Protecting children at risk of abortion on grounds of disability

by Rita Joseph

Public Submission to the Australian Senate Inquiry into item 16525 in Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007

Summary

I welcome the opportunity to make a submission to the Committee.

The following submission:
- analyses the current failure under item 16525 to comply with the newly ratified **Convention on the Rights of Persons with Disabilities (2007)**;

- notes the lack of transparency and accountability currently being exercised with regards to item 16525 both in assessing and approving the number of services relating to abortion of children in their second trimester and in proper scrutiny of the basis (i.e. on grounds of the child's disability or the "life-threatening disease" of the mother) upon which payments of benefits are made under this item; and

- provides recommendations for ensuring that second trimester abortion practices on grounds of disability (currently funded under item 16525) be reformed to be made compatible with Australia's grave new obligations under the *Convention on the Rights of Persons with Disabilities (2007)* to protect children at risk of abortion because of their disabilities, to provide them with prenatal as well as post-natal care and to institute community education programmes that foster respect for them as part of human diversity and humanity while combating stereotypes, prejudices and harmful practices (including selective abortion) perpetrated against them.
.

(a) the terms of item 16525 of Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007

Problematic interpretations of the term "gross foetal abnormality" in item 16525

With regard to later term abortions which target children with disabilities, discrimination lurks behind seemingly innocuous language— "evacuation of the contents of the gravid uterus" (abortion) and "management of second trimester labour with…induction" (abortion) for "gross foetal abnormality" (for a child with disabilities). In using these terms to glide over the very real human rights abuse that lies behind this language, the Australian government fails to comply with the *Convention on the Rights of Persons with Disabilities (2007)* which it ratified July 17

this year. It fails *to nurture receptiveness to the rights of children with disabilities and to promote positive perceptions and greater social awareness towards such children.*[1]

In the *Convention on the Rights of Persons with Disabilities (2007),* Australia as a party to the Convention**,**

- recognizes *the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.*[2]

This is especially significant for the legal protection of the human rights of those children who are at risk of abortion on the grounds of what some abortion 'providers' label as "gross foetal abnormalities".[3] This term should be outlawed by the medical profession as well as in parliamentary discourse and legislation. These children at risk of abortion are children with disabilities "*who require more intensive support*" and States are to recognize *the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.*

The terms of item 16525 shed a disturbing light on the extreme prejudice that is permitted by the Government to be exercised in Australia against children detected before birth to have disabilities. Discriminatory attitudes are revealed in the discriminatory language. Indeed, the modern revolution in human rights for the disabled seems to have passed by the authors of this Schedule.

Dismissive and disrespectful attitudes towards children before birth who have been identified as having disabilities are a shameful indictment of our legislature. Discriminatory language constitutes a serious violation of the human rights of children with disabilities such as Down syndrome. It is dishonest and offensive to use the term "gross foetal abnormality" when the Schedule is really referring to a child who has been detected in the second trimester to have disabilities. Such children should neither be lumped in with "intrauterine fetal death" (the child with disabilities is very much alive *in utero*—that is exactly why the child is being targeted for abortion) nor with "life-threatening maternal disease" (the child detected to have disabilities *in utero* is not to be identified with a "disease" that threatens the life of the mother—pregnancy is not a disease. While any mother who has a life-threatening disease is entitled to treatment of that disease that will save her life, her child *in utero* is not to be identified with her disease.)

---

[1] *Convention on the Rights of Persons with Disabilities (2007* Article 3 General Principles.

[2] Preamble to *Convention on the Rights of Persons with Disabilities (2007*) para (j)

[3] See, for example, Lachlan J de Crespigny and Julian Savulescu: *Pregnant women with fetal abnormalities: the forgotten people in the abortion debate* Medical Journal of Australia January 2008; 188 (2): 100-103 "In 30 years of obstetric ultrasound practice, one of us (L J d C) has seen how the diagnosis of a fetal abnormality affects couples hoping to raise a family — it is their worst nightmare."—the authors go on to speak of "the shocking news of a major fetal abnormality" and "the devastating outcome to their much wanted pregnancy" to argue for decriminalization of late abortions.

‘Children requiring more intensive support’ not ‘gross foetal abnormalities’

This language dehumanizes the child *in utero*, identifies and equates the disability with the child and treats children with the disability as a disease to be detected and progressively eliminated from the population through selective abortion**.** For example, in some parts of Australia, it is being reported that between 90% and 95% of children with Downs syndrome are routinely aborted, many in the second trimester.[4] Australian obstetrician, Professor Lachlan de Crespigny in his advocacy of decriminalization of abortion in the Australian state of Victoria, claims that women are being denied later term abortion for “fetal abnormality”. Professor de Crespigny identifies Down syndrome as a “major fetal abnormality” and approves abortion on request of children with Down syndrome.

> Most women will request abortion after the diagnosis of a major fetal abnormality — 95% do so after the diagnosis of Down syndrome in Victoria (J Halliday, Head, Public Health Genetics, Murdoch Children’s Research Institute, Melbourne, personal communication).[5]

Recall that the UN Committee on the Rights of the Child (CRC) has condemned selective abortion as discrimination against children and as *a serious violation of their rights, affecting their survival*.[6]

Intentional “deprivation of life” of the unborn child in situations where the child is selected for abortion because of a disability contravenes *Right to Life Article 6* of the *International Covenant on Civil and Political Rights* (*ICCPR*) [7] and fails the common law tests of absolute “necessity” and strict “proportionality.[8]

CRC recognition of their right to “prenatal care” follows on from their “right to life, survival and development”. It is under this right that the UN CRC Committee condemns *the systematic killing of children because of their disability*.[9]

---

[4] See for example: Michael D Coory, Timothy Roselli and Heidi J Carroll: “Antenatal care implications of population-based trends in Down syndrome birth rates by rurality and antenatal care provider, Queensland, 1990–2004” MJA 2007; 186 (5): 230-234)

[5] See, for example, Lachlan J de Crespigny and Julian Savulescu: “Pregnant women with fetal abnormalities: the forgotten people in the abortion debate”, Medical Journal of Australia January 2008; 188 (2): 100-103 “In 30 years of obstetric ultrasound practice, one of us (L J d C) has seen how the diagnosis of a fetal abnormality affects couples hoping to raise a family — it is their worst nightmare.”—the authors go on to speak of “the shocking news of a major fetal abnormality” and “the devastating outcome to their much wanted pregnancy” and to argue from this perception for decriminalization of late abortions.

[6] UN Committee on the Rights of the Child (CRC) Comment No 7 (2005), Right to Non-discrimination para 11

[7] The ICCPR’s travaux préparatoires acknowledges that the unborn child’s right to life, from the State’s first knowledge of that child’s existence, is to be protected: “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.”

[8] CCPR General Comment No. 29 (72), para.4. Eur. Court HR, Case of McCann and Others v. the United Kingdom, Series A, No. 324, p. 46, para. 148 & p. 46, para. 149.

[9] CRC General Comment No 9 (17)

"Children" with rights to "prenatal care"—not just "foetuses"

In the *Convention on the Rights of the Child*, the promise in the *Preamble* to provide "special safeguards and care" for all children "before as well as after birth" is given a specific application in Article 23(2):

> States Parties recognize the right of the disabled child to special care…

The most authoritative statements on human rights obligations under the *Convention on the Rights of the Child* are the formal General Comments issued by the *CRC*. The Committee's recent *General Comment on the Rights of Children with Disabilities* reaffirms that children before birth are "children" not just "foetuses"—they are children with rights, and specifically with a right to prenatal care.

> The Committee recommends that States parties introduce and strengthen prenatal care for children…[10]

The *Convention on the Rights of Persons with Disabilities*, taking up this initiative for "early intervention" in prenatal care for children with disabilities, requires State commitment to:

> Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children [11]

Aborting children with disabilities—no respect for difference

Children with disabilities who are at risk of abortion are being condemned as stereotypes, victimized by prejudices and threatened with a lethally harmful practice. The *Convention on the Rights of Persons with Disabilities (2007)* now *requires* States:

- *To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life* [12]

But, contrary to this human rights obligation, pro-abortion States are denying legal protection to children at risk of abortion because of their disabilities and are permitting lethal discrimination against them on the basis of age—specifically on the basis of the child's *physical and mental immaturity.* These children with disabilities are at risk of abortion because of a contempt rather than respect for their particular stage of life—the prenatal area of life.

Indeed, human life *in utero* is a clinically verifiable and easily monitored *area of life.* Children detected in these earliest stages of life to have disabilities are entitled to the

---

[10] CRC General Comment No 9, para 46.

[11] Convention on the Rights of Persons with Disabilities (2007) Article 25(b)

[12] *Convention on the Rights of Persons with Disabilities (2007)* Article 8 (1)(b)

same protection from *stereotypes, prejudices and harmful practices relating to persons with disabilities* in other stages and areas of life.

Abortion, "foetal abnormalities" and the non-discrimination principle

The Committee on the Rights of the Child has reaffirmed that selective abortion violates the fundamental human rights principle of non-discrimination. [13]

This non-discrimination principle imposes a legal obligation to eliminate the practice of treating some children with respect because they are "normal" and other children with contempt because they have "foetal abnormalities". This term, "foetal abnormalities", is often preceded by the adjectives "serious', "severe" and "gross". But none of these qualifying adjectives can divest the child of his/her inherent humanity nor of the dignity and rights that belong to the child because of that humanity. They remain human beings with disabilities—these children are not as abortion "providers" like to describe them— "foetal abnormalities". Their identity is not to be diminished, falsified and reduced to their disability.

The term "foetal abnormalities" is being promoted by abortion advocates as a replacement term for "unborn children with disabilities". The new term has become exceedingly elastic and is currently being stretched to include treatable conditions such as cleft palate and club foot.[14]

"…on an equal basis with others"

Selective abortion constitutes for children before birth an exclusion on the basis of disability as defined by Article 2 of the *Convention on the Rights of Persons with Disabilities (2007)* to mean any exclusion on the basis of disability which has the purpose or effect of nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms. Selective abortion as is accommodated in the terms of item 16525 of Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007 violates Article 2 of the *Convention on the Rights of Persons with Disabilities (2007)* and the funding of such violations should be terminated.

(b) the number of services receiving payments under this item and the cost of these payments

How many lethal 'services' are too many for children at risk of abortion in their second trimester of growth and development?

In regard to the number of 'services' resulting in the abortion of children *in utero*, I would point out that one of *the* most significant numbers relates to the 'services' performed on children identified with "gross foetal abnormalities". The percentage figures of 90% to 95% of children identified with such disabilities as Downs syndrome and aborted because of their disabilities are a shameful indictment of those

---

[13] UN Committee on the Rights of the Child (CRC) Comment No 7 (2005), *Right to Non-discrimination*.
[14] Clout, Laura: *Babies with disabilities aborted*, Daily Telegraph October 21, 2007.

involved both in aborting the lives of these children and in funding these lethal 'services'.

Disclosure of grave justifying reasons for referral of a particular child for lethal medical 'services' must be made a condition of Medicare funding. There can be no doubt that at least some of the current Medicare-funded later term abortions under item 16525 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".

Regarding the cost of these 'services', it should be understood that there is not just financial cost but also an incalculable moral cost in terms of the human rights abuse that is masked by these 'services'.

Lack of transparency

At present, Medicare payments are funding each year an unconscionable number of abortions of children in their second trimester of growth and development. The fact that in most Australian states and territories 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 the abortion of such large numbers of unborn children is both necessary, and indeed long overdue. Item 16525 of Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007 fails abysmally to set conditions for ensuring that referrals for termination and subsequent abortions 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.

In the interest of justice, it is crucial that item 16525 be removed. A Federal funding carte blanche for later term abortions has operated in a situation where there has been an 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 and State and Territory laws protecting the child *in utero* from arbitrary deprivation of life appear to be largely ignored.

Inadequate scrutiny of later term abortions funded by Federal Government

Better scrutiny of the competency and professional integrity of those who carry out later term abortions 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 'services'. When it estimated that one baby in every four is given lethal abortion 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 assert its legitimate authority. Under the international human rights treaty commitments, the Federal Government has the power and responsibility to set more stringent conditions,

limitations and restrictions on abortion providers, so that adequate checks and balances are set in place and maintained.

Immediate withdrawal of medical funding under the terms of item 16525 in Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007 is a commendable first step in this direction of much needed reform. Legal protection for children at risk of abortion because of disability is totally inadequate under the terms of item 16525.

(c) the basis upon which payments of benefits are made under this item

The basis lacks transparency, accountability and integrity.

Despite recent liberalization of abortion laws in some Australian states and territories, the Federal Government still retains the authority and the obligation to restrict abortion, especially later term abortions. 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.

Parliament holds both the authority and the obligation under the external affairs power to demand and to monitor that each and every use of an abortion procedure in the States and Territories will be strictly compatible with the human rights treaty commitments regarding children *before as well as after birth* solemnly undertaken by previous Australian governments[15].

- The Universal Declaration of Human Rights (UDHR) recognizes that all children "*by reason of their physical and mental immaturity*" are entitled to *special safeguards and care*" including **"legal protection before as well as after birth"[16]**
- "*No one may be deprived of their life arbitrarily*", says Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). 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***".[17] The unborn child's right to life is also protected under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR). 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.

---

[15] Article 50 of the ICCPR states that "the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions". On all matters pertaining to violation of the human rights of the unborn child, the Federal Government is obliged to challenge State and Territories legal interpretations that have failed to provide adequate protection for some 90,000 unborn children each year.

[16] UN General Assembly, November 20th, 1959, reaffirmed explicitly the UDHR's recognition of the rights of the child before birth.

[17] Human Rights Committee General Comment 6, Para. 3.

The Commonwealth retains grave ICCPR human rights obligation

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*".**

Lest item 16525 in Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007 continue to be interpreted liberally in contravention of the human rights of the unborn child as promotion and endorsement of arbitrary deprivation of the lives of children in the second trimester of growth *in utero*, the Federal Government should require the States and Territories

1. To review their laws and judicial interpretation of those laws so that, in line with **the common law method of legal interpretation**, all public officials and private abortion providers must justify actions **by reference to both principles of necessity and proportionality** when the intended outcome of their interference results **in deprivation of the life of an unborn child.**
2. To ensure that before deprivation of life on **grounds of necessity is invoked** all other measures have been exhausted. **Necessity is what remains when all choice has 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".
3. To ensure that **the principle of proportionalism also is applied.** "A life for a life…" Anything less than the saving of the mother's life is not proportional to the harm done to the unborn child, and is arbitrary and unjust.

The Federal government, in compliance with the human rights obligation of the Commonwealth to provide "legal protection for the child before birth", should also put the States and Territories on notice that:

- The Federal Government shall not be applying a presumption of innocence to the use of abortion against children *in utero* in the second trimester. Nor shall this government assume, in the absence of a court decision to the contrary, that every termination of the life of an unborn child is performed by a medical practitioner in accordance with relevant State or Territory law, especially where those laws protecting the unborn child are inadequate, either in their framing or in their interpretation; it is not valid under international human rights law to plead a defence that terminations of children with Down syndrome are legal and/or common practice in a member country of the UN—the *Convention on the Rights of the Child* does not permit violation of children's rights on the grounds that local or customary law or common practice tolerates such violations.[18]
- Nor shall the Federal Government allow public and private abortion providers, to use the right to privacy to attempt to evade human rights responsibilities to protect the child before birth from arbitrary death. Where the life of a child before birth is at risk, human rights protection overrides appeals to privacy.

[18] CRC General Comment No 5 para 19.

The right to privacy whether inveighed by the mother 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. Privacy cannot be invoked by women or prenatal health providers to conceal human right abuses of children with disabilities, including violations of their rights to prenatal care, survival and development. International human rights law has consistently rejected the right to privacy as a defence against human rights violations by adults in positions of power over children in positions of dependency.[19] Major human rights treaties have laid down the principle that "neither privacy nor State sanction can be a defence for human rights violations".[20]

(d) the effects of disallowing this item

The principal effect of disallowing item 16525 will be an immediate improvement in human rights protection for vulnerable children at risk of abortion because of their disabilities.

Another important outcome should be that payments hitherto expended on aborting these children can be channelled into better support services for children with disabilities, their mothers and their communities, as required under our obligations in *Convention on the Rights of Persons with Disabilities (2007).* The Convention is very clear as to the obligations of the State to provide an adequate standard of social protection and economic assistance for these children and their families.[21]

And in the event that mother of a child with disabilities fears that she will be unable to care for that child after birth, the State has an obligation to provide alternative care for that child. [22]

Recommendations:

1. That item 16525 in Part 3 of Schedule 1 to the Health Insurance (General Medical Services Table) Regulations 2007 be disallowed in accordance with our newly ratified obligations under the *United Nations Convention on the Rights of Persons with Disabilities (2007)* to provide legal protection for

---

[19] Human Rights Committee, General Comment No 31 (2004) "It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict…cruel, inhuman or degrading treatment… on others within their power" (8)

[20] *UN Declaration on the Elimination of Violence Against Women* (1993). Article 1 & Article 2(c); also the UN Convention on the Elimination of All Forms of Racial Discrimination (1969) Article 5(b),

[21] *Convention on the Rights of Persons with Disabilities (2007* Articles 23(3), 28(2)

[22] *States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.* (Article 23(5))

children with disabilities at risk of abortion and to provide them and their families with on-going care and support.

2. In those States where routine second trimester abortion of children with disabilities has been decriminalized, legal protection should be restored and Federal funding of such procedures should cease. Abortion policies that condone and fund selective abortion of children because of their disabilities cannot be reconciled with the treaty's core commitment—*acceptance and respect for all human beings with disabilities*

3. In those States where laws protecting these children have fallen into disuse, these laws must be reactivated and once more taken seriously. Selective abortion (a lethal form of violence albeit in a clinical or surgical setting) perpetrated against children because of their disabilities must be *identified, investigated and, where appropriate, prosecuted.* [23]

4. Both the Commonwealth and the States are required upon ratification of the *Convention on the Rights of Persons with Disabilities (2007)* also to provide education programs:
   - to raise awareness of the plight of these children at risk of abortion because of their disabilities,
   - to foster respect for them as part of human diversity and humanity,
   - to combat stereotypes, prejudices and harmful practices (including selective abortion) perpetrated against them, and
   - to promote positive perceptions and greater social awareness towards such children, especially among their expectant mothers and families as well as within the medical profession attending them.

---

[23] *Convention on the Rights of Persons with Disabilities (2007)* 16(5)