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ACT Human Rights Act: Legality of Abortion Remains with the Legislative Assembly.

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One current argument against the ACT *Human Rights Bill*, focuses on proposed provisions therein rendering it “unlawful” for public authorities to engage in conduct “incompatible” with “every human being’s inherent right to life” (clauses 2.1 and 6.1-2). These, it is alleged, may threaten the decriminalisation of abortion, recently achieved by legislation in this jurisdiction (*Crimes (Abolition of Offence of Abortion) Act 2002*).

A valuable part of introducing any Bill of Rights is the encouragement thereby provided for that society to seriously reflect on how best to achieve an open democracy based on values of equal respect for inherent human dignity and the sanctity of life. Vigorous and hopefully principled, debates about complex bioethical issues such as abortion and euthanasia, are inevitable in any such process and should be welcomed, as signifying an important step in the maturation of that community’s respect for political institutions.

The ACT *Human Rights Act*, however, will operate very differently from the fully justiciable “rights” expressed in the US Constitutional *Bill of Rights* and upheld by its Supreme Court, or the *Charter of Rights and Freedoms* inserted in the Canadian Constitution in 1982. Our model is more declaratory in style and resembles the UK *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990*. The ACT Legislative Assembly will retain ultimate control over the scope and content of ACT *Human Rights Act*. Our Supreme Court will not be able to “strike down” legislation (that is, declare it invalid, or affect its operation or enforcement) for any perceived incompatibility with the *ACT Human Rights Act* (clause 5). The Court will only be able, if it wishes, to issue a declaration about such incompatibility that must be considered, but not necessarily acted on, by the Attorney-General and ACT Legislative Assembly.

The abolition of sections 44 and 45 of the ACT *Crimes Act* and the insertion of the new part 4B into the ACT *Medical Practitioners Act (Medical Practitioners (Maternal Health) Amendment Act 2002)* have removed in this Territory the offence of procuring a miscarriage not justified by medically-determined necessity. Abortion in the ACT is not now a crime if performed upon a requesting woman by a medical practitioner in an approved facility. Whatever may be our views about such a result morally, there are several reasons at law why this position will not be altered by clause 2.1 of the ACT *Human Rights Bill*, should it be enacted. Clause 2.1 in full provides: “*Every human being has the inherent right to life. No one shall be arbitrarily deprived of his or her life.*”

First, the ACT Supreme Court in interpreting clause 2.1, would have to utilise whatever definition of “human being” the ACT Legislative Assembly provided in the *Human Rights Act*. Second, in the absence of such a definition, that Court would have to

consider the term “human being” in relevant legislation, or analogous provisions in human rights documents and judicial interpretations of them (clause 4.4-5).

The record of drafting negotiations (*travaux préparatoires*) leading to the creation of the “right to life” in the human rights document known as Article 6 of the *International Covenant of Civil and Political Rights* (ICCPR), indicate that the proposal by Belgium, Brazil, Mexico and Morocco to make the protection apply “from the moment of conception” was rejected by a vote of 31 to 20 with 17 abstentions.

The General Comments of the Human Rights Committee (HRC) on Article 6 of the ICCPR have remained deliberately neutral on whether the international human right to life applies to a fetus prior to viability. “Viability” refers to the capacity for independent existence outside the mother’s womb, a point varying with access to and the technological capacity of, neonatal intensive care. Instead, the HRC has emphasised the maternal mortality arising from illegal abortions, the inhumanity of criminalising abortion where pregnancy has arisen from rape, the suicides of young females unable to obtain legal abortion and the imperative need for education and access to contraceptives, so that abortion becomes a measure of absolute last resort.

General principles of law in many developed nations have settled, after widespread, often unfortunately violent confrontation, to the compromise position that prior to viability, abortion is an issue for the morality of the mother, in conjunction with a medical evaluation of her safety in terms of substantial risk to her life or health. After that time, abortion is a problem chiefly for medical ethics and the protective powers of the State over the vulnerable. This is the position accepted, for example, in Australia under *Wald, Davidson, Superclinics* and in the United States in *Roe v Wade* (the latter chiefly on the basis of the maternal right to privacy prior to viability).

One reason for this compromise, is that both sides in the abortion debate generally recognise that each values the sanctity of life and deplors its waste. The difficult moral issue dividing them relates, rather, to how they value an existing human being’s capacity for self determination, when it directly conflicts with the potential existence of her dependent foetus. Many Courts have seen the issue as who best bears responsibility for the dreadful choice (see Dworkin’s *Life’s Dominion*).

In *H v Norway* lawful abortion of a 14 week old fetus on “social grounds” was held not to be contrary to *European Convention on Human Rights* (ECHR) article 2 (“right to life”). Similar interpretations permitting abortion despite the “right to life,” prior to viability, have been made in interpretations of the ECHR by the Constitutional courts of Germany, Poland, Austria, Spain and the Netherlands.

In the *White and Porter v USA* case, the “right to life” in the *American Declaration of the Rights and Duties of Man* was held not to apply from the moment of conception. In South Africa, the Christian Lawyers Association unsuccessfully argued that the *Choice on Termination of Pregnancy Act 1996* (SA) conflicted with the “right to life” in article 11 of that nation’s Constitution. The South African High Court determined that under the Constitution the fetus was not a legal person.

Further, debate on this issue would have to take account of the *Convention on Elimination of Discrimination Against Women*, which indicates that, at international law, depriving women of autonomous decision-making in relation to matters of procreation, will inappropriately deprive them of human rights related to their health, education,

employment and their ability to shape their own roles in relation to family and public life. It would also have to consider the right to the “highest attainable standard of health” (clause 3.3), one of the most valuable in the ACT *Human Rights Act*. The core of our “right to health” would include equitable access to health facilities, goods and services for vulnerable or marginalised groups and monitoring through health indicators and benchmarks.

To conclude, the ACT “right to life,” whatever its considerable benefits in ensuring the maintenance of minimum standards of human dignity in our society, will remain neutral on the abortion issue. Its legality will remain a matter for our Legislative Assembly to determine.

The primary reasons are, first, the ACT Parliament, in any event, expressly retains the capacity to define “human being” in the *Human Rights Act* so as to accord with its decriminalisation of abortion legislation. Second, under Australian and International Law, there is no established principle that recognises fetal rights from the moment of conception. Third, in the alternative, the ACT’s existing decriminalisation legislation will probably render any “deprivation” of life via such procedure non “arbitrary.” Fourth, whatever the definition, because of our existing decriminalisation legislation, the conduct of ACT public authorities assisting abortions will not be “unlawful” under clause 6.2.

It will be a great legacy of our Parliamentary representatives if the citizens of the ACT become the first in the Australian Commonwealth to enjoy a Bill of Rights. In interpreting and applying the ACT *Human Rights Act* our institutions will immediately become part of an international jurisprudential dialogue focused on respect for human dignity. This legacy should not be sacrificed for arguments that fail to recognise the necessary compromises between morality and law that have been achieved on this complex issue nationally and internationally, or seek to misrepresent the legal effect of the ACT *Human Rights Act*.