

Minority Report

Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005

**Senator Stott Despoja
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1. Background:

The aim of *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005* (to be referred to as ‘the bill’ from here on after) is to regulate pregnancy counselling services to prevent misleading or deceptive advertising or notification of pregnancy counselling services.

On the recommendation of the Selection of Bills Committee, the bill was referred to the Community Affairs Legislation Committee for further examination into the adequacy of the legislation in improving the regulation of pregnancy counselling services. The Committee was also required to determine whether counselling provided by Government funded pregnancy counselling services is objective, non-directive and includes information on all three pregnancy counselling options.

This bill does not discriminate against any particular pregnancy counselling service, whether anti-choice or pro-choice.

It is designed to implement the necessary regulatory measures to prevent the misleading and deceptive advertising of pregnancy counselling services. It will not force services that have a philosophical opposition to abortion to refer women to termination clinics, but as the legislation clearly sets out, it requires these services to advertise if they do not provide that particular service, so women can be fully informed.

However, Dr Sally Cockburn argued in her opening statement to the Committee that the focus should be on the rights of Australian women to receive non-directive impartial and evidence-based information on all three pregnancy options. Dr Cockburn argued that:

Much of the focus has been on the rights of service providers. SH&FPA, however, believes that focus should be on the rights of Australian women and their support persons.¹

2. Summary:

This Minority report analyses some of the key debates to come out of the Committee inquiry into the bill.

The Committee process was an essential step in bringing a full and ongoing debate about the issue of transparency in advertising of pregnancy counselling services to the Federal Parliament.

Unlike organisations which charge for the services they provide, and are thus subject to the Trade Practices Act, non-fee charging pregnancy counselling organisations are

¹ *Committee Hansard* 19.7.06 p.24 (Dr Sally Cockburn, SH&FPA)

not regulated in any way to prevent them from engaging in deceptive behaviour, or misleading advertising.

2.1 The key conclusions:

This bill was introduced into the Senate “to prohibit misleading and deceptive advertising and notification of pregnancy counselling services; promote transparency and full choice in the notification and advertising of pregnancy counselling services; improve public health; and minimise the difficulties associated with obtaining advice to deal with unplanned pregnancy.”²

Considering most pregnancy counselling services are not subject to the Trade Practices Act because they usually do not charge for the information or services they provide, this bill “essentially makes pregnancy counselling services subject to the same laws regarding misleading advertising as organisations which are engaged in trade or commerce.”³

Evidence presented during the committee process further highlighted the need for a piece of legislation of this kind to protect Australian women from accessing false and misleading pregnancy counselling services. This is detailed in section 3 of the report.

The introduction of this bill is essential in protecting the rights of women, and preventing pregnancy counselling services that do not provide balanced information about, offer, or refer for all three options, from advertising in ways that suggest otherwise. This Bill, in effect, will hold pregnancy counselling services accountable for the advertising and information that they provide, creating a safety mechanism protecting the fundamental right for women to have access to non-directive counselling on all three pregnancy options: keeping the baby, adoption, or abortion, if they choose.

The bill is the best way so far to prevent pregnancy counselling services from advertising services for which they do not provide, and which will ensure they become accountable for the information and services that they do provide.

This bill should be seen as the vital first step in the legislative and policy debate about pregnancy counselling services in Australia, and the related issues and concerns to arise from the committee hearings.

2.2 The key findings:

- The public hearings highlighted the misinterpretation of the bill, with anti-choice organisations and individuals arguing that this piece of legislation:
 - forces pregnancy counsellors to participate in an illegal act

² Senator Natasha Stott Despoja Second Reading Speech *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005* Senate Hansard 23/06/05 p4

³ *Ibid*

-
- forces pregnancy counselling services to provide referrals for an abortion
 - affects the amount of women calling/visiting these counselling services, by ‘forcing’ them to outline what they do/do not refer/advise on
 - will shut down or decrease funding to certain services
 - fails to regulate ‘pro-choice’ counselling services due to the biased nature of the bill
 - Highlighted the need to incorporate a definition of the term ‘refer’ in the bill
 - Misunderstanding of the term ‘refer’
 - Whether or not it is only a medical term
 - Highlighted the need to adequately address the definition of non-directive counselling
 - Inadequacy of the Department of Health and Ageing definition compared to the definition provided in the bill
 - Relevant suggestions to address this issue
 - Highlighted the concerns over the 24-hour pregnancy counselling listing in the *White Pages*
 - Raised other concerns outside the content of the bill
 - Misinformation about abortion risks e.g. alleged link between breast cancer and abortion
 - What medical information pregnancy counselling service providers should base their research on (i.e. W.H.O or N.H.M.R.C)
 - Counselling standards
 - The report concludes that this piece of legislation is essential in protecting women from misleading advertising, and highlights that further debate and discussion about other related pregnancy counselling concerns is required in the Federal Parliament;

We welcome and appreciate the participation and contribution of medical practitioners, pregnancy counselling services, and individuals all of whom provided the committee with essential evidence in the debate about this bill and other related issues.

3. Need for the Bill

Senator Stott Despoja introduced this Private Member's Bill on June 23, 2005, in response to a number of concerns "about the way one pregnancy counselling service, Pregnancy Counselling Australia, was listed in the White Pages." These concerns are outlined in Senator Stott Despoja's second reading speech introducing the bill, where she stated that:

"my increasing awareness of a number of other pregnancy counselling services which like Pregnancy Counselling Australia, do not refer for terminations yet do not mention this in their advertising and notification material, has encouraged me to continue to push for greater transparency in this area, to ensure women are able to make informed choices about who they contact for information when they are deciding whether they can continue with a pregnancy, are seeking support in continuing their pregnancy, or have decided to have an abortion."⁴

The urgency of this issue was highlighted in March 2006 when the Federal Government announced it would allocate \$51 million over the next four years to establish a National Pregnancy Support Telephone Helpline, and introduce a Medicare rebate for pregnancy counselling. Service providers with any connection to abortion clinics are precluded from accessing the Medicare rebate for their patients, while those groups with religious or philosophical objections to abortion will be eligible.

In response to Questions on Notice, The Department of Health and Aging confirmed that GPs associated with termination clinics would be excluded from the accessing the item stating

- The service is non-directive
- Practitioners and allied health professionals claiming the item are not associated with clinics that provide termination services
- Practitioners cannot also provide termination services for the periods that they are claiming the counselling item.⁵

Anecdotal evidence presented during the inquiry highlighted the need for the regulation of pregnancy counselling services. A document tabled by the Pregnancy Advisory Centre in Adelaide, highlighted the misleading and deceptive information women have been receiving.

One woman reported being told that if she terminated her pregnancy it was;

Killing the baby...Also said that the Government would give them money – a 'few thousand.'⁶

⁴ Senator Natasha Stott Despoja, Second Reading Speech, *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005*, 23 June 2005

⁵ Department of Health and Aging 'Questions and Answers' 3.03.06

⁶ Case studies tabled by Pregnancy Advisory Centre at the Adelaide Committee Hearing 20.7.06

Another woman reported

They told me I was at increased risk of breast cancer later in life and that I was also at risk of being more infertile. They kept saying 'but there is help through the Government financially, there are childcare benefits, we will give you a cot and baby clothes...' they were really pushing and pressuring me to having a child, I felt bullied.⁷

Dr Susie Allanson, a clinical psychologist for the Fertility Control Clinic provided the Committee with a number of case studies from women who had come to the FCC following a traumatic counselling experience. One woman reported;

My boyfriend and I went to a pregnancy counselling service in [a country town]. They showed us a film that was really frightening showing the baby trying to get away from the instruments the doctor was using. Then they told us how bad it was to have an abortion and I would never be able to have any children. They said my boyfriend would leave me if I had an abortion. I said my parents would kill me and kick me out if they found out I was pregnant. They said they would give me baby clothes and somewhere to stay till I had the baby. I said I wanted to finish school and I had to get an abortion. I did not want to live with strangers or adopt the baby out. I was so furious and scared after seeing them.⁸

The bill seeks to ensure that pregnancy counselling organisations that do not refer for terminations declare this, so women seeking advice on whether to continue a pregnancy know what sort of organisation they are contacting.

Ms Cait Calcutt from Children by Choice reinforced this point, arguing that the intent of the bill "is not about outlawing different types of services but about recognising the different types of pregnancy counselling services in Australia. This bill is about ensuring that we represent ourselves accurately to women who may be seeking our services."⁹

The need for greater transparency in pregnancy counselling services was further reinforced by Dr Haikerwal. The AMA highlighted the fact that coercion towards a particular reproductive choice is simply unacceptable;

Whilst advocating for a reduction in Australia's abortion rate through acceptable interventions, the AMA feels that all women must be able to access non-directional pregnancy counselling services at any time. We support the principles behind the bill-namely, that advertising and notification for pregnancy counselling services must not be misleading or deceptive."¹⁰

⁷ *Ibid*

⁸ *Submission No.2 p.7 (Case studies – Dr Susie Allanson)*

⁹ *Committee Hansard 19.7.06 p.39 (Cait Calcutt, Children By Choice)*

¹⁰ *Committee Hansard 22.6.06 p.31 (Dr Mukesh Haikerwal, President of the Australian Medical Association)*

4. Terminology

Although witnesses generally supported the need for transparent advertising, there was debate about some of the terminology used in the bill including:

While there is a clear need for the implementation of legislation to regulate pregnancy counselling services in Australia, a theme to arise from the public hearings, highlighted how sections of the bill have been misinterpreted by anti-choice services.

4.1 Non-directive

As mentioned in the Chair's report, the term "non-directive" received particular attention throughout the Committee process.

Section 3 of the bill defines "non-directive" pregnancy counselling services as:

A service that offers counselling, information services, referrals and support on all three pregnancy options being:

- (a) raising the child; or
- (b) adoption; or
- (c) termination of pregnancy

and will provide referrals to termination of pregnancy services where requested.¹¹

Brigid Coombe, Director of the Pregnancy Advisory Centre, provided the Committee with her understanding of the term non-directive. She stated during her opening address that:

The definition given in the bill of 'non-directive counselling' does not, in my view, describe a counselling methodology but rather a service approach. Moreover, it is an appropriate approach as it responds to the variation in women's needs when contacting such a service. Women often require information about all of the options that they may be considering and expect that they get this from a service which advertises to provide help for them in their crisis. Accurate information is at times a crucial part of women's informed and responsible decision-making process. It is women's needs that should be central to appropriate service provision.¹²

Dr Pesce, from the AMA stated during the hearing in Canberra, that:

non-directional would mean...that once a patient indicates that her preference seems to be for a particular course or approach to solve a problem, you should be able to support her in that decision...I think that, if you want to provide a proper

¹¹ *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005* Senator Stott Despoja

¹² *Committee Hansard 20.7.06* p.35 (Brigid Coombe, Pregnancy Advisory Centre)

service, you are obliged to follow the path that the patient chooses for herself as you advise her on all her options.¹³

Dr Susie Allanson, from the Fertility Control Clinic in Melbourne argued that the term "non-directive", as defined in Senator Stott Despoja's bill, has been confused due to the Department of Health and Ageing's understanding of the definition.

...it appears that the Federal Department of Health and Aging believes that AFPSS is providing "non-directional" pregnancy counselling. The Department's view raises the difficult issue of language and how anti-choice organizations may commandeer pro-choice language to hide their actual practice and philosophy. Because of the problem in discriminating between false providers versus pro-choice pregnancy counselling, pro-choice services have tried to more clearly articulate the concerns and differences between anti-choice and ethical counselling by emphasising certain language such as "non-directional", "woman-centred", "options", and "pro-choice". Unfortunately, anti-choice rhetoric can subsequently claim this language as its own and the confusion for the public continues.¹⁴

In her opening statement to the Committee, The Honourable Carolyn Pickles, from the Children, Youth and Women's Health Service in South Australia argued that non-directive counselling is an important aspect of pregnancy counselling.

Pregnancy counselling services should be non-directive. The experience reported by some women to our staff at Women's Health Statewide indicates that they have been provided with factually incorrect information, such as exaggerated risks of harm such as breast cancer... Women who are distressed may not, may choose not, to discuss their decision with family or friends, and rely on impartial counselling services to assist them.¹⁵

This statement further indicates the general understanding of the term "non-directive" in relation to the bill.

When questioned by one Senator as to whether Children by Choice offer advice on all three options, Coordinator, Cait Calcutt, stated:

We offer counselling, information and referral around all three options of an unplanned pregnancy. The aim of our service is to facilitate a woman to make the decision that she believes is best for her. But, if she comes to us and she has decided that she wants a termination of pregnancy and she is seeking information in relation to termination of pregnancy, we are happy to provide her with that, and the same goes if she has decided upon adoption or continuing with the pregnancy and parenting the child.¹⁶

Non-directive counselling, under the definition of the bill, requires counsellors to provide information on all three pregnancy options, and refer where necessary. The

¹³ *Committee Hansard* 22.6.06 p33 (Dr Andrew Pesce, The Australian Medical Association)

¹⁴ *Submission No.2* p11-12 (Dr Susie Allanson)

¹⁵ *Committee Hansard* 20.7.06 p.33 (The Hon. Carolyn Pickles, Board of Directors, Children Youth and Women's Health Service)

¹⁶ *Committee Hansard* 19.7.06 p.33 (Cait Calcutt, Children by Choice)

meaning of refer in this context has resulted in much debate from those who oppose the bill.

4.2 Refer

We acknowledge that a specific definition of the term ‘referral’ is needed in Part 1 section 3 of the bill, the term ‘refer’ is commonly used as a general term in the daily fixtures of life. However, the term refer is defined as **as “To direct for information or for anything required”**¹⁷

Opponents of the bill claim that pregnancy counselling services do not have the authority to ‘refer’, as this is a medical term, and only Medical Practitioners can provide referrals. This claim, however, was refuted by the Australian Medical Association, with Dr Pesce arguing that:

You can refer to *Hansard*, and there is a more general meaning of the word...I am a bit frustrated that a lot of energy may be spent on this. It would be better to call it ‘assisting the woman in obtaining the relevant service that she requires.’ If you do not want to call it a ‘referral’, then call it ‘assisting’. If you don’t want to assist someone then you should probably say that. We could get stuck on the concept of ‘referral’, which has a specific meaning in the MBS structure and with Doctors, but the term is used all the time. If I were trying to do my job properly and a patient came to me and asked me for something that I could not provide then it would be my obligation to assist her in obtaining that somewhere else, whether that includes a medical referral or a referral to her spiritual counsellor.¹⁸

The frustration with the medicalisation of such a term was evident during the public hearings, with Dr Leslie Cannold from Reproductive Choice Australia stating:

I feel that all this quibbling about the word ‘referral’ is a way of ducking the main issue. Do we support transparency or do we not? If we do, maybe we can find another word. Andrew Pesce in the Canberra hearings used ‘assist women to’, if we are going to have such a hard time with the word ‘referral’. This is not really a major obstacle to having this bill go into law.¹⁹

Ms Margaret Kirkby, from the Bessie Smyth Foundation reinforced this frustration in her opening statement to the Committee in Sydney, stating:

We would reject the view that referral to an abortion provider is solely the prerogative of a doctor. If you place meeting the needs of women at the centre of your service delivery, you have to have referral information about a wide range of services – and not just where to get an abortion or where to get support to continue a pregnancy or about adoption...We are very conscious about wasting women’s time if you do not give them decent referral information.²⁰

¹⁷ *Macquarie Australia’s National Dictionary Revised 3rd Edition* (Macquarie Library Pty Ltd: Macquarie University, 2001) p1589

¹⁸ *Committee Hansard* 22.6.06 p.35 (Dr. Andrew Pesce Australian Medical Association)

¹⁹ *Committee Hansard* 18.7.06 p.31 (Dr Leslie Cannold, Reproductive Choice Australia)

²⁰ *Committee Hansard* 19.7.06 p.66 (Margaret Kirkby, The Bessie Smyth Foundation)

A large proportion of the debate at the final public hearing in Adelaide focussed on defining contentious terminology within the bill. Senator Moore reiterated the frustration about the time spent on this debate, and asked both the Coalition for Women's Right to Choose, and the Women's Services Network of SA to outline their understanding of the term referral.

Senator Moore: So from your perspective, working with women's services, what connotation does the verb 'to refer' conjure up for you in the draft legislation, when it says 'non-directional?'

Dr Ripper: My experience would be that in everyday speech people use the word 'refer' to mean 'passing on to', in a very general and generic way; in the way that the AMA clarified. Inside a medical consultation it may well have a different meaning but that is not what we are speaking about...

Ms Hayes: From the Women's Services Network perspective, it would be in common parlance that we would use the word 'refer' to provide a woman with information about a service and refer her to that service and it is not in a strict way.²¹

Ms Coombe, argued in her opening statement that referral in the context of the bill is not limited to the

Definition of referral by a doctor to a medical specialist...Referral also encompasses the provision of information about what services are available to meet a person's specific need and may include facilitating links to assist that person to get to that service.

I would argue that the need to say a service cannot provide a woman with a referral, as in information about where to go to access the service – because only a doctor can do that – is in fact a rationalisation for services which are placing their needs above that of the client – that is, the service is solving their conflict of interest by creating an obstacle for women to navigate.²²

5. Misinterpretation of Bill

5.1 Background:

Anti-choice organisations and individuals argued incorrectly that the bill "intends to put out of business any pregnancy counselling service which will not refer for abortion...such an attempt to suppress community groups who do not share the permissive views on abortion held by the framers of this bill is surely a misuse of parliamentary power..."²³.

This bill does not disadvantage so-called 'pro-life' pregnancy counselling services as suggested, by opponents of the bill, but rather it is designed to prevent the misleading and deceptive advertising of these services. This is a gross misinterpretation of the bill.

²¹ *Committee Hansard* 20.7.06 p.27 (Senator Moore, Dr Ripper and Ms Hayes)

²² *Committee Hansard* 20.7.06 p.35 (Brigid Coombe, Pregnancy Advisory Centre)

²³ *Committee Hansard* 19.7.06 p.42 (Dr van Gend – World Federation of Doctor's who Respect Human Life)

The bill ensures that pregnancy counselling organisations which do not refer for terminations declare this, so women seeking advice on whether to continue a pregnancy whether the organisation provides information and referrals on all three pregnancy options.

Point 1.139 of the Chair's report highlights the concerns raised by Festival of Light regarding the penalties imposed, arguing that:

Because corporations are often profit-making organisations, whereas the small organisations we describe are not corporations, but the same penalty would apply to them though they are not corporations.²⁴

In response to this argument by Mr d'Lima, his colleague Ms Phillips, stated:

It would bankrupt them because Birthline has an annual budget of \$55,000. If they were to be fined \$200, 000-

Senator Stott Despoja: I am sure that Birthline are not going to engage in misleading and deceptive practices.²⁵

The penalty units have been incorporated to enforce and promote the importance of non-directive and truthful advertising and mirror those contained in the Trade Practice Act. It is not designed to 'hamper' any particular counselling service, and indeed is only payable if an organisation is providing misleading and deceptive advertising. Rather it is intended to promote transparency transparent advertising and notification of pregnancy counselling services. Only organisations that breach the rules will be penalised.

5.2 The Bill forces pregnancy counselling services to refer for abortion:

A common misconception that arised in the public hearings and the submissions, by opponents of the bill was that this bill, if successful, would “force” all pregnancy counselling services, regardless of their pro/anti choice stance, to provide referrals for termination.

Dr Nicholas Tonti-Filipini highlighted this misconception arguing that:

I do not think it is appropriate to force pregnancy counselling services into a medical model by requiring it to refer for abortion.²⁶

- Section 6(1) of the *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005* states

Any person that advertises or notifies a pregnancy counselling service that does not provide referrals for terminations of pregnancy must include in the advertising or

²⁴ *Committee Hansard* 20.7.06 p.15 (Mr d'Lima -Festival of Light)

²⁵ *Committee Hansard* 20.7.06 p.15 (Ms Phillips –Festival of Light)

²⁶ *Committee Hansard* 18.7.06 p.3 (Dr Nicholas Tonti-Filipini)

notification material a statement that “This service does not provide referrals for terminations of pregnancy” or a like statement.

In reference to Section 6(1) of the bill, Ms Roselyn Phillips, of The Festival of Light stated:

“The bill is specifically penalising pregnancy counselling services which do not provide referrals for abortions if they do not state that in their advertisements, whereas it makes no mention of counselling agencies which do refer for abortions but do not provide ongoing support for women who choose to keep their babies. It does not require them to put that in the ad, so it is a very much biased bill.”²⁷

This is a clear example of how the bill has been misinterpreted.

The legislation simply does not ‘force’ pregnancy counselling services to refer for abortion. It does require services to be upfront about whether or not they offer or advise on all three options to women seeking advice.

Debate over whether or not the bill would make pregnancy counselling services *refer* for terminations, was a common theme of attack from anti-choice advocates.

In his submission to the Committee, Mr Charles Francis claimed the bill “proceeds on the entirely erroneous principle that the alternative possibility of referring a woman for an abortion should be an integral part of all pregnancy counselling.”²⁸

5.3 Bill forces counsellors to participate in an "illegal act":

Considering this bill seeks to enshrine in law transparency in advertising, the claim made by opponents of the bill that this piece of legislation would force them to participate in an "illegal" act is an extraordinary example of misinterpretation. Pregnancy Help Australia claim in their submission to the Committee that “abortion remains illegal in most states in Australia. Therefore, in these situations, the Bill requires the counsellor to be complicit in an illegal act.”²⁹

Upon questioning, Senator Stott Despoja asked if Pregnancy Help Australia, would consider their statement arguing that:

It does not loosen or change the law in any way. In fact, there is nothing to suggest that counsellors who are operating now would operate any differently as a consequence of this legislation – that is suggesting that counsellors are acting illegally now...I recognise that you might have different views on some issues but I urge you to reconsider that statement.³⁰

²⁷ Phillips, Roselyn – Festival Of Light *Community Affairs Legislation Committee* Proof Committee Senate Hansard, Thursday 20th July p8

²⁸ Francis, Charles QC Submission to the *Community Affairs Legislation Committee*

²⁹ *Submission 46*, p.1 (Pregnancy Help Australia)

³⁰ *Committee Hansard 22.6.06* p47 (Senator Stott Despoja)

The misinterpretation of this bill is one of many examples that stem from an anti-choice philosophy rather than being grounded in the actual legal and medical realities and facts.

5.4 Bill "favours" Pro-choice pregnancy counselling services:

The argument that the bill favours pro-choice counselling services was raised spuriously by anti-choice services through the Committee process. Considering the bill is designed only to promote transparency in advertising, this argument is again an example of how this piece of legislation has been wittingly misinterpreted.

President of the ACT Right To Life Association, Ms Kath Woolf outlined in her opening statement to the Committee that this:

bill is a transparent attempt, we believe, to severely disadvantage those pregnancy counselling services which assist women with real alternatives to abortion... The bill's provisions serve, first, to entrench inappropriately in legislation a theory of counselling that is based on misunderstanding of both the theory and practice of counselling.³¹

During the Committee hearing in Sydney, Senator Moore highlighted that the intent of the bill is "to ensure that any woman in the community or her family, when seeking information about what is available to her if she is pregnant, will have an open choice when looking at any of the advertising material." This statement reinforces the simple fact that the bill requires only, that pregnancy counselling services are upfront and clear about what services they do and do not provide. It does not force all pregnancy counselling services to refer for abortion, as argued by anti-choice individuals and services.

Those opposed to the bill argued that the legislation was both biased and unfair on services that do not provide referrals. Festival of Light claimed in their submission that:

The Bill assumes that it is good public policy to favour only those pregnancy counselling services which "provide referrals to termination of pregnancy services where requested."³²

If so - called "pro-life" pregnancy counselling services are proud of their stance, then advertising that they do not refer for terminations should not be an issue.

This bill is not a debate about the legality of abortion it is about providing women with upfront information about the services that they are contacting for pregnancy counselling.

When questioned on how the bill would 'favour' only pro-choice pregnancy counselling services, Festival of Light claimed:

³¹ Woolf, Kath ACT Right to Life Association *Community Affairs Legislation Committee Proof Committee Senate Hansard*, Wednesday 19th July p2

³² *Submission No.12*, p.3 (Festival Of Light)

Because it would provide penalties only for those pregnancy counselling organisations which do not directly refer for abortion and no penalties for agencies like the Pregnancy Advisory Centre in Woodville which does not provide ongoing support for women who want to continue their pregnancy.³³

In response to this accusation, Senator Stott Despoja stated:

If they advertised as a non-directive counselling service and they failed to provide those three options, you bet I'd be happy and they would be guilty under this legislation! It applies across the board.³⁴

While there have been suggestions that some pregnancy counselling services may be covered by the *Trade Practices Act* because they charge for their services, Graeme Samuel Chairman of the ACCC argued:

The fact that the advertising was paid for does not change the character of the conduct to bring it within the "trade and commerce" pre-condition. (An example was a case where Canberra Airport paid for newspaper advertising in relation to a zoning decision - this was held not to be conduct in trade or commerce.)³⁵

Upon questioning Right to Life Australia Inc., Senator Moore asked the President, Ms Margaret Tighe:

Can you tell us where in the draft legislation your services are being threatened?

Mrs Tighe: That is a good question Senator. I believe they are not, actually, because of the response from the ACCC...

Senator Stott Despoja: But there is nothing in the bill designed to target or close down the organisation.

Mrs Tighe:...I believe it is important that we stand up against this type of legislation, which, really, is only aimed, I believe, at closing all avenues for those women who are ambivalent about whether or not they have an abortion...

Senator Moore: But where in the legislation is your work being threatened?

Mrs Wells: In the legislation, I cannot see anything in particular...³⁶

This Hansard passage is evidence of the misinterpretation and misunderstanding of the bill. Right to Life Australia and Pregnancy Counselling Australia admit that no where in this proposed piece of legislation does it infer that pro-life pregnancy counselling services will be threatened.

Considering this was an argument put forward during the Committee process, it is important to note that not only does this bill only require pregnancy counselling services to be upfront about the services they provide, but anti-choice services admit that this legislation does not threaten the existence of their organisations.

³³ *Committee Hansard* 20.7.06 p.8 (Mrs Phillips, Festival of Light)

³⁴ *Committee Hansard* 20.7.06 p.11 (Senator Stott Despoja)

³⁵ This was an email sent to Senator Stott Despoja on 15.8.06

³⁶ *Committee Hansard* 18.7.06 p.60 (Senator Moore, Mrs Tighe, Senator Stott Despoja and Mrs Wells)

6. Constitutionality of bill

6.1 Constitutional basis for the bill

The Chair's report raises the issue of the constitutional validity of the bill.

Despite this issue being raised by opponents of the bill, obviously it is not the role of nor is it appropriate for a Senate Committee to determine constitutional validity of a bill. This is a matter for the High Court.

Nonetheless, we acknowledge the important and various interpretations of constitutional powers but believe there are strong grounds in which to proceed with such a bill.

One of the reasons the bill was drafted as a stand-alone piece of legislation was in an attempt to by pass some of the evident constitutional matters that arise.

The drafting of the bill proceeded on the basis that:

"The statute books already have the Tobacco Advertising Prohibition Act 1992 which has operated constitutionally since 1992 and the Disability Discrimination Act 1992 – the Act which I used as a precedent – which has also operated constitutionally for 14 years, however the exact nature and context of the advertising must remain within the trade practices power"

We still believe that there are several heads of power that would support the bill. The most likely section 51(v) – broadcasting power, which can be used to regulate advertising by radio, newspaper, internet, TV, telephone etc. This should support a law which seeks to regulate the manner in which services are advertised such as clauses 5 and 6 of the Bill.

Senator Webber requested additional information from Mr Cleaver Elliot, Clerk Assistant (Procedure) regarding constitutional issues, Mr Elliott stated:

As I have mentioned before there is only one test on constitutionality – it is the one which the Federal Government is undergoing at the moment with its WorkChoices legislation before the High Court of Australia. It is a most common argument put to the Senate, the House and in our community that one should not proceed because something is not constitutional (any Hansard word search will get you scores of hits) yet government's still proceed in the face of such risk and criticism in their endeavour to implement new public policy.

I stand by the bill's drafting and I do not see anything in the evidence presented so far that would change my mind. Robust political debate and evidence has been given which may cause the text of the bill to be adjusted. This is routine legislative procedure. While some passing cursory policy comment has been given in relation to the constitutionality of the bill, I have seen no authoritative legal opinion with supporting authority which has questioned the constitutionality of the bill.³⁷

³⁷ Cleaver Elliot's email to Senator Webber 14.8.06

In response to a query from Senator Barnett, regarding constitutionality, Mr Elliot responded:

It is important that you be advised that a Senate committee has no jurisdiction to determine the constitutionality or otherwise of a bill.

If for example a committee in considering a bill were to determine as a threshold issue that a bill is unconstitutional and that is a reason for the committee to not further consider it, that action by the committee would itself be unconstitutional – (although not justiciable because it could not be brought before the court).

Mr Elliot also stated:

It would appear that some confusion has developed here to lead the committee away from its responsibilities and in to areas where it has neither responsibility nor jurisdiction.

A committee which purported to exercise authority in accordance with an area of the Constitution from which it is excluded, and did not exercise authority in an area of the Constitution where it has exclusive authority, would be derelict in its duty.³⁸

6.2 Role for the States

Mr Charles Frances in his submission argued that:

It seems to me that the requirements of the Bill in so far as it seeks to deal with those who provide counselling services free is probably beyond the constitutional powers of the Commonwealth and is a matter for the States only.³⁹

Mr Francis' view that this is a matter for the States is one that is definitely worth pursuing.

The intent of this legislation should also be adopted on a State-by-State basis. This is an avenue that the supporters of this bill will pursue.

At a minimum, this would provide a useful back up to any federal legislation.

7. 24 hour pregnancy help pages:

Concerns that this section needs to be less restrictive could be accommodated by allowing both non-directive pregnancy counselling services, as per the definition in the bill, and those which do not refer for terminations to advertise in the 24-hour listings in the White Pages.

Currently, no Government funded pro-choice dedicated pregnancy counselling services, which means that pro-choice service is able to provide national 24 hour pregnancy counselling helpline. Thus, there is no service that is able to meet Sensis' eligibility criteria for listing in the 24-hour listing of the White Pages.

³⁸ Cleaver Elliot's email to Senator Barnett 14.8.06

³⁹ Submission No. 23 p.2 (Charles Francis)

Ms Kate Mannix, reinforced the problem of the current 24-hour listings in the *White Pages* stating:

Only non-directive services (within the definition described in the Bill) should be legally allowed to advertise under 24 hour emergency services. It is insulting and degrading to mislead a person in a state of extreme distress into believing they will receive counselling which is impartial. It is sinful (I use this word deliberately) to use taxpayers' funds to insult and degrade such a person.⁴⁰

The Federal Government should to address this by allocating a similar amount of funding a pro-choice dedicated pregnancy counselling services, **to that provided to the 'pro-life' Australian Federation of Pregnancy Support Services.**

Ms Brigid Coombe provided an example of the problem associated with the current 24hour pages in the white pages, stating:

I would also like to give you an example of how easy it is for women to misinterpret information describing services on the 24-hour pages. I spoke with a woman at the centre last week who had rung Pregnancy Counselling Australia. As you will note the White Pages, there it states, 'Alternatives to abortion and post-abortion counselling.' I asked her why she had rung them given that their entry states, 'Alternatives to abortion'. She said she saw the word 'abortion' and in her anxious state thought, 'That's what I want', and rang them. She was given inaccurate and alarming information and took a route via a hospital gynaecologist to be reassured by accurate information and then information about our service and found us. That example is reason for consideration about it is that will accurately describe to women what sort of service they are going to get.

Senator Stott Despoja raised these concerns with Ms Coombe, asking:

If people disclose that, as per the requirements of the bill for other advertising, in that 24-hour section: provided that it is disclosed, would that be sufficient, or would you want an added proviso, which is that there was a service listed in the 24-hour section of the *White Pages* that actually provided referrals for terminations as well?

Ms Coombe: Yes, of course I think it would be great improvement on services if there were also a service that was available for women that provided comprehensive services...I have given examples. We read 'alternatives to abortion'. We understand that we would not ring that service. Other women do not read it that way. Their levels of literacy and their sophistication about this whole issue may not be what ours are.⁴¹

It is concerning that, women who call 12456 and ask to be connected to a pregnancy counselling service, are offered anti-choice services initially. Questioning Sensis about the 24-hour listing the the *White Pages*, Senator Webber informed the Committee:

Just for the information of both the people from Sensis and the committee, I took you up on your suggestion and spoke to a very helpful woman when I rang 12456

⁴⁰ *Submission No.32 p.2* (Kate Mannix)

⁴¹ *Committee Hansard 20.7.06 p.37* (Brigid Coombe, Pregnancy Advisory Centre)

and asked to be connected to a pregnancy counselling service in Melbourne. I was offered Pregnancy Counselling Australia as my first option and Pregnancy Support Service as my second option and then asked whether instead I wanted a more geographically specific referral – so it is 'p' for pregnancy⁴².

This example alone is representative of the need to balance the 24-hour listing in the *White Pages*.

8. Other concerns to arise from the hearings that are not directly related to the bill

8.1 Alleged Breast Cancer abortion link:

During the Inquiry into the bill, there was much debate over pregnancy counselling in general.

A disturbing theme was the alleged 'link' between breast cancer and abortion. This particular issue is one that some anti-choice pregnancy counselling services discuss and advertise as a risk associated with terminating pregnancy.

A common question to arise during the hearings was the basis on which anti-choice organisations base their research. The World Health Organization (W.H.O), the National Health and Medical Research Centre (N.H.M.R.C) or the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG) all support this. Reputable medical organisations refute any link between breast cancer and abortion, and indeed attest to elective early abortion being a very safe procedure.

One study on which "pro-life" services and individuals relied was a study conducted by Professor Joel Brind, Professor of Human Biology and Endocrinology at Broun College of the City University of New York. A submission was received by Professor Brind following the conclusion of the Committee hearings.

Professor Brind claimed in his submission that the issue sheet circulated by the WHO refuting the link between abortion and breast cancer is an example of scientific misconduct. He argues that the WHO:

Follows a summary description of the illicit manipulations of data that resulted in false results of no connection between abortion and breast cancer.⁴³

Anti-choice counselling services have relied primarily on one piece of evidence supporting the link between abortion and breast cancer yet, have failed to acknowledge the studies conducted by the WHO at an international level, and NHMRC, RANZCOG, and in the Breast Cancer Council of Australia. These organisations state that the available evidence suggests there to be no conclusive link between abortion and breast cancer.

⁴² *Committee Hansard* 18.7.06 p.40 (Senator Ruth Webber)

⁴³ *Submission No.91* (Professor Joel Brind, USA) p.1

In November 2005, RANZCOG published *Termination of pregnancy: A resource for health professionals*. In the section on long-term risks associated with abortion RANZCOG concluded that:

The evidence does not support an association between termination of pregnancy and infertility, ectopic pregnancy or breast cancer...A comprehensive analysis of data from 53 studies including 83,000 women with breast cancer concluded that 'pregnancies that end as a spontaneous or induced abortion do not increase a women's risk of developing breast cancer and that studies of breast cancer with retrospective recording of induced abortion yielded misleading results.'⁴⁴

RANZCOG states:

In recent years there has been epidemiological debate about a possible association between induced abortion and breast cancer. A number of studies have looked at the influence of induced or spontaneous abortion on breast cancer risk; however the quality of the studies varies, and results have been inconsistent.⁴⁵

Dr Norman Ford, director of the Caroline Chisholm Centre for Health Ethics, himself may 'morally disprove abortion', but is opposed to using fear rather than evidence when advising women of the possible side effects of an induced abortion. Dr Ford argues in an article published in the *Chisholm Health Ethics Bulletin* 2003 that there is an:

ethical imperative to provide accurate information on the increased risk of breast cancer ... More flawless research should provide the answers. Women have a right to know the truth, and fears that induced abortion may not appear safe should not be allowed to obscure the facts.⁴⁶

The so-called abortion/breast cancer link, a common point raised by anti-choice groups and refuted by pro-choice groups during the Committee hearings, is representative of the debate around the importance of pregnancy counselling services drawing on reliable sources of evidence-based information and reinforces the need for greater debate on the regulation of such services.

In response to an article written by Senator Stott Despoja in *The Herald Sun*, Mr Francis argued:

It has taken the World Health Organisation decades to warn that the contraceptive pill is a Class I carcinogen, in the same category as tobacco and asbestos, and no doubt it may take decades for WHO, wedded to the ideology of population control, to acknowledge the link between abortion and breast cancer. However, women need the truth NOW, and especially on facts about which there is no scientific dispute: that the younger a woman is when she has her first full-term pregnancy, the lower her risk of breast cancer. Conversely, women who have no children or only have children after age 30 are at increased risk. One wonders why

⁴⁴ 'Termination of pregnancy: A guide for health professionals' *Royal Australian and New Zealand College of Obstetricians and Gynaecologists* November 2005

<http://www.ranzcog.edu.au/womenshealth/pdfs/Termination-of-pregnancy.pdf>

⁴⁵ *Ibid*

⁴⁶ Ford, Dr Norman 'Abortion and the Risk of Breast Cancer' *Chisholm Health Ethics Bulletin* Winter 2003 p.11

our Cancer Councils have not used the high-profile case of a celebrity who had breast cancer, to advise women to give priority to having babies over career, especially when breast cancer is the major killer of pre-menopausal women, and the third major cause of death in post-menopausal women.⁴⁷

This quote highlights the importance of regulating pregnancy counselling services. While we acknowledge that there are risks associated with all surgical procedures, the alleged abortion breast - cancer link has been refuted by all reputable medical associations, and should therefore not be considered as a genuine risk.

Senator Judith Adams pursued this alleged link between abortion and breast cancer throughout the inquiry, specifically inquiring as to what research this claim was based on.

Senator Adams: There is a World Health Organisation document – their fact sheet 2040; this was June 2000:

Induced abortion does not increase breast cancer risk.

So that is their assessment.

Mrs Phillips: Yes, and that is based largely on the Melby study which they thought was reliable but in fact was fact.

Senator Adams: They have got 10 studies here. Anyway, thanks –

Mr d'Lima: There are certainly many studies on both sides. But it may well be the case that we are at the stage where smoking was perhaps in the fifties or sixties and it may turn out to be the case that there are grave risks linked to abortion that are yet to be more thoroughly identified.⁴⁸

The alleged "risks" associated with termination, were pursued by Senator Kerry Nettle during the Melbourne Public Hearing, whereby the Senator stated:

I just wanted to alert Mrs Francis to the US National Cancer Institute which in 2003 concluded that abortion and miscarriages do not increase a woman's subsequent risk of developing breast cancer....

Mrs Francis: ...Many of the heads of the National Cancer Institute in the United States are also connected with the abortion industry...The abortion industry is so powerful and has so many people on the payroll of the National Cancer Institute that they are trying to bury the abortion-breast cancer link as much as they can.⁴⁹

This statement is representative of the additional concerns to arise from the Committee Inquiry. While the medical risks associated with abortion are not directly related to transparency in advertising, the need for the implementation of effective pregnancy counselling regulation is more important now, than ever before, in addition to transparent advertising legislation such as that contained in the bill.

⁴⁷ Francis, Charles 'Grave Risks in having an abortion' *Herald Sun* 24.7.06

⁴⁸ *Committee Hansard* 20.7.06 (Senator Adams questions)

⁴⁹ *Committee Hansard* 18.7.06 p.18 (Senator Nettle, Mrs Francis)

8.2 International examples of the regulation of pregnancy counselling services

The Committee has requested information on whether there are any international examples of regulation on which we could model this piece of legislation.

While nothing to the extent of this bill has been enforced at a national level, there are some interesting international examples to be studied.

Affirmative legislation has been introduced into the United States at both the federal and state level. In 2006, Congresswoman Carolyn Maloney (D-NY);

...introduced a bill intended to curb deceptive advertising of CPCs, entitled the “Stop Deceptive Advertising in Women’s Services” Act. The bill authorizes the Federal Trade Commission to regulate the advertising practices of CPCs so they cannot be confused with legitimate abortion providers or providers of abortion referrals.⁵⁰

The bill was referred to the Committee on Energy and Commerce on April 19 2006 for further examination.

Although steps have been taken to regulate the advertising of pregnancy counselling services in the USA, Christina Richards, from the Australian Reproductive Health Alliance outlined during the Committee hearing in Canberra that:

In ensuring that transparency, professional expertise and capacity to properly advise or refer remain at the centre of considerations in transparent advertising and notification of pregnancy counselling services in Australia, my hope is that the committee is able to avoid the volatility of the US experience around this issue, where specific facilities have been set up to look like medical clinics but are actually centres that give false information to those seeking an abortion.⁵¹

The AMA, while not supporting any particular international model for regulating pregnancy counselling services, argued that:

pregnancy counselling services be guided by the following principles, they must be:

- Professional;
- Objective and non-directive;
- Supportive to women (not coercive or judgemental);
- Committed to protecting privacy and confidentiality; and

Transparent (particularly in advertising) and accountable in conducting their services, so as to ensure that the best interests of women seeking such services.⁵²

8.3 Implementation of pregnancy counselling standards

The question of enforcing pregnancy counselling standards was a issue of concern that was raised throughout the Committee process. Through the evidence presented to the Committee, it became evident that a form of counselling standards required, in addition to transparent advertising to ensure that women who contact pregnancy

⁵⁰ ‘Crisis Pregnancy Centres: An Affront to Choice’ *National Abortion Federation USA* 2006 p.17

⁵¹ *Committee Hansard* 22.6.06 p.14 (Christina Richards, Australian Reproductive Health Alliance)

⁵² *Additional Information* 3.08.06 (Australian Medical Association)

counselling services, regardless of the pro/anti choice stance, receive non-directive and truthful information.

This point was highlighted by Ms Cait Calcutt, from Children by Choice:

All our counsellors and employed staff are required to have four-year degrees in psychology or social work or a related discipline, such as behavioural science. They are also required to have counselling experience, and they undertake training with Children by Choice in pregnancy counselling.⁵³

Following on this point, Senator Stott Despoja asked:

Surely there is a strong argument there for professional counselling?

Dr Grey: Senator, I think your point about accreditation is very important. In every area it is a question of getting standards, and I think that is where the Abortion Providers Federation of Australasia did a lot of very good work in developing some protocols...So moving in the direction of having some publicly debated and acknowledged levels of accreditation and accreditation procedures would be very good.⁵⁴

The issue of implementing pregnancy counselling standards was reinforced during the public hearing in Melbourne:

Senator Allison: You would endorse a system whereby that accreditation or professionalism was expressed as part of advertising?

Dr Tonti-Filipini: I would very much like to see that. I have done some work in another area which is related, and that is infertility counselling. The same problem was occurring there. If you look at the National Health and Research Council guidelines on reproductive technology, you will see that they specify that somebody has to be appropriately qualified in a counselling discipline.

While Dr Tonti-Filipini, opposes the proposed legislation, his support for the implementation of counselling standards, is representative of the problems associated with counsellors that fail to provide non-directive and objective advice.

In response to the question of whether or not specific counselling standards should be enforced, the Australian Medical Association argued that:

Professionally trained counsellors are most likely to have the high-level of skills and knowledge required to conduct pregnancy counselling services. Certainly, the government is accountable to the Australian public to ensure that pregnancy counselling services are staffed by appropriately trained professionals.⁵⁵

Dr Cannold argued that such standards and guidelines would not substitute for transparent in advertising and notification of pregnancy counselling services, stating:

⁵³ *Committee Hansard* 19.7.06 p.36 (Cait Calcutt, Children by Choice)

⁵⁴ *Committee Hansard* 19.7.06 p.37 (Dr Grey, SH&FPA)

⁵⁵ *Additional Information* 3.8.06 (Australian Medical Association)

There has been a lot of valid concern about the quality of the training of some of the people who are on the other end of the phones, but it does not take the place of the need for the bill to ensure that there is transparent advertising.⁵⁶

9. Sensis concerns

The purpose of clause 6 of the bill is to specify the requirements for pregnancy counselling organisations which may otherwise promote their services in a manner which is misleading or deceptive – not the organisations which advertise these services.

However, if an organisation that advertises a service in a manner which is misleading and that organisation is involved in trade and commerce, it is already subject to a range of provisions under Parts V, VC and VI of the *Trade Practices Act 1974*. That Act already provides substantial penalties for a breach of these provisions.

It is the intention of clause 6 of the bill to clarify, so as to remove any possibility of misleading or deceptive advertising in this area, the specific requirements for the advertising of, or notification of, pregnancy counselling services. The clause does provide both defences and for a penalty. This specific situation is not covered by the *Trade Practices Act 1974*, hence the need for the separate provisions provided by this bill.

10. Recommendation

We recommend that the bill pass the Senate.

Senator Natasha Stott Despoja
AD, South Australia

Senator Claire Moore
ALP, Queensland

Senator Kerry Nettle
AG, New South Wales

Senator Ruth Webber
ALP, Western Australia

Senator Lyn Allison
AD, Victoria

Senator Carol Brown
ALP, Tasmania

⁵⁶ *Committee Hansard* 18.7.07 p.25 (Dr Cannold, Reproductive Choice Australia)

