

Summary notes for the case against the Government of New Zealand for crimes against humanity and genocide towards people with Down syndrome

1. Introduction

It is the opinion of the complainants that the New Zealand Governments' "[Antenatal Screening for Down Syndrome and other conditions - Quality Improvements](#)" screening programme (the Programme), which was introduced in February 2010, is in violation of:

- Articles 6 and 7 of the Rome Statute of the International Criminal Court (the Rome Statute) and
- Article 2 (d) of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Convention): Imposing measures intended to prevent births within the group.

Around 75% of the group is being destroyed through the Programme, which indicates that the harm against the group is widespread. The Programme is systematic as it is New Zealand Government policy that screening is offered to every pregnant woman and it is funded by the Government.

People with Down syndrome are an identifiable group of the civilian population as they are identified by their 3rd 21st Chromosome. Antenatal screening for Down syndrome is based on the fact that this group of the population is identifiable through their genetic constitution.

The widespread or systematic persecution, by reason of the identity of a group of the civilian population, is prohibited under the definition within Article 7 2(g) of the Rome Statute.

The prevention of births within an identifiable group of the civilian population is prohibited under Article 7 of the Rome Statute as genocide is a crime within the jurisdiction of the International Criminal Court via Article 6 and genocide includes measures intended to prevent births within the group.

Article 6 of the Rome Statute and Article 2 of the Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (d) Imposing measures intended to prevent births within the group.

Intent to destroy, in whole or in part, is established through the test of Article 30 (2(b)) of the Rome Statute that a person has intent where they are aware that a consequence will occur in the ordinary course of events. Government documents confirm foresight of the consequences of the Programme, being the prevention of births of people with Down syndrome with around 75% of the group being destroyed. The desire to act is established through the introduction of the Programme.

People with Down syndrome are also a stable and permanent group and as such falls within the status of a protected group as established in the International Criminal Courts [Akayesa judgement](#), dated 2nd September 1998, relating to genocide in Rwanda.

Imposing measures intended to prevent births within the group is established through the introduction of the Programme and the use of selective abortion to prevent births within the group.

We have included a number of references to government documents that have been obtained under the New Zealand Official Information Act as part of our evidence. These can be provided on request.

2. The Rome Statute

In terms of crimes against humanity: Article 7 subsets 1(h) and 2(g) of the Rome Statute relate to crimes against humanity through the persecution against an identifiable group within a civilian population. Article 7 states:

1(h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

2(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively.

Article 7 1(h) covers any identifiable group within a civilian population. People with Down syndrome are an identifiable group of people. They all share a third 21st chromosome. The Programme is solely based on identifying unborn children within the group through their genetic constitution, i.e. by the very facts that are an identifiable group of people.

There is precedence to prosecutions under International law for the persecution of people with Down syndrome and other disabilities in relation to the [Nazi Action T-4 programme](#) that preceded the holocaust. This indicates that the international community has recognised that the persecution of people with Down syndrome is a crime and must be prevented from occurring and stopped where it does occur.

Of particular relevance to precedence is "[The Doctors Trial](#)". In December 1946, an American military tribunal (commonly called the *Doctors' Trial*) tried 23 doctors and administrators for their roles in war crimes and [crimes against humanity](#). These crimes included the systematic killing of those deemed "unworthy of life", including the mentally disabled, the institutionalized mentally ill, and the physically impaired. These crimes included the killing of children with Down syndrome. After 140 days of proceedings, including the testimony of 85 witnesses and the submission of 1,500 documents, in August 1947 the court pronounced 16 of the defendants guilty.

Article 7 1(h) refers to any crime within the jurisdiction of the Court. That includes genocide (Article 6), and the crime of genocide includes preventing births within the group (Article 6d). The persecution against people with Down syndrome (an identifiable group of the civilian population) is therefore a crime against humanity under Article 7 as genocide is a crime within the jurisdiction of the International Criminal Court via Article 6. Persecution by reason of the identity of a group is prohibited under the definition within Article 7 2(g).

3. People acting in an official capacity

The Programme is managed through the [National Screening Unit](#) (NSU), within the [Ministry of Health](#), both of whom are governmental departments. The [Minister of Health](#) is responsible for the programme under the statutory roles of Government Ministers. The **enclosed** document "Screening

programme management structure” outlines the various roles of Government and Ministry of Health officials in relation to the Programme. These are provided in accordance with the provisions of Article 27 of the Rome Statute, in relation to these people acting in an official capacity in implementing and managing the Programme. Where we refer in our complaint to the actions of the New Zealand Government, this is to be interpreted as relating to the roles of individuals acting in an official capacity, as outlined above.

Article 27 provides that a role as a government official shall in no case exempt a person from criminal responsibility under the Rome Statute.

4. The Convention

The legal definition of genocide is covered under the international treaty, the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention), which was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260 and ratified by New Zealand in 1949. Genocide is also covered under the Rome Statute as outlined in section 2 above.

Genocide is an international crime. All participating countries are required to prevent and punish acts of genocide.

Article 2 of the Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The definition of genocide also includes non-killings that in the end eliminate the group, such as preventing births.

The three relevant issues in this case are:

- Having a protected group of people;
- An intent to destroy, in whole or in part, that group and
- Established measures to prevent births within the group.

These issues are discussed below.

5. Having a protected group of people

As outlined in section 2 above, people with Down syndrome are an identifiable group of the civilian population and are protected against genocide under the provisions of Article 7 2(g) of the Rome Statute.

The following additional arguments are also presented in support of our view that people with Down syndrome are protected against genocide under the Convention.

In the International Criminal Court's [Akayesa judgement](#) dated 2nd September 1998, relating to genocide in Rwanda, the Chamber deals with the interpretation of "groups" under the Convention under item 701 and footnote 100, repeated below:

701: In its findings on the law applicable to the crime of genocide supra, the Chamber considered whether the protected groups should be limited to only the four groups specifically mentioned or whether any group, similar to the four groups in terms of its stability and permanence, should also be included. The Chamber found that it was necessary, above all, to respect the intent of the drafters of the Genocide Convention which, according to the travaux préparatoires, was clearly to protect any stable and permanent group.

Footnote 100: Concerning this issue, see in particular Nehemiah Robinson, "The Genocide Convention. Its Origins as Interpretation", p.15, which states that victims as individuals "are important not per se but as members of the group to which they belong".

Our view is that people with Down syndrome fall within the definition of a *stable and permanent group*. [Down syndrome](#) is defined from:

Down – after Dr. Langdon Down who first recognised the distinctive characteristics of Down syndrome in 1866.

Syndrome – a collection of distinctive characteristics or symptom.

Down syndrome is a genetic condition where the individual has an extra 21st chromosome. The condition is also referred to as Trisomy 21. It occurs with equal frequency in people of different nationalities, social backgrounds, and economic classes, averaging 1 in about every 600 births. New Zealand has a Down syndrome birth rate of 1 in 945. This compares to Ireland's rate of 1 in 404, where abortions for disability are illegal. Ireland has a comparable population and birth rate to New Zealand.

Babies with Down syndrome share some common physical characteristics – often a small nose, flat facial profile, small mouth, eyes that appear to slant upward and outward, and broad hands with short fingers.

Although the existence of Down syndrome was not formally recognised by the medical community until 1866, there is evidence to suggest that individuals with Down syndrome have existed throughout history. Olmec statues dated from 1500 B.C. depict children with physical features matching those with Down syndrome.

The above factors establish people with Down syndrome as a stable and permanent group and therefore falling within the status of a protected group under the Convention (stable being “established”, permanent being “lasting” and a group being “a number of persons classed together”).

Additionally, people with Down syndrome as a group can be compared with the definitions of an ethnical group and a racial group. Ethnical is defined as being a group of people having common racial origins. Race is defined as including a group of people distinguished on the basis of common genetically linked characteristics and physical characteristics. Dr. Langdon Down himself observed people with Down syndrome as an ethnic classification in the original “[Down paper](#)”, published in 1866.

As people with Down syndrome are genetically linked through their commonality in having a third 21st chromosome and share the same physical characteristics they could be defined as both an ethnical group and a racial group, or compared with these groups as a similar stable and permanent group that would be consistent with the intent of the drafters of the Genocide Convention, as recognised in the Akayesa judgement.

People with Down syndrome also fall within the definition of “disabled persons” and are recognised under the [UN Declaration on the Rights of Disabled Persons](#) as a group which forms part of a nation. Under that Declaration disabled persons:

- Have the same civil and political rights as other human beings (Article 4), and
- Must be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature (Article 10).

These rights are further reinforced under Article 10 of the [Convention on the Rights of Persons with Disabilities](#), which states:

- "State 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."

The [UN Universal Declaration on the Human Genome and Human Rights](#) further protects the rights of people regardless of their genetic characteristics:

- Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics (Article 2a);
- That dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity (Article 2b); and
- No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity (Article 6).

The [UN Convention of the Rights of the Child](#) indicates that selective abortion is discrimination, and that all children with disabilities are specifically protected against discrimination. Article 2 (1) states:

“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.”

The United Nations Committee on the Rights of the Child has provided further comment on Article 2 in the [General Comment No.7 in 2005](#). In summary the Committee has condemned selective abortion as discrimination against children and as *“a serious violation of their rights, affecting their survival”*. The Committee denounces not only selective abortion of girl children on the grounds of gender discrimination (refer to section 11(b)(i)), but also goes on in the same section (11(b)(v) to condemn *“multiple discrimination (e.g. related to ethnic origin, social and cultural status, gender and/or disabilities)”*. These General Comments (which are the most authoritative statements that can be issued by the UN Committee on the Rights of the Child) reaffirm that the operative provisions of the UN Convention of the Rights of the Child include the child before birth. For clarity:

- Item 11 of the General Comment No.7 in 2005 states *“Article 2 ensures rights to every child, without discrimination of any kind”*; and
- Item 11 (b) of the General Comment No.7 in 2005 states *“Discrimination may also be expressed through harsh treatment and unreasonable expectations, which may be exploitative or abusive”*. A number of examples are then given. Example (i) includes *“they may be victims of selective abortion”*. Example (v) refers to *“multiple discrimination, including those with disabilities as being at risk”*.

These are clear statements from the United Nations Committee on the Rights of the Child that reaffirm that the operative provisions of the Convention on the Rights of the Child include the child before birth and specifically list selective abortion as a prohibited ground for discrimination, and children with disabilities are specifically protected against discrimination. In our opinion, there would be a clear case of illegal discrimination against unborn children diagnosed with Down syndrome through antenatal screening and selective abortion.

Our view is that unborn children diagnosed with Down syndrome are afforded protection under the United Nations Committee on the Rights of the Child and the other UN instruments noted above, as well as through Articles 6 and 7 of the Rome Statute.

The actions of the New Zealand Government also substantiate our contention that children with Down syndrome are members of a distinct racial group and a stable and permanent group. The Programme is based on the premise that unborn children with Down syndrome can be distinguished by the extra chromosome attached to the 21st chromosome and they are specifically named in the title of the Programme.

In summary, there are sufficient grounds to establish people with Down syndrome as a stable and permanent group and therefore falling within the status of a protected group under the Convention and the Rome Statute. This is supported by the protection granted to disabled children through the

UN Declaration on the Rights of Disabled Persons, the UN Convention on the Rights of Disabled and the United Nations Committee on the Rights of the Child.

6. An intent to destroy, in whole or in part, that group

The legal test of intent is covered under Article 30 of the Rome Statute. Article 30 states:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. *For the purposes of this article, a person has intent where:*

(a) *In relation to conduct, that person means to engage in the conduct;*

(b) *In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.*

3. *For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.*

As outlined below the New Zealand Government was aware of the consequence that genocide (being the destruction in part the group of people with Down syndrome through the prevention of around 75% of births within the group) would “occur in the ordinary course of events”. They have engaged in the conduct as they proceeded with introducing the Programme aware of the consequences, based on the knowledge they had at the time. Under the second part of Article 30 (2(b)) the test is whether an offender is aware that the consequence would occur in the ordinary course of events. Evidence demonstrating that this test is met is presented below. Additionally the government is continuing to act with this knowledge despite concerns being raised officially with them.

Antenatal screening for Down syndrome has operated in New Zealand since 1968. It was initially introduced with no public debate or Parliamentary direction. In 2007 there were 64 abortions performed where Down syndrome was noted as present, in 2008 there were 62 (figures provided by the Abortion Supervisory Committee). This compares with 63 births in 2006 (figures determined from page 177 of the 2008 International Clearing House for Birth Defects and Surveillance with data for 2006 report, based on a rate of 10.58 births per 10,000 births and a total number of births of 59,193). These figures indicate that prior to the Programme being introduced around 50% of unborn children with Down syndrome were being aborted.

The Ministry of Health has been unable to provide abortion numbers involving unborn children diagnosed with Down syndrome from February 2010, when the Programme was introduced. The Minister of Health has recently advised that the collection of statistics on the number of babies aborted, who were diagnosed with Down syndrome, ceased in 2008 and that these statistics are not held by his Ministry or other Department, or Crown organisation. This means that evidence of the effects of the Programme on the population of people with Down syndrome will no longer be available.

At the National Screening Unit (NSU) workshop on screening for Down syndrome on 29 April 2004 Professor Peter Stone, Auckland University Professor of Maternal & Foetal Medicine, and a member of the NSU antenatal Down syndrome screening advisory group, made a presentation and outlined the objectives of prenatal screening. One of these was stated in the fifth power point slide, third bullet as:

“Allow couples at risk of anomaly to embark on having a family, knowing they may avoid the birth of seriously affected children through selective abortion”.

Professor Peter Stone has been involved in assessing the practice of antenatal screening for Down syndrome in New Zealand, and advising on the delivery of antenatal screening for Down syndrome for the NSU over a number of years. Subsequent to the 2004 workshop he was engaged by the NSU to produce his 2006 co-authored report “Assessment of Antenatal Screening for Down Syndrome in New Zealand”. The objective of this report is stated in the first paragraph of the Executive Summary:

“The purpose of this report is to provide the National Screening Unit of the Ministry of Health information on the current state of the antenatal screening for Down syndrome in New Zealand and how a co-ordinated approach to such screening could be implemented.”

The first sentence of the fourth paragraph in section 1 of that report identified concerns that the programme at that time had failed to reduce the numbers of babies born with undiagnosed Down syndrome:

“Mounting evidence in New Zealand has shown that not only is this becoming an increasingly expensive and labour intensive approach but failed to reduce the numbers of babies born with undiagnosed Trisomy 21”.

Professor Peter Stone is also part of the group that imports RU486 (mifepristone), which has been approved for use for both first and second trimester abortions. At the 5th ALRANZ Abortion Providers conference he gave the opening keynote address and spoke of his support for the decriminalisation of abortion. Foetal issues are his specialty and he supports foetal abnormality as a ground for abortion after 20 weeks (<http://www.alranz.org/NewsletterMay2008.htm>). Our view is that the NSU appointed a person who is clearly biased in favour of the abortion of unborn children with Down syndrome to head the review of antenatal screening.

The NSU recommended in their report “Antenatal Down syndrome screening in New Zealand 2007”, under Recommendation 6:

“To encourage wider societal debate, the Government should consider carrying out public consultation to determine the public’s views on whether or not there should be an antenatal Down syndrome screening programme.”

At that time, the Minister of Health decided there would be a project to “improve the quality” of the antenatal screening for Down syndrome and no public consultation was carried out. Item 34 of the Memorandum to Cabinet dated 23 October 2007 states:

“Given expert views on the quality of the current screening for Down syndrome, I consider that public consultation, or awaiting the outcomes of the Bioethics consideration of pre-birth

testing, a process that is due to commence shortly, would unnecessarily delay improvements.”

At no time has any individual with Down syndrome ever been consulted on this programme, a clear example of discrimination towards them (reference: Deputy Director-General of the Ministry of Health letter dated 19th May 2010).

In February 2010, the Government of New Zealand instituted the “Antenatal Screening for Down Syndrome and other conditions - Quality Improvements” programme. It is our view that there is a national screening programme for Down syndrome in New Zealand, although the NSU and the Minister of Health refers to the new programme as “quality improvements”. The name of this programme was changed from a "national screening programme" to "improving the quality" in 2008, at the direction of the Minister of Health, Pete Hodgson. Item 4 of the Health Report HR20081110 states:

“When provided with the proposed implementation plan for a national antenatal screening programme for Down syndrome (HR 20071668), Minister Hodgson requested a shift in focus, from “national screening programme” to “improving quality”.”

Additionally, in November 2009, Professor Stone stated publically with regards to this topic:

“There will in effect be national screening but due to complex sensitive political factors the advice from the National Screening Unit and the Director General of Health to the past and current Ministers of Health was not to call this a national screening programme but ‘quality improvement’. Reference: <http://www.voxy.co.nz/national/national-screening-finally-way-down-syndrome-babies/5/29592> and verified with the reporter.

It is our view that there is a national screening programme for Down syndrome, as that section of the NSU website is called "Antenatal Screening for Down syndrome and other conditions - Quality Improvements" and all three information pamphlets for parents have "Screening for Down Syndrome and other conditions" on the title page.

The Programme was introduced by the Ministry of Health in February 2010, following advice from the NSU. Cabinet papers obtained under the Official Information Act state that the outcomes of the programme will be a reduction in the number of births of people with Down syndrome, with around 90% of unborn children diagnosed with the condition being aborted.

Item 28 of the Memorandum to Cabinet dated 23 October 2007 states:

“There is the potential for activities associated with improving the quality of antenatal screening for Down syndrome to have a negative impact on people with disabilities, including:”....

.... (Fourth bullet) “decrease in the number of babies born with Down syndrome. International experience suggests that as a result of screening and diagnostic tests, up to 90 percent of women who receive an antenatal diagnosis of Down syndrome will choose to terminate their pregnancies.”

In practice the total abortion rate can be expected to be around 75% as not all women will participate in screening. The best international evidence available in terms of the consequences of the Programme can be found in the 2008 Danish study "[Impact of a new national screening policy for Down's syndrome in Denmark: population based cohort study](#)". The objective of the report was "To evaluate the impact of a screening strategy in the first trimester, introduced in Denmark during 2004-6, on the number of infants born with Down's syndrome". This report is directly relevant to the revised screening programme introduced by the NSU, as they use identical procedures and the relevant numbers are almost the same. Both the Danish and New Zealand programmes are State funded and voluntary. In 2006 in Denmark there would have been 135 infants with Down syndrome expected to be born in a population of 65,000 live-born infants if the mothers had no prenatal intervention. In New Zealand the respective numbers are 125 and around 60,000 live births.

As detailed in the Danish study the introduction of a combined risk assessment during the first trimester at a national level in Denmark in 2004 – 2006 halved the number of infants born with Down's syndrome and halved the number of invasive diagnostic tests.

Based on the above Danish evidence the New Zealand Programme will reduce the number of births of people with Down syndrome from around 63 per year to 31 per year, with the number of selective abortions increasing from around 63 per year to 94 per year. This indicates that around 75% of the group will be destroyed through the Programme ($(94 \text{ abortions} / (94 \text{ abortions} + 31 \text{ births})) = 94/125 = 75\%$).

The 75% abortion rate compares with around 50% being aborted prior to the Programme being introduced. This confirms that there will be a significant reduction in the births of people with Down syndrome as a result of the Programme and that the Cabinet of the New Zealand Government were aware of this.

The 90% abortion figure, where there is a confirmed diagnosis of Down syndrome in-utero, referred to in the Cabinet paper, is widely recognised in international research. Two examples are given below.

[Studies in Taiwan](#) concluded:

"The policy of prenatal diagnosis program including amniocentesis for pregnant women aged 35 or more and the liberal application of maternal serum screening for DS in younger women was responsible for the marked decrease in the live births affected with DS in Taiwan from 1993 to 2001."

[Studies in Australia](#) concluded:

"The introduction of maternal serum screening in South Australia has resulted in increased use of any prenatal testing for Down's syndrome from about 7% (mainly older women having amniocentesis or chorionic villus sampling) to 84% of women (about 8% having direct amniocentesis or chorionic villus sampling and 76% having maternal serum screening first). This has resulted in a significant fall in the birth prevalence of Down's syndrome. Maternal serum screening was the first indication of Down's syndrome for about half the terminations of pregnancy for Down's syndrome in 1993-1996, including three quarters of those in younger women."

Item 27 of the supporting report that accompanied Health Report 20070054 (13 March 2007) to the Minister of Health states:

“International experience suggest that as a result of screening and diagnostic tests, up to 90 percent of women who have received an antenatal diagnosis of Down syndrome will choose to terminate their pregnancies. This results in a decreased incidence of babies born with Down syndrome.”

Item 28 of that report goes on state:

“...these are valid concerns.”

One of the purposes of the Programme is to abort unborn children diagnosed with Down syndrome. Item 14 of the Memorandum to Cabinet dated 23 October 2007 details the purposes of the Programme as:

“Down syndrome occurs in approximately 1 in 700 births. The purpose of screening is to provide women with information about their pregnancy to enable them to make informed choices. This information may help women to:”....

.... (Second bullet) “decide whether to continue with or terminate the pregnancy.”

This is also stated as an option in the public NSU [“increased chance”](#) leaflet.

In the NSU report “Antenatal Down syndrome Screening in New Zealand 2007” it is stated:

“ International literature suggests that a national screening programme will lead to reduced incidence of Down syndrome and other fetal anomalies, which is a cause of concern in the disability community.” (Page 2, fourth paragraph, first sentence) and

“It is also likely to result in a reduced incidence of Down syndrome, despite this not being one of the purposes of screening” (Table C, page 47).

The NSU training module (QIASD) for the Programme states in the second paragraph on page 12:

“Whatever the intent of antenatal screening, it may also lead to a reduction in the incidence of Down Syndrome.”

The Health and Disability Commissioner (H&DC) wrote to the NSU on the 18th August 2009 commenting on the draft NSU document *“Guidelines for Maternity Providers offering antenatal screening for Down syndrome and other conditions in New Zealand”*. The third paragraph of the H&DC letter states:

*“On page 8 and other places in the document there is the comment “The purpose of the improvements is **not** to reduce the incident of Down syndrome or other fetal conditions”. This statement is correct in as much as the purpose of improved screening is to provide more accurate results and provide maternal choice, but the effect nonetheless will be to reduce the number of these conditions.”*

The conclusion of the H&DC letter includes the statement:

“As the numbers of Down syndrome people in the community decreases, it is expected that women may lack knowledge of the realities of raising a child with the condition. In particular, greater efforts will be needed to minimise any negative impact of the screening programme on disabled people in the community.”

The programme is funded by the Government and targets all pregnant women in New Zealand in their first trimester on the basis of providing information to women to make decisions about their pregnancies, including abortion. Government funding indicates that the Government supports the Programme and considers that participating in the Programme is the “right thing to do”. NZ\$9.4M per year is allocated towards the programme. This equates to approximately \$75,000 per diagnosis of an unborn child with Down syndrome.

People with disabilities are the only group of people in New Zealand targeted for selective abortion.

Down syndrome, and other conditions that are targeted, are genetic conditions that have no cure.

Screening in the first trimester enables a termination of the pregnancy within the standard 20 week legal timeframe for an abortion on the grounds of foetal abnormality in New Zealand. The primary reasons for first trimester screening in the general population, as a medically necessary standard-of-care procedure, are not well justified. We consider that the purpose of first trimester screening is to encourage earlier diagnostic testing in order to facilitate early termination when Down syndrome or other chromosomal anomalies exist. Other reasons for prenatal diagnosis, such as parent education, hospital selection and delivery management, do not necessarily require testing during the first trimester and can be safely left until the later stages of pregnancy.

The above information demonstrates that the NSU, the Minister of Health and Cabinet had foresight that the consequences of the Programme would be the prevention of births of people with Down syndrome via selective abortion, leading to the destruction, in part, of that group of people. This information is readily available and the Minister of Health is continuing with the programme in the knowledge that the vast majority of pregnancies with Down syndrome will be aborted in the ordinary course of events.

We also have evidence that the Programme has been driven by that fact that it is “cost effective”. The March 2007 Health Outcomes International report for the NSU “Summary of Key Informant Interviews, Antenatal Down syndrome Screening” includes the following statements under section 2.3.2:

“A further assumption regarding the establishment of formal screening programmes is that the programme will be cost beneficial for the population and the health system”;

“The economic costs of screening outweigh the high cost associated with the long term care needs of an individual with Down syndrome”; and

“It is cost effective as the estimated cost of avoiding the birth of a baby with Down syndrome (about 38,000 pounds) is substantially less than the lifetime costs of care”.

The fact that formal screening programmes are considered to be cost beneficial, by preventing the births of children with Down syndrome, indicates an intent to prevent the births of this identifiable group of the civilian population, otherwise government funding would not be made available.

The desire to act is simply established through the introduction of the Programme in February 2010.

It is concluded that the implementation of the Programme meets the legal test of intent as it relates to the destruction, in part, the group of people with Down syndrome.

7. Established measures to prevent births within the group

Article 2(d) of the Convention and Article 6(d) of the Rome Statute includes *“Imposing measures intended to prevent births within the group”* as a definition of genocide.

“Imposing measures” means establishing or applying a measure. *“Imposing”* being the transitive verb (i.e. without an object). In this case *“measure”* is not an object and the transitive verb *“impose”* applies, which is to *“establish or apply by authority”* (<http://en.wiktionary.org/wiki/impose>).

The question may arise as to whether the Convention is limited only to cases where abortion is imposed on women. As the Convention and Rome Statute define genocide in terms of *“killing members of the group”*, since *“measures intended to prevent births”* clearly includes induced abortion, and since abortion involves the intentional killing of the unborn, then the Convention’s reference to *“imposing measures”* cannot be interpreted in a way that would limit its application to women who are forcibly aborted. This is reinforced by the legal test of intent that is covered under Article 30 of the Rome Statute as including acting in the knowledge that *“a consequence will occur in the ordinary course of event”*.

“intent” has been discussed under section 6.

Abortion *“prevents the birth of a person”*.

Imposing measures intended to prevent births within the group is proved through the establishment of the Programme and the use of selective abortion to prevent births within the group.

8. Possible warning signs that may lead to genocide

The United Nations Economic and Social Council’s Report of the Secretary-General on the implementation of the Five Point Action Plan and the activities of the Special Adviser on the Prevention of Genocide, dated 9 March 2006 ([UN reference E/CN.4/2006/84](http://www.un.org/News/Press/docs/2006/0603_20060309.htm)), details a Five Point Action Plan on the activities of the Special Adviser on the Prevention of Genocide.

This Plan includes under item d):

- Early and clear warning of situations that could potentially degenerate into genocide and the development of a United Nation’s capacity to analyse and manage information.

The Annex to that report details possible warning signs that may lead to genocide.

The following examples are directly relevant to the issue of the Programme and are consistent with warnings that genocide would be carried out against the group of people with Down syndrome, which is now occurring.

The existence of a national, ethnic, racial or religious group(s) at risk

(a) A pattern of discrimination with the purpose or effect of impairing the enjoyment of certain human rights – demonstrated by imposing measures intended to prevent births within the group and selective abortion.

(b) Exclusionary ideologies that purport to justify discrimination – demonstrated by the eugenic nature of the programme, that targets disabled people.

(d) Demonization of groups in political or social discourse.

- Example: The “*quality improvements*” were partially driven by the unfortunate practice of having around 27 to 33 procedure-related miscarriages per year whilst detecting 65 to 75 so called “*affected foetuses*”. This conveys a view that the lives of the babies lost via procedure-related miscarriages are considered more worthy than the lives of the “*affected foetuses*” (Section 4 of Health Report 20070054).

-Example: [Report in the Independent newspaper \(UK\), 9 March 2011](#)

“A less risky non-invasive procedure based on maternal DNA to diagnose Down syndrome could be generally available to pregnant women by 2013.”

*“The cheaper and quicker method of blood sampling rather than collecting fluid from the womb will encourage more couples to take the test and **therefore slowly eradicate the disease.**” - Philippos Patsalis of the Institute of Neurology and Genetics, Nicosia, March 2011.*

Stage 3 of the 8 stages of Genocide, Gregory Stanton, President of Genocide Watch, 1996 states:

*“One group denies the humanity of the other group. Members of it are equated with animals, vermin, insects or **diseases.**”*

People with Down syndrome are being demonized by being compared to a disease for eradication.

Violations of human rights and humanitarian law, which may become massive or serious

(b) Violations of civil and political rights affecting a specific group.

– By imposing measures intended to prevent births within the group and selective abortion.

- Failure to consult with any individual within the group over the screening programme or the wider public (reference: Deputy Director-General of the Ministry of Health letter dated 19th May 2010).

- Refusal by the New Zealand Human Rights Commission to investigate the Programme as a broader human rights matter (Commissions' letter dated 7 April 2010, 29 September 2010 and 15 October 2010).

- Absence of Parliamentary direction or statutory authority.

- One of the purposes of the programme is to abort unborn children diagnosed with Down syndrome. The purpose of screening includes an option to "*terminate the pregnancy*". The NSU expressed concern that "*current practice does not adequately achieve the purpose of screening*".

(c) Serious or massive violations of economic, social and cultural rights.

- By imposing measures intended to prevent births within the group and selective abortion.

- Screening sends a clear message to people with Down syndrome that their lives are not valued, particularly as the NSU documentation includes an option to "*terminate*" where there is a diagnosis of Down syndrome.

(d) Instances of discrimination.

- By imposing measures intended to prevent births within the group and selective abortion, failure to consult with any individual within the group over the screening programme (confirmed via an Official Information Act inquiry).

- In 2006 the National Screening Unit (NSU) identified concerns that the programme "*failed to reduce the numbers of babies born with undiagnosed Trisomy 21*".

A history of genocide or discrimination

(a) A history of vilification or dehumanization of a group.

- Previous history in New Zealand of Institutionalisation of almost all individuals within the group until the 1970's.

- The use of depo provera, an injected contraceptive, on females in New Zealand as young as 13 in the group until the 1970's, without their informed consent.

- Absence of the right to education in New Zealand until 1989.

- In 1939 Hitler authorised a euthanasia program to rid Germany of all those people classified as unworthy to live. This classification initially covered disabled children. The first to be murdered under the T-4 program were babies and children, including those with Down syndrome. Genetic screening promotes and achieves the same outcomes through selective abortion using technology to detect a third 21st chromosome.

- Example of discrimination: Failure by NSU to deliver any materials to convey the perspectives of young people and adults with Down syndrome, despite indications provided to the New Zealand Cabinet that this would be done.

- Example of discrimination: Failure by NSU to consult with people with Down syndrome over issues that affects them.