ABORTION IN AUSTRALIA: ACCESS VERSUS PROTEST

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INTRODUCTION

Recognition of the gendered and androcentric nature of the law means the law must constantly evolve to better meet the needs and human rights of women in particular. This submission discusses Australian women's access to health services, especially those providing abortion, as a prime example of the law needing change. This submission does not consider the contentious nature of restrictive abortion legislation in Australia, but rather the issue of access which is problematic whether abortion is legal or not. Anti-abortion protester rights are currently privileged over women's right to access abortion. This submission reviews the legality of abortion in Australia, provides a case study of a Victorian abortion providing clinic, considers the status of women as people and articulates within a human rights framework the ways women's human rights are violated as they attempt to access abortion services in Victoria. It recommends legislation already in place in the United States and Canada - "bubble" or "buffer" zone legislation - as a means of remedying the current breaches of women's human rights.

1. ABORTION AND THE LAW IN AUSTRALIA

It wasn't until the 1970s that abortion was legally liberalized, that is, made lawful in some circumstances, in all Australian states and territories except Queensland and Tasmania. Queensland's abortion laws were not clarified until 1986 (Baird, 1998), while Tasmanian legislation was only introduced in 2001. However it is clear that the legality of abortion has never prevented women from accessing abortions. In Australia in the 1920's the abortion rate was one in every three pregnancies. Our current rate of abortion

is one in every four pregnancies. (Better Health, 2003). The crucial difference abortion's legality has made to Australian women has been to reduce reproductive mortality and morbidity. In 1921 the death rate from abortion was 28.5%, in 1971 the year abortion laws were liberalised in NSW, it was 21.6 per 1000 births, but by 1981 the death rate from abortion in Australia was zero (The Pregnancy Advisor Service and Absolutely Women's Health, 1997). Before the 1970's Australian women obtained abortion from midwives, backyard providers, and also self-aborted. The Australian Bureau of Statistics states that "abortion was the largest identifiable cause of maternal mortality in the first half of this century" (The Pregnancy Advisor Service and Absolutely Women's Health, 1997), p. i). In the twentieth century there have been two times when abortion related mortality and morbidity have significantly declined. "The first was in the late 1930s and early 1940s when the introduction of sulphonamide drugs and better blood transfusions gave doctors more powerful tools in treating post-abortion infections and bleeding. The second has been in the wake of liberalisation" (Baird, 1998, p 326). Making abortion lawful in Australia has saved women's lives, and increased the safety and ease with which Australian women can now control their fertility.

On August 21st this year the ACT became the first Australian state or territory to formally legalise abortion. In doing so they struck abortion from the ACT Crimes Act and inserted protections against 'backyard abortions' in their "Medical Practices Act so abortion can only be performed by certified doctors on licensed premises"(Moscaritolo, 2002). In every other Australian state and territory criminal codes continue to criminalise abortion (e.g. Crimes Act 1958, Vic, ss 65, 66) where essentially "it is a criminal offence to

unlawfully procure a miscarriage by drugs or an instrument."(Skene, 1998, p. 265) Women are not entitled to abortion on demand and "there is a lack of formal responsibility by normal health regulatory mechanisms for maintenance of standards for care and accessibility of abortion services."(Ryan, Ripper, & Buttfield, 1994, p.15)

Women can have 'lawful' abortions, where 'lawfulness' is defined in different ways (Skene, 1998). This essay focuses on abortion within Victoria, where its 'lawfulness' relies mainly on case law interpretations of legislation (National Health and Medical Research Council, NHMRC, 1996, pp49-50) as defined by the Menhennit ruling in R v Davidson (1969)

> *Abortion is lawful provided the following situation exists. The doctor honestly believes on reasonable grounds that the act is: (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail (the necessity test); and (b) in the circumstances, not out of proportion to the danger to be averted (the proportionality test)*(Skene, 1998, p265).

In R v Wald (1971), Judge Levine extended the definition of danger to a woman's life or body to include consideration of economic, social or medical reasons (*R v Wald*, 1971; Skene, 1998). Therefore, in Victoria a woman can access abortion if a doctor believes the continuation of the pregnancy is dangerous to the woman's general wellbeing. However, abortion remains in Victoria's Crimes Act, is technically still illegal, and remains the only surgical procedure not covered by the Health Act (Keleher, 1997).

2. ABORTION ACCESS versus ANTI-CHOICE PROTESTERS

Throughout Victoria numerous hospitals and clinics provide abortion services legally and openly. The NHMRC's 1996 publication, "An information paper on termination of pregnancy in Australia" states

> *The objectives of interaction with the woman seeking abortion are to support her decision-making process with respect for her autonomy, to minimise intrusiveness by the provider, and to validate the woman's feelings. The provision of abortion services should occur in an environment which is consistent with these objectives* (NHMRC, 1996, p31).

Protesters outside women's health clinics subvert these objectives. Anti-abortion, i.e. anti-choice, groups' rhetoric and actions attempt to prevent and discourage the provision of abortion services and women's access to abortion-providing clinics. For example, the Fertility Control Clinic (FCC) in East Melbourne, originally established by abortion rights pioneer Dr. Bertram Wainer in 1972, is Victoria's largest freestanding, private abortion-providing clinic. It provides a range of medical and counselling services for women including termination of pregnancy, contraception, pap smears and colposcopies, and also provides vasectomies for men (FCC, 2000). The FCC provides an essential health service to people throughout Victoria, interstate (in particular Tasmania) and people visiting or who have migrated to Australia. However, in order to access the FCC during the primary morning theatre hours, women, their partners, friends and family must pass through a usually small, but highly visible, picket line of protesters who harass, verbally abuse, intimidate, obstruct and sometimes accost women as they attempt to reach the FCC entrance. Protesters approach people's cars, chase women as they try to access

an alternative entrance, and approach people simply passing by the clinic. At times they have targeted children as young as four, “Your mummy is going to kill your baby brother or sister…”(Dryburgh, 1999). Protesters also threaten and harass clinic staff calling them ‘murderers’ or personalising their comments by saying things such as “you’re wearing red today – the colour of the blood of the babies you kill”(Dean, 1999). Along with their words and physical actions the protesters display offensive posters and attempt to disseminate graphic and offensive literature, placards, and misinformation about dire consequences for women having an abortion. Understandably these tactics often result in distress or anger for staff, clientele and passersby.

Such intimidation, harassment and intrusion of privacy can cause psychological or physical harm, especially when those targeted may already be under stress or anxious about an impending operation, an unplanned pregnancy, or health-related medical or counselling appointment (Allanson, 2001). “High anxiety levels may increase the physical pain women experience during or following examination or surgery. And for those women with a history of victimisation, the protesters’ tactics can pose a tremendous barrier to accessing a necessary health service”(Allanson, 2001).

The clinic employs a security guard who ushers women past the protesters. After face-to-face death threats from a protester the FCC’s female security guard resigned. In July 2001, the FCC’s new security guard was shot dead inside the FCC by a man intent on destroying the FCC. On occasion the gunman had stood amongst the protesters outside the FCC. Despite this shocking crime and the implied threat by protesters, the day after

the shooting protesters were once again allowed to stand outside the FCC and harass women and staff.

This example highlights a failure by the law to provide protection to women attempting to access a health service. A person's right to freedom of speech and freedom to protest continues to be held above a woman's right to privacy and to safely access a health service free from intimidation and harassment. This situation overwhelmingly affects women, whether as clients or staff, and amounts to a refusal on the government's part to recognize women's personhood and rights as people.

3. WOMEN AS PEOPLE

Australia's laws follow a religious and medical tradition of ignoring the reproductive and health implications of regarding women as people. Throughout time scientific and religious discourse has systematically denied women are people, with many laws perpetuating this belief (Whitbeck, 1983). Although much religious discourse continues to play a powerful role worldwide as an anti-choice force, this aspect is beyond the scope of this submission.

From its inception the medical establishment has been a patriarchal organization, androcentric in its development of theory and its conduct of research and medicine. Historically medicine has been one of the major power brokers maintaining men's superiority and dominance over women by citing biological and scientific 'truths' to deny woman's right to full personhood (Astbury, 1996). "According to Aristotle, only

embryos that had sufficient heat could develop into fully human form. The rest became female…. Woman was, in Aristotle's words a 'misbegotten man' and a 'monstrosity' – less than fully formed and literally half baked" (Weitz, 1998, p 3).

The concept of heat in relation to reproduction was just one example of the myths about women which the medical profession created and reinforced well into the 1900s. According to the medical profession a woman's sole responsibility was the continued reproduction of the human race. In order to do this effectively women were not to expend mental energy on education, as this would take heat away from their uteruses, which would damage their reproduction capabilities (Astbury, 1996). Essentially the medicalisation of women was the pathologisation of women. Femininity and womanhood were constructed as inferior and sick by nature. In fact anything other than white heterosexual man was considered inferior. Women's bodies were decontextualised "from women's concrete social existence… To put it bluntly women are either vaginas or uteruses and, curiously, never both at the same time" (Patton, 1995, p 172).

3.1 The Law

Australian law has perpetuated the medical fraternity's pathologisation of women. Holmes (1991) suggests that an Adam and Eve complex is at play within Australian society – women are inherently seductive and destructive and a danger to society, and therefore laws must control their sexual and reproductive behaviour (Holmes, 1991; Faludi, 1991; Astbury, 1996). In contrast to the male situation, women in Australia are not trusted to make decisions relating to their own fertility. In Australia women must

have their doctor's consent before they can have an abortion. The ACT is the only Australian state or territory where women can legally obtain abortion on demand without having to prove to a doctor why they should be allowed to have one. In Victoria and New South Wales, a doctor must use the proportionality and necessity tests to determine that there are reasonable grounds for an abortion (Skene, 1998). Queensland, Western Australia and Tasmania also allow abortion in certain circumstances but once again women are required to convince a doctor that they should be allowed to have one. In South Australia and the Northern Territory abortion is only lawful when two doctors agree "that the continuance of the pregnancy would involve greater risk to [the woman's life]" (Skene, 1998, p 267).

No such doctor approval is required for any surgical operation for men (gender reassignment is the only exception). This system of medical control, rooted in an archaic paternalism, erodes women's autonomy and bodily integrity. Women are not considered capable of making the 'right' decision. In essence they are not accepted as full human beings (Holmes, 1991). Holmes (1991) articulates the situation well, it is "dictatorial, degrading and an insult to the intelligence of a woman to have the decision of whether she will become a mother imposed on her by law or by a panel, or a doctor, or a priest, and then to leave her to carry out the responsibility of that decision" (Holmes, 1991).

3.2 Women's Rights vs. Foetal Rights

Over the past decade there has been a discarding of women's rights to the advantage of foetal rights, particularly overseas. In fact, at times legal judgments have denied

women's rights completely to save the life of a foetus. The maternal/foetal conflict has served to humanise the foetus and dehumanise the woman. This conflict has proven most potent when a woman makes a decision which could potentially harm the foetus (McSherry, 2002). In order to save a foetus' life, United States courts have shown a willingness to override a woman's decision to refuse a caesarean section or forgo treatment. In *Jefferson* the United States Courts ordered a pregnant woman to undergo a caesarean section deeming that she could not refuse medical treatment due to her religious beliefs (*Jefferson*, 1981).

On a more positive note many other US and English courts have upheld women's autonomy by validating their decision to refuse medical treatment. In *Re AC (the Angela Calder case)* and *Baby Boy Doe* the District Columbia Court of Appeal and the Illinois District Court respectively ruled that the decision to refuse medical treatment was to be made by the patient on the behalf of the foetus and herself (*Re AC*, 1990), (*Baby Boy Doe,* 1994). In *Re MB (Medical Treatment)* the English Court of Appeal held:

> *"A competent woman who had the capacity to decide may, for religious reasons, other reasons, for rational or irrational reasons or for no reason at all, choose not to have medical intervention even though the consequences might be the death or serious handicap of the child she bore or her own death"* (*Re MB (Medical Treatment),* 1997), (McSherry, 2002).

However one of the ways the law has continued to protect foetuses and reject women's autonomy is to deny women's competence and capacity. In *Rochdale Healthcare (NHS)*

Trust v C the United Kingdom High Court ruled that because C was in the throes of labour she was incompetent to make decisions for herself (*Rockdale Healthcare (NHS) Trust v C*, 1997). In these cases where a woman's competence or capacity is questioned, the woman is conveniently reduced in the eyes of the law to a hysterical mess. Decisions such as these are made hurriedly while the woman is in labour, often with only one side being presented to the court. The paternalism of the courts then colludes with the paternalism of medicine. The woman's side of the case is very rarely heard, the woman regarded simply as a vessel for the foetus (McSherry, 2002).

3.3 "Child" Protection

Although in most countries foetuses are not defined as children, the area of child protection is gradually encroaching on the maternal/foetal relationship and consequently on the freedom and rights of pregnant women. In the US and Canada some states have enacted legislation to protect the foetus. Minnesota enacted legislation in 1998 to prevent drug use during pregnancy (*Minn Stat ss 626.5561*, 1998), and two Canadian provinces have also enacted legislation to protect the foetus (McSherry, 2002).

4. HUMAN RIGHTS, WOMEN'S RIGHTS AND REPRODUCTIVE RIGHTS

As discussed above the current legal status of abortion within Australia, legal intervention during pregnancy and the 'child' protection movement all result in dehumanising women by disregarding women's autonomy, bodily integrity, self-determinism, privacy and status as a person. The common conundrum encountered within all these situations is a basic refusal of women's human rights, especially in

women's capacity to make their own reproductive decisions. The question of women's humanity and attributed rights is one which can be legally problematic. However by considering abortion and women's rights within a human rights framework there is no need to question a woman's right to personhood. A human rights framework takes as given that women are human and as such are entitled to undeniable human rights. These rights are examined more closely below.

4.1 United Nation's Human Rights Framework

Women's human rights stem from the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948 (United Nations, 1948). The UDHR was the first international statement to use the term human rights, and was adopted by the Human Rights movement as its charter (Human Rights Web, 1997). The basic human rights the UDHR sought to protect were: the right to life, liberty and security, equality of all persons under the law; the right to consent to marriage and to equality in marriage; the right to be free from discrimination (United Nations, 1948). "The international consensus on human rights is codified in international law and in a series of documents that have been signed and ratified by many member states of the United Nations" (Tripathi, 1998, p 5) stemming from the UDHR in 1948. United Nations declarations, treaties, covenants and laws over the years have broadened and further defined the notion of human rights. Human Rights can now be broken up into a number of different categories:

- " Civil and political rights – such as rights to life, liberty, free speech, movement, political thought and religious practice, a fair trial, privacy, to found a family and to vote;
- Economic, social and cultural rights – such as rights to adequate food and water, health care, education, a clean environment, respect for cultural practices, and welfare assistance;
- Humanitarian rights – that is the rights of those who are involved in, or affected by, armed conflict, such as the treatment of prisoners of war, of the wounded or sick or shipwrecked, of civilians, and of women and children in particular;
- Various categories of rights as defined by the nature of the holders – such as the rights of workers, women, children, minority groups, refugees, indigenous peoples, and people with a disability etc;" (Human Rights and Equal Opportunity Commission (HREOC), 2003, p. 4).

Although not always legally enforceable these United Nations documents serve as a force for equity and the promotion of human rights. Tripathi's (1998) table below is helpful in considering the impact on women's reproductive rights of a number of the United Nations consensus documents. Australia is a signatory to all covenants listed below in addition to the UDHR (HREOC, 2003).

Table 1: United Nations Consensus Documents and Reproductive Rights

Consensus Document	Impact on Reproductive Rights
The Universal Declaration of Human Rights – 1948 (UDHR)	- Bases human rights on the fundamental dignity and worth of the human person - Recognises first principles: entitlement of all people to all rights; fundamental rights to life, liberty, and security of person; of all persons under law - Recognises the right of people to found a family and share equal rights within marriage.
Proclamation of Teheran World Conference on Human Rights – 1968 (PTHR)	- Established the right to family planning ("the right of parents to determine the number and spacing of their children") - Notes the right to benefit from scientific progress
International Covenant on Civil and Political Rights – 1976 (ICCPR)	- Defines rights to self-determination, pursuit of development, and information and education - Notes right to not be arbitrarily deprived of life and to have rights protected in a non-discriminatory fashion
International Covenant on Economic, Social, and Cultural Rights – 1976 (ICESCR)	- Recognises the right to the highest attainable standard of health, including medical services
Convention on the Elimination of All Forms of Discrimination against Women – 1981 (CEDAW)	- Reflects recognition that general rights instruments are not sufficient to protect the human rights of women - Addresses the violation of human rights by private agents (non-systematic violations) - Sanctions the modification of traditional practices, customs, and laws
Vienna Declaration of the World Conference on Human Rights – 1993 (ICPD)	- Focuses on the empowerment of individuals through rights oriented activities - Mainstreams women's rights, including mechanisms for promotion as a key area of concern
Cairo Consensus of the Conference of Population and Development – 1994 (ICPD)	- Focuses on integrating reproductive rights and the rights to health and education into population policies and programs - Notes individual empowerment as primary goal of such programs
Platform for Action of the Fourth World Conference on Women – 1995 (FWCW)	- Addresses importance of shared responsibility between sexes, inclusion of women's rights in human rights, and the broader context of economic and social development - Notes specific objectives and mechanisms for promoting relevant rights

(Tripathi, 1998, p 5).

The key reproductive rights enshrined in these human rights treaties which may be applicable to an analysis of access to abortion within a human rights framework include the following:

- The right to life, liberty and security (United Nations, 1948);
- The right to health, reproductive health, and family planning (United Nations, 1979);
- The right to decide the number and spacing of one's children (United Nations, 1979);
- The right to consent to marriage and equality in marriage (United Nations, 1948);
- The right to privacy (United Nations, 1966);
- The right to be free from discrimination (United Nations, 1948);
- The right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment (United Nations, 1948);
- The right to bodily integrity (United Nations, 1966);
- The right to be free from gender discrimination (United Nations, 1979);
- The right to modify customs that violate women's rights (United Nations, 1979);
- The right to family planning services and information (United Nations, 1979);
- The right to information and education (United Nations, 1994);
- The right to be free from sexual violence (United Nations, 1979), and;
- The right to enjoy scientific progress and to consent to experimentation (United Nations, 1966);

4.2 Human Rights Framework for Access to Abortion

As discussed previously, the application of law may require debate around women's status as people. One of the significant advantages of examining women's access to abortion within a Human Rights framework is that there is no need to determine women's humanity and right to personhood. The United Nations Human Rights documents consistently reaffirm women's humanity and right to equality before the law. Australia has attempted to incorporate the United Nations Human Rights documents into its laws. For example, the main purpose of the Commonwealth's *Sex Discrimination Act 1984* is to "incorporate into Australian law the main provisions of the CEDAW" (HREOC, 2003). Similarly, the purpose of the Commonwealth's *Family Law Act 1975* is to incorporate into Australian law the main provisions of the United Nations *Convention on the Rights of the Child* (HREOC, 2003).

However Australia's legal adaptations have not always translated to a true commitment to human rights. Australia consistently fails to uphold many of the human rights responsibilities to which it has committed, particularly in the instance of women attempting to access abortion services. The United Nations at the International Conference on Population and Development (ICPD) in Cairo in 1994 made a landmark compromise regarding the controversial issue of abortion. The ICPD produced the following statement:

> *"Women who have unwanted pregnancies should have ready access to reliable information and compassionate counseling… In circumstances in which abortion is not against the law, such abortion should be safe. In all*

cases women should have access to quality services for the management of complications arising from abortion. Postabortion counseling, education and family planning services should be offered promptly"

(United Nations, 1994)

Despite some disappointment around restrictive abortion legislation in many countries, this statement signified a gigantic step in women's reproductive rights. Following this decision, at the ICPD+5 meeting in June 1999 language was added to recommend that: "health systems should train and equip health workers and take other measures to ensure that abortion is safe and accessible" (United Nations, 1999). Therefore the right to safely access abortion is now incorporated within a woman's right to reproductive health care.

4.3 Australia's Human Rights Violations

It follows then, that by allowing anti-choice protestors to harass, intimidate and obstruct women attempting to enter abortion providing clinics, Australian women's human rights related to health care are violated. The situation Australian women face when attempting to access abortion providing clinics means that they are not assured access to abortion services. By failing to take measures to ensure that women can safely access abortion services the Australian government is breaching Australian women's human rights as defined by the United Nations.

When examined closely there are a number of other ways women's human rights are being violated when they attempt to access abortion services. Attempting to access an abortion service is a uniquely female experience. It is women and women alone who bare the brunt of anti-choice protesters' intimidation, harassment and obstruction. The

CEDAW guarantees non-discrimination in access to health care (The Centre for Reproductive and Law and Policy, 2002, p 18). Failing to protect women from this form of harassment constitutes a form of gender discrimination because it is a uniquely female experience. The CEDAW committee has consistently described any lack of access for women to a health care service as discriminatory (The Centre for Reproductive and Law and Policy, 2002).

Incorporated within women's human rights listed earlier is the right to reproductive self-determinism. This right is based on the following interrelated rights: "the right to plan one's family; the right to freedom from interference in reproductive decision-making; and the right to be free from all forms of violence, discrimination and coercion that affect woman's sexual and reproductive life" (The Centre for Reproductive and Law and Policy, 2002, p. 16). The right to plan one's family includes the right to decide the number and spacing of one's children and be provided with the information and means to do so (United Nations, 1979). These rights imply that access to abortion is necessary to uphold a woman's right to reproductive self-determinism. Without access to abortion sometimes it is impossible for a woman to make choices about the number and spacing of her family. The 100% reliable, effective, easy to use contraceptive is not yet available and women continue to be disproportionately represented amongst victims of physical and sexual violence (Krug, Dahlberg, Mercy, Zwi, & Lozano, 2002). Access to abortion services is vital to upholding a woman's right to reproductive self-determinism.

The current situation women face when trying to access an abortion providing clinic is not conducive to the rights set out above. Women accessing an abortion providing clinic for fertility services other than abortion (e.g. colposcopies, pap smears, counselling) also face protesters' intimidation. The environment anti-choice protesters create violates women's right to be free from all forms of violence, discrimination and coercion that affect women's sexual and reproductive life. What the protesters do to women is a form of violence, discrimination and coercion aimed at affecting women's reproductive life by stopping women from entering an abortion providing clinic whether the woman is trying to access an abortion or other service. The protesters' conduct is also a form of interference in women's reproductive decision-making process which prevents women from maintaining their bodily autonomy and physical integrity. Ultimately these violations culminate in a violation of a woman's right to privacy.

The CEDAW Committee explicitly recognises the necessity of healthcare services being more readily available to women and requiring that impediments to women's access to health care services be removed. Until limitations are placed on the actions of anti-choice protesters this is unattainable. The CEDAW Committee explicitly recognises that access to safe abortion is necessary to decrease the incidence of unsafe abortion which often results in reproductive mortality and morbidity. To reduce the incidence of unsafe abortion the CEDAW Committee has recommended that governments increase access to safe abortion and family planning services. The CEDAW Committee has also continually criticized restrictive abortion laws, praising governments who amend restrictive legislation (CEDAW, 1999; The Centre for Reproductive and Law and Policy,

2002). It is clear that the CEDAW Committee has been instrumental in incorporating abortion rights within women's rights.

5. REMEDIES

The current situation Australian women face when attempting to access an abortion is unacceptable within a human rights framework. By failing to ensure women's human rights the Australian government is not upholding its commitment to the United Nations human rights framework. By considering the way other countries have dealt with the issue of access to abortion, and considering other legal challenges, it becomes clear that there are ways the Australian government can remedy its current contraventions of Australian women's human rights. United States legislation clarifies a framework for legislative change where abortion access and protester rights come into conflict, while Canadian legislation provides us with a way to remedy Australia's current situation because Canadian legislation has been formulated within a legal system similar to Australia's. These potential remedies are explored below.

5.1 Overseas Legislation

Spurred on by the murder of abortion-providing doctors and the bombing of abortion-providing clinics, some US and Canadian states have passed legislation generally known as "buffer-zone", "bubble" or "bubble-zone" legislation. Basically this type of legislation creates a "bubble" around abortion-providing clinics within which protesters' speech and action is restricted. Two such cases of legislation are discussed below.

5.1.1 Canada

Canada's treatment of access to abortion is useful as like Australia, Canada's legal system stems from an English constitutional system. Consequently, Canada may offer a legislative model which Australia could use. In Canada bubble zones are in place around certain abortion providers and their homes, and enforced under Canada's *Access to Abortion Services Act (1995).* The Act was created in response to *The Abortion Services Task Force report* documenting "repeated threatening anti-choice activity outside the clinics, including harassment and intimidation [as one factor contributing to] the negative and stressful environment in which women must obtain a legal medical service"(Prochoice Action Network, 1996). The purpose of the act is "to ensure that women who choose to use abortion services will have unimpeded access to those services. It will also ensure that those who provide these services can do so safely and without harassment"(Crane, 1995).

Since bubble zones have been in effect numerous anti-choice protesters have been arrested and charged. The first person to be arrested for violating the Act was anti-choice activist Maurice S. Lewis. On appeal magistrate Judge Cronin's not guilty verdict was overturned by Judge Saunders. The pro-choice coalition proffered arguments that the "case was not about the morality of abortion, but rather rested on women's right to obtain a legal medical service with respect and dignity, as with any other medical service"(Prochoice Action Network, 1996). The anti-choice coalition argued that the act "violated Lewis' charter rights to freedom of religion, expression, assembly, and conscience"(Prochoice Action Network, 1996). It also argued that women give up their

right to privacy when they decide to obtain an abortion. Judge Saunders disagreed, "suggesting it was not pregnant women who give up their privacy, but the 'protester' who 'strip' women of their privacy"(Prochoice Action Network, 1996). Judge Saunders also ruled that "specific geographical limits on freedom of speech are constitutionally permissible in order to protect the rights of a vulnerable group---women seeking abortions"(Prochoice Action Network, 1998).

Joel Bakan, Associate Professor at the University of British Columbia's Faculty of Law reviewed the Act's constitutionality and concluded:

- The act does not violate Canada's freedom of expression Charter
- The objective of the act "to ensure women's access to abortion services is not impaired", meets the Supreme Court's "pressing and substantial criteria", its measures are "carefully tailored" to meet that objective, consisting of time, place and manner restrictions.
- The purpose of the act is not to restrict people's expression but to "protect people from the potentially harmful consequences of such expression occurring in a particular place, time and manner."
- "Legislation restricting expression is more likely to be upheld under the Charter where it is designed to protect a 'vulnerable group.'" The Bill's purpose includes protecting women accessing abortion, who fit this category.
- The Bill ensures women's access to abortion is not denied due to abortion-providers being deterred from providing this facility by demonstrators' tactics.

- "The Supreme Court has held that legislation impairing women's access to abortion services violates the Charter's right to security of the person."
- The bill advances other Charter values as well, like liberty, equality, freedom of conscience and privacy, in removing potential barriers to women's reproductive choice (Bakan, 1995).

5.1.2 United States

In United States federal law, the *Freedom Of Access to Clinic Entrances Act* (1994) effectively "prohibits blocking access to clinics, damaging clinic property, or injuring or intimidating patients or staff"(Prochoice Action Network, 1999). Throughout the US different sorts of buffer or bubble zones exist in the form of ordinances, statutes and injunctions. "Buffer zones can be designated by courts, city officials, or state legislatures. The latest comprehensive study on clinic safety indicates that out of 351 clinics surveyed nationally, over 25% are protected by buffer zones"(Action Network, 2000).

5.1.3 United States Supreme Court

A U.S Supreme Court case, *Hill v Colorado* (1999), put bubble zones versus First Amendment Rights to the test. The case challenged Colorado statutory provision section 18-9-122(3) which provides that

> *"[n]o person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of…counseling with such other person in the public way or sidewalk area*

within a radius of one hundred feet from any entrance door to a health care facility"(*Hill v Colorado*, 1999).

In upholding the statute, the court acknowledged, "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized [individuals]"(*Hill v Colorado*, 1999) and concluded that "the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental right, an individual's right to privacy, here represented by access to medical counseling"(*Hill v Colorado*, 1999). The court also found that protections afforded by the First Amendment are not limitless, "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"(*Hill v Colorado*, 1999). The First Amendment is subject to time, place and manner restrictions which statute 18-9-122(3) imposes. Statute 18-9-122(3) serves the government's legitimate, content neutral interests and ample alternative channels of communication have been left open (*Hill v Colorado*, 1999). The Court concluded that section 18-9-122(3) "represents a fair legislative balancing of the 'right to protest or counsel against certain medical procedure' while protecting 'a persons right to obtain medical counseling and treatment'"(*Hill v Colorado*, 1999).

5.2 Australia – Victoria

The FCC commissioned Galbally Rolfe Barristers and Solicitors to investigate legal action against Pro-life Victoria in 1998. The report commissioned indicated very few avenues the FCC could pursue but suggested four possible courses of action (Moore, 1998):

(i) An intervention order against the protesters for stalking under s.21A of the Crimes (Family Violence) Act 1987. After considering the two elements necessary for a person to be deemed a stalker, the physical and mental elements, the solicitor advised that it would be difficult to prove these elements of stalking. Given the preceding account of the protesters' behavior I believe that the clinic could possibly prove these elements. The true conditions and experiences of clinic staff and clientele or the services the clinic provides were perhaps not fully understood by the male solicitor. However the problem with an intervention order is that anti-choice protesters do not all belong to 'Pro-Life Victoria'. There are numerous anti-choice splinter groups. If the clinic were to obtain an intervention order against one group, another anti-choice organisation may picket the clinic instead, or the original group could reform as a new organisation with no intervention order levelled against it.

(ii) Under the tort of nuisance, the solicitor advised two forms of private nuisance are relevant: watching and besetting, and making unreasonable noise. However, he concluded that the circumstances at the clinic did not really make private nuisance a legal option against the protesters. Again, in my opinion, the solicitor did not appreciate the true conditions at the clinic. In Hubbard v Pitt [1976] QB 142 at 172-173, picketing is defined as being lawful when it involves nothing more than:

> *"…an orderly and peaceful collection of persons outside particular premises where there was no obstruction, molestation or intimidation of*

> *persons entering and leaving the premises, the object of the picket being the communication of information" (Hubbard v Pitt,* 1976).

From my own observations, although the protesters outside the FCC claim the objective of their protest is to hold a vigil, and provide counsel, their protests do involve obstruction of the FCC entrance and the intimidation (at times including unwanted physical contact) of patients and staff entering the clinic.

In the *Dollar Sweets Case* (1986), Justice Murphy defined besetting as:

> *"The occupation of a roadway or passageway through which persons wish to travel, so as to cause those persons to hesitate through fear to proceed, or if they do proceed, to do so only with fear for their own safety or the safety of their property"* (*Dollar Sweets Pty Ltd v FCA*A, 1986).

The anti-choice protesters and their billboards outside the clinic constantly occupy the passageway through which patients and staff must travel in order to reach the FCC. In doing so the protesters make people hesitate and sometimes turn away from the clinic perhaps for fear of the their own physical safety, but definitely for fear of their emotional safety.

The Appeal Division in the *Animal Liberation Case* (1991) concluded:

> *"Besetting includes a surrounding with hostile demeanor so as to put in fear of safety"* (*Animal Liberation (Vic) Inc v Gasser*, 1991).

In contrast to the solicitors beliefs, I feel the environment surrounding the clinic created by the protesters can be described at times as nothing short of hostile.

Nuisance by shouting was suggested by the solicitor. I feel this may be applicable because sometimes protesters stick their heads over the fence and yell at patients and staff. However preventing protesters from shouting would be only of slight help to the clinic.

(iii) I agree with the solicitor that the tort of intimidation, which is basically defined as one person threatening another would be difficult to apply in this case although the protesters unsolicited intrusion into another person's personal space can be felt as very intimidating and threatening.

(iv) I also agree with the solicitor that conspiracy to injure would be difficult to prove in this case as proof that the intention of protesters to injure would be necessary but difficult to prove.

5.2.1 Bubble Legislation in Australia

Given that common law precedents appear to provide no legal remedy to abortion access, the best course of action would be enactment of legislation replicating US and Canadian bubble legislation. America's Bill of Rights emphasises the right to freedom of expression, however Bubble legislation restricting this right has been upheld when challenged. The Australian Constitution "does not expressly protect freedom of speech or expression"(High Court of Australia, 2002) in the same way the American constitution does. However the High Court in 1992 held that the right to freedom of expression is

implied in the constitution (High Court of Australia, 2002). This "right does not extend more generally to a right to freedom of expression where political issues are not involved"(High Court of Australia, 2002), which could be argued is the case when protesters picket the clinic. In New Zealand, which has a similar legal system to Australia, Justice McCarthy recognised both the right to expression and the tension that flows from it in the New Zealand Court of Appeal, *Melser v Police* [1967]:

> *"A democracy is compounded of many different freedoms, some of which conflict with each other, and the right to protest, if exercised without restraint, may interfere with other people's rights of privacy and freedom from molestation. Freedom of speech, freedom of behavior, academic freedom, none of these is absolute. The purposes of a democratic society are only made practicable by accepting some limitations on absolute individual freedoms"* (*Melser v Police,* 1967).

Such a limitation needs to be placed on anti-choice protests outside abortion-providing clinics in order to serve the greater good of society by protecting a vulnerable group – as defined in the US and Canada – women seeking abortions. Since such legislation targets only health clinics, concerns that it may be used to thwart other protests (e.g. workers unions) are unwarranted.

5.2.2 Current Status in Victoria

Currently no action is being taken in Victoria to ensure women's reproductive rights when attempting to access abortion-providing clinics. The Women's Electoral Lobby when contacted agreed that action needs to be taken on this issue, however have no

current plans to act themselves (WEL, 2002). Similarly The Office of Women's Policy have made some inquiries into the issue and received submissions from the Fertility Control Clinic (Allanson, 2002a; Allanson, 2002b). However neither the Government's Women's Safety Strategy nor the Victorian Women's Health and Wellbeing Strategy address this issue at all (The Office of Women's Policy, 2002; Victorian Government Department of Human Services, 2002).

6. CONCLUSION

This submission highlights the glaring gap between the Australian government's commitment in principal to women's reproductive health rights, versus the reality of harassment and intimidation women face accessing abortion. Although a signatory to United Nations Conventions such as the Convention on the Elimination of All Forms of Discrimination against Women, the Australian government fails to ensure Australian women's rights to reproductive self-determinism and privacy. Anti-choice protesters' rights are privileged above women's human rights. The legal status of abortion will not affect this appalling situation. A human rights framework unequivocally requires that women have the right to access health services, such as abortion, free from harassment, intimidation and obstruction. This submission argues that these rights should be recognised by Australian law, and that legislation replicating Canadian and United States bubble legislation could remedy these human rights violations.

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