Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013

Introduced into the Senate on 19 March 2013
By: Senator Madigan

Summary of committee view

1.135 The committee seeks further information about the prevalence of gender selective abortions in Australia and whether the limitations on the right to health and the right to social security contained in the bill seek to address a pressing social concern.

Overview

1.136 This bill seeks to amend the *Health Insurance Act 1973* to provide that a Medicare benefit is not payable where a medical practitioner performs an abortion (or is a service relating or connected to performing an abortion) and the abortion is carried out 'solely because of the gender of the foetus'.

Compatibility with human rights

1.137 The bill is accompanied by a self-contained statement of compatibility that states that a number of human rights are engaged by the bill, including rights of non-discrimination in the Convention on the Elimination of All Forms of Discrimination against Women and promotion of the rights of the child under the Convention on the Rights of the Child.[1] It concludes that the bill is compatible with human rights 'as it limits gender selective discrimination which enhances human rights'. The statement of compatibility provides:

> This Bill would restrict funding for discriminatory practices of gender selection but does not exclude access to health care services. Gender selective abortions, while being discriminatory towards both sexes; have been demonstrated to be predominately prejudicial to women. The bill is designed to actively encourage the advancement of the equality of the sexes.[2]

1 The committee notes that current international human rights law (including the Convention on the Rights of the Child) does not recognise a foetus as a person or individual who is the holder of human rights under the principal UN human rights treaties.

2 Statement of compatibility, p. 1.

Right to non-discrimination on the ground of sex and the elimination of traditional attitudes that are based on the superiority of one sex

1.138 The UN Committee on the Elimination of Discrimination against Women has on a number of occasions expressed concern about the practice of sex-selective abortion in certain countries and the coercion that women may face in certain contexts to undergo such abortions.[3] The CEDAW Committee considers that such practices, to the extent that they reflect a social preference for sons over daughters, fall within the scope of article 5(a) of the CEDAW which requires States parties to take all appropriate measures to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

Right to health

1.139 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to the enjoyment of the highest attainable standard of health. The UN Economic, Social and Cultural Rights Committee has explained what this entails:

> The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[4]

1.140 The Committee has also noted that the right to health requires available, accessible, acceptable and quality health care. In particular, in relation to accessibility, the Committee has made the following comment:

> health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.[5]

---

3 See the Committee's concluding comments on China, UN Doc. CEDAW/C/CHN/CO/6, paras 17-18 and 21 (2006), and India, UN Doc CEDAW/C/IND/CO/3, paras 38-39 (2007).

4 UN Economic, Social and Cultural Rights Committee, General Comment No. 14, (2000), para 8.

5 UN Economic, Social and Cultural Rights Committee, General Comment No. 14, (2000), para 12(b)(iii).

1.141 Removing the entitlement for Medicare benefits for certain types of abortion raises issues around the economic accessibility of health care for such procedures. While, as the statement of compatibility notes, this 'does not exclude access to health care services', in practice it may well do so, as those who cannot afford such services would be unable to access such health care services.

1.142 The right to health may be limited if it can be demonstrated that the limitation on the right seeks to address a legitimate objective, there is a rational connection between the limitation and the measures taken to achieve that objective and the limitation is proportionate. A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.143 The explanatory memorandum refers to a statement made in 2011 by a number of international organisations which noted the problem of gender discrimination and imbalanced sex ratios caused by sex selection, and to commitments made at the 1994 Cairo Population Conference to 'take the necessary measures to prevent … prenatal sex selection'.[6] These international documents refer to sex selection practices being most prevalent in South Asian, East Asian and Central Asian countries. They make no reference to this practice being common in Australia. The explanatory memorandum states:

> Recent reports in the United States as well as Australia have suggested the practice of gender selective abortions are taking place in Western countries as well. While the reports indicate the numbers are smaller than those reported in the Asian, Central Asian and Eastern European countries previously mentioned there is an indication that they often occur in communities that originate in those regions.[7]

1.144 However, no reference is given as to where these reports come from or how prevalent this practice may be in Australia.

Right to social security

1.145 Article 9 of the ICESCR provides that everyone has the right to social security. This includes the right to access benefits to protect people from unaffordable access to health care.[8] As the UN Economic, Social and Cultural Rights Committee has

6 See explanatory memorandum at p. 1.

7 Explanatory memorandum, p. 1.

8 See UN Economic, Social and Cultural Rights Committee, General Comment No. 19, (2008), para 2.

stated, 'States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all'.[9]

1.146 Similarly with the right to health, restricting Medicare benefits limits the right to social security, and so any such limitation must be justified as seeking to pursue a legitimate objective and be reasonable, necessary and proportionate.

1.147 Before forming a conclusion on the human rights compatibility of the bill, the committee intends to write to Senator Madigan to seek further information about the prevalence of gender selective abortions in Australia and whether the limitations on the right to health and the right to social security seek to address a legitimate objective (being one that addresses an area of public or social concern that is pressing and substantial enough to warrant limitations on these rights).

9 UN Economic, Social and Cultural Rights Committee, General Comment No. 19, (2008), para 13.