

Day One of Public Hearings
Session: The Hot Button Issues

Presentation by Rita Joseph, Lecturer, Institute on Family Policy and Politics

Three points:

1. Australia must adhere to existing International human rights Law.
2. Existing International Law requires legal protection for the child before birth and precludes abortion.
3. Even though current Australian legislation condones abortion, any move towards a Bill of Human Rights must realign domestic abortion law with our international obligations to protect the right to life of the child at risk of abortion.

The right to life is “the supreme right” and “basic to all human rights”.¹
At present, Australia is not meeting its obligation to uphold and protect in its legislation the right to life of children at risk of abortion. Abortion constitutes arbitrary deprivation of life in breach of international human rights law, as established via the Nuremberg principles and judgments and their codification in the International Bill of Rights.

In 1959, the UN General Assembly formally declared: that the *Universal Declaration of Human Rights* “recognized” 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.”

This means that the right to life, as protected under Article 3 of the Universal Declaration, is recognized as equally valid for the child before birth as for the child after birth.

So why in Australia today, do we continue the routine destruction of the lives of some 90% of children detected before birth to have Down syndrome? Where is the promised legal protection for these children? It is just one year since we ratified the UN Convention on the Rights of Persons with Disabilities. We solemnly agreed to protect the right to life of children at risk because of their disability. We promised to provide them with prenatal as well as post-natal care and to foster respect for them as part of human diversity and humanity, and to combat prejudices and harmful practices perpetrated against them.

Regrettably, with regards to abortion and the right to life, Australia has developed in its legal and political architecture a serious flaw. The ACT and Victoria, with their truncated versions of human rights, deliberately exclude children at risk of abortion from legal protection. And in the Northern Territory and the other States, remaining regulations have either fallen into disuse or been reinterpreted so loosely as to be ineffective.

¹ UN Human Rights Committee General Comment 6, paras. 1 & 3. See also Inter-American Court of Human Rights in *Jailton Neri Da Fonseca v. Brazil*, (2004): “The human right to life is a fundamental human right, the basis for the exercise of the other human rights. ...enjoyment of the right to life is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning.”

International human rights law comes into play in precisely these circumstances where the Commonwealth has failed to fill in the gap which has opened up in State and Territory law, especially where those laws protecting the unborn child are inadequate, either in their framing or in their interpretation.

Right from our first negotiations on the Universal Declaration, Australia understood and accepted the obligation to conform domestic law to international human rights law. Original cablegrams, sent in May and December 1948 from New York and London to the Australian Government, made it clear that we would be required to *change* domestic laws to conform to the universal human rights obligations.²

The right to legal protection “before as well as after birth” is one of the equal and inalienable rights of all members of the human family proclaimed at the start as the foundation of justice in the world. No one may destroy that right, nor deprive any human being of that right, nor transfer that right, nor renounce it—that’s what *inalienable* means. And when the Preamble goes on to say:

...it is essential...that human rights should be protected by the rule of law it is clear that no one may remove the human rights of the unborn child from the protection provided by the rule of law. The term “no one” means no treaty monitoring committee, no commission, no legislature, no judiciary—none of these has the authority to de-recognize the human rights of any individual human being or any selected group of human beings. If it is permissible to withdraw legal protection for the human rights of any one group (such as children before birth), then it may be permissible some time in the future to withdraw legal protection for any other group (such as children immediately after birth, children with a disability, Jewish children, middle-aged women with dementia, old men with incontinence, and so on).

Four key principles were validated—inclusion, inherency, equality, and indivisibility. Inclusion – meaning that these rights applied to absolutely everyone, including the child before birth. Inherency – meaning that these rights were seen as inherent in each human being, not granted by external government. The child’s rights pre-exist birth – they “inhere” in the child’s humanity. Equality – in modern human rights law, there can be no concept of some human beings being “more equal” than others – thus the child at risk of abortion has the same right to life as every other member of the human family. Indivisibility – meaning that the rights of one set of human beings cannot be sacrificed for the rights of another group of human beings.

Let’s examine the implications of these principles for an Australian Bill of Rights.

If it is right and true that under international human rights law, States must provide legal protection for the child before birth: then it can’t be right and true that

² Two confidential reports from the Australian delegate on the UN Commission on Human Rights record a very clear, if somewhat nervous, understanding among all delegations that the Convention principles would require changes in domestic legislation. See *Report of Australian Alternate on Human Rights drafting Committee, second session May 3-21, 1948* sent from New York, 26 May, 1948; see also Memorandum, London, 22 December 1948, on the negotiations in Committee Three at the United Nations Assembly, Paris 1948.

international law now requires legal protection for the child at risk of abortion to be removed and decriminalized.

This would be logically inconsistent and legally incoherent.

So the first and fundamental problem that this committee has to resolve now is one that will take tremendous intellectual courage and honesty to tackle. You look around you and you see that abortion is widespread, socially accepted in popular culture, endorsed and paid for by Federal government funding, and so you will be tempted, like the ACT and Victoria, to think that you can write a Bill of Rights that can dump the right to legal protection for the child at risk of abortion, and enact instead a new right to life that will be restricted to children after birth.

This can't be done.

If you want to write an Australian Bill of Rights, then you can't start by accepting the current abortion practices as a 'right'. Reason and logic preclude that abortion can be reconciled with the child's right to life.

You can't affirm that human rights are inalienable and then remove them from children at risk of abortion. It can't be done, not with intellectual integrity.

You can't affirm the equality of all human beings and then enact legislation that refuses the right to life to children selected for abortion.

You can't affirm the principle of indivisibility and then argue that your Bill of Rights can't respect the rights of unborn children on the grounds that you must uphold the reproductive rights of women.

You can't affirm that the right to life is non-derogable and then go ahead with a Bill that derogates from the right to life of the child before birth.

You can't affirm the inherent dignity of all members of the human family and then introduce exceptions, introduce laws that would tolerate pre-natal sex selection, laws that would allow for children of rape and incest to be aborted for the sins of their fathers.

You can't affirm the human rights of persons with disability and then tolerate routine abortion of 90% of children detected to have Down syndrome.

You can't do any of these contradictory things, not without abandoning reason and logic, not without compromising the inner coherence of the whole international human rights system.

Now, historically, this system is deontologically based – that means, it's based on human rights principles that are permanent and immutable. To allow, now, a right to abortion, to over-ride the right of life is to switch horses midstream. It is to try to move across to a different philosophical basis, consequentialism, a system in which expediency trumps principles. An awful lot of academics, politicians, judges and commentators have made this switch but they refuse to be honest about it. They

changed horses midstream and now pretend that they are still on the same horse we set out on.

Untethered from the rock-solid natural law principles of the International Bill of Rights, they are now floundering in the rapids of relativism and compromise, and are on their way to being washed out to sea.

So my advice to this panel is to get back onto the original horse, go back to the original human rights principles recognized in the International Bill of Human Rights. Stick to these principles and we can go on, carrying with us the poor, the disabled, the dysfunctional, the unwanted, the frail old age, the very young, and the most vulnerable. Hold on to our original principles and one day, we will get safely to that far shore, that pleasant shore where every human being has inherent dignity and worth, is protected by the rule of law and is accorded unconditional value, where each human being is recognized from the moment of conception to natural death as “an end in himself”.