

Submission

on the

Possible Ratification of the United Nations Convention on the Rights of Persons with Disabilities

to the

Joint Standing Committee on Treaties

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1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 at the United Nations Headquarters in New York. “The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity.”¹

Australia was among the first nations to sign the Convention when it was opened for signature on 30 March 2007. The treaty was tabled in the House of Representatives on 4 June 2008 and automatically referred to the Joint Standing Committee on Treaties for inquiry and report. The Committee has called for public submissions which are due by 16 June.

The effect of ratification would be to affirm Australia’s intention to be bound by the Convention’s articles and to oblige Australia to make regular reports on its compliance with the Convention to a new Committee on the Rights of Persons with Disabilities.

This submission will address selected aspects of the Convention as well as the specific question of ratification.

2. Inherent dignity of every human person

The inherent dignity of every human person is a fundamental principle of human rights. This principle is foundational to the Christian heritage and values on which Australia was founded. Christian belief in the inherent dignity of every human being derives from the biblical account according to which man – male and female – is made in the image of God.²

Insofar as the Convention recites, reinforces and upholds the equal inherent dignity of persons with disabilities with all other human beings it is a welcome international expression of this fundamental principle.

3. The family and marriage

Clause (x) of the preamble to the Convention reads as follows:

“Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,”.

Article 23 of the Convention provides in part that:

“1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

- (a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;”.

These affirmations of the family, based on marriage, are most welcome. The provision asserting the right of persons with disabilities to marry is justly based on the “free and full consent of the intending spouses”. Such free and full consent must necessarily be based on a capacity to understand the nature and purpose of marriage. In Australia marriage is a “solemn and binding” relationship being “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”³

4. Right to life

Article 10 of the Convention provides that:

“States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”

This provision is not reflected in the practices of eugenic abortion, pre-implantation genetic diagnosis of human embryos and experimentation on human embryos identified as disabled, which, sadly, are not only widespread in Australia but in some jurisdictions explicitly permitted by law.

The claim in the National Interest Analysis⁴ that Article 10 does not apply before birth is ill-conceived. It cites Article 6 of the International Covenant on Civil and Political Rights and implies that this article limits the right to life to after birth. However, the article does not do so at all. It states at 6 (1) that “Every human being has the inherent right to life”. Further at 6 (5) it expressly protects the unborn child by prohibiting the implementation of the death penalty on a pregnant woman.

In any case, consideration of ratification of the Convention should be taken as an appropriate occasion to reflect profoundly on the entrenched discrimination against persons with disabilities inherent in the practice of eugenic abortion, genetic screening of human embryos and experimentation on disabled human embryos and to resolve to amend laws and policies which permit them to continue.

At the Commonwealth level the payment of Medicare benefits for abortion includes payments for eugenic abortions. The term “gross foetal abnormality” has no fixed meaning and can be defined by each individual clinical practitioner. For example, correctable conditions like cleft palate or hair lip or conditions like missing fingers or dwarfism are not excluded.⁵ In 2003-04 at least three babies were aborted in Victoria after 20 weeks gestation solely because they had cleft lip or cleft palate and lip with no other disabilities⁶.

As all intentional direct abortions are a violation of the right to life the appropriate policy response would be to remove the relevant items (16525 and 35643) from the General Medical Services Table.⁷

Commonwealth law also permits non-beneficent, destructive experimentation on human embryos diagnosed as having a disability as one category of so-called “excess ART human embryos”.⁸ This provision is also contrary to Article 15 of the Convention which prohibits subjecting persons with disabilities to non-consensual medical or scientific experimentation. The provision should be repealed.

Recommendation 1:

The Commonwealth Government should take the occasion of consideration of ratification of the Convention on the Rights of Persons with Disabilities, which includes a clear affirmation that regardless of disability “every human being has the inherent right to life”, to remove legal provisions for the funding of eugenic abortions through Medicare and the licensing of non-beneficent, destructive experimentation on human embryos identified as disabled.

5. Sexual and reproductive health

International proponents of an unfettered right to abortion have sought for at least the past 15 years to include references to ambiguous language such as “sexual and reproductive health” in United Nations documents with the intention of creating a right to unfettered abortion in customary international law. Pro-abortion members of United Nations treaty monitoring bodies use the occurrence of such terms in UN treaties as the basis for urging States Parties to those treaties to remove any legal or policy provisions which limit unfettered access to abortion in their respective countries.

The negotiations over the Convention on the Rights of Persons with Disabilities were not exempt from these efforts.

Article 25 of the Convention provides in part that:

“States Parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;”

The inclusion of this controversial language was the occasion of interpretive comments by a number of States Parties.

The representative of the Marshall Islands said he understood that “references to ‘sexual and reproductive health services’ did not include abortion, or abortion rights, or create any new rights or obligations that contravened national laws”⁹

H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See at the United Nations, said “regarding article 25 on health, and specifically the reference to sexual and reproductive health, the Holy See understands access to reproductive health as being a holistic concept that does not consider abortion or access to abortion as a dimension of those terms. Moreover, we agree with the broad consensus that has been voiced in this chamber and the travaux préparatoires that this article does not create any new international rights and is merely intended to ensure that a person’s disability is not used as a basis for denying a health service.

“However, even with this understanding, we opposed the inclusion of such a phrase in this article, because in some countries reproductive health services include abortion, thus denying the inherent right to life of every human being, affirmed by article 10 of the Convention. It is surely tragic that, wherever fetal defect is a precondition for offering or employing abortion, the same Convention created to protect persons with disabilities from all discrimination in the exercise of their rights, may be used to deny the very basic right to life of disabled unborn persons.

“For this reason, and despite the many helpful articles this Convention contains, the Holy See is unable to sign it.

“In conclusion, my delegation considers that the positive potential of this Convention will only be realized when national legal provisions and implementation by all parties fully comply with article 10 on the right to life for disabled persons.”

In addition to the Marshall Islands and the Holy See, the United States, Canada, Peru, Honduras, Uganda, Egypt, Iran, Nicaragua, Libya, Costa Rica, the Philippines, Syria, and El Salvador noted their interpretations of the phrase 'sexual and reproductive health' as not including abortion.

The US representative stated: “The United States understands that the phrase ‘reproductive health’ in Article 25(a) of the draft Convention does not include abortion, and its use in that Article does not

create any abortion rights, and cannot be interpreted to constitute support, endorsement or promotion of abortion. We stated this understanding at the time of adoption of the Convention in the Ad Hoc Committee, and note that no other delegation suggested a different understanding of this term.”¹⁰

In signing the Convention, Malta lodged the following interpretative statement and reservation:

"Pursuant to Article 25 of the Convention, Malta makes the following Interpretative Statement - Malta understands that the phrase "sexual and reproductive health" in Art 25 (a) of the Convention does not constitute recognition of any new international law obligation, does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion. Malta further understands that the use of this phrase is intended exclusively to underline the point that where health services are provided, they are provided without discrimination on the basis of disability."

Poland made a similar reservation upon signature: *"The Republic of Poland understands that Articles 23.1 (b) and 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto."*

While abortion is permitted, under various conditions and requirements, in some jurisdictions within Australia there is certainly no consensus in Australia that unfettered access to abortion is a human right. If Australia does ratify the Convention it should lodge a reservation in the same terms as that of either Malta or Poland.

Such a reservation would be consistent with the statement in the National Interest Analysis¹¹ that “the Convention does not create any new human rights, but rather expresses existing rights in a manner that addresses the needs of people with disability.”

6. Ratification

Despite the many positive aspects of the Convention there are good reasons for Australia to refrain from ratification.

6.1 Federalism

Article 4.5 of the Convention has a specific provision for States Parties with a federal structure. It states that:

“The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.”

Many of the matters covered by the Convention are matters which in Australia remain the responsibility of States rather than the Commonwealth.

Since the Franklin dams case¹² the ratification of an international treaty by the Commonwealth has been held, by virtue of Section 51 (xxix) of the Constitution, the “external affairs” provision, to give the Commonwealth power to legislate on a matter, the subject of the treaty, for which it would otherwise have no head of power under which to legislate.

A Commonwealth government that is respectful of Australia’s federalist structure ought not to undermine this by ratifying a treaty which explicitly attempts to undermine federalism or which will give it a capacity to legislate outside the heads of power (other than ‘external affairs’) enumerated in the Constitution.

6.2 National sovereignty

Article 35 of the Convention requires States Parties to submit regular reports to the Committee on the Rights of Persons with Disabilities, a new treaty monitoring body established by the Convention.

The United Nations treaty monitoring bodies are notorious for making extraordinary adverse findings against State Parties, based on the ideological personal views of the members of the bodies, and often with little or no credible link to the actual text of the treaty they are monitoring or with flagrant disregard for the understanding of the text that was agreed to by intending States Parties at the time it was negotiated.

For example, United Nations treaty monitoring bodies have expressed¹³ that it is a violation of human rights and of various United Nations treaties for State Parties:

- to foster the observance of Mother's Day;
- to permit parents to withdraw their children from a sex education class;
- to have less than 30 percent of children under 3 in full time day care;
- to allow doctors or hospitals to conscientiously object to participation in abortion;
- to give economic support to mothers who choose to stay at home;
- to limit children from seeking medical or legal counselling without parental consent;
- to limit teenagers access to abortion without parental knowledge; and
- to allow religious bodies any exemptions from anti-discrimination laws.

Efforts to reform the treaty monitoring process have not been successful.

Australia should not subject itself to this farcical process by ratifying any further United Nations treaties that require reporting to monitoring bodies.

Recommendation 2:

Australia should not ratify the Convention on the Rights of Persons with Disabilities.

7. Endnotes

1. *Convention on the Rights of Persons with Disabilities*, available at: www.un.org/esa/socdev/enable/documents/tccconve.pdf, Article 1.

2. "So God created man in his own image, in the image of God he created him; male and female he created them." Genesis 1:27, Revised Standard Version.

3. Marriage Act 1961, Section 46.

4. http://www.aph.gov.au/house/committee/jsct/4june2008/treaties/disabilities_nia.pdf, p 16.

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5. Senate Community Affairs Legislation Committee, *Answers To Estimates Questions On Notice Health And Aged Care Portfolio, Supplementary Budget Estimates 2000-2001* 22 November 2000 Outcome 2: Access To Health Services, Question: E015; Senate Community Affairs Legislation Committee, *Answers To Estimates Questions On Notice Health And Ageing Portfolio Supplementary Budget Estimates 2004-2005, November 2004*, Question: E04-043
 6. Riley, M. and Halliday J. *Birth Defects in Victoria 2003–2004*, Victorian Perinatal Data Collection Unit, Public Health, Department of Human Services Victoria, 2006, http://www.health.vic.gov.au/perinatal/downloads/bdr_report0304.pdf.
 7. *Health Insurance (General Medical Services Table) Regulations 2007*, Select Legislative Instrument 2007 No. 355, [F2007L04101].
 8. *Research Involving Human Embryos Act 2002*, Section 20.
 9. *General Assembly Adopts Groundbreaking Convention, Optional Protocol On Rights Of Persons With Disabilities*, available at: www.un.org/News/Press/docs/2006/ga10554.doc.htm.
 10. Western, John-Henry, “Vatican Refuses to Sign UN Disabilities Rights Treaty over Pro-Abortion Language”, *LifeSite News*, 14 December 2006, available at: www.lifesite.net/ldn/2006/dec/06121406.html.
 11. http://www.apf.gov.au/house/committee/jsct/4june2008/treaties/disabilities_nia.pdf, p 3.
 12. *Commonwealth v Tasmania (1983) 158 CLR 1*, available at: www.austlii.edu.au/au/cases/cth/HCA/1983/21.html.
 13. Patrick F. Fagan, *How U.N. Conventions On Women’s And Children’s Rights Undermine Family, Religion, And Sovereignty*, Heritage Foundation Backgrounder no. 1407, 5 February 2001 at: www.heritage.org/Research/InternationalOrganizations/upload/95496_1.pdf.