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16th June 2006

Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005

The proposed Bill needs to be amended to comply with the Australian Parliament's fundamental obligation under international human rights law to provide and to ensure adequate legal protection for the human rights of the child before birth.

1. It is highly commendable that at last the Australian Federal Government is moving to recognize and enact their strict legal duty under international human rights law to scrutinize the pregnancy counselling processes that result in Australian mothers aborting some 90,000 unborn children each year. Yet the Bill does not go far enough. Logical consistency requires that this Bill, as it is addressing the issues of transparency and notification with a view to imposing disclosure as a condition of financial assistance, must extend its reach to include imposing disclosure of the reasons that are considered legally sufficient for "referral for pregnancy termination". It is only fair that the same level of transparency, notification and disclosure be imposed on those pregnancy counselling services who provide "referrals for termination of pregnancy" (i.e. abortion) as to those who are ready to help mothers both to a successful, natural termination of pregnancy (i.e. a live baby) as well as to a successful adjustment to life with the new baby or with the new baby and his/her adopted parents.
2. In examining the provisions of the Bill relating to the Parliament's new-found interest in setting conditions, limitations and restrictions on the circumstances in which financial benefits will be payable for pregnancy counselling services, there is a glaring hole in the legislation regarding the need to apply necessary conditions, limitations and restrictions on "referral for pregnancy termination". This Bill must be extended to require that pregnancy counsellors are fully qualified and appropriately credentialled in law, psychology, obstetrics and gynaecology before they are permitted to provide "referrals for termination of pregnancy".
3. Lest unrestricted and unexamined "referrals for termination of pregnancy" be interpreted as promotion and endorsement of arbitrary deprivation of life in contravention of the human rights of the unborn child, the Federal Government should require that pregnancy counsellors' interpretation of abortion laws protecting the unborn child is in line with **the common law method of legal**

interpretation, now routinely adopted by both English and Australian courts, under which all public officials and private abortion counsellors and abortion providers must justify actions **by reference to both principles of necessity and proportionality** when the intended outcome of their intervention and advice is to result **in arbitrary deprivation of the life of an unborn child.**

4. This Bill unfortunately has misrepresented "pregnancy termination" i.e. abortion of the unborn child, as an "option" that must always be "offered" to the mother seeking counselling regarding her "unplanned pregnancy". It must be pointed out that under the laws of most States in Australia the fact that a pregnancy is "unplanned" does not constitute sufficient legal grounds for "offering" abortion as a legal "option". Legally speaking, pre-meditated abortion of an unborn child is never an "option": always it must be "a necessity" which is conceptually and substantially different to a mere option. Deprivation of life on legal **grounds of necessity is invoked** only after all other measures and remedies have been genuinely explored, tried and exhausted.—it means that there is no other option. The objective "necessity" test that every counsellor should apply is this: "If this baby was a desperately wanted baby, what could I do 'to save the life of the unborn child' as well as the life of the mother?" If the answer is absolutely nothing, then the abortion might be considered "necessary". **Necessity is what remains when all "options" have been eliminated**. State condoned deprivation of life, whether capital punishment or abortion, is a very, very serious matter—it should never be trivialized as "a choice" or "an option".
5. This Bill must ensure that in issuing "referrals for pregnancy terminations" **the fundamental legal principle of proportionalism also is applied.** Anything less than the saving of the mother's life is not strictly proportional to the irreparable and lethal harm done to the unborn child, and is open to the charge of being arbitrary and unjust. If the life of the unborn child is destroyed in the process of saving the life of the mother—that is justified. If the life of the unborn child is destroyed for any lesser reason, intentional deprivation of the child's life may not be legally justified and should certainly be investigated. Over 98% of abortions in Australia over recent years are for "social and financial" reasons and are thus in contravention of the fundamental principle of proportionalism.
6. There is, at present, no serious scrutiny of the lawfulness of the referrals that result in an inordinately large number of abortions every year. The medical profession itself seems to be either powerless or reluctant to scrutinize the excessive number of "referrals for pregnancy termination", referrals which would appear to be less than honest. It is just not credible that pro-abortion advocates are referring over 90.000 Australian mothers each year for abortions on the absurd claim that all 90.000 of them are in such grave danger of death or serious injury to health that the children in their wombs must be aborted.
7. Regrettably, the States and Territories of Australia are utilizing the empty forms of legal process to hide extermination of unborn children on a vast scale. Termination of the lives of some 90,000 unborn children each year is being funded by the Federal Government in the naïve belief that the States and Territories are ensuring that all abortion providers are always performing "lawful" abortions. **Prior to the introduction of this Bill, the Federal Government has**

consistently shied away from scrutinizing abortion decisions. This Bill should be amended to provide Parliament with an opportunity to take a new stand, one that will be in compliance with the human rights obligation of the Commonwealth to provide `legal protection for the child before birth". This Bill should be amended to indicate clearly that the Parliament will no longer be **applying a presumption of innocence to the inordinate numbers of unborn children "referred" for abortions**. In this Bill, the Parliament should give clear and unequivocal notice that it will no longer operate blindly on the assumption that, in the absence of a court decision to the contrary, every referral for termination of the life of an unborn child is based on reasons that are in accordance with relevant State or Territory law. The absence of a State or Territory court decision to the contrary cannot be accepted as a reliable proof that selection of a particular unborn child for referral for abortion is legally justified, especially where State or Territory laws protecting the unborn child are inadequate, either in their framing or in their interpretation.

8. Disclosure of grave justifying reasons for referral of a particular child for lethal medical services must be made a condition of financial assistance. There can be no doubt that at least some of the current "referrals for pregnancy termination" for Medicare-funded abortions are in contravention of. The human rights obligation of the Australian Federal Government, under international human rights law, to provide appropriate legal protection for each child "before as well as after birth.
9. At present, Medicare payments are funding each year an unconscionable number of abortions. The fact that the number is so hedged about with obfuscation that it cannot be calculated with any degree of accuracy and transparency, is itself an indictment, and a powerful piece of evidence that increased scrutiny of "referrals for termination" of such large numbers of unborn children is both necessary, and indeed long overdue. In the interest of justice, it is crucial that this legislation be extended to include setting conditions for ensuring that "referrals for termination" are legally valid, objectively necessary and proportional in that the lethal harm planned for her child is balanced by the necessity to avoid a proportionately serious harm to the mother. Such an extension is particularly necessary in view of the appalling dearth of responsible scrutiny of the abortion industry not only by "non-directive pregnancy counsellors" who provide "referrals" for abortion "on request" but also by the doctors' self-regulatory bodies and by the State and Territory Governments. Self-regulation of the medical profession in regard to abortion is not working—our abortion rate is higher than other comparable countries—and State and Territory laws protecting the child *in uteri* from arbitrary deprivation of life appear to be largely ignored.
10. From a human rights perspective, the proposed legislation is seriously flawed in that it has made no provision for ensuring (a) that "referral for termination of pregnancy" is in compliance with State and international laws that seek to provide adequate legal protection against arbitrary deprivation of life for the unborn child; and (b) that those counsellors who refer a mother for termination of her baby's life are adequately qualified to assess and advise on the legal, psychological and physiological risks and consequences of "referring" the mother for an abortion.

11. It is a disturbing failure of the duty of care that is owed to both the mother and the baby in her womb that there are no provisions in this legislation to scrutinize the so-called "non-directive pregnancy counselling services", defined essentially in the Bill by the singular distinction "will provide referrals to termination of pregnancy services where requested". If these "non-directive pregnancy counselling services" are indeed referring mothers for abortion "on request", then they are almost certainly committing an illegal act. Neither international law nor Sate nor Territory laws in Australia can condone abortion "on request".
12. Any "non-directive counselling service" that "on request" provides "referrals for termination of pregnancy" is in contravention of international human rights law that insists that appropriate legal protection be given to every child before as well as after birth. The *Universal Declaration of Human Rights* (1948) recognized that the child, by reason of his physical and psychological immaturity, needs special safeguards and care, *including legal protection before as well as after birth*. This makes abortion a human rights issue. Legal protection for the defenceless child at risk of abortion is the purview of the federal government, which has, under international law, the authority when it comes to human rights violations to override state and territory laws.
13. Deprivation of the life of the unborn child, as the intended outcome of a consultation concerning pregnancy, is presented quite falsely in this Bill as an "option". Regrettably, this is an indefensibly simplistic representation of a very serious human rights protection failure—a serious refusal to acknowledge both our State laws and our international human rights law obligations to ensure that the human rights of he unborn child are protected, that deprivation of the life of an child is permitted only in cases of dire necessity and only when the principle of proportionalism is applied.
14. This Bill offers a great opportunity right now for our Parliament to correct faulty processes and this Bill should be expanded to set conditions, limitations and restrictions on the extremely high incidence of unregulated abortion in the States and Territories. As one who was at the 1994 Cairo International Conference on Population and Development (and at every UN mega-conference since), I can attest to the fact that all countries, including Australia, agreed and reaffirmed at subsequent conferences that "*in no case should abortion be promoted as a method of family planning"*. When the Australian Government continues each year to pay for and thus to endorse one abortion for every three live births, it constitutes nothing less than a deliberate "promotion" of abortion as "a method of family planning". When one baby in every four is given lethal treatment instead of pre-natal care, abortion is being used as a method of family planning in contravention of the agreement reached by the international community. What more effective promotion of abortion as a method of family planning than to pay for these abortion referrals, no questions asked and no dissuasion from further abortions proffered? All UN member countries at the Cairo and Beijing conferences agreed that *in no case should abortion be promoted as a method of family planning.* All governments promised also to make every effort "*to reduce the recourse to abortion"*. Yet since the Australian Government made this promise in 1994, and reaffirmed it in 1995, there has been no significant reduction.

15. It would be a travesty of justice if this Bill does not redress the need for acknowledging and restoring the rights of the child before birth whose health and well-being are important along with the health and well-being of his/her mother. . Failure to rectify this omission in the Bill will amount to an ethically untenable endorsement of "referrals for termination of abortion on request". It will fail to deal with an unconscionably unjust process where tens of thousands of unborn children are being arbitrarily deprived of life, "referred" by pro-abortion advocates for extermination of their most elementary rights, denuded of recognition and respect due, without any discrimination whatsoever, to all humanity, denied the right to good medical care, robbed of the right to legal protection, exposed to every form of mutilation and abuse, branded as unwanted, inconvenient or imperfect, and treated by the abortion counsellors and providers with utter contempt.
16. Because "referrals for termination of pregnancy" are being made in such large numbers in Australia as to be blatantly inconsistent with the spirit and letter of the laws that are supposed to provide legal protection for unborn children, the need for scrutiny of " non-directive pregnancy counselling services" is a serious human rights issue. Responsibility for restoring legal human rights protection before birth for these children at risk of extermination reverts to the Australian Federal Government. International human rights instruments such as the *International Covenant on Civil and Political Rights* (1966) (ICCPR)specifically require Federal Governments to override individual State and Territory Governments when non-derogable human rights, such as the right to life (article 6), are being violated. The *International Covenant on Civil and Political Rights* Article 50, decrees that all human rights provisions "shall extend to all parts of federal States without any limitations or exceptions."
17. Medicare payments for "on request"(i.e. self-assessed, unregulated) "referrals for termination of pregnancy" is a grave offence against human rights and amounts to an endorsement of the arbitrary removal of basic legal protection for the human rights of the child before birth. The noble aims and purposes of Medicare, which was set up to protect the health of all mothers, and all children, including the health of all children *in utero*, are being profaned when they are put in the service of promoting referrals for abortion as an option that all mothers must be offered and be forced to consider. The pretence of expanding a mother's "options" to include abortion for every mother seeking counselling, even for those mothers for whom the abortion option is not legally valid, is no excuse for the perversion of the original noble and honorable recognition that in every pregnancy there are two patients, both the mother and the baby. Medicare must endeavour to encourage all counsellors and medical professionals to provide both mothers and their babies with good pre-natal advice and health care—in a good health system such as here in Australia, it should be only in the most exceptional cases, that the life and health of both the mother and her baby cannot be saved.
18. In view of this glaringly obvious "over-supply" of "referrals for termination of pregnancy" i.e. referral for the lethal procedure of abortion as a "health service", an extension of this legislation to include better scrutiny of the competency and professional integrity of "non-directive pregnancy counselling services" is long

overdue. There is, indeed, a most urgent need to initiate responsible reform, to set conditions, limitations and restrictions on the circumstances in which Medicare benefits will be payable for abortion referral services. When one baby in every four is given lethal treatment instead of pre-natal care, when State and Territory Governments insist that it is no responsibility of theirs to protect babies at risk of abortion, when abortion providers are permitted to be a law unto themselves, pleading privacy to cover up possible human rights abuses of both mothers and babies, then the federal government must exercise its legitimate powers, under the international human rights treaty commitments to set more stringent conditions, limitations and restrictions on abortion counsellors and providers, so that adequate checks and balances are set in place and maintained.

19. Scandals such as the infamous Victorian case of a Melbourne child of 32 weeks gestation, diagnosed with dwarfism and aborted just one month before birth in February 2000 at the Royal Women's Hospital, must be addressed urgently. Where those who refer for such abortions are paid out of the federal public purse, it involves all Australians in the injustice of arbitrary deprivation of a human life. Victorian state laws failed to provide adequate human rights protection for that child. Such violations should not be hidden behind doctor-patient confidentiality. International human rights law rejects the right to privacy as a defence against human rights investigations. Major human rights treaties have laid down the principle that "neither privacy nor State sanction can be a defence for human rights violations", as commonly expressed in those treaties. They condemn all acts of violence resulting in or likely to lead to physical harm "whether occurring in public or in private life" and including "violence perpetrated or condoned by the State, wherever it occurs". It is imperative that privacy is not allowed to provide an excuse for not scrutinizing the reasons that are purported by "non-directive pregnancy counselling services to justify issuing "referrals" for an unborn child to be aborted. Nor shall we allow public and private abortion counsellors or providers, to use the right to privacy to attempt to evade human rights responsibilities to protect the child before birth from arbitrary abortion. Where the life of a child before birth is at risk, human rights protection overrides appeals to privacy. The **right to privacy** whether inveighed by the mother or the abortion counsellor or the abortion provider **must be subordinate to the necessity of being able to investigate and uphold the human rights of the unborn child** wherever they are being violated in private or in public. The Commonwealth has a grave legal duty to ensure the existence of adequate protection in domestic law against human rights violations against the unborn child committed not only by public authorities but also by private individuals
20. New Zealand's Professor David Fergusson's recent long-term study (the largest study of its kind internationally) reported in the Journal of Child Psychiatry and Psychology (January, 2006) linked those having abortions with elevated levels of subsequent mental health problems, including depression, anxiety, suicidal behaviours and substance use disorders. Researchers found that at age 25, 42% of women in the study group who had had an abortion also experienced major depression at some stage during the past four years. This was 35% higher than those who had continued the pregnancy. Despite Professor Fergusson's own

admission (“I’m pro-choice but I’ve produced results which… favour a pro-life viewpoint”), he has concluded: “It verges on scandalous that a surgical procedure that is performed on one in ten women has been so poorly researched and evaluated given the debates about the psychological consequences of abortion.”2 In a letter to the Abortion Supervisory Committee, he wrote that his reading of the literature on abortion suggested that it was “one of the most methodologically flawed and illiterate research areas” he had ever encountered.3 Professor Fergusson went on to say that the ides behind the law that abortion was a mental health issue was “based on conjecture”. No one, he said, had examined the costs and benefits: “If the legislation was based on health grounds, you would naturally think this would lead to monitoring of people who had had abortions’ but, he said, “the health aspect is always secondary to personal choice.”

21. This elevation of “personal choice” or (in the language of this Bill) the “referral” for abortion “by request” over genuine health aspects should certainly alert the Australian Parliament to the possibility that facile claims that “referral for termination of pregnancy” and the abortion of her child is a cure for a mother’s mental health problems are invalid and less than reliable as are claims that suicide threats by an unborn child’s mother can only be averted by referring her to an abortion provider who will destroy her child. Claims such as these that mental health problems in the mother provide a justifying reason for aborting her child contravene a fundamental principle of international human rights law, viz., the indivisibility of human rights. This principle demands that human rights protections for both mother and child be observed—both mother and child are entitled to the best possible health care. Suicide threats by the mother should be treated with compassion and professional competence, and “the need for special safeguards and care” of both the mother and child should be met.
22. It is critically important that those who are involved in “non-directive pregnancy counselling services” are educated to understand the serious human rights violations involved in arbitrary deprivation of an unborn child’s life as well as the grave implications and consequences of “referrals for termination of pregnancy”. They should ensure that such referrals respect the human rights obligations towards both the mother and her unborn child as set out in the *International Covenant on Economic, Social and Cultural Rights* (1966). This Convention recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and requires the States Parties to provide: *“*for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”. Referral for abortion services do not make for the healthy development of the child—they are a violation of the right of every child, including the child before birth, to achieve the highest attainable standard of physical and mental health. The immense advances in fetal medicine and fetal surgery that are now available challenge all those involved in genuine pre-natal health-care and counselling to abandon altogether the harmful modern practice of

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2 *New Zealand Sun-Herald: “Abortion researcher confounded by study” 5/1/06 by Ruth Hill*

3 *ibid*

abortion. Rapid expansion in fetal medicine and fetal surgery, improved medical knowledge of the developmental needs of the child before birth, new recognition of the ability of the child before birth to feel pain—all of these are building an unstoppable force for returning to the highest international human rights standards for the proper treatment and care of the child before birth.

23. The immense abortion toll in Australia represents a failure of state and territory law to provide adequate human rights protection for the child selected for referral to undergo this lethal, pseudo-medical procedure. Genuine medicine, as agreed by all civilized human societies since the time of the Hippocratic Oath, does no deliberate harm to an unborn child. In this situation where State and Territory laws protecting the unborn child are either non-existent (as in the ACT) or so liberally interpreted by the courts as to provide ineffective protection for some 90,000 Australian children who are "lawfully" aborted each year.
24. With a scandal of such immense ethical proportions, it is not possible for this state of legal and medical fraud and corruption to be maintained indefinitely. The right to life, as protected by international human rights law, means, inter alia, that States have, at all times, to prevent, investigate, prosecute, punish and redress violations of the right to life wherever such violations occur, both in private and in public, and even in public emergencies threatening the life of the nation (Article 4(2) ICCPR).
25. Only a corruption of this strict legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life could enable a government to authorize unrestricted "on request" abortion access through "referrals" designed to mark the unborn child for a lethal medical procedure.. States Parties' human rights obligation to provide legal protection for the child before as well as after birth means that governments are prohibited from promoting, condoning or paying for referrals for abortion where no serious attempt has been made to prove that the intended outcome is not an arbitrary deprivation of the life of the unborn child
26. This legislation cannot be complete without it addresses the serious issue of whether or not "non-directive pregnancy counselling services" are competent authorities in assessing whether or not a referral to terminate the life of the unborn child is itself consistent with the Commonwealth's international human rights obligations to provide all children with "*special safeguards and care including appropriate legal protection before as well as after birth*". The Federal Parliament as the appropriate protective authority for the well-being and human rights of the child before birth. The statistics of abortion in Australia, over 90,000 each year, stand as a shameful indictment of the lack of accountability and the dearth of appropriate checks and balances that would protect the unborn child from arbitrary (and thus illegal) deprivation of life.
27. The section of this Bill entitled "**Objects**" needs to be altered: an article 4(e) should be added to read "ensure that advice to deal with unplanned pregnancy is consistent with the legal principles of necessity and proportionalism and is compatible with legal protection of the human rights of the unborn child.
28. Under international human rights law, the national legislature (i.e. the Federal Parliament) remains the primary line of legal defence of the human rights of unborn children in Australia. This Bill must be amended in order to conform to

the Government's human rights obligations to provide protective laws against those abortions which constitute arbitrary deprivation of life and which are in breach of international human rights law, as established via the Nuremberg principles and judgments (UN Resolution 95) and their codification in the International Bill of Rights.

29. It is part of the Nuremberg record of the trial testimony that unborn children are considered from this very foundation of modern international human rights law to be human beings entitled to the protection of the law: "…**protection of the law was denied to unborn children**…" (RuSHA/Greifelt Case, Nuremberg)
30. The Universal Declaration of Human Rights (UDHR) recognizes that the child "*by reason of his physical and mental immaturity*" is entitled to *"special safeguards and care* including appropriate **legal protection before as well as after birth"**[i]**4** This immaturity is not to be allowed to diminish in any way their inherent humanity. The right to life, as protected under Article 3 of the Universal Declaration, is equally valid for the child before birth as for the child after birth, "*without any discrimination whatsoever"*.
31. "*No one may be deprived of their life arbitrarily*", says Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Governments are required to "***strictly control and limit the circumstances in which the State may condone deprivation of life***"5 The unborn child's right to life is also protected under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR's travaux *preparatoires* (explanatory notes written at the time the Covenant was negotiated) stated this explicitly: "***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***." 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.

Thus all **sovereign nations like Australia have grave ICCPR human rights obligations**

1. **to** "***strictly control and limit the circumstances in which the State may condone deprivation of life" and***
2. **"to *save the life of the unborn child*".**

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4 UN General Assembly, November 20th, 1959, reaffirmed unanimously and 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.

5 Human Rights Committee General Comment 6, Para. 3

Parliament as human rights defender of the life of the unborn has a grave duty here to exercise its authority **and responsibility to demand and to monitor that each and every use referral for termination of the life of an unborn child will be strictly compatible with the human rights obligation to provide for every Australian child "special safeguards and care, including legal protection before as well as after birth". Parliament has both the authority and the obligation under the external affairs power in accord with the human rights treaty commitments already made by previous Australian governments**

The Australian Parliament has historically-based international human rights obligations to recognize the child before birth as a legitimate subject of human rights with "the inherent dignity and equal and inalienable rights of all members of the human family"—this Bill must be amended to conform to these obligations.

Recommendations:

(i) **That the Bill be altered to include disclosure of the justifying reasons for "referrals for pregnancy termination" in order to qualify for financial assistance from the Commonwealth.**

(ii) **That the Bill be altered to provide for objective scrutiny of the legality of the justifying reasons for "referrals for pregnancy termination": the Parliament must be satisfied that the reasons are of such a grave nature that referring an unborn child for termination of his or her life is not in contravention of the Commonwealth's ICCPR human rights obligation "to save the life of the unborn child", nor in contravention of the Universal Declaration of Human Rights which requires the Commonwealth to provide appropriate legal protection for the child before birth, nor in contravention of the Nuremberg principles and judgments, forming the foundation of modern international human rights law, which require that protection of the law must not be "denied to unborn children".**

(iii) **The section of this Bill entitled "Objects" needs to be altered: an article 4(e) should be added to read "ensure that advice to deal with unplanned pregnancy is consistent with the legal principles of necessity and proportionalism and is compatible with legal protection of the human rights of the unborn child.**

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