Restoring legal rights protection for unborn children at risk of abortion

Public Submission to the Victorian parliament's Scrutiny of Acts and Regulations Committee re Review of Charter of Human Rights and Responsibilities

Rita Joseph

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The need to provide every child with “appropriate legal protection before as well as after birth”

Regarding the matters referred to in Section 44 (2) of the Charter, I must strongly urge the Victorian Government to consider providing additional rights in the Charter by recognizing the rights of all children “before as well as after birth” to legal protection from arbitrary deprivation of life and providing improved protections of their right to survival and development as promised in the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the rights of the Child (CRC).

For two decades now, I have been engaged in research both in Australia and at the United Nations regarding the origins of the drafting of the Universal Declaration and in the travaux préparatoires for the core international human rights treaties to which Australia is a party. Australia’s role in these negotiations is very well documented. It troubles me that there appears to be a great deal of ignorance today about what Australia actually committed to in these instruments.

Thus, in my written submission to the National Human Rights Consultation Committee and in my oral Presentation to the National Human Rights Consultation Committee in the Hot-Button Issues Session at the Great Hall, Parliament House, Canberra, July 1, 2009, I set out some of the very serious omissions and misrepresentations of our current implementation of our human rights obligations. Coherent, logically consistent scrutiny of the proposed legislation will be impeded until the basic architecture of rights is clarified, especially the question of whether any government has the authority to exclude any particular group of human beings (such as children before birth) from human rights protection.

In order to apply an higher degree of transparency and integrity necessary to a more just implementation of the Victorian Charter than in the last four years under consideration in these consultations, it is critical that the Victorian government re-commits to the original principle of inclusion in the definition of human rights and in the application of these rights to “all members of the human family”1 and

1 Inherency and inalienability are core values at the heart of the International Bill of Rights: “...recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” This appears in the Preamble of all three instruments and was characterized by the Commission of Human Rights as “a statement of general principle which was independent of the existence of the United Nations and had an intrinsic value of its own.” GAOR, A/2929 Chapter III para. 4.
especially to all children “without any exception whatsoever” and “without discrimination of any kind”. And the International Covenant on Civil and Political Rights confirms that for all members of the human family, every human being, including the unborn child, has the inherent right to life, to be protected by law from arbitrary deprivation, and that this right is nonderogable. Documented proof that the unborn child is included as a member of the human family and entitled to human rights protection is set out in my book: “Human Rights and the Unborn Child” (Leiden & Boston, Martinus Nijhoff Publishers, 2009).

Provision of services by public authorities: tolerating arbitrary deprivation life—children at risk of abortion because of disabilities

Regarding the effect of the Charter on 2 (c) Provision of services, and performance of other functions, by public authorities, the Victorian Government needs to make further provisions regarding public authorities' compliance with ensuring the human rights of the most vulnerable of children—those who are targeted for arbitrary deprivation of their lives on the discriminatory grounds that these children are detected pre-natally to have a disability.

Operation of the Charter over the last four years has had the unintended effect of appearing to tolerate and so further entrench the routine abortion of around 95% of Victorian children detected pre-natally to have such disabilities as Down syndrome and Spina Bifida.

Exclusion of these children from human rights protection sends the wrong message—it tolerates the fact that prejudice against children with Down syndrome and other disabilities begins in the womb.

The biological and legal truth about each child at risk of abortion because of a disability is that he or she is a human being entitled to human rights protection "before as well as after birth" under the rule of law and this should be recognized in the revised Victorian Charter.

2 UN Declaration on the Rights of the Child, Principle 1: “Every child without any exception whatsoever is entitled to these rights ...”

3 UN Convention on the Rights of the Child, Article 2.

4 International Covenant on Civil and Political Rights (ICCPR), Article 6(5).

5 International Covenant on Civil and Political Rights (ICCPR), Article 6(1).

6 ICCPR Article 4(2).
The Victorian Equal Rights and Opportunities Commission's report *Talking rights: Consulting with Victorians about the rights of people with disabilities and the Charter - March 2011* confirms this:

“Participants expressed concern about the choice to terminate foetuses with disabilities such as Down syndrome. Participants believed that broader society does not see a life with disabilities as valuable; it may not be the quality of life a doctor or society views as perfect, but it is still a human life. Society has chosen to say, “Down syndrome babies – they’re disposable”.

The right of persons with disabilities to have a family is commonly taken away through terminating pregnancy without consent. Many courts in Victoria and interstate have shown their willingness to approve the forcible termination of pregnancies, particularly for people with intellectual disabilities. Participants believed that this is due to the ‘prejudicial’ belief that these people cannot make good parents.”

The presence in the Charter of the Section 48: Savings Provision “Nothing in this Charter affects any law applicable to abortion or child destruction ...” has served, for all practical purposes, to endorse the continued lethal human rights abuse of unborn children placed at risk of abortion solely on the grounds of their disability.

The rights of children at risk of abortion in Victoria solely on the grounds that they have been detected to have a disability have been totally abrogated despite the solemn assurance given in Section 5:

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

When the Australian government ratified the ICCPR, it was clearly understood and agreed that our domestic laws must comply with our international human rights obligations, especially with regard to specified non-derogable rights.

There was no "if we feel like it" at the bottom in small print.

Recognition of the child before birth as a human being entitled to legal protection is enshrined in the 1948 Universal Declaration of Human Rights. This recognition cannot be reversed by any subsequent human rights instrument.

The Victorian Charter seeks explicitly to disfranchise the unborn by virtue of an exclusionary clause that purports to limit the right to life: section 9 of the Charter is
qualified by section 48 of the Charter which excludes from the Charter’s ambit, laws in respect to ‘abortion’ and ‘child destruction’.

Such a limitation of or exception from a non-derogable right, the right to life, is expressly forbidden under ICCPR provisions.

ICCPR Article 4 stipulates that no government may derogate from the right to life even in times of "public emergency".

ICCPR Article 50 states that "the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions".

The ICCPR’s travaux préparatoires (explanatory notes written at the time the Covenant was negotiated) recognized explicitly the need for legal protection for unborn children: “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.” 7

Pro-abortion re-interpretations of the rights of the child to special safeguards and care contradict one of the “ten basic principles of child welfare and protection, in 1959” — the child’s right to prenatal care, a right that belongs “both to him and to his mother”:

...he shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care... Declaration on the Rights of the Child, Principle 4

From the State’s first knowledge of the child’s existence and of the mother’s pregnancy, adequate pre-natal care should be provided “both to him and to his mother”. From the moment of fertilization, i.e., from the earliest moment of biologic existence, the child begins “to grow and develop in health”. There is no reputable physician or obstetrician who would be so foolish as to say that the child begins “to grow and develop in health” only after birth, as a newborn.

The Convention on the Rights of the Child reaffirms “the need for appropriate legal protection before as well as after birth”. The term “appropriate legal protection” is formally sourced from the Declaration on the Rights of the Child where very specific guidance as to what “appropriate” means is to be found in Principle 2 of the Declaration:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. [Emphasis added]

In the Convention itself, further reference is made under Article 3(2) to “appropriate” legislative measures which should be read in conjunction with the Preambular commitment to provide “appropriate legal protection, before as well as after birth”:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians,
or other individuals legally responsible for him or her, and, to this end, shall take all
appropriate legislative and administrative measures. The phrase “protection and care” takes on particular significance for the well-being of
children at risk of abortion in the light of the commitment in the Preamble to provide
“special safeguards and care, including legal protection before as well as after birth”.
And so “to this end”, that is, to ensure the child before as well as after birth “such
protection and care as is necessary for his or her well-being”, States have undertaken,
inter alia, to enact legislative protection for children at risk of abortion and to provide
administrative measures to help mothers whose unborn babies are at risk.

The CRC Committee entirely concurs with the Committee on Economic, Social and
Cultural Rights9 in asserting that “even where the available resources are
demonstrably inadequate, the obligation remains for a State party to strive to ensure
the widest possible enjoyment of the relevant rights under the prevailing
circumstances ...” Whatever their economic circumstances, States are required to
undertake all possible measures towards the realization of the rights of the child,
paying special attention to the most disadvantaged groups.10 This includes children at
risk of abortion because their mothers are in difficult economic or social
circumstances.

The Committee emphasizes that, in the context of the Convention, States must see
their role as fulfilling “clear legal obligations to each and every child”—
implementation of the human rights of children must not be seen as a charitable
process, bestowing favours on children.11 If the human rights of children to “special
safeguards and care, including legal protection before as well as after birth” are to be
implemented in accordance with the Convention, then legal protection for the child at
risk of abortion is to be seen as part of the State’s “clear legal obligations to each and
every child”.

Applying the general principles of the CRC inclusively

1. Non-discrimination

The development of a children’s rights perspective throughout Government,
parliament and the judiciary is required for effective implementation of the whole
Convention on the Rights of the Child and, in particular, in the light of the following
articles in the Convention identified by the Committee as general principles:

Article 2: the obligation of States to respect and ensure the rights set forth in the Convention
to each child within their jurisdiction, before as well as after birth, without discrimination of
any kind.

This non-discrimination obligation requires States actively to identify individual
children and groups of children [e.g., children at risk of selective abortion], the
recognition and realization of whose rights may demand special measures. For
example, the Committee highlights, in particular, the need for data collection to be

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8 On “all appropriate legislative and administrative measures”, see UN CRC Committee: General
Comment No 5 (2003) General measures of implementation of the Convention on the Rights of the
Child (arts. 4, 42 and 44, para. 6) para 4.

9 UN Committee on Economic, Social and Cultural Rights: General Comment No 3 para 11.

10 UN CRC Committee: General Comment No 5 (2003), para. 6.

11 Ibid., para. 9.
disaggregated to enable discrimination or potential discrimination to be identified [e.g., data collection of specific and verifiable reasons given for performing abortion]. The UN Human Rights Committee points out:

Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes.\textsuperscript{12}

The Committee on the Rights of the Child commends the Human Rights Committee on this for it “has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination” [e.g., discriminatory attitudes towards female unborn children, or towards the unborn children whose fathers have committed rape or incest, or towards unborn children with disabilities]. Article 2(1) of the Convention on the Rights of the Child provides that States must ensure children can enjoy their rights without discrimination.\textsuperscript{13} Article 2(2) of the Convention goes a step further and requires States to ensure that a child is protected against “all forms of discrimination” based on the status or opinions of their parents.\textsuperscript{14} In other words, article 2(2) of the CRC affirms a stand alone right which protects children from suffering any discrimination on the basis of the status or opinions of their parents—including the opinions of their parents or their “abortion providers”, that these children should not have the right to good prenatal care or the right to life, survival and development.

2. The best interests of the child

Article 3(1) of the Convention on the Rights of the Child upholds the best interests of the child as a primary consideration in all actions concerning children:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The Committee on the Rights of the Child asserts that the principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions.\textsuperscript{15}

Thus, in the light of the Preamble’s commitment to legal protection for the child before as well as after birth, the requirements relate to any proposed or existing law or policy or administrative action or court decision that tolerates arbitrary deprivation of

\textsuperscript{12} UN Human Rights Committee General Comment No 18, 1989.

\textsuperscript{13} UN Convention on the Rights of the Child, Article 2(1):

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

\textsuperscript{14} UN Convention on the Rights of the Child, Article 2(2):

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

\textsuperscript{15} UN CRC Committee: General Comment No 5 (2003), “General measures of implementation of the Convention on the Rights of the Child”, para. 12.
life for unborn children or authorizes their selective abortion or encourages removal of legislative protection from children at risk of abortion. The best interests principle requires the legislature of each State, the executive (including private institutions acting on their behalf) and the judiciary to ensure that the best interests of the child are a primary consideration in all actions concerning children.

Jurisdictions which decriminalize abortion and promote “lawful” abortion as a “health right” for mothers will have a negative impact in that they discriminate against children before birth, denying them a right to survival and development and having the intended dire outcome for these children of arbitrary deprivation of life. If such a negative impact is a reasonably foreseeable outcome of a particular change in the law, it suggests strongly that the best interests of the child principle was not a primary consideration in the decision to enact such legislative changes.

3. The child’s inherent right to life

Article 6: the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child.

The UN Committee on the Rights of the Child expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures, according to the Committee, should be aimed at achieving the optimal development for all children. Logically, this should be read in the light of the Preamble’s direction to provide legal protection before as well as after birth, and also in the powerful light shed by modern embryology and fetology on our most intimate knowledge of the child’s vitally complex development from the moment of fertilization to the moment of birth. States must “ensure to the maximum extent possible the survival and development” of these children before as well as after birth.

Inclusiveness fundamental to all human rights treaties

In view of the States’ grave obligation to provide “appropriate legal protection before as well as after birth” and “to ensure to the maximum extent possible the survival and development of the child”, decriminalization of abortion is irrational and counterproductive. Any interpretation of “appropriate legal protection” for the child at risk of abortion that leads to decriminalization of abortion is indeed “a result which is manifestly absurd or unreasonable”. It is an “absurd and unreasonable” attempt to de-recognize the rights of the child before birth. Decriminalization of abortion can have no validity for it is entirely out of character with the original and abiding determination by the post World War II international community to include all human beings under universal human rights protection. The Universal Declaration of Human Rights is fundamentally an inclusive document. All subsequent human rights instruments were intended to reaffirm and expand on that inclusiveness, not to reduce it. Reverting to the old injustice of excluding a particular class of vulnerable human beings (unborn children in this case) is perverse. It is contrary to the formidable sweep of history that brought the international community to found the modern international human rights instruments which proclaimed the inclusion of “all members of the human family”. In contravention of this concept of ‘inclusiveness’ that characterized the human rights movement at its very deepest level, removal of human rights protection for unborn children
Improving the promotion and protection of the rights of persons with disabilities

Regarding terms of reference #4—options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria, the most urgent reform should be to re-establish legal human rights vigilance and protections for children at risk of abortion or child destruction.

The Savings Provision (Section 48) should be repealed and the right to life (Section 9) should be restored to non-derogability, according to the ‘ordinary meaning’ of the term.

Victoria’s human rights obligations towards children at risk of abortion because of disability have changed substantially since this Savings Provision was enacted—as part of the Australian Federation which ratified UN Convention on the Rights of Persons with Disabilities on 17 July 2008 after the Victorian Charter was introduced, the Victorian State has very real obligations to honour the commitments therein and incorporate them into a revised Charter..

Under the UN Convention on the Rights of Persons with Disabilities, we solemnly agreed:
• to protect children at risk of arbitrary deprivation of life because of their disabilities;
• to provide them with prenatal as well as post-natal care;
• to institute community education programmes that foster respect for them as part of human diversity and humanity; and
• to combat stereotypes, prejudices and harmful practices (including selective abortion) perpetrated against them.

Under the UN Convention on the Rights of Persons with Disabilities, the international community solemnly agreed:
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• to institute community education programmes that foster respect for them as part of human diversity and humanity; and
• to combat stereotypes, prejudices and harmful practices (including selective abortion) perpetrated against them.

The UN Convention on the Rights of Persons with Disabilities is very clear as to the obligations of the State to provide an adequate standard of social protection and economic assistance for children with disabilities and their families. Governments are required to provide children who require more intensive support and their families with early and comprehensive information, services and support and to ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care.
And in the event that the immediate family of a child with disabilities fears that family members will be unable to care for that child after birth, governments are required to provide alternative care within the wider family, and failing that within the community in a family setting.

It is improved human rights protection and realisation for children with Down syndrome, and not their elimination, that should be our focus. The answer to the serious problems of children with disabilities and their families cannot lie in denying human rights protection to children at risk of abortion because of their disabilities. They remain human beings with a disability—they are not a 'disease' to be progressively eliminated.