Reaffirming universal human rights "without any exception whatsoever"

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Public Submission to Parliamentary Inquiry into Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

INTRODUCTION

1. Responding to the Report of the National Human Rights Consultation Committee, the Attorney-General, the Hon. Robert McClelland, is to be commended for his Government's initiative to introduce a formal National Human Rights Framework designed to improve Federal Parliament's capacity to review existing and proposed legislation for consistency with international human rights instruments. The Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 are a commendable attempt to implement important recommendations of the National Human Rights Consultation Committee.

2. The first priority in this Parliamentary Inquiry must be to determine whether human rights in Australia are to apply to "all members of the human family" as agreed in all three instruments of the International Bill of Rights. Or is there to be an exclusionary interpretation of universal human rights similar to the one concocted quite ineptly by the ACT Assembly for the ACT Human Rights Act 2004? This Act sought explicitly to disfranchise the unborn by virtue of an exclusionary clause that purports to limit the right to life "…to apply to a person [only] from the point of birth".

3. For two decades now, I have been engaged in research both in Australia and at the United Nations regarding the origins of the drafting of the *Universal Declaration* and in the *travaux préparatoires* for the core international human rights treaties to which Australia is a party. Australia's role in these negotiations is very well documented. It troubles me that there appears to be a great deal of ignorance today about what Australia actually committed to in these instruments.

4. Thus, in my written submission to the National Human Rights Consultation Committee and in my oral Presentation to the National Human Rights Consultation Committee in the Hot-Button Issues Session at the Great Hall, Parliament House, Canberra, July 1, 2009, I set out some of the very serious omissions and misrepresentations of our current implementation of our human rights obligations. Coherent, logically consistent scrutiny of the proposed legislation will be impeded until the basic architecture of rights is clarified, especially the question of whether any government has the authority to exclude any particular group of human beings (such as children before birth) from human rights protection.

4. In order to apply the transparency and integrity necessary to a just implementation of the proposed legislation under consideration in these consultations, **it is critical that the Australian government re-commits to the original principle of inclusion in the definition of human rights and in the application of these rights to "all members of the human family"[1] and especially to all children "without any exception whatsoever"[2] and "without discrimination of any kind"[3].** And the International Covenant on Civil and Political Rights confirms that for all members of the human family, every human being, including the unborn child[4], has the inherent right to life, to be protected by law from arbitrary deprivation[5], and that this right is nonderogable.[6] Documented proof that the unborn child is included as a member of the human family and entitled to human rights protection is set out in my book: "*Human Rights and the Unborn Child"*(Leiden & Boston, Martinus Nijhoff Publishers, 2009).

Deletion of the non-derogable right to life for some human beings—"a result… manifestly unreasonable"

5. The Commonwealth must take care not to follow the ACT legislation's ideologically-driven exclusion of the child before birth in its 2004 reinterpretation of the non-derogable right to life.

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[1] Inherency and inalienability are core values at the heart of the International Bill of Rights:

> "…recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

This appears in the Preamble of all three instruments and was characterized by the Commission of Human Rights as "a statement of general principle which was independent of the existence of the United Nations and had an intrinsic value of its own." GAOR, A/2929 Chapter III para. 4.

[2] UN Declaration on the Rights of the Child, Principle 1: "Every child without any exception whatsoever is entitled to these rights …"

[3] UN Convention on the Rights of the Child, Article 2.

[4] International Covenant on Civil and Political Rights (ICCPR), Article 6(5).

[5] International Covenant on Civil and Political Rights (ICCPR), Article 6(1).

[6] ICCPR Article 4(2).

Such a limitation of or exception from a non-derogable right, the right to life, contravenes ICCPR Articles 4 and 6, and remains inadmissible under the provisions of ICCPR Article 50.[7]
Any attempt to limit the non-derogable right to life to the child only after birth leads to a result which is manifestly unreasonable, *viz.*, discriminatory selection of a vulnerable group of human beings for permanent exclusion from human rights protection. Any attempt to derogate from the non-derogable right to life of all unborn children at risk of arbitrary deprivation of life is manifestly absurd.[8] According to the Vienna Convention on the Law of Treaties Articles 31 and 32(b), when an interpretation "leads to a result which is manifestly absurd or unreasonable", then "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order… to determine the meaning".

6. The meaning of the ICCPR provisions cannot be determined without reference to the foundational Universal Declaration of Human Rights principles which were mandated to be codified in the ICCPR. I have gathered and set out in meticulous detail compelling evidence[9] that the preparatory work for the Universal Declaration and the circumstances of its conclusion determine without doubt that the meaning of 'child' is inclusive—it was *recognized* at the time of negotiation of the UDHR text and affirmed in the historical context that the child *before as well as after birth* possesses *inherent and inalienable* rights. The Universal Declaration recognized *the need for such special safeguards and care, including legal protection before as well as after birth.*[10]

7. Moreover, according to Article 53 of the Vienna Convention on the Law of Treaties, a treaty is simply "void if, at the time of its conclusion, it conflicts with a peremptory norm of international law". UDHR Article 3, "Everyone has the right to life…" ("everyone" including the child before as well as after birth), is a peremptory norm of general international law.[11] Thus human rights treaties subsequent to the Universal Declaration are void if at the time of their conclusion they conflict with this norm. So when treaty monitoring bodies or legislatures or courts of law reinterpret international human rights instruments to withdraw legal protection from unborn children whose lives at risk of arbitrary deprivation, they are espousing a nonsensical interpretation which, if true, would have rendered the particular treaty void at the time of its conclusion.

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[7] ICCPR Article 50 states that "the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions".

[8] ICCPR Article 6(2) makes a singular provision for deprivation of life that is non-arbitrary relates to the death penalty imposed only in countries which have not yet abolished the death penalty, only for the most serious of crimes and only carried out pursuant to a final judgment rendered by a competent court. Furthermore, ICCPR Article 6(5) insists that even in this singularly lawful exception to State's duty to protect all human beings from arbitrary deprivation of life, the life of the innocent unborn child is to be protected—"Sentence of death…shall not be carried out on pregnant women."

[9] See Rita Joseph: "*Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009), especially Chapter 1: "UDHR recognition of the Child before Birth—Analysis of the Texts" and Chapter 2: "UDHR Recognition of the Child Before Birth: The Historical Context".

[10] UN Declaration on the Rights of the Child, Preambular paragraphs III & IV

[11] Ibid pp59-60 and pp, 81-102.

8. Any attempt to de-recognize the rights of the child before birth is "absurd and unreasonable". Removal of human rights protection for unborn children can have no validity for it is entirely out of character with the original and abiding determination by the post World War II international community who drafted the foundation instrument to include absolutely all human beings under universal human rights protection.[12] The Universal Declaration of Human Rights is fundamentally an inclusive document. All subsequent human rights instruments were intended to reaffirm and expand on that inclusiveness, never to reduce it.[13] Reverting to the old injustice of excluding any particular class of vulnerable human beings (unborn children in this case) is perverse. It is contrary to the formidable sweep of history that brought the international community to found our modern system of international human rights law which "recognized"[14] the inclusion of all children "before as well as after birth".[15]

DEFINITION OF HUMAN RIGHTS

9. Human Rights are defined in s.3(1) of the Human Rights (Parliamentary Scrutiny) Bill 2010 to include all of the human rights and freedoms enshrined in the seven core international human rights treaties to which Australia is a party. Foremost among these is the International Covenant on Civil and Political Rights which from the very first drafting session (1947) of the Drafting Committee of the Commission on Human Rights, recognized the concept of human rights protection for "any person, from the moment of conception". Article 1 of the Draft International Covenant on Human Rights says:

> It shall be unlawful to deprive any person, from the moment of conception, of his life or bodily integrity, save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law.[16]

This text became the basis of Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)* which goes on in paragraph 5 to make special provision for protection of *all* children, born and unborn, from sentence of death. This article prohibits imposition of the death penalty for crimes committed by persons below the age of 18 years, and adds the clarification that sentence of death shall not be carried out on pregnant women. Here is clear and irrevocable acknowledgement that the right to life of every child, from the State's first knowledge of that child's existence, is to be protected.

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[12] See *"Human Rights and the Unborn Child"*, Chapter 3: Fundamentals of the Universal Declaration's Human Rights Protection

[13] See "*Human Rights and the Unborn Child"*, Conclusion: "Ideologies Must Conform to Human Rights—Not Human Rights to Ideologies".

[14] For the drafters of the Universal Declaration and the first two Covenants, the concept of 'recognition' of human rights had a very special meaning with very particular obligations attached. See *"Human Rights and the Unborn Child"*, Chapter 5: "What is 'Appropriate Legal protection Before As Well as After Birth?", p. 78; also pp. 66-9

[15] *UN Declaration of the Rights of the Child*, Preambular para.III; also UN Convention on the Rights of the Child, Preambular para IX.

[16] UN Doc.E.CN.4/21.

The *travaux préparatoires* for the *ICCPR* reveals many specific references to the intention to save the life of an unborn child—for example:

> The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was "to save the life of an unborn child".[17]

Urgent need to address popular misconceptions concerning human rights and the child before birth

11. Over time the original intention to provide legal protection for an unborn child whose life is at risk of arbitrary deprivation has been forgotten or ignored. Yet as far as the framers of the foundation human rights instruments were concerned, recognition of the human rights of the unborn child was never put in doubt. From the fact that the term "from the moment of conception" was dropped from the final text of Article 6 of the *ICCPR*, some of today's ingenious, but possibly not ingenuous, academics have attempted to argue that human rights begin "only from birth".[18] A more careful reading of the *travaux* préparatoires, however, reveals that 'persons from the moment of conception', along with 'incurables', 'mental defectives', 'the insane' and even 'women' were all deleted for the very good reason of the stated intention of the drafters to keep to the broadest, simplest expression of the principle in order to produce a more concise text.[19] Peter Heyward, the Australian member of the drafting team that enunciated the first principles of the Universal Declaration, affirmed that **their intention in the deliberate use of the terms "every person" or "everyone" throughout the Declaration was to extend the prohibition of discrimination in the application of every human right in the Declaration to every human being.**[20]

12. Others who would deny a child human rights protection before birth do so on the logically indefensible grounds that there is some perceived difficulty in making a consensual statement on "when life begins". The international community which drafted the "right to life" Article 6 of the *ICCPR* faced that problem and solved it. For all practical purposes, they recognized that a life has begun when a woman is confirmed to be pregnant, and that from the State's first knowledge of the pregnancy, there is a State responsibility to protect the innocent unborn child from harm even in circumstances

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[17] Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 121. A/C.3/SR.810 para. 2; A/C.3/SR.811 para. 9; A/C 3/SR.812 para. 7; A/C.3/SR.813 para. 36; A/C 3/SR 815 para. 28.

[18] For assessment and refutation of these theories, see Rita Joseph: "*Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) Chapter 3: "Fundamentals of the Universal Declaration's Human Rights Protection", pp. 31-46

[19] See Rita Joseph:"*Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) Chapter 6:The Inaugural human Right—To Be Born Free and Equal, pp.47-62

[20] See Johannes Morsink: "Women's rights in the Universal Declaration", *Human Rights Quarterly*, Vol. 13, p.230.

where the mother's right to life had been forfeited for having committed a crime punishable by death.

In the 1947-8 negotiations of the Universal Declaration, one of the first things agreed by the Australian delegation and the international community was that the "innocent unborn child" was to be legally protected. [21]

In the drafting of Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the only recorded attempt to introduce abortion as an exception to the right to life occurred in the Working Group's 2nd Session (1947). It was put to a vote in the Commission on Human Rights and was resoundingly defeated. A principle was adopted in which the only exception to the unlawfulness of deprivation of a life was to be in the execution of the sentence of a court following on conviction of a crime for which the penalty is provided by law. [22]

The ICCPR drafting history records repeatedly that protection of the law is to be "extended to all unborn children" (See 5th Session (1949), 6th Session (1950), and 8th Session (1952) of the UN Commission on Human Rights).

Again in the 12th Session (1957) of the Third Committee, the right to life of "an innocent unborn child" is recognized:

> The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child; that protection should be extended to all unborn children. [23]

Not only did they recognize the unborn child as having a life to be saved but also that legal protection is to be extended to all unborn children—that is, in practical terms, from the first moment that an unborn child's existence in a new pregnancy is acknowledged and verified.

13. It is regrettable that certain "experts" in the Attorney General's Department appear to be labouring under the misunderstanding that a bungled ploy[24] executed in the lead up to

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[21] See Rita Joseph:"*Human Rights and the Unborn Child"* Chapter 2: "UDHR Recognition of the child before Birth:The Historical Context", pp. 26-7

[22] E/CN.4/SR.35, p.16.

[23] A/C.3/SR.819 para. 17 & para. 33.

[24] For the historical facts surrounding the failure of this ploy see Rita Joseph: *Human Rights and the Unborn Child*, Chapter 7: "Decriminalization—a Treaty Interpretation Manifestly unreasonable", in particular the section from "Reinterpretation of human rights instruments to exclude the child before birth: legally and morally an invalid process" p.106 to "Each State determines for itself what is "appropriate legal protection"p.113.
Also, Chapter 8: "CRC Legislative history and the Child before Birth" pp.121-140.

the Convention on the Rights of the Child freed States parties to decide for themselves whether to honour human rights for children "before as well as after birth" as had been irrevocably agreed from the very first meetings of the drafting committee of the Universal Declaration and in the travaux préparatoires for the ICCPR. The fiction that States can decide for themselves to exclude human rights protection from all children before birth cannot be maintained. Disquieting considerations point to some intellectually dishonest reinterpretation of the historical records on this issue.[25] Regrettably, this reinterpretation is being propelled, no doubt, by sustained pressure from those States who have removed most domestic legal protections for the unborn child at risk of arbitrary deprivation of life, albeit in medical settings. Given that the international community in the founding documents of modern international human rights law reached a formal and virtually unanimous agreement on the need for safeguards and care including legal protection for the child before birth[26] and in view of the strong testament in the *Legislative History on the Convention on the Rights of the Child* (Geneva: OHCHR, 2007) that a valid alternative consensus to the contrary was not reached,[27] the original consensus must remain in effect.

THE PROBLEM: To Reaffirm Original Principle of Inclusion in Definition of Human Rights

14. In introducing the proposed legislation now under consideration, the Attorney-General stated its purpose *viz.* to 'improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'. While this is a commendable objective, I believe that it cannot be implemented with logical consistency without a preliminary re-commitment by the Parliament to the original foundation architecture consisting of recognition of the fundamental principles of the *Universal Declaration of Human Rights* and their codification in the subsequent Human Rights Conventions.

!5. Original principles irrevocably embedded in the foundation architecture of modern international human rights law were principles of inclusion, inherency, equality, inalienability and indivisibility. Australia's formal re-commitment to these principles in this new legislation will make it clear that fidelity to these principles is not optional for

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[25] Ibid.

[26] In the UN Declaration on the Rights of the Child, the UN General Assembly, November 20th, 1959, reaffirmed explicitly the UDHR's "recognition" of the rights of the child before birth. The concept of formal universal recognition of the child before birth as a legitimate subject of inherent and inalienable human rights including entitlement to legal protection is critical for it is the nature of inherent and inalienable human rights that they can never be de-recognized by courts of law or legislatures.

[27] "Other delegations, including Norway, the Netherlands, India, China, the Union of Soviet Socialist Republics, Denmark, Australia, Sweden, the German Democratic Republic and Canada, however, opposed what in their view amounted to reopening the debate on this controversial matter which, as they indicated, had been extensively discussed at earlier sessions of the Working Group with no consensus achieved." Legislative History, p. 295, para. 36.

any Australian government. Should this legislation be passed, it is inevitable that the scrutiny committee will come up against the problem of competing human rights. This problem is popularly misconceived at the present time as sufficient justification for the complete removal of legal protection for the right to life of unborn children in order to protect 'women's reproductive rights', even where their small lively presence in their mothers' wombs present no proportionately lethal threat to their mothers' lives.
The problem of competing rights was faced by the framers of the Universal Declaration and the foundation Covenants—the ICCPR and the ICESCR. It was solved by recognition of the fundamental human rights principle of

- Indivisibility—that the rights of one set of human beings cannot be rescinded or sacrificed to enhance the rights of another group of human beings;
- Inclusion – that these rights applied to absolutely everyone, including the child before birth.
- Inherency – that these rights were seen as inherent in each human being, not granted by external government or judicial decisions. The child's rights pre-exist birth – they "inhere" in the child's humanity;
- Equality – that in modern human rights law, there can be no concept of some human beings being "more equal" than others – thus the child at risk of abortion has the same right to life as every other member of the human family; and
- Inalienability—that no one may destroy that right to life, nor deprive any human being of that right, nor transfer that right, nor renounce it— Human beings cannot be deprived of the substance of their rights, not in any circumstances, not even at their own or their mothers' request.

15. Of great shame to all Australians is the current contravention of these principles in the confused and invalid attempt in the ACT's Human Rights Act (2004) to restrict human rights to "after birth". In a recent letter from an officer in the Federal Attorney-General's Department (7/6/10), I have been informed that the present Australian Government also now "interprets the protection from arbitrary deprivation of life in Article 6(1) of the *ICCPR*, as applying from birth". **Significantly, however, the Departmental correspondent was unable to provide me with any particular date or any substantive evidence of the formal adoption by the Australian Parliament of this appalling interpretation. Regrettably this is an invalid re-interpretation of what Australia actually agreed to when we ratified the *ICCPR*.** I doubt that the Attorney-General had any knowledge of or agreement with this *ad hoc* re-interpretation.

16. Certain members of the Attorney-General's Department are wrong to infer that arbitrary deprivation of life in Article 6 applies "only from birth" on the very selective grounds from Dominic McGoldrick's work[28] that "(d)raft proposals that would have covered the right to life from conception were ultimately not adopted in the final version

[28] Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, Clarendon Press, 1991

of the text (330)". A more careful reading of the same page would have revealed that the concept of rights beginning only from birth was in fact rejected on the grounds that it was "not consistent" with protective laws for unborn children in many states.

12. Marc Bossuyt's scholarly work *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff Publishers, 1987) provides a much more substantial historical record. Careful reading of Bossuyt's history reveals that there were absolutely no indications that the drafters in removing "from the moment of conception" were completely removing all protection of the right to life of the unborn child until after birth. The only two objections to "from the moment of conception" were very limited and practical ones:

> That it was impossible for the State to determine the moment of conception and hence, to undertake to protect life from that moment;[29] and
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> That the proposed clause would involve the question of the rights and duties of the medical profession in different countries where legislation on the subject was based on different principles.[30]

The first problem, as pointed out above in para 11, was addressed effectively in ICCPR Article 6(5) prohibiting execution of pregnant women, where it was acknowledged that the child, from the State's first knowledge of that child's existence (if not *precisely* from the moment of conception), is to be protected.
When the second practical obstacle to protecting the right to life from the moment of conception was raised by the USSR and Pakistan, it was given short shrift. It was seen as less than convincing in the light of the fact that the World Medical Association seemed to have had no difficulty in getting international agreement from doctors in all parts of the world across many different jurisdictions on the need to protect life from the moment of conception. The Geneva Declaration (1948) was agreed by the World Medical Association (an association of national medical bodies) only three months before the UN General Assembly adopted the Universal Declaration:

> I will maintain the utmost respect for human life from the time of conception, even under threat; I will not use my medical knowledge contrary to the laws of humanity.

The concept of a duty to protect the child before birth was well established and included a solemn duty to maintain respect for human life "from the time of conception" and to protect human life "from the time of conception…according to the laws of humanity".

This promise was reaffirmed *verbatim* by the World Medical Association in the Declaration of Geneva (1968), thus verifying that from three months before the Universal Declaration until two years after the ICCPR, this understanding of human rights to include the child before birth ("from the time of conception" if not from the exact moment of conception) was indeed universally established and agreed.

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[29] A/C 3/SR.817 para. 37.
[30] A/C. 3/SR 815 para. 37; and A/C.3/SR.818 para. 13.

A further impediment to removing human rights protection from unborn children at risk

13. Regarding the non-derogable right to life Article 6 of the *ICCPR*, any government's re-interpretation of the term "everyone" to exclude children before birth being protected and nurtures in their mothers' wombs is rendered invalid because it contravenes Article 5 (1) of the *ICCPR*:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

Excluding unborn children from legal protection against arbitrary deprivation of life is a prohibited activity:

- first, as an activity aimed at the destruction of this right which was "recognized" by the Universal Declaration of Human Rights (reaffirmed in the UN Declaration on the Rights of the Child (1959) and then recorded clearly and irrevocably in the drafting history of in Article 6 (5) of the International Covenant on Civil and Political Rights.[31]

- second, as an act aimed at the limitation of the right to life to children from birth only and not as was "recognized in the Universal Declaration of Human Rights"—that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[32]

Recognition of the rights of the child before birth, embedded irrevocably in the foundation documents of modern international human rights law, cannot now be de-recognized by alteration of government policy without adequate research, proper scrutiny, wide consultation and then, finally, without formal lodging of a proposed amendment in accord with Article 51(1) of the ICCPR.[33] And even after all that, he

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[31] Bossuyt, Marc J., *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff Publishers, 1987, A/C.3/SR.810 para. 2; A/C.3/SR.811 para. 9; A/C 3/SR.812 para. 7; A/C.3/SR.813 para. 36; A/C 3/SR 815 para. 28.

[32] See Rita Joseph: "*Human Rights and the Unborn Child"* Chapter 1: UDHR Recognition of the Child before Birth: Analysis of the Texts pp.1-6; and Chapter 2: UDHR Recognition of the Child before Birth: The Historical Context pp. 7-46.

[33] ICCPR Article 51(1): "Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours

outcome of such a proposed amendment is extremely doubtful in view of the fact that, contrary to ICCPR Article 4 (1) and Article 4(2) [34], it would attempt to limit permanently non-derogable rights and will bring Australia into sharp conflict with the object and purpose of the treaty. The fact that Australia, at the time of ratifying the ICCPR, did not lodge any reservation or statement of interpretation to the effect that Australia interpreted Article 6 to exclude children before birth from legal protection against arbitrary deprivation of their lives should also be taken into account. Indeed, a number of confidential cablegrams sent by our Australian UN delegates back to the Government in Canberra make it very clear that we understood and fully accepted the human rights principles of Covenants to be binding and unalterable once they were in place.[35]

Permitting domestic law to delete the human rights of smaller human beings before birth is incompatible with the deontological basis of the original international agreements[36], which are irrefutably based in natural law.[37] Such attempts to refuse universal human rights protection in domestic legislation are based on an invalid utilitarian or consequentialist premise that human rights may be granted or withdrawn by governments according to the politically dominant ideology of the day.[38] Removal of legal protection for unborn children whose lives are at risk is based on a kind of cultural pragmatism and not on international human rights law. Cultural practices, no matter how popular at the time, are frequently contrary to law and relying on cultural practice to restrict or narrow human rights protection for a vulnerable group is not a sound basis human rights law reform.

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such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval."

[34] ICCPR Article 4:
1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

[35] See, for example, Report of Australian Alternate on Human Rights Drafting Committee, Second Session, May 3-21, 1948; and Memorandum, (188 Watt to Burton) London, 22 December 1948, United Nations Assembly, Paris, 1948: Committee Three. These are quoted in Rita Joseph: "*Human Rights and the Unborn Child"*, pp.114-5.

[36] Rita Joseph: "*Human Rights and the Unborn Child"*, p.199, p.203. p.323, p.326.

[37] Ibid, p.35, pp.39-43, pp.50-2, pp.76-8, pp.199-204, p.300, pp.322-6.
[38] For internationally agreed limitations on the authority of domestic law to deny human rights protection, see Rita Joseph: "*Human Rights and the Unborn Child"*, p.186, pp. 294-5, pp.237-241, pp. 286-288.

Indeed, the notion of any individual State abrogating legal protection of the child before birth in order to accommodate that State's existing domestic laws contravenes Article 27 of the Vienna Convention on the Law of Treaties provides:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

NEED TO ADDRESS LIMITATIONS OF HUMAN RIGHTS EXPERTISE IN ATTORNEY GENERAL'S DEPARTMENT

14. The Joint Parliamentary Committee's powers are:

> a. To examine Bills, legislative instruments and existing Acts for compatibility with human rights and to report to both Houses as to such matters; and
> b. To inquire into any matter relating to human rights which is referred to it by the Attorney-General.

The Committee's capacity to report on the compatibility of legislative instruments and existing Acts with international human rights principles is only as good as the accuracy of its understanding of the founding human rights principles to which that Australia has solemnly agreed. On these principles, the advice from the Attorney-General's Department may not always be correct—see for example, the specious argument in a recent letter to me from that the Office of International Law in that Department[39], that the Australian Government may renege on the principles and commitments made in the *Preamble* to the *Convention on the Rights of the Child* (CRC) on the grounds that "an obligation to apply the rights in the Convention to unborn children was not included in the operative articles of the CRC". As any competent officer of international law should know, this is in direct contradiction to Article 31, general rule of interpretation of the Vienna Convention on the Law of Treaties (1969):

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text … its preamble…

The operative provisions within the CRC (*i.e.*, in the text) shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (*i.e.*, in the context of its preamble in addition to the text). Clearly, operative provisions must be read consistently with the preambular paragraphs, which set out the themes and rationale of the Convention. Furthermore, they must be read consistently with the International Bill of Rights. This is confirmed in the full text of the most relevant consecutive preambular paragraphs of the CRC, which are as follows:

> Bearing in mind the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in

[39] 10/880; MC10/6680, June 7, 2010.

> particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10), and in the statutes and relevant instruments of specialized agencies and international organisations concerned with the welfare of children.
> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth…"

In two earlier preambular paragraphs:

> Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as…birth or other status,
> Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance…

the CRC adopted two precepts established in the UDHR. In regard to the first, note the recognition that entitlement to rights and freedoms set forth in the UDHR applies equally, without distinction of any kind, *i.e.*, before and after birth. In regard to the second, note that such "special care and assistance" includes "appropriate legal protection, before as well as after birth", which was an integral part of "the special safeguards and care" that Australia along with the international community solemnly agreed in the Declaration on the Rights of the Child had been "recognized" by the UDHR.

The inescapable conclusion here is that the child before as well as after birth is to be protected by the CRC, if that Convention is interpreted in good faith [without discrimination against the child before birth] in accordance with the ordinary meaning to be given to the terms of the treaty in their context [both text and preamble] and in the light of its object and purpose [recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, and that human rights should be protected by the rule of law].

15. Yet another example of intellectually shoddy research by certain members of the Office of International Law in the Attorney-General's Department is found in the totally inaccurate conclusion they have reached regarding the outcome of the CRC debate on when protection for children should start. The researchers had cited McGoldrick's line that draft proposals that would have covered the right to life from conception were rejected in the final draft of the ICCPR text but ignored p.162 of the same work, which confirmed that the proposal that human rights of the child "begin at the moment of birth" was also rejected and did not appear in the final version of the text for the Convention on the Rights of the Child.[40] **In any case, the records show that it was NOT ultimately decided to leave it to each State party to decide whether to interpret the rights in the CRC as applying "only from birth".** No such decision was made. The authority quoted in support of this conclusion (Sharon Detrick, "A commentary on the United nations Convention on the Rights of the Child" (1999), 53-4) goes on to reveal on the very next page (55) that although the Australian delegation was one of a small group of

[40] Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, Clarendon Press, 1991

ten delegations that tried to exclude the child before birth from Article 1's definition of the child, the record shows that it was "discussed intensively with no consensus achieved".
The fact that "no consensus was achieved" on de-recognition of the human rights of the child "before as well as after birth" as recognized by the UDHR and consensually agreed in the Declaration on the Rights of the Child means that the old consensus remains in force. **Australia's obligation to provide appropriate legal human rights protection for the child before birth is still in place.** Australia was indeed part of what Detrick calls "a compromise" by which the words "Bearing in mind that" replaced "Recognizing that". This substitution, however, was altogether a feeble and ineffectual attempt to de-recognize the rights of the child before birth. Perhaps the Australian delegation, like the United Kingdom delegation, could have concocted a Statement of Interpretation attempting to de-recognize children before birth. But this too turned out to be ineffective, quashed by the subsequent Legal Counsel requested by the representative of the United Kingdom and annexed to the report. In the end, the ploy lacked sufficient validity to exclude the child before birth from "the interpretation of Article 1" and subsequently from the operative protective provisions of the Convention.
In the meantime, this present Senate legal and Constitutional Affairs Committee would do well to note that just recently, the UN Committee on the Rights of the Child has not only called on States Parties to introduce and strengthen "prenatal care for children" but has also **explicitly condemned selective abortion (on the ground of sex, ethnic origin, social and cultural status, or disability) as a "serious violation" of the rights of the child**.

16. Finally, it must be pointed out that it is not valid to replace the international human rights legal terms 'child before birth' and 'unborn children' with medical textbook term 'the foetus' and then claim that 'the foetus' has no right to legal protection.
Such a device is being deployed illegitimately to contravene one of the founding principles of modern international human rights law—that unborn children are entitled to the protection of the law. To exclude the child before birth from the protection of human rights law is to return to Nazi concepts condemned by the international community at Nuremberg:

"…protection of the law was denied to the unborn children…"[41]

As one of the Nuremberg judgments, this principle was mandated to be codified in the *International Bill of Rights*.[42]

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[41] *Nuremberg Trials Record*: "The RuSHA Case", March 1948, Volume IV, p 1077. Available at : http://www.mazal.org/archive/nmt/04a/NMT04-T1076.htm .

[42] UN Resolution 95(1): Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal. Resolution 95 (1) of the United Nations General Assembly**,** 11 December 1946. The UN committee on the codification of international law was directed to establish a general codification of "the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal". These became the foundation of modern international human rights law.

CONCLUSION

Australia's original commitment to recognition of the State's duty to protect the rights of the child before as well as after birth was made in the *Universal Declaration of Human Rights* (1948)—this was confirmed and reaffirmed in the *UN Declaration on the Rights of the Child* (1959) as well as in the *International Covenant on Civil and Political Rights* (1966) and the *UN Convention on the Rights of the Child.*

Any narrowing of human rights protection to apply only to children 'after birth' constitutes an abrogation of Australia's abiding obligation to provide "special safeguards and care including appropriate legal protection before as well as after birth."

Human rights, once recognized, are by definition inherent and inalienable and thus can never be de-recognized.

In the final analysis, removal of human rights protection from the child before birth is an aberration that cannot be reconciled with our current obligations. Removing human rights protection cannot be done without compromising the essential non-derogability of the right to life itself. It cannot be done without rejecting the deontological foundations of human rights law. The hard truth is that international human rights law cannot be converted now to a utilitarian or consequentialist approach without a catastrophic unravelling of all the human rights protections that have been painstakingly built on principles such as equal protection before the law of every human being, equal safeguards including appropriate legal protection for the child before birth as for the child after birth, and an equal right to development and survival for all members of the human family.

RECOMMENDATION:

Reaffirm the principle of universal application of all human rights, including the right to legal protection for all children, before as well as after birth, as recognized in the Universal Declaration of Human Rights and subsequently codified in the right to life and the right to legal protection in all seven core human rights instruments to which Australia has solemnly agreed.