

# Abrogation of rights of religious minorities invalid

*Rights of religious minorities—freedom of association and the right to use their own language—are not to be treated as exceptions to any new law but must be recognised as fundamentals in any proposed law.*

Rita Joseph

21<sup>th</sup> December 2012

Public Submission to

Senate Legal and Constitutional Affairs Committee

Re: 'Exposure Draft Human Rights and Ant-Discrimination Bill 2012'

**Every religious minority has its own language. There exists a language of faith, a language of morality that belongs to the realm of individual conscience, a language which the State may not seek to outlaw.**

Free expression of conscientiously held tenets of faith and morals and the freedom to live, either alone or in community, according to these tenets may not be mischaracterised by any law of the Commonwealth as culpable discrimination against those who do not hold those beliefs. The language of 'marriage' as between one man and one woman and the religious beliefs and actions associated with this language of 'marriage' are not to be denigrated or outlawed as discrimination "connected to any area of public life". ICCPR Article 27 does not permit laws that prohibit religious minorities from using their own language

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

ICCPR Article 27 has particular pertinence here in that "religious minorities...shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". This should rule inadmissible current vociferous attempts to 'police' the biblically-based language of Christians and to deny them expression of the long-held belief that certain homosexual practices are sinful, spiritually harmful or immoral.

**Inherent human rights may not be down-graded to government granted "exceptions"**

In this respect, it is totally invalid to introduce legislation that pretends to necessitate the down-grading of the universal, inherent and inalienable religious rights

fundamental to every human being to a mere “exception” granted graciously (and perhaps temporarily<sup>1</sup>) by an incumbent government (Clauses 32 and 33). To propose this Draft Legislation is to attack the fundamental human rights principle of inherency.

**Inherency**—Human rights are inherent in each human being, not granted or withheld by external government. The aged persons right to religious freedom is not affected by old age – human rights “inhere” in the humanity of the aged person. It is not governments that confers human rights, it is just being a human being. This is the irrevocable legal basis of all human rights.

To insult to the aged is added injury when it is further proposed in this Bill, that these exceptions will not apply to a body established for religious purposes which is receiving Commonwealth funding for aged care delivery. This is a heinous attack on the religious rights and freedoms of the aged and the sick—their freedom of association and their freedom to practice one’s religion “in community with others and in public or private”. Their fundamental rights and freedoms are to be withdrawn in direct contravention of what the Australian government has solemnly undertaken to maintain and protect as a signatory to the ICCPR. ICCPR Article 18 (1) states:

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

Clearly this exclusion of persons in Commonwealth-funded religious based aged care facilities from these religious rights is designed to coerce the old and the frail and the sick into accepting that it is no longer lawful for them to exercise their right to choose a religiously based aged care facility which respects and is committed to upholding a set of religious beliefs and practices, an ethos within which they can continue to practice their faith in community and in public. Why should the old and the frail and the sick be coerced by the proposed law to live with others who do not share their beliefs and who have trampled on and scoffed at those beliefs by unrepented amoral and immoral sexual relationships and lifestyles contrary to the genuinely religious beliefs of those who have chosen religiously based health care facilities? Why should the old, the frail and the sick be coerced to forego their religious rights to practice their faith in a community? Why should the old, the frail and the sick be coerced through the legal threats of discrimination implicit in this Bill and through proposed withdrawal of Commonwealth funding for their religious based health care community?

---

<sup>1</sup> “All exceptions will be the subject of a review after three years to enable consideration of whether these specific exceptions are still necessary, taking into account the operation of the new general justifiable conduct exception.” Explanatory Notes, Clause 22, paragraph 142.

## Coerced secularism prohibited by International Covenant

In fact, there is no justification for such coercion. In fact, such coercion is directly prohibited in ICCPR Article 18 (2):

*No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

To this end, it is invalid that this draft legislation should attempt to coerce the aged, the frail and the sick who cannot afford private aged care into adopting “secularism”. In fact, while our international human rights conventions must uphold religious rights and freedoms, they are “not empowered to bully States into secularism or to coerce countries into schemes of religious neutrality.”<sup>2</sup> As Grégor Puppink, Director of the Strasbourg-based European Centre for Law and Justice, has pointed out: “Secularisation is exclusive because it favours a secular belief system to the exclusion of all other beliefs, especially religious beliefs, while the principle of neutrality is inclusive because it allows both religious and secular beliefs in the public space,” Indeed, the Draft Bill seeks to impose a legal duty on the aged in need of aged care to accept secularism as a national religion that overrides all other religions. The Bill seeks further to coerce aged people of all other religions to approve the new sexual doctrines of secularism. Such approval is to be exacted through imposition of restrictions on free expression of their beliefs via legal threats of anti-discrimination. Aged persons who have lived all their lives in communities that have respected their religious beliefs and allowed and helped them to practice their faith openly and faithfully are now to be coerced into living in a ‘secularist’ community that is enforced by law to ensure adoption of ‘secularist’ doctrines of sexual morality, doctrines that offend against the consciences of persons of many other religions who sincerely believe that the sinful practices and beliefs newly adopted by ‘secularism’ remain deeply offensive to their God.

In interpreting religious rights and freedoms in the founding international human rights instruments, the Commonwealth is still solemnly bound by the “ordinary meaning” test; and in cases of doubt, to examine the *travaux préparatoires* to the *Conventions* in order to ascertain the meaning that was agreed at the time, in accordance with the rules of interpretation in the *Vienna Convention on the Law of Treaties*.<sup>3</sup> This requirement of international human rights law invalidates any attempt such as this Draft Bill to render ineffective religious rights and freedoms through ideological re-interpretation of the language defining religious rights and freedoms in the *Universal Declaration* and *International Covenant on Civil and Political Rights*. Radical revisionism to the extent proposed by this ‘anti-discrimination’ Bill in order to legally enforce the proposed imposition of ‘secularist’ sexual morality on persons being cared for in religious-based facilities innocuous is incompatible with the obligations of States and of courts of justice (at all levels) to comply with the “ordinary meaning” test. The “ordinary meaning” criterion is in itself a strong argument in favour of an expectation that all new Commonwealth legislation will most carefully avoid giving the universally agreed religious rights provisions a

---

<sup>2</sup> See the concurring opinion of Judge Giovanni Bonello in judgment at Strasbourg 18 March 2012 in the case of *Lautsi and Others v. Italy*, the European Court of Human Rights.

<sup>3</sup> *Vienna Convention on the Law of Treaties* Articles 31 and 32(b)

meaning which plainly thwarts the drafting intention behind the States' original commitment.

### **Constitutional protections of religious freedom contravened by Draft Bill**

Clauses 11-13 of the Bill set out the purported constitutional bases of the Bill. The proposed legislation does not take seriously the Commonwealth's solemn duty to uphold and protect in full measure the freedom of religion as committed to in the Australian Constitution (Section 116). Why is the Australian Constitution not referenced here especially in regard to the rights of the aged to exercise their religion?

This Draft Bill is in blatant contravention of the Constitutional rights of aged Australians to religious freedom—they may not be coerced into living in secular aged care facilities. Secularism, which is just another form of religion, just another set of doctrines, tenets and beliefs manifested currently to include the esoteric new ideological doctrines of 'same-sex marital relationships', 'gender identity', and 'sexual orientation', may not be legislatively forced onto the aged, the frail and the sick who are entitled to continue to exercise their traditional religion freely, in community and in public with others of the same faith. The proposed legislation is unconstitutional on the grounds that the Commonwealth may not legislate in respect of religion:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

The Commonwealth must not impose a religious test (that the aged, the frail and the sick who have chosen to make their homes in Commonwealth-funded religiously based healthcare facilities must accept and abide by the newly formed tenets of the new Government imposed "secularism" and must agree to live with others whose new "secularist" sexual morality contrasts in a radically offensive way with the religious moral norms of the existing religiously based community).

Neither do the drafters of this Bill, it appears, take seriously the international human rights conventions to which the Commonwealth is a party. The proposed introduction of dubiously defined new concepts of "sexual orientation and gender identity discrimination, and extension of protections against relationship discrimination to same-sex couples in any area of public life" (clause 17) has absolutely no valid basis in the foundation instruments of international human rights law, to which Australia is a party. Neither the Universal Declaration nor the ICCPR upon which this Bill is purported to be based make any mention of these newly invented concepts.

### **Draft Bill ignores 'non-derogable' nature of religious rights and freedoms**

**In contrast, religious rights and freedoms have been accepted and recognised by the international community of States as peremptory norms, as *jus cogens* in nature by virtue of their presence in the Universal Declaration and the ICCPR.** It is the universal nature of non-derogable human rights that States Parties to the

*International Covenant on Civil and Political Rights (ICCPR)* may not derogate from them, not even “in times of national emergency”.

Indeed, no domestic human rights legislature can withdraw legal protection of a non-derogable right. Article 4 of the ICCPR establishes religious freedom as a non-derogable right.

Regrettably, in this Draft Bill, Australian domestic legislature (the Commonwealth) is seeking now to shape a law that violates the religious and conscience rights as articulated in the Universal Declaration and the ICCPR, i.e., they seek to promulgate a law that violates an expression of human rights in the UN Charter. As a State Party to the ICCPR, Australians are obliged to reject any part of domestic law that purports to authorise the abuse of the non-derogable human rights set out in the Universal Declaration Article 18 and the ICCPR Articles 18 and 27 or the removal of legal protection for “freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”.

Regrettably, the Draft Bill is also in contravention of ICCPR Article 5 (1):

*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.*

All acts directed towards the suppression of religious and conscience freedoms under the ICCPR Article 5(1) should be denounced. Genuine human rights advocates must reject the current campaign mounted by ideologically driven groups to pressure persons of faith, their Churches, their teaching establishments, and especially their religiously based aged care facilities into apostatising their beliefs on such serious moral issues as the immorality of practices such as sodomy; or to coerce the aged, the frail and the sick to live their final years in close quarters with those who are openly disrespectful in profession and in “sexual lifestyle” practices of the moral beliefs of the religion which forms the moral and practical basis of the facility. Such campaigns are fundamentally in contravention of the object and purpose of the Convention. They seek to destroy non-derogable rights and freedoms and to limit them to a greater extent than is provided for in the present Covenant.

It is historical fact that the whole architecture of modern international human rights law is deontologically based on human rights principles that are permanent and immutable. Human rights protection was created most carefully to ensure a holistic unity. Withdrawal of legal protection of religious and conscience freedoms and destruction of these human rights recognised by the *Universal Declaration* is not permissible—under any circumstances. This is made clear in Article 30:

*“Nothing in this Declaration 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.”*

Article 30 ( which became Article 5(1) in the ICCPR) is an explicit prohibition of revisionist interpretation aimed at the destruction of any of the rights recognised in the Declaration. Recognised human rights to freedom of religion and conscience may not be reinterpreted to destroy those rights.

Charles Malik called this last article of the Universal Declaration “the article of inner consistency”:

*“...it states that nothing should flow from this Declaration that can contradict or nullify its effect. Thus no person aiming at the destruction of the fundamental rights can take cover under any of the freedoms granted by this Declaration...”<sup>4</sup>*

There is absolutely no basis in these international human rights instruments for the proposed derogation from upholding fundamental religious rights and freedoms by extremely arbitrary introduction of “additional” and ill-defined legal prohibitions against “sexual orientation and gender identity discrimination”. Nor is there any sound or universally accepted legal basis for unilateral “extension of protections against relationship discrimination to same-sex couples in any area of public life” (clause 17). In fact such a radically revisionist misinterpretation introducing such an esoteric extension of the grounds for protection from discrimination in ICCPR Article 4 is invalid for the following reasons:

**Human Rights Principle of Inalienability**—The right to exercise one’s religious beliefs freely is one of the equal and inalienable rights of all members of the human family. No one may destroy that right, nor deprive any human being of that right, nor transfer that right, nor renounce it—that’s what *inalienable* means.

And when the *International Bill of Rights* goes on to say that *it is essential...that human rights should be protected by the rule of law*, it is clear that no one may remove the human right to express and to practice one’s faith from the protection provided by the rule of law. The term “no one” means no sovereign State, no legislature, no judiciary, and certainly not the Commonwealth of Australia—none of these has the authority to de-recognise the human rights of any individual human being or any selected group of human beings.

Human beings cannot be deprived of the substance of their rights, not in any circumstances, not even under the guise of eliminating alleged new dubiously defined forms of ‘discrimination’.

**Human Rights Principle of Indivisibility** – Legal protection of the rights of one set of human beings cannot be sacrificed to enhance the rights of another set. Religious rights and freedoms must not be sacrificed to prioritise, for example, spurious newly-coined rights such as ‘same-sex marriage’. The principle of indivisibility requires States to provide for all persons legal protection of *the right to freedom of thought, conscience and religion... freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public*

---

<sup>4</sup> Malik, Charles, “International Bill of Human Rights”, *United Nations Bulletin*, July, 1948.

or private, to manifest his religion or belief in worship, observance, practice and teaching.

**Human Rights Principle of Universality** –the same non-derogable human rights are to be upheld in every age, everywhere, by every culture and every legal system.<sup>5</sup> Localised democratic majorities may not pass laws in violation of non-derogable human rights.<sup>6</sup>

Each principle of application for the human rights set out in the *Universal Declaration* was explored and debated thoroughly by international delegates including our Australian delegates before being set down for posterity. Human rights principles were first “recognised” in the *Declaration* and then codified in binding international law in the subsequent UN *Conventions*. Any re-interpretation of the *Conventions* that claim to de-recognise freedom of religion and seeks to outlaw fundamental tenets of faith as ‘discriminatory’, is invalid –a complete nonsense for such a re-interpretation would represent a rupture with the foundation principles the *Covenants* have been entrusted to codify.

**Human Rights Principle of Equality** – In modern human rights law, there could be no concept of some human beings being “more equal” than others – thus the old and the frail and the sick are entitled to religious freedom to choose religiously based aged care facilities.

It is an absurdity of self-contradiction that this Draft Bill attempts to provide ‘exceptions’ for the staff employed in religious based aged care facilities to be chosen according to their religious affiliation and life-style practices while at the same time denying the aged, the frail and the sick inmates of such a facility the dignity and freedom of being able to go on living in a religious based community, to be able to exercise their faith in a community of like-minded persons who wish to honour God’s commandments, especially on sexual morality and lifestyle ‘choices’ in their final years.

Alleged discrimination against those whose beliefs and lifestyles are antithetically contrary to the religious basis of a particular facility cannot be used by the Commonwealth government to withdraw a just funding and force those who sincerely respect, adhere to and profoundly need the authentic religious basis of a particular facility. Their inability to fully fund privately a position in a facility that is religiously based and can provide them with a securely religious community in which they can continue to profess and practice their faith requires as a matter of justice and equality that the Commonwealth continues to fund in part or in whole these religious based facilities.

The old, the frail and the sick have the same right to practice their beliefs and to live in a community of faith as all other members of the human family. Human rights

---

<sup>5</sup> To ensure the principle of universality, all references to World War II were deleted from the original draft of the *Preamble* as well as from all other passages that sought to situate the *Universal Declaration* in the specific post-war period. See Martti Koskenniemi :“The Preamble of the Declaration of Human Rights” in Godnundur Alfredson and Asbjorn Eide, (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Nijhoff, 1999, pp.32-3.

<sup>6</sup> See, for example: “**The Word ‘Laws’ in Article 30 of the American Convention on Human Rights**”, **Advisory Opinion OC-6/86, May 9, 1986, Inter-American Court of Human Rights, (Series A), No. 6 (1986), para. 22.**

entitlement to freedom to exercise one's religion is not be restricted according to age or affordability—Commonwealth funding cannot be predicated on the unequal grounds that the aged, the frail and the sick must renounce their religious rights, freedoms and moral beliefs and be coerced into accepting and abiding by the proposed new law that entrenches a newly fashioned set of secularist beliefs concerning sexual morality that are deeply offensive to many of traditional faiths.

Such attempts to establish such human rights violations as 'anti-discrimination' law is outrageously incompatible with the fundamental right to religious freedom.

Indeed, the false claim is made in the Explanatory Notes to the Draft Bill that preservation of religious exceptions (clauses 32–33) supports religious freedom, with some limitations where Commonwealth-funded aged care services are provided by religious organisations. This is a disgraceful whitewash of an appalling attempt in this Bill to sabotage the fundamental religious rights and freedoms of those who are to receive these anti-discriminatory, legally imposed 'secularist'-based Commonwealth-funded age care services.

Mendaciously, Clause 17(1) of the Draft Bill lists the protected attributes. Protected attributes are those personal characteristics of an individual which the Bill will protect from discrimination. Under Provisions:

*Religion is part of the 'equal opportunity in employment' scheme under the AHRC Act.  
Religion will be a protected attribute in relation to work only (see subclause 22(3)).*

But why is the Australian Constitution not referenced here? or the ICCPR articles 18 and 27?

### **An attack on religious rights and freedoms**

**The essential problem raised by this Draft Bill is the legal power that it proposes to invest in some arbitrarily chosen group of ideologues committed to the dubious sexual morals of the new "secularism" to attack sincere religious beliefs and freedom to exercise those beliefs in community and in public areas and to condemn them as "anti-discriminatory" and thus unlawful.**

The seed of this attack on religious freedom is already evidenced by the new anti-discrimination terminology introduced in this Draft Bill — the doctrinal language of the new secularism built around a sexual morality that demands as *de rigure* religious acceptance of 'same-sex marital relationships', 'gender identity', and 'sexual orientation' as a legal duty and religious test for commonwealth funding of services to persons in religious based aged care facilities. The imposition by law of acceptance of these new 'moral' concepts goes too far when it prohibits the aged, the frail and the sick from being allowed to live and to practice their chosen religion in religiously based aged care homes of their choosing. The proposed accusation of "discrimination" against persons living in homosexual relationships who do not profess the religion on which the home is based and will not agree to abide by the moral norms of the freely chosen religion is a travesty of justice. All major religions

as practiced in Australia hold the religious belief that people who have homosexual inclinations are to be treated with respect for their inherent human dignity but that the promotion or toleration of homosexual acts of intercourse is forbidden by God and is a gravely sinful offence against God and against human nature.

It is rational logic for religiously based healthcare facilities to exclude all those who would display openly behaviours that do not respect and honour the religious values that are at the heart of these aged care communities. As members of a freely chosen religiously based community, they are required to proclaim and to uphold the moral tenets of their faith, and others outside that choice must respect the community's religious belief that "same sex relationships" involving sexual immorality are offensive to God, harmful to one's body and soul and harmful to others.

It troubles me greatly that this Draft Anti-discrimination Bill has deemed it necessary to tamper with the fundamental human right characterised from the beginning of modern international human rights law as "freedom of religion and belief".

This tampering is unjustified as it seeks to restrict

- the right of the aged to exercise in community the religious values that they hold, especially those regarding matters of sexual morality such as the belief that the practice of homosexuality is immoral and harmful;
- the right to freedom of association and freedom to assemble in one's sickness, frailty or old age in aged care communities with homogeneous beliefs and values—any government's so-called 'legal' restriction on this right is an unconscionably discriminatory attempt to impose on a religiously based aged care community the contrarian 'duty' to have this religious unity destroyed by the forced entry of those of the new secularist faith who endorse and live values contrary to the religious values of the existing faith-based community.

Quite irrationally, in some parts of the world, the biblical teaching of the immorality of homosexual intercourse has led to a charge of incitement to hatred against those people who have homosexual proclivities. This is as ridiculous as forbidding the teaching of the immorality of stealing lest it incite hatred against those who have a tendency towards theft.

***No permissible limitation on a right may entail the total denial of that right.***

The pseudo-human right to freedom from 'discriminatory' criticism of one's immoral practices is an outrageous demand that should be discarded for the imprudent nonsense that it is. It mis-characterises the genuine human right to freedom of religion and belief as something evil to be subverted and reduced by a Government to only what latest public opinion or the current legislature deems is minimally "necessary". The original "freedoms" included "freedom from want" and "freedom from fear" and it is both mischievous and untruthful to misrepresent "freedom of religion and belief" as impinging on others' rights. Everyone, including atheists, have

beliefs and have the right to hold such beliefs and to follow them in good conscience in community with others of like mind.

It is imperative that this proposed legislation does not introduce the seeds of destruction of the very rights that it professes to be wanting to protect more fully. It is the antithesis of human rights protection to introduce this nonsensical idea that anti-religious people have the right to disrupt and attempt to destroy with mendacious cries of “discrimination” genuine human rights to freedom of religion and conscience and freedom to pass on our religious values to our own children.

Ensuring the effective protection for human rights is one of the original requirements of the Charter of the United Nations. Ensuring effective protection of freedom of religion and belief is to be seen as a real obligation to be exercised in full, an obligation not to be restricted or toyed with in clever and manipulative ways. The Inter-American Court of Human Rights has issued a sharp warning on this emerging tendency to gut genuine human rights of true meaning and value:

*Finally, it is essential to mention that no permissible limitation on a right may entail the total denial of that right. In other words, the exercise of a right may be regulated, limited, or conditioned, but in no circumstances may it be converted into a mere illusion on the pretext of its limitation.<sup>7</sup>*

This warning has immense significance for all those who would use the pretext of “discrimination” to deny others effective protection of freedom of religion and belief.

---

<sup>7</sup> *Inter-American Court of Human Rights, Annual Report 2002, Section IV, Chapter 6, para. 99.*