

Submission

on the

Possible Ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities

to the

Joint Standing Committee on Treaties

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1. Introduction

The Optional Protocol to the Convention on the Rights of Persons with Disabilities (the Convention) entered into force on 3 May 2008. As at 16 December it had been ratified by 26 states parties.¹ Australia is permitted to accede to the Optional Protocol, under Article 11, because it has signed and ratified the Convention on the Rights of Persons with Disabilities which entered into force for Australia on 16 August 2008.

Once Australia has lodged its instrument of accession to the Optional Protocol, the Optional Protocol would enter into force for Australia thirty days later (Article 13 (2)).

The Optional Protocol was tabled on 3 December 2008. The Joint Standing Committee on Treaties has invited public submissions which are due by 23 January 2009.

2. National sovereignty

If Australia were to ratify the Optional Protocol it would authorise any individual who believes that his or her rights as expressed in the Convention on the Rights of Persons with Disabilities have been violated to lodge a complaint to be heard by the Committee on the Rights of Persons with Disabilities. The Committee first determines if the complaint is admissible, including determining whether all domestic remedies have been exhausted (with exceptions). If the complaint is declared admissible, the Committee considers the substantive matter. If the complaint is upheld the Committee can propose remedies to the State Party which is obliged to respond to this proposal.

The fundamental notion of Australia as a sovereign nation is compromised by allowing a committee of foreigners, appointed by the nations which have ratified the Convention, to second guess the outcome of domestic judicial proceedings or the validity of laws passed by our parliaments. This undermining of Australia's sovereignty is unacceptable particularly when several of these nations, such as China and Cuba, have notoriously poor records on human rights.

3. Federalism

Article 4.5 of the Convention has a specific provision for States Parties with a federal structure. It states that:

"The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions."

Many of the matters covered by the Convention are matters which in Australia remain the responsibility of States rather than the Commonwealth.

Since the Franklin dams case² the ratification of an international treaty by the Commonwealth has been held, by virtue of Section 51 (xxix) of the Constitution - the "external affairs" provision - to give the Commonwealth power to legislate on a matter, the subject of the treaty, for which it would otherwise have no head of power under which to legislate.

A Commonwealth government that is respectful of Australia's federalist structure ought not to undermine this by ratifying a treaty which explicitly attempts to undermine federalism by empowering aggrieved individuals to take a complaint about the law or policy of a State to a foreign committee.

4. The ideological views of the Committee

Article 1 of the Optional Protocol states that

“A State Party to the present Protocol (“State Party”) recognizes the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.”

The Committee on the Rights of Persons with Disabilities was only elected on 3 November 2008. It is not yet clear what views the Committee will adopt.

Other United Nations treaty body committees have been notorious for adopting strong ideological positions often completely unsupported by the text of the convention they are charged with upholding.

For example UN treaty bodies have expressed the view governments should “protect” human rights by:

- prohibiting parents from withdrawing their children from a sex education class;
- ensuring that at least 30 percent of children under age three are in full time day care;
- denying doctors or hospitals the right to conscientiously object to participation in abortion;
- denying economic support to mothers who choose to stay at home;
- allowing children to access medical or legal counselling without parental consent;
- allowing teenagers to access to abortion without parental knowledge; and
- denying religious bodies any exemptions from anti-discrimination laws.³

There is obviously a real possibility that, given the election procedures for this committee are similar to those for other treaty bodies, the Committee on the Rights of Persons with Disabilities may, at some time, adopt similarly idiosyncratic and ideological views. It would be reckless to commit Australia in advance to taking serious notice of a committee which may be subject to this lack of common sense.

5. A right to abortion?

International proponents of an unfettered right to abortion have sought for at least the past 15 years to include references to ambiguous language such as “sexual and reproductive health” in United Nations documents with the intention of creating a right to unfettered abortion in customary international law. Pro-abortion members of United Nations treaty monitoring bodies use the occurrence of such terms in UN treaties as the basis for urging States Parties to those treaties to remove any legal or policy provisions which limit unfettered access to abortion in their respective countries.

The negotiations over the Convention on the Rights of Persons with Disabilities were not exempt from these efforts.

Article 25 of the Convention provides in part that:

“States Parties shall:

- (a) *Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;”.*

The inclusion of this controversial language was the occasion of interpretive comments by a number of States Parties.

The representative of the Marshall Islands said he understood that “references to ‘sexual and reproductive health services’ did not include abortion, or abortion rights, or create any new rights or obligations that contravened national laws”⁴

H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See at the United Nations, said “regarding article 25 on health, and specifically the reference to sexual and reproductive health, the Holy See understands access to reproductive health as being a holistic concept that does not consider abortion or access to abortion as a dimension of those terms. Moreover, we agree with the broad consensus that has been voiced in this chamber and the travaux préparatoires that this article does not create any new international rights and is merely intended to ensure that a person’s disability is not used as a basis for denying a health service.

“However, even with this understanding, we opposed the inclusion of such a phrase in this article, because in some countries reproductive health services include abortion, thus denying the inherent right to life of every human being, affirmed by article 10 of the Convention. It is surely tragic that, wherever fetal defect is a precondition for offering or employing abortion, the same Convention created to protect persons with disabilities from all discrimination in the exercise of their rights, may be used to deny the very basic right to life of disabled unborn persons.

“For this reason, and despite the many helpful articles this Convention contains, the Holy See is unable to sign it.

“In conclusion, my delegation considers that the positive potential of this Convention will only be realized when national legal provisions and implementation by all parties fully comply with article 10 on the right to life for disabled persons.”

In addition to the Marshall Islands and the Holy See, the United States, Canada, Peru, Honduras, Uganda, Egypt, Iran, Nicaragua, Libya, Costa Rica, the Philippines, Syria, and El Salvador noted their interpretations of the phrase ‘sexual and reproductive health’ as not including abortion.

The US representative stated: “The United States understands that the phrase ‘reproductive health’ in Article 25(a) of the draft Convention does not include abortion, and its use in that Article does not create any abortion rights, and cannot be interpreted to constitute support, endorsement or promotion of abortion. We stated this understanding at the time of adoption of the Convention in the Ad Hoc Committee, and note that no other delegation suggested a different understanding of this term.”⁵

In signing the Convention, Malta lodged the following interpretative statement and reservation:

“Pursuant to Article 25 of the Convention, Malta makes the following Interpretative Statement - Malta understands that the phrase “sexual and reproductive health” in Art 25 (a) of the Convention does not constitute recognition of any new international law obligation, does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion. Malta further understands that the use of this phrase is intended

exclusively to underline the point that where health services are provided, they are provided without discrimination on the basis of disability."

Poland made a similar reservation upon signature: *"The Republic of Poland understands that Articles 23.1 (b) and 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto."*

While abortion is permitted, under various conditions and requirements, in some jurisdictions within Australia there is certainly no consensus in Australia that unfettered access to abortion is a human right.

Depending upon the ideological make-up of the Committee on the Rights of Persons with Disabilities, Australia could be providing a channel for individuals who disagree with any restrictions on abortion in Australia to pursue their grievance at the United Nations.

6. Conclusion

Acceding to the Optional Protocol to the Convention on the Rights of Persons with Disabilities is not in Australia's national interest because:

- it would undermine Australia's sovereignty to allow individuals to pursue remedies against Australian judicial decisions or validly passed laws of an Australian parliament with a foreign body;
- it would undermine federalism by allowing grievances against a State to be pursued before a foreign body;
- it would subject Australia to the vagaries of ideological opinion of the Committee elected by States Parties, including several who are notorious abusers of human rights; and
- it would potentially allow appeals against State laws restricting abortion to a foreign body.

Recommendation:

Australia should not accede to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

7. Endnotes

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1. <http://www.un.org/disabilities/countries.asp?id=166>.
 2. Commonwealth v Tasmania (1983) 158 CLR 1; www.austlii.edu.au/au/cases/cth/HCA/1983/21.html.
 3. Fagan, Patrick F, "How U.N. Conventions On Women's And Children's Rights Undermine Family, Religion, And Sovereignty", *Heritage Foundation Backgrounders*, no. 1407, 5 February 2001; http://www.heritage.org/Research/InternationalOrganizations/upload/95496_1.pdf.
 4. General Assembly Adopts Groundbreaking Convention, Optional Protocol On Rights Of Persons With Disabilities; www.un.org/News/Press/docs/2006/ga10554.doc.htm.
 5. Western, John-Henry, "Vatican Refuses to Sign UN Disabilities Rights Treaty over Pro-Abortion Language", *LifeSite News*, 14 December 2006; www.lifesite.net/ldn/2006/dec/06121406.html.