Reaffirming universal human rights "without any exception whatsoever"

Rita Joseph
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PUBLIC SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE: INQUIRY INTO THE HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) 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 some of the recommendations of the National Human Rights Consultation Committee.

2. For two decades now, I have been engaged in research regarding Australia's part in 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. It troubles me that there appears to be a great deal of ignorance about what Australia actually committed to in these instruments.

3. Thus, in my submission to the National Human Rights Consultation Committee and in my Presentation to the National Human Rights Consultation Committee in the Hot-Button Issues Session in the Great Hall, I set out some of the very serious omissions and misrepresentations of our current human rights obligations. 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), no meaningful and logically consistent scrutiny of the proposed legislation is possible.

4. In order to apply the transparency, justice and integrity proper to the implementation of the proposed legislation under consideration in these consultations, it is a matter of critical importance that the Australian government re-commits to the original principle of inclusiveness 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].

DEFINITION OF HUMAN RIGHTS

5. Human Rights are defined in s.3(1) of the Bill 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 has included from the very first drafting session (1947) legal protection for the human rights of children conceived but not yet born. At the very first session of the Drafting Committee of the Commission on Human Rights, the concept of human rights protection for "any person, from the moment of conception," was recognized. The term "from the moment of conception" was used in this original text for Article 1 of the Draft International Covenant on Human Rights:

> 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.[3]

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 be specific about protecting the unborn child from sentence of death. This article, prohibiting execution of pregnant women, acknowledges that the child, from the State's first knowledge of that child's existence, is to be protected. The *travaux préparatoires* for the *ICCPR* refers specifically to the intention to save the life of an unborn child:

> 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".[4]

6. Recognition of the human rights of the unborn child was never put in doubt. Some ingenious, but possibly not ingenuous, modern commentators have attempted to argue from the fact that the term "from the moment of conception" was dropped from the final text of Article 6 of the *ICCPR* that the human rights begin "only from birth".[5] But a careful reading of the *travaux préparatoires* reveals that unborn children, along with

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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 Doc.E.CN.4/21.

[4] 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.

[5] For a concise assessment and refutation of these commentators, 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

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.[6] Peter Heyward, the Australian member of the drafting team of the first documents, 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: "…logically, discrimination was prohibited by the use in each article of the phrase 'every person' or 'everyone'". [7]

7. It is logically indefensible to deny a child human rights protection on the 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 pregnant, that pregnancy signifies that the first stage of life, the child's nine months of growth and development in the womb, has begun already and that there is a State responsibility "to save the life of the unborn child":

> The provisions of paragraph 4(5) of the draft article aimed at the protection of the life of the unborn child whose mother was sentenced to death; that protection should be extended to all unborn children. [8]

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.

8. It is regrettable that the present government appears to be labouring under the misunderstanding that a bungled ploy[9] executed in the lead up to 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. 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 abortion. Given that the international community in the founding documents of modern international human rights

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[6] 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

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

[8] 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.

[9] For the historical facts surrounding the failure of this ploy see Rita Joseph:"*Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) 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.

law reached a formal and virtually unanimous agreement on the need for safeguards and care including legal protection for the child before birth[10] 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,[11] the original consensus must remain in effect.

THE PROBLEM: TO RESTORE ORIGINAL PRINCIPLE OF INCLUSION TO OUR DEFINITION of HUMAN RIGHTS

9. In introducing the legislation, the Attorney-General summed up 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. 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 any Australian government.

10. 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 the 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". Regrettably this is an invalid re-interpretation of what Australia actually agreed to when we ratified the *ICCPR*.

11. The Attorney-General's department is wrong to infer that arbitrary deprivation of life in Article 6 applies "only from birth" on the very selective grounds from McGoldrick's work that "(d)raft proposals that would have covered the right to life from conception were ultimately not adopted in the final version of the text (330)". A more careful

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[10] 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.

[11] "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.

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;[12] and
> 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.[13]

The first problem was addressed effectively in 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.

The ICCPR negotiators' second practical obstacle to protecting the right to life from the moment of conception 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. 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.

It is logically indefensible to deny a child human rights protection on the 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 pregnant, that pregnancy signifies that the first stage of life – the child's nine months of growth and development in the womb – has begun already and that there is a State responsibility "to save the life of the unborn child":

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

> The provisions of paragraph 4(5) of the draft article aimed at the protection of the life of the unborn child whose mother was sentenced to death; that protection should be extended to all unborn children. [14]

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. 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 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 (UN Declaration on the Rights of the Child (1959) and then in Article 6 (5) of the ICCPR; it is recorded clearly and irrevocably in the drafting history of International Covenant on Civil and Political Rights that protection of the law is to be "extended to all unborn children".[15]

- second, as an act aimed at the limitation of the right to life to children from birth only and not as was recognized as a founding principle of international human rights law—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" (Declaration on the Rights of the Child). Consensus was established that "the need for such special safeguards has been stated in the Geneva Declaration of the Rights of the Child of 1924, and recognized in the Universal Declaration of Human Rights".[16]

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

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[14] 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.

[15] 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.

[16] See Rita Joseph: "*Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) 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.

scrutiny, wide consultation and then, finally, without formal lodging of a proposed amendment in accord with Article 51 of the ICCPR. The outcome of such a proposed amendment is extremely doubtful in view of the fact that 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.

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 existing Acts with international human rights principles is only as good as its correct understanding of the original principles that Australia agreed to. On these principles, the advice from the Attorney-General's Department is not always correct—see for example, the specious argument in a recent letter to me from that Department, 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". 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 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 sloppy research by the Attorney-General's Department is found in the totally inaccurate conclusion 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.[17] 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 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" but this was altogether an incompetent and ineffectual attempt to de-recognize the rights of the child before birth which had been irrevocably recognized by the Universal Declaration. Perhaps the Australian delegation, like the United Kingdom delegation,

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

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. 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.

RECOMMENDATION:

Reaffirm universality of all human rights, as agreed in the original Universal Declaration of Human Rights and the seven core human rights instruments to which Australia has solemnly agreed.