LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH AND COMMUNITY WELLBEING
Mr Johnathan Davis (Chair), Mr James Milligan MLA (Deputy Chair),
Mr Michael Petterson MLA

Submission Cover Sheet

Inquiry into Abortion and reproductive choice in the ACT

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From: [redacted]
To: LA Committee - HCW
Subject: The most vulnerable demographic of all
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Standing Committee on Health & Community Wellbeing,

Inquiry into abortion and reproductive choice in the ACT.

Dear Committee Members,

Please accept my submission below.

Sincere regards,

Rita Joseph

[redacted]

The most vulnerable demographic of all

Rita Joseph

(*Rita Joseph is the author of "Human Rights and the Unborn Child" (Leiden & Boston, Martinus Nijhoff, 2009)*

In regard to Terms of Reference 1 e "other vulnerable demographics":

Attention should be drawn to the most vulnerable of all – the unborn children targeted for abortion. The current barriers to adequate legal protection for these most defenceless of all human beings residing in in the Australian Capital Territory remain insurmountable for the time being.

Like other demographics in other times and other places, large numbers of our unborn children are being dehumanized through an unjust law in order that their lives may be 'legally' destroyed.

No Australian Government—Federal, State or Territory—has any valid authority to remove inalienable human rights from any select group of human beings such as unborn children who have been recognized as rights-holders from the very foundation documents of modern international human rights law.

The drafting records show a long, constant and consistent concern and commitment to protecting the unborn child, a concern arising out of the Nuremberg judgments, finding expression in the Geneva Conventions and impacting on the very earliest drafting sessions of the ICCPR, specifically in the Draft Committee's 1st Session (1947).

The only recorded attempt to introduce abortion as an exception to the right to life Article 4 (now Article 6) of the ICCPR Draft occurred in the Working Group's 2nd Session (1947). It was put to a vote in the Commission on Human Rights and was resoundingly defeated.

In 1959, along with the rest of the international community, Australia agreed in a solemn Declaration on the Rights of the Child, that the Universal Declaration had "recognized" the rights of the child before birth to special safeguards and care, including appropriate legal protection.

Having been recognized, these human rights of the child before birth cannot now be de-recognized simply by an informal counter-declaration that it is the ACT Government's policy to restrict human rights protection to apply only from birth.

Under international human rights law this is not a valid option—it is not possible to remove all legal protection of the child at risk of abortion and still remain compatible with the State's international human rights obligations to provide such legal protection.

The State has no legitimate capacity to abolish common law offences or to remove the obligations to scrutinize all decisions concerning children at risk of abortion and to assess objectively the common law defences of necessity and proportionality in relation to such decisions.

The ACT's abortion laws fail to comply with international human rights law that requires States to provide appropriate legal protection for the child before birth who because of his/her immaturity needs "special safeguards and care".

It fails to deal with the terrible injustice at the heart of each abortion—that a small human child already verified as present, already in existence and alive in a mother's womb—is medically or surgically exterminated.

Regrettably, a majority in the current ACT government lacks the intellectual integrity to acknowledge the biological and legal truth—that a child at risk of abortion is a human being entitled to human rights protection under the rule of law.

Being human confers human rights—not the act of being born

Under international human rights law, human rights are inherent and inalienable. It is not the act of 'being born' that grants or confers human rights. It is being human.

Reason and science confirm the humanity of these children at risk of abortion, and the modern international human rights instruments, beginning with the Universal Declaration,

guarantee the human rights of every member of the human family. For a child at risk of abortion, membership of the human family is never dependent on a discretionary or gratuitous 'permission' to be 'granted' by individuals or by the State.

International human rights law can override Territory law if it fails to provide appropriate legal protection for the child before birth. The ACT's removal of legal protection for the child at risk of abortion amounts to an exclusionary act that purports to limit the right to life only to adults and to children after birth.

Such a broad, undifferentiated decriminalization of all abortions comprise invalid limitations or exceptions to the non-derogable right to life—inadmissible under Articles 4 and 50 of the *International Covenant on Civil and Political Rights* (ICCPR).

ACT Government's duty to protect children's rights "before as well as after birth"

In addition, the ACT Government, in its capacity as defender of human rights of the child at risk of abortion, has a duty to enact positive legal reforms that will promote rather than contravene the relevant human rights principles which include:

- adult obligations of persons in positions of responsibility and power to ensure respect for the human rights of children in positions of dependency, especially to protect their *right not to be subjected to inhuman or degrading treatment*.[i]
- *the best interests of the child* principle[ii]
- the child's *right to life, survival and development to the maximum extent possible*; [iii]
- the child's *right to prenatal care*; ***[iv]***
- the child's *right to have his or her identity and family relations preserved and respected*;[v]
- the child's *right to be protected from all forms of discrimination on the basis of the expressed opinions or beliefs of the child's parents*.[vi]

Laws which decriminalize and deliberately facilitate abortion negatively impact upon and discriminate against children before birth and have an intended lethal outcome for these children.

Under the State's obligation to honour the fundamental human rights principle of **indivisibility,** the policy objectives of any law of abortion should be to provide equal protection for the human rights of the both the mother and the child at risk of abortion.

The ACT Government must not continue to ignore two grave *ICCPR* human rights obligations:

1. to "strictly control and limit the circumstances in which the State may condone deprivation of life"***[vii]*** and
2. "to save the life of the unborn child"[viii].

These obligations were forged out of post-World War II revulsion against Nazi atrocities

that came to light and were prosecuted at Nuremberg.

Decriminalization of abortion –condemned at Nuremberg

The Nazi record of decriminalizing abortion in Poland and the Eastern Territories was still fresh in the public perception when the International Bill of Rights was drafted. Instructions by Nazi authorities issuing directives to decriminalize abortion were furnished as evidence at the Nuremberg Trials for the count of crimes against humanity:

> *Abortion must not be punishable in the remaining territory… Institutes and persons who make a business of performing abortions should not be prosecuted by the police.* [ix]

A systematic program of decriminalized abortion was set in place for Eastern women workers. In addition, to the charge of "compelling" abortions, there was also the charge of "encouraging" abortions among Polish women by removing abortion from prosecution in Polish courts:

> Abortions on Polish women in the General Government were also encouraged by the withdrawal of abortion case from the jurisdiction of the Polish courts.[x]

Decriminalization of abortion was judged and condemned at Nuremberg as encouraging abortions. Even though the Nazi authorities had removed abortion from Polish domestic law, State-condoned abortion was still judged "a crime against humanity".

Though the Nazis had decriminalized abortion, the Nuremberg Tribunal still judged that "…protection of the law was denied the unborn children".[xi]

Making abortion "*a simple and pleasant affair*"

Just as with today's pro-abortion rhetoric here in the ACT Assembly, Nazi propaganda was deviously persuasive. In Poland, Russia and the Eastern Occupied Territories, Nazi ideologues had set about "encouraging" abortion of the unwanted.[xii]

Himmler's March 1943 decree coined the excuse (familiar these days) that *the pregnancy is being interrupted for reasons of social distress*.[xiii] Abortion was to be sanitized:

> *A pregnancy interruption should go off without incidents and the Eastern worker or Pole is to be treated generously during this period in order that this may get to be known among them as a simple and pleasant affair.* [xiv]

History such as this should serve as a timely warning for the ACT Government that removal of appropriate legal protection for the child at risk of abortion is based on a kind of cultural pragmatism and not on international human rights law. Cultural practices are frequently contrary to law and facilitating a cruel cultural practice to achieve an even greater convenience in the killing of these smallest human beings while in their mothers' wombs is not a sound basis for any government.

[i] *Convention on the Rights of the Child* article 37, *Universal Declaration of Human Rights* Article 5, *International Covenant on Civil and Political Rights* Article 7.

[ii] The *Convention on the Rights of the Child (Articles 3, 9, 18, 20, 21, 37 and 40)* requires that this principle be applied to each and every proposed or existing law or policy or administrative action or court decision directly or indirectly affecting the well-being of children. [See CRC General Comment No 5 (10)]

[iii] CRC Article 6

[iv] CRC General Comment No 9 (46)

[v] CRC Article 8 (1) and (2)

[vi] CRC Article 2 (2) A mother's belief or opinion that the child is disabled, not the right sex or just not wanted is not sufficient to justify the violation of the human rights of the child trapped *in utero* "in circumstances beyond his control". (See UDHR Article 25)

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

[viii] The ICCPR's *travaux préparatoires* (explanatory notes written at the time the Covenant was negotiated) stated this concern explicitly:

> 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.

[ix] Trial of Ulrich Greifelt and Others http://www.mazal.org/archive/nmt/05/NMT05-T0111.htm Indictment [Tr. pp. 1-18, 7/1/1947.] p.10

[x] ibid para 13

[xi] Two SS Officers Richard Hildebrandt and Otto Hofmann were convicted for "compelling and encouraging abortion" receiving sentences of 25 years. Richard Hildebrandt was Higher SS and Police Leader at Danzig-West Prussia from October 1939 to February 1943, and simultaneously he was leader of the Administration District Danzig-West Prussia of the Allgemeine SS and deputy of the RKFDV. From 20 April 1943 to the end of the war, he was chief of RuSHA. Also, Otto Hofmann, as chief of RuSHA from

1940 to 1943 See **War Crimes and Crimes Against Humanity** (Vol. V, pp.152 to 154) and (Vol. V, pp.160 ff.)

[xii] Dr Erich Wetzel, Director of the Nazi Central Advisory Office Memorandum: *Stellungnahme und Gedanken zum Generalplan Ost des Reichsführers SS* (Opinion and ideas Regarding the General Plan for the East of the Reichsführer SS) 27 April 1942:

> We must emphasize the expenses that children cause, the good things that people could have had with the money spent on them. We could also hint at the dangerous effect of child-bearing on a woman's health... It will even be necessary to open special institutions for abortion, and to train midwives and nurses for this purpose. The population will practice abortion all the more willingly if these institutions are competently operated. The doctors must be able to help out, there being any question of this being a breach of their professional ethics

[xiii] Nuremberg Military Trials Vol. 5 109

[xiv] "On 18 February 1944, a letter went out from the SD office in Koblenz to the branch offices…" *Nuremberg Military Trials* Vol IV p 687