suggested that the criminalisation of abortion reduces the quality of the services available. Abortion remains low status medical work in which few doctors gain extensive experience.¹⁸⁹ The removal of punitive provisions from legislation criminalising abortion has also been recommended by the Committee on the Elimination of All Forms of Discrimination Against Women.¹⁹⁰ Decriminalisation would allow accountability for the quality of health care to be regulated through the laws governing health services, rather than through criminal proceedings.¹⁹¹ From a health perspective, the Western Australian provisions, which treat abortion as a health rather than a criminal issue, would appear to be a more preferable alternative.

F. The Right to Adequate Information about Health

Women need information to make informed decisions in order to exercise their right to reproductive health.¹⁹² The right to freedom of expression, and more importantly in this context, the right to information, is included in the UDHR, the ICCPR and CEDAW. Article 19 of the ICCPR guarantees the right to freedom of expression which includes the “freedom to seek, receive and impart information and ideas of all kinds”. This right is subject to exceptions necessary for the protection of public health or morals and public order. In the context of reproductive health, this obligation is reinforced by Article 10(h) of CEDAW, which states that women shall have “[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning”.

The Beijing Platform for Action¹⁹³ also acknowledges that reproductive health eludes many of the world’s people because of “inappropriate or poor quality reproductive health information”. Coliver believes that the rights outlined in the above instruments impose immediate obligations upon governments not to interfere with information about abortion, even where abortion is legally restricted, and not to perform or permit medical terminations without free and informed consent.¹⁹⁴

In relation to Coliver’s first point, the European Court of Human Rights has considered the right to information on abortion facilities in the case of *Open Door Counselling and Dublin Well Woman Centre v Ireland*.¹⁹⁵ The Irish

188 *Ibid.*

189 *Ibid.*

190 Committee on the Elimination of Discrimination Against Women, note 115 *supra* at [31(c)].

191 L Ryan, M Ripper, B Buttfield, note 156 *supra*, p 202.

192 See S Coliver, “The Right to Information Necessary for Reproductive Health and Choice under International Law” (1995) 44 *The American University Law Review* 1279.

193 Note 177 *supra* at [95].

194 S Coliver, note 192 *supra* at 1280.

195 (Ser A) No 246, (1993) 15 EHRR 244.

Supreme Court had issued an injunction against the applicants, forbidding them from circulating in Ireland information about abortion facilities available outside Ireland, in particular in Britain. This was in fulfilment of the right to life of the unborn child contained in the Irish Constitution. The European Court of Human Rights recognised that abortion may be crucial to a woman's health and well-being and held that the Irish Supreme Court's injunction violated the right to freedom of information contained in art 10 of the ECHR. In particular, the injunction imposed a "perpetual" restraint on the provision of information, regardless of the woman's "age, state of health or reasons for seeking counselling on the termination of pregnancy".¹⁹⁶ There was also evidence before the Court that the Supreme Court's order had created a risk to the health of women who sought abortions at a later stage and that the injunction was likely to affect women who lacked education, information or resources more adversely than other women.¹⁹⁷

There is no explicit limitation contained in Australian law on the type of information that may be given to women seeking an abortion. However, it is an offence to solicit or incite a person to commit an indictable offence.¹⁹⁸ The effect of such laws is demonstrated by the request that a doctor attending a conference in Australia sign a statement that he would not advocate activities in relation to abortion which would breach Australian law. It has been suggested that access to adequate information about abortion facilities differs widely in Australia. Ryan, Ripper and Buttfield report that there was an enormous variability in the quality of information received by women as to what the procedure would involve, how to prepare for it, and the need for post operative care.¹⁹⁹ In their study of abortion in Queensland, Tasmania and South Australia, they found that more women in South Australia, than anywhere else felt that they were provided with adequate information.²⁰⁰ (South Australia is also the only state among these three that has legislated to legalise abortion in certain situations.) Women who had abortions in country hospitals were some of the least informed.²⁰¹ Thus, while the law does not prohibit the provision of information to women about abortion, its implementation at the practical level may vary between jurisdictions.

On the issue of consent, according to the common law, doctors must advise their patients of material risks associated with a medical procedure and its alternatives,²⁰² including abortion. The High Court has held that a risk is material:

if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance.²⁰³

196 *Ibid* at 266.

197 *Ibid* at 267.

198 See for example, *Crimes Act* 1958 (Vic), s 321G.

199 L Ryan, M Ripper, B Buttfield, note 156 *supra*, p 124.

200 *Ibid*, p 126.

201 *Ibid*.

202 See *Rogers v Whittaker* (1992) 175 CLR 479.

203 *Ibid* at 490.

The *Health Act* 1911 (WA) specifically imposes an obligation on medical practitioners performing an abortion to obtain informed consent based on the medical risks of continuing or terminating the pregnancy.²⁰⁴ Interestingly, cl 8(1)(c) of the original ACT Bill provided only that information of “the particular medical risk associated with the type of the abortion to be used” be given to the woman. The Bill did not specify that the woman be given details of the risk of continuing the pregnancy, despite the fact that in order to qualify for an abortion pursuant to the Bill, the woman must have been subject to a grave medical or psychiatric risk. The final Act provides a more comprehensive regime whereby the woman is to be given advice about the “medical risks of termination of pregnancy and of carrying a pregnancy to term”, and of the risks associated with the type of procedure to be used.²⁰⁵ While the law requires informed consent prior to a medical procedure, there are situations where the requirement is impracticable, including therapeutic privilege and the performance of an emergency procedure. Therapeutic privilege enables the doctor to withhold information where it is in the patient’s best interests not to receive that information due to a mental or emotional state which may prevent them weighing up the information in a rational manner.²⁰⁶ Leaving aside this exception, the requirement of consent demonstrates the importance of ensuring that access to adequate information about abortion procedures and the options available results in informed decisions.

G. The Right Not to be Subjected to Cruel or Degrading Treatment

Article 7 of the ICCPR provides in part that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. This prohibition is also reflected in art 5 of the UDHR, art 3 of the ECHR, art 5(2) of the American Convention on Human Rights and art 5 of the African Charter on Human and Peoples’ Rights. It is considered a non-derogable right and has also been held to constitute a rule of customary international law.²⁰⁷ The prohibition against torture was raised before the European Commission on Human Rights in the case of *H v Norway*.²⁰⁸ The applicant argued, in relation to an abortion performed on a woman who was 14 weeks pregnant, that no measures had been taken to prevent the foetus feeling pain during the procedure. He claimed that this constituted torture or inhuman treatment within art 3 of the ECHR. The Commission rejected the argument on the basis that there was no material on which to base such a judgment, and that the procedure utilised did not disclose a violation of art 3.²⁰⁹ Apart from this case, the prohibition does not seem to have been raised in the context of abortion before any international tribunal. But the general principles elaborated by tribunals such as the European Court of Human Rights or the United Nations Human Rights Committee may be relevant.

204 *Health Act* 1911 (WA), s 334(4).

205 *Health Regulation (Maternal Health Information) Act* 1998 (ACT), s 8(1)(a).

206 *F v R* (1983) 33 SASR 189 at 193.

207 *R v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827 at 897.

208 Application No 17004/90, (1992) 73 DR 155.

209 *Ibid* at 169.

The Human Rights Committee has considered the prohibition on several occasions, but its contribution to the clarification of the concept is minimal, since in the majority of cases the Committee has merely asserted that the facts before it in a particular case do or do not constitute a breach of art 7. It has generally been accepted that the infliction of some degree of severe mental or physical pain is required to characterise conduct as 'torture'²¹⁰ but that lesser treatment will constitute inhuman or degrading treatment. There are also suggestions that degrading treatment denotes a lesser standard of conduct than inhuman treatment. In *Ireland v United Kingdom*,²¹¹ the European Court of Human Rights ultimately decided that conduct including sleep deprivation and enforced standing for lengthy periods did not constitute torture, but certainly fell within the characterisation of inhuman and degrading treatment.²¹² It is unlikely that any application of abortion laws would amount to torture. This is particularly the case since the definition of torture contained in the Convention Against Torture implies treatment that is designed to obtain a confession or punish a person or coerce a third person.²¹³

The European Court has held that both the subjective emotions of the victim and the humiliation of the victim in the eyes of others may be relevant to an assessment of degrading treatment.²¹⁴ It is possible to envisage cases in which the application of abortion laws could cause severe mental and physical distress to a woman. One example was the requirement in the original ACT Bill that a woman seeking an abortion be shown photographs of a foetus at regular stages of development, presumably to appeal to the woman's sympathies. It may well be that in certain circumstances, the provision of that information would constitute degrading treatment. For instance, when a woman may only have an abortion because she is subject to a grave medical risk or grave psychiatric risk, the provision of such information could lead to wholly unnecessary suffering and distress. These requirements were removed from the final ACT legislation.

Counsel in *Morgentaler* argued that s 251 of the Canadian Criminal Code violated the guarantee against cruel and unusual punishment. However this argument was not considered by the majority in the Supreme Court, and was explicitly rejected by McIntyre J in dissent.²¹⁵ Justice McIntyre followed the judgment of the Ontario Court of Appeal where it was held that the mere prohibition of abortion, except in accordance with the s 251 procedure, did not infringe the guarantee against cruel or unusual punishment.²¹⁶ Specific mention was made of the fact that s 251 was predicated on the consent of the woman, and that the state was not empowered to subject her to the abortion procedure

210 See for example, *Estrella v Uruguay* (74/1980), *Francis v Jamaica* (320/1988), and *Ambrosini v Uruguay* (5/1977), in which conduct including beatings, electric shocks and denial of medical treatment was held by the Human Rights Committee to constitute torture.

211 (Ser A) No 25, (1979-80) 2 EHRR 25.

212 *Ibid* at 80.

213 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art 1.

214 *Tyrer v United Kingdom* (Ser A), (1979-80) 2 EHRR 1 at 10.

215 *Morgentaler, Smoling and Scott v R* (1988) DLR (4th) 478.

216 *R v Morgentaler, Smoling and Scott* (1986) 22 DLR (4th) 641 at 680.

provided in the Code.²¹⁷ Given that the Canadian procedures were not found to be in violation of the guarantee against cruel and unusual punishment, it is unlikely that Australian laws would be held to infringe this right.

H. The Rights of the Father

The prospective father's right to intervene and prevent a woman obtaining an abortion has been denied by both national and international courts. Men have mounted challenges to decisions to terminate pregnancies in the United Kingdom, Canada, the United States and Australia.²¹⁸ In the United Kingdom, both married and unmarried men have been denied standing in this respect. In *Paton v British Pregnancy Advisory Service*, Baker P described a father's attempt to obtain an injunction to restrain his wife from obtaining an abortion without his consent as "completely misconceived".²¹⁹ A subsequent attempt to challenge the *Abortion Act* 1967 (UK) in the European Commission on Human Rights, on the basis that it denied the father the right to respect for private and family life in art 8 of the ECHR was refused. The Commission held that the pregnant woman was "the person primarily concerned in the pregnancy and its continuation".²²⁰ In *C v S* the English Court of Appeal upheld the decision in *Paton's Case* in relation to an unmarried man.²²¹

There is some Canadian authority for the proposition that a husband has standing to enforce compliance with s 251 of the Canadian Criminal Code.²²² However, these cases predate the Supreme Court's decision in *Mortgentaler's Case*, which struck out the relevant provision of the Criminal Code. In the United States case of *Planned Parenthood of South-Eastern Pennsylvania and others v Casey and others*,²²³ the Supreme Court referred to research which revealed that the majority of women do notify their male partners of their decision to obtain an abortion, when it struck out a spousal consent provision. When notification did not occur it was usually because either the pregnancy was as the result of an extra-marital affair, or that marital difficulties had been experienced, often accompanied by violence.²²⁴ The Court stated that "[f]or the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision".²²⁵ Those most affected by the law were in the gravest danger of its consequences.²²⁶

At the international level, the European Commission of Human Rights upheld its reasoning in *Paton v United Kingdom* in *H v Norway*.²²⁷ In this later case the

217 *Ibid.*

218 See J Caldwell, "Abortion: The Father's Lack of Standing" (1988) *New Zealand Law Journal* 165.

219 [1979] QB 276 at 283.

220 (1980) 19 DR 244 at 255.

221 [1987] 1 All ER 1230.

222 See for example, *Medhurst v Medhurst* (1984) 9 DLR (4th) 252.

223 (1992) 112 S Ct 2791.

224 *Ibid* at 2828.

225 *Ibid* at 2831.

226 *Ibid.*

227 (1992) 73 DR 155 at 170.

father's assertion that the child meant something particular to him from a religious point of view, and therefore that his right to manifest his conscience and religion in art 9 had been violated, did not enhance his claim.²²⁸ Similarly, H's allegation that he had been discriminated against on the basis that he had been excluded from decisions relating to the welfare of his child was dismissed. In particular, the Commission found that for the purposes of discrimination in art 14, the applicant was not placed in an analogous situation to the mother.²²⁹

Australian law is in step with these national and European authorities, having refused prospective fathers the ability to challenge a woman's decision to terminate her pregnancy. While there have been attempts to mount such cases,²³⁰ the law is as it stands in the Queensland decision of *Attorney-General (ex rel Kerr) v T*.²³¹ The Full Court of the Supreme Court of Queensland denied a prospective father standing to restrain a woman having an abortion. This was despite the fact that there were no therapeutic grounds for the abortion, and there was at least a suspicion that a criminal offence was threatened under Queensland law.²³² In *In the Marriage of F*, Lindenmayer J held that the Family Court did have jurisdiction under the *Family Law Act 1975 (Cth)* to hear a husband's application to obtain an injunction to prevent his wife having an abortion.²³³ However, on the merits His Honour found that the "husband's proper interest in having his intended offspring born" were subordinate to the interests of the wife in "being left free to decide a matter which affects her far more directly than it does the husband".²³⁴ While the debate about a father's right to challenge a woman's decision in these circumstances will no doubt continue,²³⁵ it appears that these Australian authorities are in line with previous decisions of both national and international tribunals.

I. A Customary International Law Right to Abortion?

Various studies have attempted to demonstrate that customary international law, above and beyond treaty law, protects the right of women to abortion.²³⁶ According to the classic statement in the *North Sea Continental Shelf Cases*, two conditions must be fulfilled for a customary international law rule to come into existence: first, the acts concerned must amount to a settled practice; and secondly, they must be carried out in such a way as to evidence a belief that the

228 *Ibid.*

229 *Ibid* at 171.

230 See L Teasdale, note 36 *supra* at 61.

231 [1983] 1 Qd R 404.

232 *Ibid* at 405.

233 [1989-90] 13 Fam LR 189 at 196.

234 *Ibid* at 198.

235 Caldwell has highlighted that as a result of the feminist movement many men who reject the traditional gender roles may be more willing to take on the role of "a caring, nurturing father". Thus he has suggested that a potential father's desire to prevent an abortion taking place cannot necessarily be condemned as an attempt to exercise dominance over the body of a woman. See J Caldwell, note 218 *supra* at 168-9.

236 For example, B Hernández, note 92 *supra* at 309. See also N Klashtorny, note 68 *supra* at 436.

practice is obligatory.²³⁷ In order to establish a customary international law to abortion, studies have attempted to survey national practices in relation to abortion. For instance, Hernandez has stated that more than three quarters of the world's population lives in countries which allow women to obtain an abortion.²³⁸ But while the data demonstrates similarities among abortion laws, particularly in cases where the woman's life is at risk, it is extremely difficult to determine any sense of state obligation as required by the second element of customary international law. If it is accepted that customary international law does recognise a limited right to abortion in specific circumstances, it is unlikely to extend beyond the availability of abortion under existing Australian law.

V. CONCLUSION

The regulation of abortion in Australia is in need of reform. Commentators and international bodies agree that it is inappropriate to treat abortion as a criminal law issue, particularly when significant penalties are imposed.²³⁹ Numerous reports in the last decade have recommended that abortion be decriminalised in Australia.²⁴⁰ The problem of criminalisation is accentuated by the disparities between the substantive laws and penalties provided in different jurisdictions. Because abortion is regulated by state and territory laws there has been insufficient attention paid to ensuring that existing and proposed laws are in compliance with Australia's international obligations. This article has shown that there are weaknesses in Australian laws in that respect. Equally, it is relatively straightforward for private members bills to be introduced in many states and the territories, following which there is unlikely to be any significant consideration given to international commitments during debate.

Decriminalisation of abortion per se would also allow the procedure to be regulated through laws governing health services and ensure that the procedure is performed on properly informed women by medically trained personnel.²⁴¹ In order to comply with its international obligations, Australian laws should be focussed on ensuring that women's health needs are met, that adequate and appropriate information is provided to them regarding their decision, and that there is no interference with their right to security of the person. Until Australia ratifies the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, the United Nations Human Rights Committee is the only viable international avenue for challenging such laws.

While abortion laws have infrequently been the subject of complaint before international bodies, litigation at the domestic level, particularly in the United

237 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v. The Netherlands)* [1969] ICJ Rep 3, 44 at [77].

238 B Hernández, note 92 *supra* at 345.

239 See Committee on the Elimination of Discrimination Against Women, note 115 *supra*, and L Ryan, M Ripper, B Buttfield, note 156 *supra*, p 202.

240 See reports listed in L Ryan, M Ripper, B Buttfield, note 156 *supra*.

241 *Ibid.*

States, has demonstrated that the issue is far from resolved. Controversy surrounding the arrest of two Western Australian doctors and the holding of an international abortion conference in Queensland has indicated that the issue is still of current concern in this country. Yet, as is commented by Justice Kirby, it does not appear that the democratic legislatures of Australia are rushing to fill the gaps or settle doubts in abortion laws, despite changes in social attitudes and medical practice.²⁴² In this respect, the recommendation of the Women's Health Committee of the National Health and Medical Research Council may go some way towards resolving any tensions between Australian and international law on this issue:

In summary, the regulation and monitoring of medical termination of pregnancy as currently practised in Australia within accepted international guidelines can be achieved without the criminal law, and it is desirable for both practitioners and women that this be done.²⁴³

242 M Kirby, "Health, Law and Ethics" (1997-8) 5 *Journal of Law and Medicine* 31 at 35.

243 NHMRC, note 8 *supra* at 53.