

## **Submission**

on the

# **Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005**

to the

## **Senate Community Affairs Legislation Committee**

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**9 June 2006**

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## **1. The Bill**

The *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005* was introduced to the Senate on 23 June 2005 as a private Senator's bill by Senator Natasha Stott-Despoja. It was referred to the Community Affairs Legislation Committee on 11 May 2006 by the Senate, on the recommendation of the Selection of Bills Committee. The Community Affairs Legislation Committee is due to report to the Senate on 17 August 2006.

Reasons for referral are given in Appendices 1 and 2 of Report No 4 of 2006 of the Senate Selection of Bills Committee.

The proposal from the Australian Democrats Whip, Senator Andrew Bartlett, states the reason for referral as "to examine the adequacy of the legislation in improving regulation of pregnancy counselling, and ensure the counselling provided by Government-funded pregnancy counselling services is objective, non-directive, and includes information on all three pregnancy options."

The proposal from the Opposition Whip, Senator George Campbell, notes that "this is a complex bill and great care will be needed to properly assess its impact on advertising and the provision of information re pregnancy counselling services."

## **2. Validity and reach of the Bill**

Section 51 of the Constitution does not allocate to the Commonwealth any head of power to enable it to legislate directly on either pregnancy counselling services or advertising. Most pregnancy counselling services are not corporations, so the Bill cannot rely on the corporations' power (Section 51 (xx)).

Advertising on television, radio and the Internet could come under Section 51 (v) dealing with "Postal, telegraphic, telephonic, and other like services".

Section 3 of the Bill defines person to include "a person, organisation, authority, agency or association in respect of which legislative power has been referred to the Parliament of the Commonwealth, by the Parliament of any State or States for the purposes of this Act". This provision anticipates the possibility that one or more State may refer some relevant matter to the Commonwealth under Section 51 (xxxviii) of the Constitution. It seems unusual to legislate in this manner in the absence of any discussion between the Commonwealth and the States on this matter.

This means that Sections 5 and 6 of the Bill would be of limited application.

It is not appropriate for the Commonwealth to attempt to legislate in an area where it has no clear head of power under the Constitution. For this reason alone the Committee should advise the Senate to reject the Bill.

## **3. Non-directive pregnancy counselling services**

At the heart of this Bill is a distinction between two kinds of pregnancy counselling services. One kind of pregnancy counselling service is defined by the Bill as "non-directive".

The definition of a non-directive pregnancy counselling service is given in Section 3 as follows:

*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.*

Non-directive counselling is a term used in the behavioural sciences to refer to a particular approach to therapy developed in the 1930s by Carl Rogers. The Encyclopedia of Mental Disorders defines it as follows:

*“Person-centered therapy, which is also known as client-centered, non-directive, or Rogerian therapy, is an approach to counseling and psychotherapy that places much of the responsibility for the treatment process on the client, with the therapist taking a nondirective role.”<sup>1</sup>*

There is serious doubt as to whether non-directive counselling is achievable in practice in areas such as genetic counselling. *“The Third European Meeting on Psycho-social Aspects of Genetics (1992) voted by a narrow majority that non-directive genetic counselling was not achievable in practice. This is partly due to the fact that counsellors come to sessions with their own views about what they think they would do in the situation or what they think a responsible person should do. These views may be held consciously or unconsciously but they will influence the counsellors' choice of words in describing conditions, tests and probabilities, their facial expression, body language, and the order in which things are explained and the amount of time spent on different topics. For this reason non-directive counselling is thought to be an unattainable ideal. It is not because of a personal failure on the part of the genetic counsellor but as a direct result of the structure of the encounter between counsellor and client.”<sup>2</sup>*

This analysis also applies more generally to pregnancy counselling. Pregnancy counselling services provided by those who believe abortion is the “responsible” choice in particular circumstances cannot achieve non-directive counselling any more than services provided by those who believe abortion is never a life enhancing choice for a woman.

The Bill would itself produce misleading advertising by falsely labelling certain pregnancy counselling services as “non-directive” based solely on their willingness to refer for abortion rather than on a professional assessment of whether they have achieved what a significant body of professional opinion considers to be unachievable, that is true “non-directive counselling”.

It is not appropriate to attempt to reduce the wide range of possible counselling approaches for pregnancy counselling to a simplistic division into “non-directive” and “other”. The Bill relies entirely on this unjustified division to allow the so-called “non-directive” pregnancy counselling services to advertise in an unrestricted manner, to be notified in telephone directories in an unrestricted manner, to be listed in the 24 hour health and help call pages of public number directories and to receive Commonwealth funding while prohibiting all other pregnancy counselling services from doing so.

## **4. Referral for abortion and public policy**

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.”

Abortion is very readily available in Australia today. Abortion providers are listed under “Pregnancy Termination Services” in the Yellow Pages. “The estimated number of induced abortions in Australia in 2003 was 84,218.”<sup>3</sup> Most Australians (87%) want the number of abortions reduced.<sup>4</sup>

A majority of Australians (54%) believe abortion involves the taking of a human life.<sup>5</sup> It would be unconscionable to require those who believe that abortion involves the taking of a human life to refer a pregnant woman to an abortion provider.

There is no justification in public policy to favour those pregnancy counselling services which facilitate abortion. On the contrary, a public policy which reflected the beliefs of the majority of Australians about abortion would favour those pregnancy counselling services which declined to refer for abortion but offered support, including material help, for women with a crisis pregnancy to continue the pregnancy.

## **5. Misleading and deceptive notification and advertising**

The Bill would create an un rebuttable presumption that a pregnancy counselling service which does not refer for abortion is engaged in misleading or deceptive advertising or notification unless it specifically includes a statement that “this service does not provide referrals for terminations of pregnancy” in any advertising or notification.

This is an extraordinary provision. It is based on a biased and unfounded assumption that the only legitimate pregnancy counselling services are those which refer for abortion. The very existence of a significant number of pregnancy counselling services which do not refer for abortion is sufficient evidence that it is not an intrinsic characteristic of pregnancy counselling services to offer such referrals.

It is inappropriate to require a service to advertise what it doesn’t provide. Nothing in the Trade Practices Act 1974, which is supposedly the legislative model for this Bill,<sup>6</sup> requires corporations to state in advertisements, let alone in their listings in telephone directories, which services they don’t provide.

## **6. Recommendation**

**The Committee should advise the Senate to reject this Bill because:**

- (i) significant parts of it lack Constitutional validity;**
- (ii) it relies on a misleading use of the term “non-directive counselling” to favour those pregnancy counselling services which refer for abortion and penalise those which do not;**
- (iii) it promotes a public policy in favour of abortion which is at odds with the views of the majority of Australians; and**
- (iv) it would subject pregnancy counselling services to a requirement that does not apply to corporations under the Trade Practices Act 1974, namely the requirement to advertise that they do not offer a particular service (being referral for abortion).**

## 7. End notes

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- <sup>1</sup> <http://www.minddisorders.com/Ob-Ps/Person-centered-therapy.html>.
- <sup>2</sup> Sahin Aksoy “Antenatal screening and its possible meaning from unborn baby's perspective” *BMC Medical Ethics* 2001, 2:3.
- <sup>3</sup> AIHW National Perinatal Statistics Unit Use of routinely collected national data sets for reporting on induced abortion in Australia Canberra, AIHW, 2005.
- <sup>4</sup> See <http://www.bioethics.org.au/docs/givingchoice/ExecutiveSummary.pdf>.
- <sup>5</sup> Market fact (Qld) Pty Ltd What Australians Really think About Abortion Brisbane, 2006.
- <sup>6</sup> Senator Natasha Stott-Despoja, Second reading speech, 23 June 2005: “Although the Trade Practices Act outlaws ‘conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services’, most pregnancy counselling services are not subject to the Trade Practices Act because they usually do not charge for the information and other services they provide and are thus not considered to be engaging in trade or commerce. This bill essentially makes pregnancy counselling services subject to the same laws regarding misleading advertising as organisations which are engaged in trade or commerce.”