

IN THE MATTER OF THE ABORTION LAW REFORM BILL 2008

A joint opinion of barristers, Neil Young QC and Peter Willis, has considered the Abortion Law Reform Bill.

In their opinion:

- (1) it is appropriate to measure the Bill against the Victorian Charter of Human Rights and Responsibilities, given the high principles which the Parliament espoused in enacting the Charter and the fundamental importance of the human rights set out in the Charter. (Opinion, p 30)
- (2) Section 48 of the Charter (a savings provision at the time of the introduction of the Charter, designed to preserve the status quo on abortion from being changed by judicial interpretation based on the Charter) does not prevent the Charter applying to the Bill or to its provisions, if enacted. (Opinion, pp 27-29)
- (3) Clauses 7 and 8 of the Bill potentially affect human rights in three areas: freedom of thought, conscience, religion and belief (section 14 of the Charter) ; the right to hold an opinion without interference (section 15(1) of the Charter; and freedom from forced or compulsory labour (section 11(2) of the Charter). (Opinion, p 7)
- (4) Clause 7 of the Bill does not impose a statutory duty on a pharmacist or nurse to comply with a doctor's direction. For that reason, clause 7 does not infringe human rights in the Charter or international law. (Opinion, p 16).

- (5) However, clause 7 highlights a gap in the Bill. There is no express statement in clause 7 to the effect that a registered pharmacist or nurse may decline to carry out the direction of a registered medical practitioner to supply or administer an abortion-inducing drug where he or she has a conscientious objection to doing so. While clause 7 imposes no statutory obligation to comply with that direction, the absence of a statement of the right of conscientious objection may create a risk that a pharmacist or nurse who declines to carry out a doctor's direction will be confronted with allegations that they have breached their contract of employment or that they are liable to professional disciplinary action. (Opinion, p 16)
- (6) The conscientious objection provision in clause 8 of the Bill encompasses pharmacists and nurses, but it does not fill the gap. Clause 8 is directed to a different set of circumstances. It is doubtful whether clause 8 extends to a pharmacist or nurse who is directed to act under clause 7. (Opinion, p 17).
- (7) Clause 8 of the Bill may be unduly narrow in two ways. It only applies where the health practitioner is dealing with the patient, not with a fellow professional. It only applies where the health practitioner is providing advice about an abortion or performing or directing an abortion. (Opinion, p 17-18).
- (a) There may be parts of clinical practice involving abortion that fall outside clause 8(1). For instance, registered health practitioners may be involved indirectly under their contract of employment - a pharmacist or nurse employed by a hospital or another practitioner may be involved indirectly in supplying or administering drugs to the woman. (Opinion, p 17).
- (b) Nurses and other health practitioners might potentially be involved in aspects of an abortion procedure where they are not administering or supplying a drug or providing requested advice. Clause 8 does not recognise their right of conscientious objection in that case. (Opinion, p 18).

- (8) Compared to legislation in other jurisdictions, clause 8 is unusual in that it does not state a right of conscientious objection or define the extent of the right. Rather, clause 8 assumes the existence of a right of conscientious objection and then sets out certain qualifications to that right. (Opinion, p 18).
- (9) In this regard, the Bill falls short of well-recognised interstate and international models. (Opinion, p 18-19). This shortcoming in the Bill should be addressed for the following reasons:
- Conscientious objection is a fundamental human right. It is a necessary and integral part of the right of freedom of thought, conscience, religion and belief.
 - It is universally acknowledged that there are persons who have a genuine objection to abortion, based on their conscience, religion or belief. The issue is not an abstract one.
 - The circumstances in which health practitioners may wish to take conscientious objection to their involvement in abortion procedures are potentially wider than the circumstances described by the introductory words of clause 8.
 - Comparable legislation in the UK¹, New Zealand², ACT³, WA⁴, SA⁵, Tasmania⁶ and the Northern Territory⁷ contains a clear statement of the right of conscientious objection.

¹ *Abortion Act 1967* (UK), s 4.

² *Contraception, Sterilisation and Abortion Act 1977* (NZ), s 46.

³ *Health Act 1993* (ACT), s 84.

⁴ *Health Act 1911* (WA), s 334.

⁵ *Criminal Law Consolidation Act 1995* (SA), s 82A(5).

⁶ *Criminal Code Act 1924* (Tas), clause 164(7).

⁷ *Medical Services Act 2006* (NT), s 11.

- (10) It would be a simple step for the Bill to recognise a general right of conscientious objection. This could be done, for instance, by including a provision modelled on s 4 of the Abortion Act 1967 (UK) to the following effect:

“(1) [Subject to this section], no person shall be under any duty, whether legal or contractual, to perform or participate in any act authorised by this Act to which the person has a conscientious objection.”

- (11) Clause 8(1)(a) appears to infringe the freedom of thought, conscience, religion and belief, contrary to art 18(2) of the ICCPR. The UN Human Rights Committee has ruled that under this article “no one can be compelled to reveal his thoughts or adherence to a religion or belief”. (Opinion, p 20).
- (12) It is strongly arguable that that the requirement to state a conscientious objection in the circumstances described in clause 8(1)(a) is a limitation on the rights of freedom of thought, conscience, religion and belief and the right to hold an opinion without interference as set out in ss 14 and 15 of the Charter. (However, Counsel ultimately conclude on balance that there is no limitation or that, if there is, it would be regarded as reasonable and justified under section 7(2) of the Charter). (Opinion, p 21).
- (13) Clause 8(1)(b) cannot be interpreted or applied consistently with the human right set out in s 14 of the Charter. The imposition of a mandatory statutory obligation to refer a woman to another health practitioner who does not have a conscientious objection to abortion interferes with the first practitioner’s right to freedom of conscience. This is because it requires the objector to participate in a process to which he or she has a conscientious objection. (Opinion, p 23).
- (14) Compulsory referral is incompatible with s 14(2) of the Charter. The objector is being coerced in a way that limits his or her rights; it does so by requiring the health practitioner to provide a referral for purposes to which he or she conscientiously objects on religious or moral grounds. (Opinion, p 23).

- (15) For the same reasons, compulsory referral breaches articles 18.1 and 18.2 of the International Covenant on Civil and Political Rights. (Opinion, p 24).
- (16) Clause 8(1)(b) cannot be justified by recourse to s 7(2) of the Charter. (Opinion, p 24).
- (17) Clauses 8(3) and (4) over-ride conscientious objection. No comparable legislation is expressed in these terms. Generally speaking, comparable legislation tends to use more nuanced and open terms when dealing with emergencies. For example, the UK *Abortion Act 1967* (UK) provides in s 4(2) that “nothing in subsection (1) [the conscientious objection provision] shall affect *any duty* to participate in *treatment* which is necessary to save the life ... of a pregnant woman.” (Opinion, pp 24-25).
- (18) The UK conscientious provision and comparable provisions in SA⁸ and Tasmania⁹:
- a. leave for determination, by reference to the facts and circumstances of the individual case, the nature and extent of the practitioner’s duty to the pregnant woman; and
 - b. leave open the possibility that the practitioner can discharge his or her duty to the woman by other means, such as by finding another qualified person to deal with the emergency.

⁸ *Criminal Law Consolidation Act 1995* (SA), s 82A(6).

⁹ *Criminal Code Act 1924* (Tas), cl 164(8).

(19) Clauses 8(3) and (4) of the Bill are a limitation on the freedom of thought, conscience, religion and belief in s 14 of the Charter. The essential reason is that subclauses (3) and (4) compel a medical practitioner or registered nurse, despite their conscientious objections, to perform an abortion in an emergency. They are thus compelled to undertake a course of action which they would not voluntarily engage in and which is contrary to their conscience and religious beliefs. (Opinion, p 25).

(20) Clauses 8(3) and (4) would be incompatible with the human right recognised in s 14 of the Charter if s 7(2) of the Charter is put to one side. There is scope for reasonable minds to differ about the application of s 7(2) of the Charter to clauses 8(3) and (4). (Opinion, p 26). (In Counsels' opinion, on balance, to the extent that clauses 8(3) and (4) of the Bill impose duties that are inconsistent with the human rights in the Charter, they address a life-threatening emergency, and in that circumstance they can be justified on the ground that they impose reasonable limits within s 7(2) of the Charter.) (Opinion, p 27).