On euthanasia and same sex 'marriage'—Territories may not pass laws contravening universal human rights obligations

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Introduction

While I understand that the stated object of the Bill and the amendments is to give exclusive legislative authority for the three territories to their local legislatures, I understand also that this 'exclusive legislative authority' is being directed specifically towards enabling these local legislatures to enact in the very near future new permissive legislation on euthanasia and same-sex 'marriage'.

Because euthanasia and 'same-sex marriage' are both very seriously in contravention of existing international human rights obligations solemnly agreed by our Federal Government in the human rights conventions, the Territories cannot be given 'exclusive legislative authority' on these issues.

The Territories do not have an unlimited right to legislate on marriage and euthanasia. Federal Parliament retains the authority and the duty to enact general overriding laws where human rights obligations and protections are jeopardized by Territory law.

This Bill should be amended to recognize and to clarify that the Territories do not have an unlimited right to legislate on marriage and euthanasia or on any other fundamental human rights issue. And certainly the Territories do not have an 'exclusive' right.

The Federal Government retains primary responsibility for ensuring that all domestic legislation (including State and Territory law) is compatible with Australia's international human rights commitments.

All Australian marriage laws (including State and Territory laws) must comply with universal obligations in the International Covenant on Civil and Political Rights ICCPR) to protect marriage and the family (Article 23).

And all Australian laws (including State and Territory laws) must comply with universal obligations in the International Covenant on Civil and Political Rights to guarantee for everyone legal protection from arbitrary deprivation of life. (Article 6).

Article 50 of the ICCPR states that “the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions”.

This means that no limitation on, or exception to, the inalienable right to life of the any person at risk of assisted suicide can be enacted without contravening the Covenant (Article 6).

This means also no limitation on, or exception to, the solemn obligation to protect marriage and the family can be enacted without contravening the Covenant (Article 23).

If a State or Territory introduces laws that tamper with the guaranteed Covenant protections for marriage and the family or laws that permit intentional deprivation of life, the Federal Parliament has the authority and the duty pursuant to its external affairs power to enact general overriding laws based on Article 23 and Article 6.

The UN Human Rights Committee decrees:

> “The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional **or local** - are in a position to engage the responsibility of the State Party**. The executive branch that usually represents the State Party internationally… may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.**” [1]

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[1] **General Comment No. 31 CCPR/C/21/Rev.1/Add.13, 26/05/2004**
The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Para 4.

The UN Human Rights Committee continues:

> **"Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees**." [2]

Section 1:

Legalizing euthanasia—incompatible with ICCPR obligations to protect "everyone' from "arbitrary deprivation of life"

Proposed Territory laws legalizing euthanasia contravene Federal human rights obligations

Proposed Territory laws introducing euthanasia assert a 'new' right which conflicts with an established right.

Under international human rights law, facilitating voluntary euthanasia, or rather assisted suicide, contravenes the duty to provide legal protection of the right to life for everyone, including the most vulnerable.

The framers of our international human rights instruments had good reason for insisting that the right to legal protection from arbitrary deprivation of life is non-derogable and inalienable.

Not even in 'public emergencies' may any government derogate from legal protection of the right to life of every human being in its jurisdiction.

Rights *"extend to all parts of federal States without any limitations or exceptions"*

Article 50 of the *International Covenant on Civil and Political Rights* (ICCPR) states that "the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions".

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[2] **General Comment No. 31 CCPR/C/21/Rev.1/Add.13, 26/05/2004**
The Nature of the General Legal Obligation Imposed on States Parties to the Covenant para 13.

On all matters pertaining to the possible violation of the right to life of the terminally ill, the Federal Government is obliged to challenge State and Territories laws that have failed to provide adequate protection against the medicalized killing of the terminally ill.

"*Every human being has the inherent right to life. This right shall be protected by law No one may be deprived of their life arbitrarily*", says Article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

It is the Federal legislature's responsibility to provide laws that "***strictly control and limit the circumstances in which the State may condone deprivation of life***".[3]

In view of the irreversible nature of each act of intentional medicalized killing of a terminally ill person, Federal legislatures must scrupulously observe all international and regional standards protecting the right to life **and must ensure that the states and territories of the Federation also observe these standards.**

Euthanasia contravenes the universal human rights principle of inalienability

The drafting history of the International Covenant on Civil and Political Rights makes it clear that medicalized killing, even when requested in response to suicidal distress, violates the fundamental human rights principle of inalienability. Human beings cannot be deprived of the substance of their rights, not in any circumstances, not even at their own request.

International human rights law assigns a very specific meaning to the word 'arbitrary'. The drafting records show that after considerable debate, it was concluded that the word 'arbitrary' should be interpreted as 'without justification in valid motives and contrary to established legal principles.'

States Parties' human rights obligation to provide legal protection for the terminally ill means that governments are prohibited from legalizing, promoting, condoning or paying for medical interventions where the intended outcome is arbitrary deprivation of the life of the suicidal and the terminally ill.

Any State or Territory law which legalizes medicalized killing of the suicidal and the terminally ill must be found sooner or later to be invalid. It will be found to have been void at the very time of its enactment because it is incompatible with the universal human rights commitments of the *ICCPR* to protect by law the inherent right to life of every human being, including the inherent right to life of the terminally ill and other vulnerable persons.

States which have ratified the *ICCPR* must at all times take positive steps to effectively protect the right to life of every human being. The right to life of persons at risk of suicide, as protected by international human rights law, means, *inter alia*,

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

that States have a strict legal duty at all times to prevent, investigate and redress threats to the right to life wherever such violations occur, both in private and in public. (Article 4(2) *ICCPR*)

Only a corruption of this strict legal duty to prevent, investigate and redress threats to the right to life could enable a government to tolerate interventions having the intended outcome of encouraging arbitrary deprivation of life involved in suicide.

States Parties' human rights obligations in a Federation that has ratified the Convention are prohibited from tolerating the promotion of assisted suicide as a human right.

Localized majorities may not pass laws in violation of universal human rights

The UN Human Rights Committee has explained further that the introduction of the concept of arbitrariness is intended to guarantee that even measures provided for by domestic law should be in accordance with the provisions, aims and objectives of the Covenants.

In other words, localized majorities may not pass laws in violation of universal human rights.

In order to guarantee universal human rights, it is therefore essential that, in a federation, all state and territory actions affecting basic rights **not** be left to the discretion of localized governments but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual will not be impaired. It is true that one of these guarantees is the requirement that restrictions to basic rights should only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure, according to one international court of human rights, not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily.[4] The Court, however, goes on to sound a timely warning:

> "Although it is true that **this procedure does not always prevent a law passed by the Legislature from being in violation of human rights –a possibility that underlines the need for some system of subsequent control**—there can be no doubt that it is an important obstacle to the arbitrary exercise of power."[5] [emphasis added]

While this is from an Advisory Opinion of the Inter-American Court of Human Rights, it has, I believe, a very real relevance to our own Constitution, Legislatures and formal obligations to conform domestic laws to international human rights conventions that Australia has ratified, such as the *ICCPR*.

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[4] ibid para 22
[5] ibid para 22

Of special relevance is this understanding that the political will of a democratic majority **does not always prevent a law passed by the Legislature from being in violation of human rights –a possibility that underlines the need for some system of subsequent control**. Federal intervention in the form of the *Euthanasia Laws Act 1997* was an excellent demonstration of just such a need for some system of subsequent control when a localized majority (the Northern Territory Legislature) has acted arbitrarily to pass a law that is in violation of human rights.

In this respect, the Territory legislatures may need to be reminded that the term "peace, order and good government" may under no circumstances be invoked as a means of denying any right guaranteed by the *International Covenant on Civil and Political Rights* or to impair or deprive it of its true content.

The inherent right to life of persons at risk of arbitrary deprivation of life shall be protected by law

The suicidally distressed and the terminally ill are among the most vulnerable human beings on earth; and legal systems must not permit them to be placed at risk of lethally persuasive arguments and initiatives. Persons at risk of suicide are entitled to have their genuine rights fully respected in accordance with the special safeguards and duty of care guarantees as set out and agreed in the original international human rights instruments which the Australian Federation has ratified.

Article 2(2) of the *International Covenant on Civil and Political Rights* states:

> *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

Legislative or other measures must be adopted by each State party to the *ICCPR* to provide protection for the inherent right to life of persons at risk of suicide.

Article 6(1) of the *International Covenant on Civil and Political Rights* asserts:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Natural death or arbitrary death?

Natural death comes inevitably to all human beings. Natural death is an unprovoked, spontaneous natural event. Death is not a right, but an inevitability. Human rights are applicable to the living. For as long as persons at risk of suicide are alive, their inherent right to life is to be protected by law—their lives are to be protected even against self-harm. There are to be no exceptions and no limitations placed on a government's duty to protect the inherent right to life and this duty applies to both individual states and territories within a federation. (ICCPR Art.50).

The law must ensure that no one is arbitrarily deprived of his life. The term 'arbitrarily' has immense significance in that it prohibits euthanasia and suicide precisely for the reason that both the timing and the manner of death are arbitrary rather than inevitable.

From the very beginning of the drafting of modern international human rights instruments, a clear understanding of the term 'arbitrarily' was established—it was to be interpreted as "without justification in valid motives and contrary to established legal principles."[6]

It is not lawful to condone propaganda or legislative programmes that promote suicide as a reasonable and valid course of action. Legal tolerance of such promotions of arbitrary deprivation of life is

- *without justification in valid motive*

  They aspire to do good (relieve suffering and/or pain) by doing evil (arbitrary deprivation of life); and

- *contrary to established legal principles*

  They contravene the established legal principle that the state may condone deprivation of life only for those who are judged guilty of serious crime. (ICCPR Article 6 (2). They contravene also the established human rights legal principles of the inherency and inalienability of the right to life.

Dr Stephen Hall, in a recent article in the *European Journal of International Law*, warns that it is when we are "unmindful of the richness of the common good under the natural law" that the temptation to turn moral wrongs into human rights arises; he intimates that laws authorizing the killing of human beings are "radically unjust (and radically immoral) in that they permit choosing directly against a self-evident form of human flourishing; i.e. life." [7]

It is the Federal legislature's responsibility, in cooperation with the States and Territories, to provide both laws and programs that protect *the inherent right to life* and the inalienability of all the rights of persons at risk of suicide especially:

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[6] « …arbitraires (c'est-a-dire sans justification pour des motifs valables et contraires a des principes juridiques bien etablis)… » Verdoodt, Albert, *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme*, Société d'Etudes Morales, Sociales et Juridiques, Louvain-Paris, Editions Nauwelaerts, 1964, p.143

[7] Hall, Stephen: *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism* European Journal of International Law, Oxford: 2001. Vol. 12, Iss. 2; p. 269

- the terminally ill, including provision of access to palliative care and to all other necessities required during this last stage of life; and
- the psychologically distressed, including provision of access to continuing psychiatric and medical care as well as ongoing access to material needs and social support necessary to their well-being.

Some genuine rights of the terminally ill under international human right law

o The inherent right to life of the terminally ill is inalienable

The term "inalienable rights of all members of the human family" applied to the terminally ill means that these human rights cannot be taken from the terminally ill person, not by anyone, and not even by himself. Thus the right to life, because it is inalienable, rules out suicide and assisted suicide.

Medicalized killing cannot be offered as a legitimate response to the suicidal distress of a terminally ill person as it is in violation of the fundamental human rights principle of inalienability. Human beings cannot be deprived of the substance of their rights, not in any circumstances, not even at their own request.

The natural law principles relevant here are that a human entity should be allowed to persist in being; and that one must not directly attack any basic good in any person, not even for the sake of avoiding bad consequences. This last principle, that the basic aspects of human well-being are never to be directly suppressed, is cited by Professor John Finnis as the principle of natural law that provides the rational basis for *absolute* human rights, for those human rights that "*prevail in all circumstances, and even against the most specific human enactment and commands".*[8]

The concepts of dignity, sanctity, status, worth, and ultimate value—*each individual an end in himself*[9] —underpin the understanding and acceptance by the drafters of the *Universal Declaration of Human Rights* of the first principle of natural law—the moral imperative to do good and avoid evil, and emanating from this, the precept that affirms preservation of each human life and proscribes arbitrary deprivation of any human life.

International humanitarian law has recognized that special safeguards must be accorded to persons in positions of extreme vulnerability. It is prohibited to subject such persons *"to any medical procedure which is not indicated by the state of health of the person concerned... even with their consent".* [10] Most significant here is the concept that some medical procedures are prohibited for human beings in vulnerable situations "even with their consent". There is indeed humane recognition here that

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[8] Finnis, John: *Natural Law and Natural Rights* (1980) and *Aquinas: Moral, Legal and Political Theory* (1998)

[9] Speech by Eleanor Roosevelt Adoption of the Declaration of Human Rights (December 9, 1948).
[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1, Article 11, "Protection of Persons"

some medical treatments are so lethal that even the consent of the persons concerned cannot give them legitimacy.

- **The terminally ill have the right to recognition of their inherent dignity**

The *International Covenant on Civil and Political Rights* (ICCPR) recognizes that all human rights derive from the inherent dignity of the human person.

Recognizing that these rights derive from the inherent dignity of the human person… (Preamble)

Inherent dignity is a core value of the *International Bill of Rights*:

> "*…recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*"

This appears in the Preamble of all three instruments and as such is a foundational premise upon which all the rights that follow are based. It is "the foundation of…justice" i.e. it is the foundation *inter alia* of international human rights law.

Given this foundation, there is no "right to die" in the human rights instruments. Nor is there what euthanasia advocates call "a right to die with dignity". The confusion here is engendered in their failure to grasp that human rights belong to the living—that every human being, because of his/her inherent dignity, has a right to live – a right that stems from the inherent dignity of every human being and inheres in every human person from conception through to the moment of their death.

The terminally ill, although they are dying, are still alive. It is their life not their death that entitles them to all their human rights. It is their live humanity, their living membership of the human family that entitles them to "*…recognition of the inherent dignity and inalienable rights of all members of the human family"*. It is this recognition that obliges us to travel in human solidarity with the terminally ill, to provide them with the best attainable palliative care, in their homes or hospices or intensive care units, or even on the streets (as exercised by Mother Teresa's Sisters) to be attentive to their needs, to be with them to the moment of natural death. While every person with a terminal illness has a right to refuse burdensome medical intervention intended to prolong life, no person has a right to demand of carers a medical intervention intended to kill. There is no right to procure arbitrary deprivation of life. The terminally ill have no right to medicalized killing which is the antithesis of genuine recognition of the inherent dignity and worth of the human person who is terminally ill.

So even while living through the natural process of dying, the terminally ill retain that inherent dignity. The term "inherent dignity" applied in the spirit and purpose of the

Universal Declaration means that every human being, from the first moment of existence as a discrete, genetically unique human entity to the point of natural death, has an immutable dignity, a dignity that does not change with external circumstances such as levels of personal independence, satisfaction or achievement, mental or physical health, or prognoses of quality of life, or functionality or wantedness. There is no conceivable condition or deprivation or mental or physical deficiency that can ever render a human being "non-human". Pejorative terms such as "just a vegetable" or "non-person in a permanent vegetative state" and dismissive attitudes such as "May as well put him out of his misery—he's going to die anyway…" cannot justify violation of the human rights of the human person so described. Such prejudices cannot destroy *the inherent dignity of the human person.* As long as a human being lives, he or she retains all the human rights of being human, all the rights that derive from his or her inherent dignity as a human being.

- **The terminally ill have the right to security of person**

Everyone has the right to life, liberty and security of person (*Universal Declaration* Article 3)

The terminally ill have the right to life, liberty and security of person. They have an inalienable right to life up to the very moment of natural death; and the right to security of person is very closely related to the right to life. The right to security of person means *inter alia*, that the right to life is to be protected and *secured* for the terminally ill. They are to be protected from all attempts against their life, including self-harm and all other measures intentionally directed towards inflicting death. The right to life cannot be distorted to mean a right to be killed. All human rights "*derive from the inherent dignity of the human person*" (ICCPR), and must be rightly ordered towards sustaining the human person in his/her being. Clear human rights obligations are set out in the *Universal Declaration* Article 25 (1):

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*.

The terminally ill have a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of "… sickness, disability…old age or other lack of livelihood in circumstances beyond his control". This last phrase has special relevance to the terminally ill—truly the terminally ill are *in circumstances beyond their control.*

The dependency, pain and deep sorrow that often accompanies terminal illness is part of the human condition—it is part of life, part of living. Dying is the final natural life event—it should not be transformed into act of arbitrary medicalized killing. Medical technology has overreached the proper purvey of medicine when it is used to kill instead of to provide palliative relief for the terminally ill.

The limits of autonomy and the duty to secure the rights of all

The autonomy of the terminally ill is limited by respect for the rights of others and for the security of all. Laws endorsing medicalized killing of suicidal persons who are terminally ill result in an abrupt disconnect of autonomous rights from the natural context of responsibilities to the community. Even persons who are terminally ill cannot unilaterally divorce their human rights from their human responsibilities to their family, their community, and mankind. Relationship between duties and rights remains valid for all human beings, including the terminally ill. Everyone has duties to the community. (UDHR Article 29 (1)).

The autonomy of the terminally ill may be limited by law in order to secure due recognition and respect for the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society. (UDHR Art.29(2).

States have a duty to maintain their part in a social and international order in which the rights and freedoms set forth in the human rights instruments can be fully realized for everyone. (UDHR Art.28)

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. (UDHR Art.29(3))

> Nothing in this Declaration [or in any of the subsequent human rights instruments] may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.(UDHR Art. 30).

Unfortunately, proposed Territory euthanasia laws *are* engaging in an activity aimed at the destruction of the inalienable right to life of the terminally ill.

In promoting a spurious new right, they take from the terminally ill who are not suicidal the security of a much older assumption. Assumptions go far deeper in human nature and in basic social organizations like the family, than any merely legal right. In this case, the original assumption is that there exists an unlimited duty of care owed by the living towards the dying, on which hitherto we have all been able to depend.

This is one of the vitally important assumptions on which the fabric of civilization has been founded and which are far deeper than any merely legal right established by legislatures.

In a clumsy grab for the personal right to suicide more comfortably, those who support this Bill threaten to undermine the common respect for a fundamental right of all human beings—the right *not* to have to choose when to die, the right *not* to have to justify lingering on, the right *not* to have to consider suicide in order to relieve one's carers of physical, medical, or financial responsibilities. Although that assumption

was not formally inscribed in any legal enactment, in fact all human beings in modern civilized societies have relied on it.

Proposed euthanasia laws—an assault on human solidarity

State subsidized and condoned medical programs used to destroy rather than to ameliorate the human condition of the terminally ill must be eschewed. As an assault on true human solidarity, the campaign to medicalize suicide will constrain the automatic entitlement of those living with a terminal illness—an automatic entitlement to have all their needs met for as long as the natural life cycle requires. It will introduce, unforgivably, a disturbing question that will threaten the peace of mind of all the terminally ill who may now be forced in subtle ways to answer this new question of *when* to die, of whether “to choose” medicalized suicide.

In making this choice, the terminally ill will be made to wrestle with their new "duty" to consider the burdensome nature of their continued life on their carers.

This pressure promises to be intolerable.

Section II:

Proposed Territory laws on same-sex marriage contravene Federal human rights obligations

Territory laws promoting same-sex 'marriage' contravene international human rights obligations for governments to provide 'the widest possible protection and assistance' for the family, 'particularly for its establishment' as 'the natural and fundamental group unit of society' (International Covenant on Economic, Social and Cultural Rights Article 10).

States parties have an obligation under the UN Conventions to protect marriage in "the ordinary meaning" of the term which at the time the Conventions were negotiated meant marriage between "men and women", not "men and men" and not "women and women".

“…marriage only the union between a man and a woman wishing to marry each other”—UN Human Rights Committee

The UN Human Rights Committee has advised:

> "Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from **article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.**" [11]

Creative attempts, however populist, to tamper with those protections, are invalid because they contravene the 'ordinary meaning' test required by Article 31 (1), General rule of interpretation of the Vienna Convention on the Law of Treaties (1969):

> 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

The right to marry and found a family in Article 23 *ICCPR*, according to the UN Human Rights Committee, 'implies, in principle, the possibility to procreate'. [12]

There is, of course, no compulsion to procreate but rather a more exacting requirement for the two rights holders of the right to marry to have 'in principle, the possibility to procreate' through their marriage.

This requirement, 'in principle, the possibility to procreate', rules out definitively any genuine legal right of two persons of the same sex to marry.

'husband and wife'—not "a discriminatory term"

It is wrong when proposed same sex 'marriage' legislation implies that 'husband and wife' is a "discriminatory term". It is a definitional term so fundamental to the meaning of 'marriage' that to attempt to replace it with 'two people' is to invite logical and legal incoherence which has the potential to effect negatively all those, especially children, who are beneficiaries of the social cohesion encouraged and protected by our marriage law.

Australia has ratified the UN Women's Convention (CEDAW) and is obliged under international human rights legal principles codified in this Convention to promote full recognition of "the social significance of maternity and the role of both parents in the family and in the upbringing of children" and to enact laws that acknowledge "that the

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[11] UN Human Rights Committee, *Joslin v. New Zealand*, Communication n° 902/1999, decision of 30 July 2002 (UN doc. CCPR/C/75/D/902/1999)

[12] UN Human Rights Committee in General Comment 19 on Article 23 of the International Covenant on Civil and Political Rights

upbringing of children requires a sharing of responsibility between men and women…"[13]
Indeed, how can the term "husband and wife" be deemed discriminatory when the official human rights language of Article 16 of the CEDAW Convention links the term "parents" definitively to "men and women" and to "husband and wife"?

International obligation to protect marriage and the family

Under international human rights law, the Commonwealth Government has the solemn duty to ensure that Australian marriage laws (Federal, State and Territory laws) comply with universal obligations in the International Bill of Rights to protect marriage and the family.

As signatory to the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the Federal Government is obliged to ensure that the provisions "extend to all parts of federal States" (ICCPR Article 50, and ICESCR Article 28). All parts of the Federation of Australian States are formally bound to uphold these covenants in their entirety.

While the Australian Constitution does award responsibility for making laws about marriage to the Commonwealth, it does not allow for the gutting of the honourable age-old natural law institution of marriage in order to replace it with some experimental Mickey Mouse cartoon-style construct.

No democracy can justify amendments to marriage law that are incompatible with specific universal human rights requirements such as State provision of protection for the family—"the natural group unit of society".
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> The family is the natural…group unit of society and is entitled to protection by society and the State." (ICCPR Article 23-1).
>
> The State Parties …recognize that: The widest possible protection and assistance should be accorded to the family, which is the *natural*…group unit of society, particularly for its *establishment* (ICESCR Part 1, Article 10-1).

When "same-sex marriage" advocates take exception to the stipulation of a man and a woman in the establishment of the family, they are in contravention of the Covenants.

Promoting unnatural forms of family formation is not in keeping with international human rights obligations of governments to provide "the widest possible protection and assistance" for the "natural" family, particularly for its *establishment* as the natural group unit of society.

Right to found a family "implies, in principle, the possibility to procreate" –UN Human Rights Committee

[13] CEDAW Preamble; also Article 5b "…recognition of the common responsibility of men and women in the upbringing and development of their children".

In interpreting Article 23 of the ICCPR which promotes protection of the family and the right to marriage, the UN Human Rights Committee in General Comment 19 (paragraph 5) insists that the right to found a family "implies, in principle, the possibility to procreate". (A General Comment is the most authoritative of all the prescriptions that may be issued by the UN human rights monitoring bodies.) This requirement, "in principle, the possibility to procreate", rules out definitively any genuine legal right of two persons of the same sex to marry and to found a family. Quite wrongly, homosexual and lesbian lobbies around the world screech "Discrimination! Discrimination!" Naïve politicians in the Australian Capital Territory taking up the shrill, false rhetoric have fabricated a Bill in waiting that is logically incompatible with fundamental provisions of the *Universal Declaration of Human Rights* (UDHR), which is the foundation document of modern human rights law.

Take, for example, UDHR Article 16 (3) in which all governments agreed:

> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Procreation was always the agreed rationale behind the natural law right to marry and to found a family. University of Chicago Professor Leon Kass, one of the world's leading authorities on the natural and sociological anthropology of sexual reproduction, says that human societies virtually everywhere have structured child-rearing responsibilities and systems of identity and relationship on the bases of the deep natural facts of begetting. "The mysterious yet ubiquitous love of one's own is everywhere culturally exploited to make sure that children are not just produced but cared for and to create for everyone clear ties of meaning, belonging and obligation." [14] It is wrong, he says, to treat such naturally rooted social practices as mere cultural constructs that we can alter with little human cost.

In view of these profound truths, it borders on the ludicrous for 'same sex marriage' advocates to claim now that marriage and adoption laws enacted originally to protect the family as the natural and fundamental group unit of society are to be deemed discriminatory against same-sex coupling which by its very nature has nothing to do with procreation.

Same sex 'marriage' fails to protect 'as far as possible, a child's right to know and be cared for by his or her parents'

This obligation to protect motherhood, childhood and the family is codified in the Convention on the Rights of the Child, Article 7 where our Australian government has promised to ensure and protect 'as far as possible, a child's right to know and be cared for by his or her parents'.

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[14] Kass, Leon R. "The Wisdom of Repugnance." *New Republic* Vol. 216 Issue 22 (June 2, 1997).

There are of course many children who through tragic circumstances are cheated of this right.

But it is intellectually dishonest to pretend that introducing a form of 'marriage' that deliberately deprives a child of the intimate knowledge and care of his/her own mother or father is anything other than an intolerable form of human rights abuse.

The concept of "special care and assistance" for motherhood, childhood and the family (UDHR Article 25) means just that—it is *special.* It is illogical to extend what is special to absolutely everyone homogeneously. The net effect of such an artificial re-interpretation is that these special human rights obligations are gutted—they become meaningless.

Certainly the generic non-discrimination clause of human rights jurisprudence was never intended to override the legitimate protective restrictions and distinctions both expressed and implicit, for example, in Article 16 of the Universal Declaration, namely, that men and women, (not men and men, nor women and women), in exercising the right to marry and to found a family, will do so in conformity with Article 16's definition of the family as "the natural group unit of society", that they will be "of full age" (not considered age discrimination), and that they will enter into marriage "only with free and full consent".

It is clear that the right to marry and to found a family was intended to be recognized:

(a) as a single right (not two separate rights which would have been written as "the right to marry *and the right* to found a family"); and
(b) as a singular right, in that this right was singled out as a special case, a right with a more limited, tightly focused list of distinctions to be considered discriminatory.

It is immensely significant that Article 16 concerning the right to marry and to found a family deliberately omits: "sex or other status". The non-discrimination clause extends only to "race, nationality or religion".

Protecting marriage—a "special protection" that "shall not be considered discriminatory"

International human rights instruments have long recognized the concept of a "special protection" that "shall not be considered discriminatory" (e.g. *Convention on the Elimination of All Discrimination Against Women* (CEDAW) Article 4). The significant legal distinction that acquits any Covenant law from the charge of being discriminatory is that it "*aims to protect*"—the child, the mother, the natural family... And so, it would be wrong to label as discriminatory, laws that promote full recognition of "the social significance of maternity and the role of both parents in the family and in the upbringing of children" and laws that acknowledge "that the upbringing of children requires a sharing of responsibility between men and women …" (CEDAW Preamble & Article 5)

In fact, there is no unqualified right to found a family in any of the UN human rights instruments. The *International Covenant on Civil and Political Rights* (ICCPR) Article 23(2), for example, declares "*The right of men and women of marriageable age to marry and to found a family shall be recognized*." Again it is a single right and that right is qualified by an age requirement.

"…that the upbringing of children requires a sharing of responsibility between men and women …" CEDAW

In the same vein, adoption laws and other laws that aim to protect as far as possible a child's right to know and be cared for by his or her parents shall not be considered discriminatory.[15]

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Indeed, the human rights directive here is unmistakable: that governments must not promote the deliberate creation of situations where the responsibilities of procreation and raising a child are NOT shared between a man and a woman and full recognition is NOT given to the role of both parents (i.e. not just the maternal parent and her lesbian partner, or the paternal parent and his homosexual partner) in the upbringing of children.

The language of international human rights instruments link definitively the term "parents" to "men and women" and to "husband and wife" (e.g. CEDAW Article 16).

The concept of "sexual orientation rights" does not appear in any of the six core UN international human rights treaties. A bit like the Emperor's clothes—"sexual orientation rights" is a clever marketing concept with more spin than substance. Innumerable attempts over the past decade have been made by international homosexual and lesbian lobbies to introduce the notion of sexual orientation into the non-discrimination clauses in the UN human rights instruments. But none have succeeded.

Dishonest grab for marriage rights—element of rorting

Socially prudent UN delegations continue to argue successfully that all people (irrespective of homosexual or lesbian proclivities) are entitled to all the basic human rights. But these rights, it is agreed, are theirs not by virtue of their "sexual orientation" but rather by virtue of the fact that they are human beings. They have equal rights to protection from violence, from vilification, from unjust imprisonment.

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[15] *Convention on the Rights of the Child* (1989) Article 7.

[16] CEDAW Preamble; also Article 5b "…recognition of the common responsibility of men and women in the upbringing and development of their children".

They have equal rights to all the usual social goods like basic education and basic health care. But they may or may not be entitled to other social goods referred to as qualified human rights. For example, they need to be of a certain age to qualify for the aged pensions. They need to be genuinely unemployed to qualify for unemployment benefits.

Where the problem arises is that homosexual and lesbian couples, under their strident same sex ‘marriage’ banner, are now making a grab for a set of special human rights that exist to protect motherhood and childhood and the integrity of the natural family. It is a dishonest grab—a greediness for recognition and benefits from which the nature of their coupling excludes them. It has the same element of rorting as amending birth certificates to collect an aged pension or pretending to be Aboriginal to access special standing or indulging in any other pretence to be what one is not.

Claims based on a deliberate falsification are being made to entitlements belonging to husbands and wives who, having in principle, the possibility to procreate, exercise their right to marry and to found a family.

Clever propaganda campaign—no basis for changing marriage laws that provide social cohesion and protection, especially for children

Regrettably, clever propaganda programs have produced opinion polls favouring same-sex ‘marriage'. But propaganda, however successful, is no basis for changing marriage laws that protect social coherence through responsible procreation, and ensure 'as far as possible, a child’s right to know and be cared for by his or her parents' (i.e. by both parents--not just the maternal parent and her lesbian partner, or the paternal parent and his homosexual partner).

In the International Journal of Human Rights 14.7 (2010), Jakob Cornides, enunciates the incompatibilities that prevent 'same-sex marriage' from serious consideration as an issue of 'equality'.

Responding to the ubiquitous claim that two people of the same sex deserve 'marriage equality' because "they love one another", Cornides has pointed out that "the institution of 'marriage' does not have the purpose of 'rewarding' people for loving each other; for this reason, the argument that homosexually oriented people, too, are capable of 'loving'...is of no relevance."

Cornides can find no legitimacy in human rights law for changing the meaning of ‘marriage’.

> "...if 'family' is no more to be defined by descent or marriage between persons of the opposite sex, by which other criteria shall it then be defined? Created as a pre-requisite for same-sex 'marriage', the adoption of children by same-sex couples, etc., this new concept turns 'family' into something of an artificial construct, removed from biological reality: the arbitrary invention of a legislator, which at any time could be replaced through another arbitrary invention of another legislator as mores once again change. If this is accepted,

> a legislator's imagination is limitless: every constellation of two or more persons could be styled a 'marriage' or 'family', and the traditional meaning of both terms would be undermined or even disappear altogether. **Labeling all and sundry as 'marriage' and 'family' could be an efficient way of destroying the traditional and logical meaning – perhaps more efficient than abolishing it directly**".

Anthropological analysis by Cornides is well worth quoting:

> "Treating all 'sexual orientations' as equal presupposes a reductionist anthropology: everybody has a sexual urge which, no matter how, he must have the right to satisfy. This must be legally recognized, as of right, and treated as fundamental to one's dignity. All sexual urges are 'equal', therefore all manners to satisfy them also are 'equal', i.e., to be accepted. The *tertium comparationis* that is used to make homosexual and heterosexual relations 'equal' is a mere sentiment: the 'love' of two people for each other (or maybe rather: the pleasure they experience when engaging in sexual intercourse). The objective and verifiable purpose of sexuality (to which until recently the sexual urge was believed to be subordinate), is discarded as completely irrelevant."

I would add that new ideologies, however popular, cannot legitimize contravention of the legal protections established for marriage and children in the foundation human rights instruments. When a radical new ideology is at odds with universal human rights law protecting marriage and children, it is the new ideology that must conform to universal human rights law, not vice versa.

It is indeed rational thought and rigorous logic, not homophobia, that forces us to recognize that 'same-sex marriage' must remain a hollow concept, an elaborate pretence at parity belied by nature itself.

CONCLUSION

Territories should not be given "exclusive legislative rights" especially with regard to introducing same sex 'marriage' or euthanasia or any other innovative social legislation that may jeopardize existing human rights protections.

The Federal Government retains primary responsibility for ensuring that all domestic legislation (including State and Territory law) is compatible with Australia's international human rights commitments.

All Australian laws (including State and Territory laws) should comply with universal obligations in the International Covenant on Civil and Political Rights ICCPR) to protect marriage and the family (Article 23) and to guarantee for everyone legal protection from arbitrary deprivation of life. (Article 6).

RECOMMENDATION

There is a very real and immediate danger that certain Australian Territories intend to introduce laws legalizing same sex 'marriage' and euthanasia that would tamper with the guaranteed Covenant protections for marriage and the family or laws that permit intentional deprivation of life.

In view of this danger, the proposed *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* should **be amended to ensure that it is clearly understood that** t**he Federal Parliament retains the authority and the duty pursuant to its external affairs power and its Covenant obligations to enact general overriding laws based on Article 23 and Article 6 of the International Covenant on Civil and Political Rights.**