

## Review of Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Bill 2005

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12<sup>th</sup> December 2005

1. A significant and legitimate distinction exists between “restricted goods” such as RU-486 and therapeutic goods—it is a critical difference in purpose between the malign and the benign. While at present, RU-486 is “the only medicine subject to the restricted goods condition”, this may not remain so—consider for example the possibility in the near future of assisted-suicide drugs for pregnant women (again a different purpose from benign therapeutic goods). Where deprivation of life is the intended outcome of a new medicine, the importation and promotion of such a drug is first and foremost a human rights protection issue. The proper purview of all grave human rights issues involving intentional deprivation of human life is each sovereign nation’s highest legislature which is obliged to assess each case in the light of the nation’s obligations under international human rights law.
2. Serious assessment of a drug such as RU486 designed to abort the life of an unborn child cannot be confined to a narrow and simplistic technical exercise in testing the pharmacological safety of the drug on the mother while ignoring the lethal effects on her child. It may be true to say that the Therapeutic Goods Administration(TGA) has the knowledge and expertise to conduct the evaluation of RU486 for quality, safety (although for the mother only) and efficacy in terms of the drug’s stated purpose to abort the life of the unborn child. But the TGA cannot be allowed to be a competent authority in the prior and much more critical evaluation of this drug’s purpose in terms of whether or not this deadly purpose to harm the 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*”. This is within the competence of the Parliament, not the TGA, and responsibility for ensuring legal protection for those targeted by a lethal drug must remain with the Parliament as the appropriate protective authority. Ministerial responsibility for written approval for every use of such a lethal drug together with the requirement that any such written approval must be submitted by the Minister to each House of Parliament within 5 days, guarantees at least some public accountability and some measures for the provision of appropriate checks and balances
3. The Universal Declaration of Human Rights (UDHR) recognizes the child before birth as a legitimate subject of human rights. These rights include “*appropriate legal protection*” to which all children before birth are entitled “*by reason of their*

- physical and mental immaturity*". 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*". (On November 20<sup>th</sup> 1959, the UN General Assembly reaffirmed unanimously and explicitly the Udder's recognition of the rights of the child before birth.)
4. In view of the irreversible nature of each abortion, national legislatures must scrupulously observe all international and regional standards protecting the right to life. These tiny vulnerable human beings at risk of lethal treatments like RU486 are entitled "*by reason of their physical and mental immaturity*" to have their rights fully respected in accordance with the special safeguards and duty of care guarantees as set out and agreed to in the original international human rights instruments to which the Commonwealth of Australia has acceded. "*No one may be deprived of their life arbitrarily*", says Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). This means that the law must strictly control and limit the circumstances in which the State may condone deprivation of life. [Human Rights Committee General Comment 6, Para. 3] From this requirement it follows that provision of RU486 designed for the arbitrary deprivation of life cannot be the valid responsibility of the Therapeutic Goods Administration (TGA). It is the legislature's responsibility to provide laws that "*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.*" The State, in order to protect the child's inherent right to life, must prohibit and prevent the death penalty for the unborn child's mother. Just so, the logical imperative of the irrefutable corollary of this directive requires that the State, also in order "*to save the life of the unborn child*", must prohibit and prevent lethal use of RU486 or use of any other form of death penalty imposed unjustly on the unborn child.
  6. The ICCPR recognizes in Article 6(5) that the pregnant woman does indeed carry within her womb another human being who is entitled, by virtue of the child's immaturity (an immaturity that distinguishes every human being below eighteen years of age) to special protection from the death sentence. 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 State's provision of lethal drugs such as Ru486 is fundamentally inconsistent and cannot be reconciled with the State's grave ICCPR human rights obligation "*to save the life of the unborn child*".
  7. The right to life is non-derogable (Article 4(2) of the ICCPR), which means that it must be protected by law and that no one, including the unborn child, may at any time be arbitrarily deprived of life. The right to life, as protected by

- international human rights law means, inter alia, that States must at no time engage in or condone the arbitrary or extrajudicial taking of human life. It is not permissible to utilize the empty forms of legal process to hide arbitrary extermination (using drugs such as RU486) of an untold number of unborn children each year.
8. States which have acceded to the ICCPR must at all times take positive steps to effectively protect the right to life. The State's legal duty to positively and effectively protect the right to life is equally valid for the child before birth as for the child after birth (UDHR). The right to life, as protected by international human rights law, means, inter alia, that States have a strict legal duty 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).
  9. 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 availability of a drug such as RU486 designed to kill the unborn child. 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 the use of a drug such as RU486 where the intended outcome is arbitrary deprivation of the life of the unborn child.
  10. Regarding the concept of arbitrariness, UN Human Rights Committee's General Comment No 16 explains that it is intended to guarantee that "*even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant...*". In Australia, the abortion industry has been built largely and erroneously on a ruling by a minor court which decreed that because the law against abortion speaks of "unlawful" abortion, there must be a form of lawful abortion. There followed the introduction of arbitrary conditions which purported to justify "lawful abortion". Such an interpretation is not valid. The child before birth, being innocent of any crime, may not be deprived "lawfully" of his life, for "*the inherent right to life... shall be protected by law [and] (n)o one shall be arbitrarily deprived of his life.*" Laws that arbitrarily deprive the child before birth of life are bad laws, impermissible under international human rights law because they are not in accord with at least one of the provisions, aims and objectives of the Covenant viz. "*to save the life of the unborn child*".
  11. The General Assembly's unanimous confirmation (20<sup>th</sup> December, 1959) of the Universal Declaration's recognition of the right of the unborn child to legal protection lays the foundation for the unborn child's recognition as a person before the law. UDHR Article 7 proclaims: "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*" The child before birth has a right to legal personality on an equal basis with the child after birth. This right is absolute and must be guaranteed in all circumstances and at all times. The right of everyone under UDHR Article 6 and ICCPR Article 16 to be recognized everywhere as a person before the law is particularly pertinent for children before birth, for whom this right is often unjustly curtailed by reason of immaturity (age), or disability. This right implies that the child before birth may not be

- treated as an object to be drugged, poisoned or otherwise maltreated and discarded. Legal personality also means that children before birth must have full and unimpeded representation of their best interests in the legal institutions of their country for the purpose of vindicating their rights and obtaining protection against premeditated violation of their rights. This grave human rights obligation to protect these children from intentional lethal harm belongs to each nation's legislature. It is ludicrously inappropriate to assign this obligation to the Therapeutic Goods Administration. The importation and administration of lethal drugs such as RU486 must remain the sole responsibility of the Australian Government and the decision must be made in the light of the fundamental human rights obligations towards the unborn child and the child's mother.
12. The Australian Government, having ratified the Convention on the Rights of the Child (CRC) and incorporated it into domestic law is required by Article 6 of that Covenant to "*recognize that every child has the inherent right to life*" (para. 1) and that governments "*shall ensure to the maximum extent possible the survival and development of the child*" (para. 2). States Parties are understood here to be obliged to take positive measures in order to maximize "*the survival and development*" of all children. No one can reasonably say that providing RU486 is a positive measure that "*shall ensure to the maximum extent possible the survival and development of the child*" Neither can it be reasonably claimed that Government approval and provision of RU486 is an appropriate measure to fulfil the obligation to provide children ("*before as well as after birth*") with "*necessary medical assistance and health care*" (cf. Art. 24 of the Convention on the Rights of the Child).
  13. Using RU486 to abort a child, even with the mother's permission, constitutes an act of premeditated violence that results in lethal physical harm to that child. It can be excused by neither the right to privacy "*whether occurring in public or private life,*" nor by the fact that it is "*condoned by the state wherever it occurs.*"( *UN Declaration on Elimination of Violence Against Women (1993) Articles 1 & 2(c)*). When this principle is applied with logical consistency to the legal protection of the right to life of the child before birth, the authorities are understood to have a primary duty to put in place effective criminal-law provisions to deter the commission of offences against the child. They are to be backed up by law-enforcement machinery for the prevention, suppression and punishment of such provisions. And further, this duty is understood to extend also to a positive obligation on the authorities to take preventive operational measures to protect the child before birth whose life is at risk from the acts of another individual (the abortion provider). The grave implication now drawn by the international community is that the States' international legal obligations extend beyond the public sphere into the field of private life. Where the life of a child before birth is at risk, the right to life overrides appeals to privacy. The right to privacy must be subordinate to the necessity of being able to investigate and uphold human rights which are being violated in private. States have a legal duty not only to provide protection against human rights violations committed by public authorities, but also to ensure the existence of adequate protection in their

domestic law against human rights violations committed between private individuals.

14. Yet increasingly in jurisdictions around the world, abortion has been deemed to be lawful on the spurious grounds that the child in the womb threatens the mother's life or her physical or psychological health. Increasingly, such grounds are being recognized to have little or no medical validity in view of the rapid advances that have been made in holistic pre-natal health care for mothers and babies, and the phenomenal progress in obstetrics, in fetal medicine and in pre-natal and post-natal psychological care for mothers. The rational response to life-threatening pregnancy these days is to improve the availability and delivery of the optimum pre-natal and post-natal healthcare. Moreover, growing recognition of post-abortion depression and post-abortion suicide further discredits abortion of the child as a life-saving, health-giving procedure for the mother. The right to life, the well-being, of both the mother and the child must be pursued with equal vigour by the medical profession and by all those in positions of authority in public health and law. Use of RU486 to procure abortion remains an intentionally 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. The noble aims and purposes of Medicare, which was set up to protect the health of all mothers, and all children, including children *in utero*, are being profaned when they are put in the service of promoting RU486. The pretence of expanding women's reproductive choices is no excuse for the perversion of the original honorable duty to recognize that in every pregnancy there are two patients, both the mother and the baby. It is the duty of the Australian Government to encourage all doctors to provide both mothers and their babies with good pre-natal 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.
15. Both the Universal Declaration and the *Preamble* to the ICCPR establish the human rights duties of individuals towards other individuals. UDHR Article 29(1) *Everyone has duties to the community in which alone the free and full development of his personality is possible.* Mothers have duties to the community that include a duty of care for the child before birth who belongs already to the new generation, the regeneration of that community. That the child before birth already belongs to the community and is entitled to be born into that community is recognized in Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide(1948)* which recognized that imposing measures intended to prevent births within the group will harm that group or community. To harm the child before birth is to harm also the community to which that child belong. The term “everyone” means just that: everyone has duties to the newest generation of a community. The mother is not alone in her duties toward the child before birth. Everyone must share that duty, and help her to provide all the needs of the unborn child—fathers, families, grandparents, uncles, aunts, doctors, nurses, neighbours, friends, employers and work colleagues—as well as the government departments of health, housing, child welfare, employment etc. Every

legal assistance also must be given to encourage and enable the mother to protect and nurture her unborn child.

16. Following the prohibition of discrimination in the *Charter of the United Nations*, the adoption of the *Universal Declaration of Human Rights* together with the *Convention on the Prevention and Punishment of the Crime of Genocide in 1948* established the principles of equality before the law and non-discrimination for all children before as well as after birth. The Universal Declaration recognized that the child before birth has a right to be “*born free and equal in dignity and rights*” (Article 1) and is entitled to “*all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex...national or social origin... birth or other status*” (Article 2). No distinction is to be made regarding birth—human rights entitlement is to apply “*before as well as after birth*”. The State may not de-recognize the right to life of the unborn child—it must at all times recognize that there are two human beings to be protected (the mother and her unborn child), with human rights that are equal and (for the full term of the pregnancy) interdependent. It is in the irrevocable nature of human rights that these rights belong to every human being equally. One’s human rights do not reduce proportionally to one’s deficiencies in physical size, independence, consciousness, intellectual or physical abilities or any other factor selected intentionally to exclude any group of human beings from human rights protection.
17. The Universal Declaration Article 7 stipulates that: “*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*” This prohibition of “*any incitement to such discrimination*” is important for it means that incitement to discrimination against the child before birth cannot be legally tolerated. However, this prohibition is being ignored at present by international and national abortion advocacy bodies which continue to promote a deadly discrimination against the child before birth, and to incite governments around the world, including the Australian government, to repeal abortion laws that seek to protect the rights of the unborn child to “*special safeguards and care*”.
18. It is the essential nature of all human rights that they are inalienable. The opening paragraph of the Universal Declaration proclaims: “*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...*” The right of the child before birth to legal protection is one of the equal and inalienable rights of all members of the human family. No one may destroy that right, nor deprive the child of that right—that’s what inalienable means. To undermine or attempt to revoke the right to life as set down in the this foundation document of modern international human rights law is to risk undermining the whole modern international human rights legal system. If it is permissible to withdraw legal protection for the human rights of any one class of “*members of the human family*” (such as the child before birth), then it is permissible to withdraw legal protection for any other class (such as the child after birth, the child with a disability, the Jewish child, the middle-aged woman with dementia, the old man with incontinence and bed sores...). And when the Preamble goes on

to say: “...it is essential...that human rights should be protected by the rule of law”, it means that no one and no body may remove the human rights of the child before birth from being protected by the rule of law—not the judiciaries, not the Parliament and certainly not the Therapeutic Goods Administration.

## **RECOMMENDATIONS**

- 1. That the 1996 Amendments to the Therapeutic Goods Act 1989 be maintained without amendment.**
- 2. That the Parliament makes provision for educating Australians in the importance of recognizing the inherent humanity of the unborn child, and in the necessary justice of upholding and protecting the inalienable human rights of these youngest and most vulnerable members of the human family.**

Biographical note:

Rita Joseph is a Canberra-based writer on international human rights issues. Across three decades, she has been engaged in human rights advocacy at the UN, including at the recent series of UN international mega-conferences in New York, Cairo, Beijing, The Hague, Istanbul, Rome, Geneva et al. She has served as an adviser to the Australian UN delegation in New York. She is an adjunct-lecturer in International Politics of the Family and the Language of Human Rights at the John Paul 11 Institute in Melbourne. She is currently engaged in writing a new work: *Reclaiming the Human Rights of the Unborn Child—A new look at the Universal Declaration of Human Rights*. Her most recent work was her contribution to the Pontifical Council for the Family’s *Lexique des termes ambigus et controverses sur la vie, la famille et les questions ethiques* (Editions Tequi 2005)