


The fall of *Roe v Wade*, the US anti-abortion movement and its influence in Australia

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Abstract

This article examines the overturning of the landmark US Supreme Court decision of *Roe v Wade*, the precedent which conferred federal constitutional protection on the right to abortion. It looks at the US anti-abortion movement which worked for decades to overturn *Roe v Wade* and the degree to which Australian law is vulnerable to its influence.

Keywords

Criminal law, decriminalisation, gender and the law, human rights law, women

The price of freedom is eternal vigilance.

Thomas Jefferson¹

In the past quarter of a century, more than 50 countries have liberalised abortion laws, in recognition that access to safe and lawful abortion is supported by international human rights norms.² Like other liberal democracies, Australia has charted a trajectory of decriminalisation. Meanwhile, the United States (US) has taken a decisive turn in the opposite direction. Abortion is criminalised or will likely soon be criminalised in more than half the country, following the US Supreme Court's overturning of *Roe v Wade* (*Roe*),³ the precedent which had conferred federal constitutional protection on the right to abortion for nearly 50 years. This article will examine *Roe*'s fall, the US anti-abortion movement, which worked for decades to achieve its demise, and the potential influence of these developments on Australia.

The constitutional foundation of US abortion law

Since 1973, US abortion law has been built on *Roe*'s constitutional foundations. In this landmark decision, the US

Supreme Court struck down laws criminalising abortion in the state of Texas, on the basis that they contravened the right to privacy, derived from the US Constitution's protections of personal liberty. The right to choose whether to terminate a pregnancy was thus given federal constitutional protection, within the ambit of the right to privacy, protecting individual decisional autonomy from interference by the state.

The right was not absolute and required balancing against the state's interest in protecting maternal health and potential human life. In achieving that balance, the Court adopted a trimester framework, barring states from banning abortion during the first trimester, allowing laws that regulate abortion to safeguard maternal health during the second, and higher-level regulation in the third trimester, when the foetus has attained viability. At this point, the state's interest in protecting the potentiality of human life permitted the banning of abortion, except where necessary to preserve a woman's life or health. Due to the fundamental nature of the right, state abortion laws were subject to 'strict scrutiny', the highest standard of judicial review.

Roe survived numerous challenges and was reaffirmed and refined in *Planned Parenthood v Casey* (*Casey*),⁴ where the Supreme Court dispensed with the trimester

¹James P McClure and J Jefferson Looney, *The Papers of Thomas Jefferson* (University of Virginia Press, 2009).

²See generally Johanna B Fine, Katherine Mayall and Lilian Sepulveda, 'The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally' (2017) 19(1) *Health and Human Rights Journal* 69.

³*Roe v Wade*, 410 US 113 (1973).

⁴*Planned Parenthood v Casey*, 505 US 833 (1992).

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framework and 'strict scrutiny' standard, finding that laws which imposed an undue burden on abortion prior to foetal viability would contravene the right to privacy. In reaffirming *Roe*, the majority observed that, by enabling women to control their reproductive lives, the ruling facilitated their equal participation in the economic and social life of the nation.⁵

Dismantling the constitutional framework

In June 2022, *Roe* and *Casey* were overturned by a 5-4 Supreme Court majority in *Dobbs v Jackson Women's Health Organization (Dobbs)*.⁶ The opinion of the Court by Justice Alito, a draft of which was leaked weeks before the ruling,⁷ found that, since abortion is not mentioned in the Constitution's text or 'deeply rooted in [US] history and tradition,' it is not a right protected by the Constitution. State abortion laws would therefore be subject to the lowest standard of judicial review, namely that they are rationally connected to a legitimate state interest.⁸ Alito's opinion was joined by Justice Thomas and Trump-appointed Justices Gorsuch, Kavanaugh and Barrett, while Chief Justice Roberts declined to join the majority in overturning *Roe*.

In a joint dissent, Justices Breyer, Sotomayor and Kagan wrote that the majority's cavalier approach to overturning the Court's precedent 'departs from its obligation to faithfully and impartially uphold the law' and will cause 'profound loss of autonomy and dignity' and enable states to 'enact all manner of restrictions', coercing women to give birth and consigning them to second-class citizenship.⁹

The impact of *Roe's* fall

As foreshadowed by the dissenting opinion, *Roe's* reversal has enabled states to impose largely unfettered restrictions

on abortion. Within hours of the decision, abortion bans took effect in several states, with further bans commencing in the weeks that followed¹⁰ and ultimately an estimated 26 states are likely to criminalise abortion.¹¹ Some state bans emanate from historic laws that were rendered unenforceable by *Roe*, while others derive from 'trigger laws', which were enacted after *Roe* and enlivened by its reversal. Some states have sought to amend their constitutions, to entrench abortion restrictions.

As states move to ban abortion, complex questions about the enforceability and interpretation of newly enacted and historic laws require judicial determination. Overlapping state laws and inconsistent state and federal law will come before the courts and proceedings are likely to be brought seeking federal recognition of foetal personhood.¹²

The febrile political and legal environment generated by *Dobbs* has created fear and uncertainty for women and pregnancy-capable people, and healthcare providers. US abortion providers have been targeted with violence for decades¹³ and *Roe's* fall has seen an escalation in harassment, intimidation and violent threats.¹⁴ The targeting of abortion providers has been further incentivised by vigilante laws, which now operate in five states, deputising individuals to seek financial gain, by suing doctors and anyone else who helps someone obtain an abortion.¹⁵

Medical colleges have expressed deep concern that patients' lives will be endangered and health inequities exacerbated nationwide by restricted access to high-quality, evidence-based healthcare.¹⁶ The US already has the highest maternal death rate among high-income countries, with Black women almost three times more likely to die from pregnancy-related complications.¹⁷ Healthcare access has been dangerously undermined by fears of prosecution, civil lawsuits and loss of medical

⁵Ibid 856.

⁶*Dobbs v Jackson Women's Health Organization*, 597 US (2022).

⁷Josh Gerstein and Alexander Ward, 'Supreme Court has voted to overturn abortion rights, draft opinion shows', *Politico* (online, 3 May 2022) <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

⁸*Dobbs* (n 6) I 8.

⁹Ibid 2 ('all manner of restrictions'), 3 (coercing women to give birth), 6 (departure from obligation to faithfully and impartially uphold the law), 15 (second class citizenship), 40 ('profound loss of autonomy and dignity').

¹⁰See map showing distance to drive to reach an abortion clinic, *New York Times* (Web Page) <https://www.nytimes.com/interactive/2022/06/24/upshot/dobbs-ro-abortion-driving-distances.html>.

¹¹Elizabeth Nash and Isabel Guarnieri, '13 States Have Abortion Trigger Bans Here's What Happens When *Roe* Is Overturned', *Guttmacher Institute* (online, 6 June 2022) <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

¹²Mary Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* (Yale University Press, 2022) 211-12; Caroline Kitchener, 'Next Frontier for the Antiabortion Movement: Nationwide Ban', *Washington Post* (Washington DC, 2 May 2022).

¹³The Feminist Majority Foundation et al, 'Brief of The Feminist Majority Foundation, Abortion Access Front, CA Goldberg, PLLC, The National Organization for Women Foundation, The Southern Poverty Law Center, We Engage Professor David S Cohen, and Krysten Connon as *Amici Curiae* in Support of Respondents', Submission in *Dobbs v Jackson Women's Health Organization*, No 19-1392, 20 September 2021, 19 23.

¹⁴Alex Woodward, "'Forced birth is an act of violence": Law professor condemns anti-abortion laws in post-*Roe* Senate hearing', *The Independent* (online, 13 July 2022) <https://www.independent.co.uk/news/world/americas/us-politics/khara-bridges-abortion-senate-hearing-b2121802.html>.

¹⁵Emma Bowman, 'As states ban abortion, the Texas bounty law offers a way to survive legal challenges', *NPR* (online, 11 July 2022) <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law>.

¹⁶Association of American Medical Colleges, *Statement on Supreme Court Decision in Dobbs v Jackson Women's Health Organization* (online, 24 June 2022) <https://www.aamc.org/news-insights/press-releases/aamc-statement-supreme-court-decision-dobbs-v-jackson-women-s-health-organization>.

¹⁷Munira Z Gunja et al, 'Health and Health Care for Women of Reproductive Age: How the United States Compares with Other High-Income Countries', *The Commonwealth Fund* (Blog Post, 5 April 2022) <https://www.commonwealthfund.org/publications/issue-briefs/2022/apr/health-and-health-care-women-reproductive-age>.

license.¹⁸ Access to medical treatment for autoimmune disorders has been denied, due to the potential for inducing miscarriage.¹⁹ Treatment for ectopic pregnancy and miscarriage has been compromised, putting patients at risk of life-threatening complications, including fallopian tube rupture and sepsis.²⁰ Many pregnant people, particularly those who experience intersectional disadvantage, are expected to die, as a result of being denied healthcare access and safe abortion.²¹

Before *Dobbs*, US women had been criminally investigated and sentenced for aggravated homicide, following miscarriage and stillbirth.²² In the post-Roe landscape, Paltrow et al argue that pregnant people will be scrutinised for ‘every choice and non-choice they make’, in ‘the name of foetal protection’, especially in communities which are already heavily policed.²³ Women and pregnancy-capable people will be stripped of fundamental human rights, including the right to privacy, healthcare, non-discrimination and freedom from torture and cruel, inhuman or degrading treatment.

Why Roe fell

While a strong majority of Americans oppose abortion bans and support Roe’s retention,²⁴ there is an extensive US anti-abortion movement comprised of myriad organisations, individuals and networks. Some focus exclusively on ending abortion. Others are located within the broader ambit of the religious right, which became focused on abortion in the late 1970s, when political strategists recognised the potential for the issue to mobilise Catholic and white evangelical Christian voters, coalescing diffuse moral anxieties about liberalism, feminism, civil rights and the sexual revolution.²⁵ Overturning Roe became a focus of the movement, after efforts to amend the Constitution’s text failed in the early 1980s.²⁶

Some sectors of the movement have taken direct action to stop abortions, through the targeted intimidation and harassment of patients and staff outside clinics or violent attacks on abortion providers, including kidnappings and murder.²⁷ Others have worked through the political and legal process and become increasingly enmeshed within the Republican Party.²⁸ By facilitating changes in the way charitable organisations are regulated and political campaigns are funded, the anti-abortion movement has shaped Republican Party strategy, policy and priorities.²⁹ The elevation of political candidates who support the anti-abortion agenda has secured the passage of hundreds of state laws which restrict abortion, undermine access and burden providers with onerous, costly and unnecessary regulations designed to close them down.

The anti-abortion movement has made control of the Supreme Court a preoccupation for Republican voters and shifted the Party’s treatment of judicial nominations from a consensus-based approach to one focused on ‘energising base voters’.³⁰ Ziegler observes that Donald Trump understood the electoral power of the anti-abortion movement and its preoccupation with judicial appointments, and was more willing to advance its aspirations than any previous Republican President.³¹ During his term, Trump appointed three Supreme Court justices, enabling a 5-4 majority to be achieved in *Dobbs*, a ruling which Ziegler observes ‘borrowed language from the anti-abortion movement – the very movement that shaped the court as it exists today’.³²

Beyond the US

The US anti-abortion movement has not confined its agenda to stopping abortion nationally. It has pressed for bans on US family planning funding for organisations which provide or actively promote abortion. This policy emerged

¹⁸Mary Tuma, ‘“At death’s door”: Abortion bans endanger lives of high-risk patients, Texas study shows’, *The Guardian* (online, 13 July 2022) <https://www.theguardian.com/world/2022/jul/13/texas-abortion-ban-maternal-health-risk>.

¹⁹Sonja Sharp, ‘Post-Roe, many autoimmune patients lose access to “gold standard” drug’, *Los Angeles Times* (online, 11 July 2022) <https://www.latimes.com/california/story/2022-07-11/post-ro-roe-many-autoimmune-patients-lose-access-to-gold-standard-drug>.

²⁰Elizabeth Weise, ‘Pregnancy-related deaths could rise 20% or more in states that outlaw abortion, experts say’, *USA TODAY* (online, 4 May) <https://www.usatoday.com/story/news/health/2022/05/04/roe-abortion-ban-pregnancy-deaths/9630025002/>.

²¹Ibid; Li Cohen, ‘“People will die”: OB-GYNs explain how ectopic pregnancy and other complications threaten lives without abortion care’, *CBS* (online, 1 July 2022) <https://www.cbsnews.com/news/abortion-doctors-ectopic-pregnancy-risk>.

²²Lynn M Paltrow & Jeanne Flavin, ‘Arrests of and Forced Interventions on Pregnant Women in the United States 1973–2005: Implications for Women’s Legal Status and Public Health’ (2013) 38(2) *Journal of Health Politics, Policy and Law* 299.

²³Lynn M Paltrow, Lisa H Harris & Mary Faith Marshall, ‘Beyond Abortion: The Consequences of Overturning Roe’ (2022) 22(8) *The American Journal of Bioethics* 1, 8.

²⁴Alison Durke, ‘How Americans Really Feel About Abortion: The Sometimes Surprising Poll Results As Supreme Court Overturns Roe v Wade’, *Forbes* (online, 24 June 2022) <https://www.forbes.com/sites/alisondurkee/2022/06/24/how-americans-really-feel-about-abortion-the-sometimes-surprising-poll-results-as-supreme-court-reportedly-set-to-overturn-roe-v-wade/?sh=52ad48ab2f3a>; Hannah Hartig, ‘About six-in-ten Americans say abortion should be legal in all or most cases’, *Pew Research Centre* (online, 13 June 2022) <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/>.

²⁵See, eg, Randall Balmer, ‘The Real Origins of the Religious Right’, *Politico Magazine* (online, 27 May 2014) <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/>.

²⁶Mary Ziegler, *Abortion and the Law in America: Roe v Wade to the Present* (Cambridge University Press, 2020) 58–87.

²⁷See, eg, Sarah Frostenson, ‘40 Years of Attacks on Abortion Clinics, Mapped’, *Vox* (online, 1 December 2015) <https://www.vox.com/2015/12/1/9827886/abortion-clinic-attacks-mapped>; Feminist Majority Foundation (n 13).

²⁸Ziegler (n 12) 6; See, eg, Daniel K Williams, ‘The GOP’s Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s’ (2011) 23(4) *The Journal of Political History* 513, 533.

²⁹Ziegler (n 12) 207.

³⁰Ibid 204–5.

³¹Ibid 199.

³²Mary Ziegler, ‘Roe’s Death Will Change American Democracy’, *The New York Times* (online, 24 June 2022).

in the Reagan administration's 'Global Gag Rule', introduced in 1984. It was subsequently rescinded by Democrat administrations and reinstated by Republican administrations. The Trump administration expanded it to ban global aid funding to all organisations which provide abortions or abortion-related services (even if those services are funded by other sources)³³ and sought to expand it further, ahead of the 2020 election.³⁴ The policy undermined HIV services, reduced access to contraceptives and increased preventable deaths from unsafe abortions in developing countries.³⁵

In pursuit of its international agenda, the US anti-abortion movement shifted from a stance of hostility towards the United Nations (UN) to active engagement, seeking to build coalitions, to arrest the progress of consensus around sexual and reproductive rights.³⁶ US anti-abortion organisations have positioned themselves as leaders in driving change to international law and policy.³⁷ Under the Trump administration, they formed part of official US delegations to the UN.³⁸ At their behest, the US pressed for the deletion of language which could promote abortion access from international consensus documents. At the General Assembly, the US sought the removal of references to 'reproductive health and rights' and, at the Security Council, threatened to use its veto power to secure the deletion of references to 'sexual and reproductive health' from a resolution on sexual violence.³⁹

The Trump administration worked with US anti-abortion organisations to coordinate and co-sponsor an international declaration designed to generate a new consensus framework to undermine international norms supporting safe, lawful and accessible abortion. The Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family was signed by the US two weeks prior to the 2020 election, alongside 33 nations ranked among the worst countries for women.⁴⁰ It '[reaffirms] that

there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion.'⁴¹

Despite the Biden administration's withdrawal of co-sponsorship and signature, the declaration has been used to substantiate the erroneous claim that abortion access is not supported by human rights norms. Although it is not binding under international law, the declaration has been relied on in submissions to US courts, such as the Supreme Court in *Dobbs*⁴² and in support of abortion restrictions worldwide, including Poland's near-total abortion ban.⁴³ Research by openDemocracy found that, between 2007 and 2020, 28 US Christian Right organisations, many linked to Trump's administration, spent at least \$280 million undermining reproductive and LGBTIQ+ rights worldwide.⁴⁴

Australia's abortion law framework

Against this backdrop, the article will now consider the degree to which Australian law and policy is subject to the influence of the US anti-abortion movement. In 2021, Australia's federal government reported to the UN Committee on the Elimination of Discrimination against Women that 'Australia actively champions and maintains a long-standing commitment to the promotion and protection of sexual and reproductive health and rights as a global and domestic health priority.'⁴⁵ Australia's foreign aid program seeks to strengthen sexual and reproductive health and rights, to meet the needs of women and girls.⁴⁶ Domestically, the National Women's Health Strategy 2020–2030 counts equitable access to pregnancy termination services as a measure of success.⁴⁷

The decision to terminate a pregnancy is not grounded in Australia's *Constitution*. The federal government regulates

³³Zara Ahmed, 'The Unprecedented Expansion of the Global Gag Rule: Trampling Rights, Health and Free Speech' (2020) 23 *Guttmacher Policy Review* https://www.guttmacher.org/sites/default/files/article_files/gpr2301320.pdf.

³⁴Federal Acquisition Regulation: *Protecting Life in Global Health Assistance*, United States Government (14 September 2020) <https://www.federalregister.gov/documents/2020/09/14/2020-17551/federal-acquisition-regulation-protecting-life-in-global-health-assistance>.

³⁵Editorial: 'The devastating impact of Trump's global gag rule' (2019) 393 (10189) *The Lancet* [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)31355-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)31355-8/fulltext).

³⁶Doris E Buss, 'The Christian Right, Globalization and the "Natural Family"' in Maru Ann Tetreat and Robert A Denemark, *Gods, Guns and Globalization: Religious Radicalism and International Political Economy* (Lynne Rienner, 2004), 57–77.

³⁷Ibid 59.

³⁸Michelle Kosinski and Eli Watkins, 'US successfully removes "sexual health" references from UN resolution on sexual violence', *CNN Politics* (online, 23 April 2019) <https://edition.cnn.com/2019/04/23/politics/un-security-council-sexual-violence/index.html>.

³⁹Jacqueline Howard, 'Trump administration pushes UN to drop mentions of reproductive health from official documents', *CNN* (online, 23 September 2019) <https://edition.cnn.com/2019/09/23/health/alex-azar-united-nations-universal-health-coverage-bn/index.html>.

⁴⁰See Georgetown University's Women, Peace and Security Index (Web Page) <https://giwps.georgetown.edu/wp-content/uploads/2019/12/WPS-Index-2019-20-Report.pdf>.

⁴¹Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family, 22 October 2020 <https://aul.org/wp-content/uploads/2021/06/geneva-consensus-declaration-english.pdf>.

⁴²See, eg, Center for Family and Human Rights, 'Brief of Amicus Curiae Center for Family and Human Rights in Support of Petitioners', *Submission in Dobbs v Jackson Women's Health Organisation*, No 19-1392, 20-21, 30-33.

⁴³See Ani Banerjee, 'How A Broken US Non-Profit System Facilitated Anti-Abortion Law in Poland', *Berkeley Economic Review* (online, 17 February 2021) <https://econreview.berkeley.edu/how-a-broken-us-non-profit-system-facilitated-anti-abortion-law-in-poland/>.

⁴⁴Claire Provost, Lou Ferreira and Claudia Torrisi, 'Trump's top lawyer in "crusade" against women's and LGBT rights across Europe' (online, 27 October 2020) <https://www.opendemocracy.net/en/5050/trump-sekulow-war-womens-lgbt-rights-europe/>.

⁴⁵Committee on the Elimination of Discrimination against Women, *Information received from Australia on follow-up to the concluding observations on its eighth periodic report* (16 February 2021) CEDAW/C/AUS/FCO/8 [25].

⁴⁶See, eg, Department of Foreign Affairs and Trade, *UNFPA Indo-Pacific Sexual and Reproductive Health and Rights COVID-19 Surge Response program* (2021) <https://www.dfat.gov.au/publications/development/unfpa-indo-pacific-sexual-and-reproductive-health-and-rights-covid-19-surge-response-srhr-c-surge-program>.

⁴⁷Australian government, *National Women's Health Strategy 2020-2030* (April 2019).

pharmaceuticals used for medical abortion through its Therapeutic Goods Administration and provides some abortion funding through its Medicare Benefits Scheme, subsidising the cost of abortions performed by private healthcare providers. Beyond this, abortion is largely regulated at the state and territory level, with distinct statutory regimes in each jurisdiction. In this respect, Australia resembles the US, where *Dobbs* returned the regulation of abortion to the states. Unlike the US, the past quarter century has seen Australia's states and territories embark on a trajectory of decriminalisation, dispensing with laws built on the template of the United Kingdom's *Offences Against the Person Act 1861*.

Legislation allowing unrestricted access to abortion up to 20 weeks' gestation was enacted in Western Australia in 1998⁴⁸ and decriminalisation achieved in the Australian Capital Territory (ACT) in 2002, Victoria in 2008, Tasmania in 2013, the Northern Territory in 2017, Queensland in 2018, New South Wales (NSW) in 2019 and South Australia in 2021.⁴⁹ In all states except Western Australia, doctors who conscientiously object to providing abortion services must refer patients to a doctor who has no such objection. While the ACT imposes no gestational limits on abortion access, all other jurisdictions stipulate a gestational period (ranging from 16 to 24 weeks), in which abortion is lawful on request; after this period, medical approval must be obtained. Legislation in each state and territory also establishes safe access zones around facilities providing abortions, proscribing conduct such as harassment, intimidation and access obstruction.⁵⁰ Significant barriers to abortion access remain,⁵¹ including over-regulation and confusion associated with Australia's patchwork of laws.⁵² However, any attempt to harmonise state and territory laws would face the formidable challenge of a growing anti-abortion movement inspired by developments in the US.

The US anti-abortion movement in Australia

Australia's anti-abortion movement is significantly smaller than its US counterpart. But the US movement has been a source of support and strategic guidance since the 1970s and its discourses and tactics increasingly replicated in Australia.⁵³ As the US movement expanded its international aspirations and reach, Australian branches of US groups have emerged. One year after its founder toured Australia in 1996, the Brooklyn-established 'Helpers of God's Precious Infants' (HOGPI) was established in seven Australian cities.⁵⁴ Five years after its establishment in Texas in 2004, '40 Days for Life' had an Australian presence.⁵⁵ Prior to the enactment of safe access zone legislation, both groups conducted a range of activities outside clinics, which they characterised as peaceful and loving 'prayerful outreach'.⁵⁶ However, research conducted nationwide has found that the conduct of individuals associated with these groups has included disseminating medical misinformation, obstructing clinic entry, photographing patients and the targeted harassment of patients and staff, including death threats directed at staff.⁵⁷

The presence of clinic picketers in Australia has interfered with privacy and undermined well-being, safety and healthcare access.⁵⁸ The safety of patients, staff and others could not be safeguarded, while picketers maintained a presence outside clinics. Clinical psychologist Dr Susie Allanson described HOGPI's constant presence outside Melbourne's Fertility Control Clinic for over two decades as a source of pervasive anxiety and fear, observing that 'on occasion ... someone from the American chapter would come out here and they'd get all revved up and they'd get even more confronting'.⁵⁹ On 16 July 2001, a man who had previously stood with HOGPI entered the clinic, planning a massacre, and murdered its security guard.⁶⁰ Echoing responses to violent attacks on US abortion providers,

⁴⁸*Health (Miscellaneous Provisions) Act 1911* (WA) s 334. After 20 weeks' gestation, approval for abortion is required from at least two doctors from a panel of six on the basis that the pregnant person or foetus has a severe medical condition. Further restrictions apply to pregnant people under 16 years of age, who must obtain approval from a parent or the Children's Court.

⁴⁹*Crimes (Abolition of Offence of Abortion) Act 2002* (ACT); *Abortion Law Reform Act 2008* (Vic); *Reproductive Health (Access to Terminations) Act 2013* (Tas); *Termination of Pregnancy Law Reform Act 2017* (NT); *Termination of Pregnancy Act 2018* (Qld); *Abortion Law Reform Act 2019* (NSW); *South Australia's Termination of Pregnancy Act 2021* came into effect on 7 July 2022.

⁵⁰See *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9; *Health Act 1993* (ACT) div 6.2; *Public Health and Wellbeing Act 2008* (Vic) pt 9A; *Termination of Pregnancy Law Reform Act 2017* (NT) pt 3; *Public Health Act 2010* (NSW) pt 6A; *Termination of Pregnancy Act 2018* (Qld) pt 4; *Health Care Act 2008* (SA) pt 5A; *Public Health Act 2016* (WA) pt 12C.

⁵¹See generally Ronli Sifris and Tania Penovic, 'Barriers to abortion access in Australia before and during the COVID-19 pandemic' (2021) 86[102470] *Women's Studies International Forum* 86.

⁵²Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) [49(1)], see also MSI Australia, *Australian Abortion Access Scorecard* (online, 26 August 2022) <https://www.maristopes.org.au/advocacy-policy/abortion-access-scorecard-australia/>.

⁵³See generally Donna Wyatt and Katie Hughes, 'When Discourse Defies Belief: Anti-Abortionists in Contemporary Australia' (2009) 45(3) *Journal of Sociology* 235; Ainsley Symons, 'Anti-Abortion Campaigning and the Political Process' (2014) 279 *Recorder* (*Australian Society for the Study of Labour History, Melbourne Branch*) 2 3.

⁵⁴*Helpers of God's Precious Infants: Founder* (Web Page) <https://www.lifeandfamily.com.au/helpers-of-gods-precious-infants-founder/>.

⁵⁵Thaddeus Baklinski, '40 Days For Life Campaign Goes Global: Australia, Northern Ireland Join Campaign', *Lifesite News* (online, 17 February 2009) <https://www.lifesitenews.com/news/40-days-for-life-campaign-goes-global-australia-northern-ireland-join-campa/>.

⁵⁶See *Helpers of God's Precious Infants: Founder* (n 54); 40 Days for Life, *About overview* (online) <https://www.40daysforlife.com/en/about-overview.aspx>.

⁵⁷Ronli Sifris, Tania Penovic and Caroline Henckels, 'Advancing reproductive rights through legal reform: the example of abortion clinic safe access zones' (2020) 43(3) *UNSW Law Journal*, 1078; Ronli Sifris and Tania Penovic, 'Anti-abortion protest and the effectiveness of Victoria's safe access zones: An analysis' (2018) 44(2) *Monash University Law Review* 317.

⁵⁸*Ibid.*

⁵⁹Interview with Dr Susie Allanson, Clinical Psychologist, Fertility Control Clinic (Tania Penovic/Ronli Sifris, 22 March 2017).

⁶⁰*R v Knight* [2002] VSC 498 (19 November 2002) [16] (Teague J).

HOGPI representatives observed that '[i]t's hardly surprising that abortion leads to acts of violence'.⁶¹

While safe access zone legislation has stopped members of groups such as HOGPI from maintaining a presence outside clinics, their anti-abortion activity over the years has helped build Australia's anti-abortion movement. Within this movement, groups without direct ties to US groups have hosted and received guidance from US anti-abortionists. The decision to form Right to Life Australia from the Victorian branch of the Australian Federation of Right to Life Associations was influenced by a US speaker, who visited Australia in 1979.⁶² In 2015, Right to Life Australia sponsored an Australian speaking tour for Troy Newman, president of Operation Rescue, a militant US anti-abortion group known for its aggressive clinic blockades,⁶³ although Newman's tour did not proceed. His visa was cancelled, partly based on his writings, questioning why doctors who provide abortions are not executed and women who obtain abortions are not charged with murder.⁶⁴

The US anti-abortion movement's influence on Australian law and policy

In an examination of religion in Australian federal politics, Maddox observed the emergence of US-style anti-abortion rhetoric during the Howard years.⁶⁵ During this time, Baird notes that aggressive and opportunistic anti-abortion action was supported by the presence of a number of parliamentarians, from the conservative Lyons Forum within government and balance-of-power Senator Brian Harra-dine,⁶⁶ who leveraged his support for the partial sale of Telstra, to secure restrictions on abortion in Australia and internationally. Domestically, a ministerial veto was placed over the importation and registration of mifepristone, barring access to a safe alternative to surgical abortion for over a decade. Under Australia's foreign policy, AusAID

Family Planning Guidelines modelled on the US Global Gag Rule were introduced, to bar the use of aid money for activities involving abortion training, services and counselling.

After becoming Health Minister in 2003, Tony Abbott endeavoured to place abortion on the political agenda, echoing the rhetoric of the US anti-abortion movement, in a series of speeches and statements 'invit[ing] Christians to build a groundswell against abortion.'⁶⁷ Referring to abortion as an 'unambiguous moral tragedy'⁶⁸ and epidemic,⁶⁹ Abbott sought to undermine abortion access, attempting to stop Medicare funding for abortion and to retain the ministerial veto regarding mifepristone⁷⁰ and funding anti-abortion groups to provide 'pregnancy counselling'.⁷¹

In the past 15 years, US developments have been increasingly referenced in Australia. The Obama administration's lifting of the Global Gag served as a catalyst for calls for the Rudd government to lift the AusAID ban on abortion spending.⁷² Trump's reinstatement of the policy was the impetus for a campaign by the Australian Christian Lobby for a Trump-style global gag.⁷³

Australian law reform has not been free of US influence. US activists from 40 Days for Life were invited to South Australia's Parliament, to share strategies for resisting liberalisation.⁷⁴ Parliamentary debates have been replete with discourses borrowed from the US. These include assertions that liberalisation will enable the routine provision of 'abortion up to birth', a narrative favoured by the US anti-abortion movement and Republican politicians,⁷⁵ which featured heavily in decriminalisation debates in Queensland, NSW and South Australia and attempts to politicise abortion federally. They furthermore include narratives of escalating abortion numbers and high rates of late-gestation abortions, despite a downward trend in abortion numbers⁷⁶ and evidence that only 1-3 percent of abortions are performed after 20 weeks' gestation.⁷⁷

⁶¹Susie Allanson, *Murder on his Mind: The Story of Australia's Abortion Clinic Murder* (Wilkinson Publishing, 2021) 138 9.

⁶²Jocelyn Hedley, "'On the side of the saints': A history of the Sydney Catholic pro-life organisation Family Life International with reference to identity formation' (PhD thesis, University of Notre Dame Australia, 2017) 94 7.

⁶³See 'Troy Newman Tour: Details and Bookings' (Web Page) <https://righttolife.com.au/resources/166-the-cost-of-body-parts>.

⁶⁴Daniel Hurst, 'US anti-abortion activist Troy Newman abandons visa cancellation challenge', *Guardian Australia* (online, 30 October 2015) <https://www.theguardian.com/australia-news/2015/oct/30/us-anti-abortion-activist-troy-newman-abandons-visa-cancellation-challenge>.

⁶⁵Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics* (Allen & Unwin, 2005) 164 227.

⁶⁶Barbara Baird, 'Abortion Politics during the Howard Years: Beyond Liberalisation' (2013) 44(2) *Australian Historical Studies* 245.

⁶⁷Ibid 314.

⁶⁸Kate Gleeson, 'Tony Abbott and Abortion: Miscalculating the Strength of the Religious Right' (2011) 46(3) *Australian Journal of Political Science* 473.

⁶⁹Ibid.

⁷⁰Baird (n 66) 257.

⁷¹Ibid 483.

⁷²Michelle Grattan, 'End abortion aid ban, Smith urged', *Sydney Morning Herald* (online, 26 January 2009) <https://www.smh.com.au/national/end-abortion-aid-ban-smith-urged-20090125-7pgv.html>.

⁷³Sean Mantesso, 'Australian Christian Lobby campaigns for Trump-style abortion gag on aid providers', *ABC News* (online, 1 May 2017) <https://www.abc.net.au/news/2017-05-01/australian-christian-lobby-campaigns-for-abortion-gag/8487502>.

⁷⁴Jenny Brinkworth, 'Timely visit by pro-lifers', *The Southern Cross* (online, 10 April 2019) <https://thesoutherncross.org.au/news/2019/04/10/timely-visit-by-pro-lifers/>.

⁷⁵Katie Balevic, 'From Donald Trump to Mike Pence, the GOP parrots claims about "abortions at the moment of birth" that experts call "terrible lies" and a "complete falsehood"', *Business Insider* (online, 9 July 2022) <https://www.businessinsider.com/why-gop-keeps-talking-about-abortions-at-moment-of-birth-2022-6>.

⁷⁶Louise A Keogh, Lyle C Gurrin and Patricia Moore, 'Estimating the Abortion Rate in Australia from National Hospital Morbidity and Pharmaceutical Benefits Scheme Data' (2021) 215(8) *Medical Journal of Australia* 375.

⁷⁷SA Health, *Pregnancy Outcomes in South Australia* (2017) <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/health+statistics/pregnancy+outcome+statistics/pregnancy+outcome+statistics>; Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws* (Report no 76, June 2018).

Former Deputy Prime Minister Barnaby Joyce claimed via unsolicited recorded telephone messages that decriminalisation in NSW would permit sex-selective abortions and 'abortions up to the day of birth'.⁷⁸ Tony Abbott echoed the claims.⁷⁹ Recently, George Christensen introduced a Federal Bill,⁸⁰ modelled on US legislation,⁸¹ which sought to penalise doctors for failing to provide life-sustaining treatment to fetuses born alive following abortion. While doctors have described the Bill as 'nonsensical' and 'premised on circumstance that by the nature of the procedure wouldn't occur',⁸² the Bill received some support, after religious lobby groups, including FamilyVoice Australia, Cherish Life and the Australian Christian Lobby, urged members of Parliament, via a mass email campaign, to adopt the Bill.⁸³

Growing politicisation

The hyper-partisanship surrounding abortion in the US has not been replicated in Australia. Abortion remains a conscience vote issue. Yet, despite strong public support for lawful and accessible abortion,⁸⁴ there are signs of growing politicisation. At the state level, the Liberal National Party in Queensland promised to revisit the state's recently enacted law decriminalising abortion in its 2020 election campaign and received campaigning support from the anti-abortion movement.⁸⁵ One Nation ran an explicit anti-abortion campaign, which replicated language used by the US anti-

abortion movement.⁸⁶ Days after legislation decriminalising abortion took effect in South Australia, a newly formed anti-abortion group was working to enlist parliamentarians to 'take forward' model legislation to restrict abortion access.⁸⁷

At the federal level, a 2019 election pledge to fund abortions in public hospitals saw Labor candidates targeted by anti-abortion groups,⁸⁸ utilising discourses commonly used in the US. Although the pledge was not renewed in 2022, allegations that Labor favoured an 'extreme late-term abortion agenda' persisted.⁸⁹ Under the Morrison government, the religious right gained political influence, pressing for religious freedoms legislation, which would have eroded abortion access.⁹⁰ During this period, anti-abortion parliamentarians, including the Assistant Minister for Women, became more vocal.⁹¹ Religious groups aligned with the 'Canberra Declaration'⁹² embarked on a 'prayer and gospel campaign', to secure the Morrison government's return, stressing that '[w]e need to see Godly leaders placed in our Parliament' and 'Australia's greatest need is an outpouring of the Holy Spirit and revival and transformation for our nation.'⁹³

No time for complacency

Prime Minister Anthony Albanese described Roe's fall as 'a setback' for US women's 'right to control their own bodies and their lives' and observed, '[i]t is a good thing that in Australia, this is not a matter for partisan political debate.'⁹⁴ But efforts to politicise abortion have intensified. Discourses and strategies used by an emboldened US anti-

⁷⁸Kate Kachor, 'Barnaby Joyce sends out robocalls ahead of NSW abortion bill parliament debate', 9 News (online, 20 August 2019) <https://www.9news.com.au/national/abortion-nsw-news-barnaby-joyce-sends-robocalls-ahead-of-nsw-abortion-bill-debate/38a416d0-f4e0-477a-a65b-9ce1c3b8f560>.

⁷⁹Nick Baker, 'NSW abortion bill "death on demand" Tony Abbott tells CPAC's conservative faithful', SBS News (online, 9 August 2019) <https://www.sbs.com.au/news/article/nsw-abortion-bill-death-on-demand-tony-abbott-tells-cpac-conservative-faithful/nk6tcl2n>.

⁸⁰George Christensen, *Children Born Alive Protection Bill 2021* (Web Page) <https://www.georgechristensen.com.au/bornalive>.

⁸¹See, eg, Mason Storrs, 'Rep Pfluger signs discharge petition for vote on Born-Alive Abortion Survivors Protection Act', NewsWest9 (online, 22 April 2021) <https://www.newswest9.com/article/news/nation-world/rep-pfluger-signs-discharge-petition-for-vote-on-born-alive-abortion-survivors-protection-act/513-fb816c3d-b6ec-479a-bc93-8bfa48b58f3d>.

⁸²Paul Karp, 'George Christensen's "nonsensical" abortion proposal could penalise doctors up to \$440,000', *Guardian Australia* (online, 23 February 2021) <https://www.theguardian.com/australia-news/2021/feb/23/george-christensens-nonsensical-abortion-proposal-could-penalise-doctors-up-to-440000>.

⁸³Si Gladman, 'Christian Right rallies behind Christensen's push for "parting shot" with abortion bill', *Rationalist Society of Australia* (online, 11 May 2021) <https://rationalist.com.au/christian-right-rallies-behind-christensens-push-for-parting-shot-with-abortion-bill/>.

⁸⁴For an examination of Australian public polling on abortion, see Anne O'Rourke, 'A Legal and Political Assessment of Challenges to Abortion Laws by Anti-choice Activists in Australia and the Progression of Abortion Law in Australia and the United States' (2022) XX *The American Journal of Comparative Law* 1.

⁸⁵Peter McCutcheon, 'Why is the anti-abortion lobby backing the LNP, when the Opposition Leader doesn't want to talk about it?' *ABC News* (online, 15 October 2020) <https://www.abc.net.au/news/2020-10-15/qld-election-analysis-anti-abortion-lobby-lnp-policy/12763174>.

⁸⁶See 'A National First: "Right to life" policy released by One Nation Party', *Cherish Life Queensland* (Blog Post, 22 August 2020) <https://www.cherishlife.org.au/right-to-life-policy-onp>.

⁸⁷Tory Shepherd, 'Anti-abortion group claims SA politicians pledged to "take forward" bill reversing new medical laws', *Guardian Australia* (online, 5 July 2022) <https://www.theguardian.com/australia-news/2022/jul/05/anti-abortion-group-claims-sa-politicians-pledged-to-take-forward-bill-reversing-new-medical-laws>.

⁸⁸Judith Ireland, 'Labor women bracing to defend party's abortion policy' *Sydney Morning Herald* (online, 2 June 2019) <https://www.smh.com.au/politics/federal/labor-women-bracing-to-defend-party-s-abortion-policy-20190524-p51qxd.html>.

⁸⁹Josh Butler, 'Labor denounces "disgusting smear campaign" on abortion in Australia's most marginal seat' *Guardian Australia* (online, 11 May 2022) <https://www.theguardian.com/australia-news/2022/may/11/labor-denounces-disgusting-smear-campaign-on-abortion-in-australias-most-marginal-seat>.

⁹⁰The Religious Discrimination Bill 2019 (Cth) expressly allowed health practitioners to refuse to participate in health services on the grounds of religious belief, overriding state laws which require doctors with a conscientious objection to abortion to refer a patient to a doctor who does not hold such objection.

⁹¹See Catherine Sheehan, 'Senator to Speak at Pro-life Event', *Catholic Voice* (Blog Post, 27 June 2019) <https://www.catholicvoice.org.au/senator-to-speak-at-pro-life-event/>; Tony Moore, "'A little bit scared of us": Pro-life Senators speak at anti-abortion rally in Brisbane', *Brisbane Times* (online, 30 April 2022) <https://www.brisbanetimes.com.au/national/queensland/a-little-bit-scared-of-us-pro-life-senators-speak-at-anti-abortion-rally-in-brisbane-20220430-p5ahdu.html>; Toby Crockford, 'Canavan, Stoker make bold claims at Brisbane pro-life rally', *Sydney Morning Herald* (online, 8 May 2021) <https://www.smh.com.au/politics/federal/senator-matt-canavan-vows-to-cut-sex-selection-abortion-medicare-funding-20210508-p57q4w.html>.

⁹²*Canberra Declaration* (Web Page) at <https://canberradeclaration.org.au/about/history/>.

⁹³David Hardaker, 'As judgment day nears, prayers emerge for another Morrison miracle and Liberal MPs join in', *Crikey.com* (online, 29 April 2022) <https://www.crikey.com.au/2022/04/29/prayers-emerge-morrison-miracle/>.

⁹⁴Daniel Hurst, "'Devastating": Australian politicians respond to US supreme court's decision on abortion rights', *Guardian Australia* (online, 27 June 2022) <https://www.theguardian.com/australia-news/2022/jun/27/devastating-australian-politicians-respond-to-us-supreme-courts-decision-on-abortion-rights>.

abortion movement are being reproduced in Australia, spreading misinformation, undermining access and stigmatising those who seek and provide healthcare. Echoing views expressed in the US,⁹⁵ the Australian Christian Lobby declared *Dobbs* 'just the beginning!', a 'tremendous victory ... in the fight to protect unborn lives!' and enjoined supporters to 'get active' with a 'new, young & pro-life generation ... rising up!'⁹⁶ Efforts to erode reforms and undermine abortion access will persist and the election of like-minded politicians could see the politicisation of abortion become entrenched. For those who are committed to safeguarding lawful and accessible abortion, the price of retaining hard-won legislative reforms will be eternal vigilance.

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⁹⁵See, eg, John Grondelski, 'Dobbs is Just the Beginning Now We Must Seize the Narrative', *National Catholic Register* (Blog Post, 25 June 2022) <https://www.ncregister.com/blog/dobbs-seize-the-high-ground>.

⁹⁶See Australian Christian Lobby (Facebook, 24 June 2022) <https://www.facebook.com/ACLobby/posts/pfbid0Ly9GsE4eiaCGAkH9hWR9vPzbd9z6rycKSqNBgHN8LKjz5fweFGMX8TH9JYiT6MI>.