

**WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE
VICTORIAN DIVISION**

President : Mr David D Westmore MBBS (Melb) FRCS (Eng) FRCS (Edin) FRACS(Urology) FACS.
Secretary: Dr Philomene Joshua MBBS (Melb)
P O Box 232 Box Hill 3128. Phone 03 9890 6856. Email: phjoshua@ozemail.com.au

June 4, 2011.

Scrutiny of Acts and

10 JUN 2011

Regulations Committee

Mr Edward O'Donohue MLC,
Chairperson Scrutiny of Acts and Regulations Committee,
Parliament House.
Spring Street
East Melbourne VIC 3002.

Dear Mr O'Donohue,

Re: Inquiry and Review of the Charter of Human Rights and Responsibilities Act 2006

1 a The International Covenant on Civil and Political Rights entered into force in Australia on 28 January 1998, and states "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 wording of the Victorian charter differs from that of International Covenant on Civil and Political Rights as enacted by Federal Treaty by use of the word "person" instead of "human being" for the recipient of human rights as in other charters.

This is important because "person" in the legal definition of personhood applies only at birth¹, whereas "human being" includes life from its undisputed biological beginning at conception or fertilization. For the Charter to say they are the same is simply wrong and unacceptable.

Use of the word "person" caused the VLRC's abortion law report to be seriously biased towards diminishing human rights in Victoria for the unborn and for doctors.

- **In Section 6 Application(1), the word "persons should be replaced by "human beings".**
- **In Section 8. (1), (2), (3), and Section 9, and Section 10, and Section 20, the word "person" should be replaced by "human being".**

¹ VLRC Final Report on Abortion Law, p165, footnote42, re Christian Lawyers Association of SA and Others v Minister of Health and Others 1998(11) BCLR 1434(T).

1b Article 1 of the Convention on the Rights of the Child states “--a child means every **human being** under the age of eighteen...” This re-affirms and emphasizes the statement in its preamble that “the child , by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, **before** as well as after birth’.

Queensland law² states

‘medical treatment, for subsection (1)(a), does not include medical treatment intended to adversely affect an unborn child.

patient means the person or unborn child on whom the surgical operation is performed or of whom the medical treatment is provided.

surgical operation, for subsection(1)(a), does not include a surgical operation intended to adversely affect an unborn child.’

Doctors in Victoria are aware, that they have a legal duty of care to the unborn, and can be sued if they fail in it.³

- **Queensland law acknowledges the unborn as the doctor’s patient. Victoria should do likewise.**

The VLRC reported a recent evolution in legal thinking, where a judge, Lord Mustill, described the relationships between a pregnant woman and her fetus, as one of ‘bond, not identity. He described the ‘mother and the foetus as two distinct organisms living symbiotically.’⁴

This view is reality based, and goes some way to explaining Article 1 of the Universal Declaration of Human Rights-“All human beings are born free and equal in dignity and rights.” This does not deny the existence of the fetus, or its need for protection before birth, but recognizes the bond of dependence on the placenta as being broken at birth. It goes on to say “They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Reason and conscience develop with age both before and after birth, sharing a common beginning at conception or fertilization.

Another difficulty with the legal personhood concept is that when a child is born with injuries acquired as a result of an assault upon its mother during pregnancy,” it requires a “legal fiction” of deeming the physical element of the offence to have occurred at birth.⁵

Abortion law in Asia⁶ and India⁷ has caused severe gender imbalance, and in Japan and Australia an aging population. Thus not only do the unborn and doctors suffer as a result of it but whole communities as well. The woman involved may later regret her decision. Suicide rates are

² Queensland Criminal Code9 (Medical Treatment) Amendment Act 2009. 2009 Act No.33.p5.

³AMA VIC Legal Series Seminar on Abortion Law 2010.

⁴Victorian Law Reform Commission Law of Abortion Final Report 2008. C 16

⁵ VLRC Law of Abortion Final Report C 7and 8, p158.

⁶ Alarm bells ring at aging over Asia. Michael Backman The Age Aug 29,2007.

⁷ India’s bad sex ratio worsens. Michael Cook. BioEdge Apr 02, 2011

increased after abortion.⁸⁹ Acceding to it can have tragic consequences for both the mother and her unborn child.

While a mother cannot accuse a doctor of assault if he does an abortion she herself has requested, the doctor well recognizes that what he is being asked to do is to kill another human being, and injure the mother. This is an assault upon his professional respect for human life, and upon his conscience.

- **Section 17.2 should read “Every child from conception or fertilization has the right, without discrimination to such protection as is in his or her best interests and is needed by him or her.”**
- **To Section 22 add a fourth paragraph –“The unborn child or children should be protected during the incarceration of the mother.”**
- **The right to life of the unborn should be more clearly enunciated.**

1c The Convention on the Elimination of All Forms of Discrimination against Women has been dogged by controversy, because some UN staff sought to introduce abortion as a woman’s right. The committees referred to in the convention and the protocol (four of them) came and went, and no longer exist. All matters concerning it have been replaced by a single UN Commissioner for Women. Some CEDAW proponents sought to deny the inherent right to life of the unborn as well as the professional and conscience rights of doctors, nurses and pharmacists.

Laws against rape and violence give women most protection.

- **CEDAW has no place in Victorian Rights law. All human beings need rights.**

Section 48 of the Victorian Charter, Savings provision “Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.” was designed to exclude further legislation against fetal rights, but the passage of the Victorian 2008 Abortion legislation means that it can now be used to deny the rights in Section 14 of freedom of thought, conscience and belief, as well as section 13’s protection of a person’s right to privacy and Section 15’s ‘right to hold an opinion without interference.’ Unfortunately Section 15 (3)(b) is even more dangerous to the freedom of expression, particularly as the passage of the abortion act has shown the difficulty of defining such matters as public order, public health or public morality. It could be used to stop all public discussion of abortion and peaceful protests. Paradoxically it has become the antithesis to Section 15’s stated aim of freedom of expression.

- **Section 48 should be abolished.**

⁸ Suicides after pregnancy in Finland, 1987-94: register linkage study. Gissler M, Hemminki E, Lonnqvist J.

⁹ Abortion and mental health disorders; evidence from a 30-year longitudinal study. Fergusson DM, Horwood LJ, Boden JM.

2. Self determination is an innate **quality** of the individual. Professor Louis Waller stated "Rights are precisely what we give them." We can only give the individual rights to enable them to **exercise or use** their self determination.

- **It is inappropriate to express a quality as a right.**

3. The scrutiny of legislation demanded by the Victorian Charter failed to stop the passage of an abortion bill containing an appalling attack on the conscience of doctors. Indirectly it diminishes the nature of the right to conscience for everyone in our community. This has since been reflected in an increased demand for abortion, and doctors complaining.

Referral by the anti-conscience clause is inapplicable. The most common emergency in obstetrics is severe bleeding. It is usually evidence of a severe enough separation of the placenta to indicate that the pregnancy is at an end and that immediate action is required, not wasting time in unnecessary referrals. It is safe to say that it has never been applied, nor will it in true medical emergencies. The anti-conscience referral clause should be abolished both as unnecessary and positively harmful. Where abortion is requested and alternative management is rejected, sometimes the only way for a doctor and other medical and paramedical staff to avoid being a fetal executioner or an accomplice in it, is by a conscience provision.

- **The Charter needs more scrutiny and changes to avoid conflict between rights.**

Our recommendations are highlighted in the bulleted lines under each section.

- i. **In Section 6.Application (1) the word "persons" should be changed to "human beings". In Section 8 (1), (2), (3), and Section 9, Section 10, and Section 20, the word "person" should be replaced by "human being".**
- ii. **Victorian rights law should acknowledge the unborn as the doctor's patient.**
- iii. **Section 17.2 should read "Every child from conception or fertilization has the right without discrimination to such protection as is in his or her best interests and is needed by him or her.**
- iv. **To Section 22 add a fourth paragraph- "The unborn child or children should be protected during the legal incarceration of the mother."**
- v. **The right to life of the unborn should be clearly stated.**
- vi. **CEDAW has no place in Victorian Rights Laws. All human beings need rights.**
- vii. **Section 48 of the present Victorian Charter should be abolished.**
- viii. **It is inappropriate to describe a quality like self determination as a right.**
- ix. **The Charter needs more scrutiny and changes to avoid conflict between rights.**



Mr David Westmore MBBS FRCS FRACS FACS, President WFDWRHL Victorian Division.