Is This Exposure Draft Compatible With Our Human Rights Treaty Obligations?

Public submission on

Exposure Draft of the Medical Services (Dying with Dignity) Bill 2014

Rita Joseph
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Some of the novel language of this Exposure Draft Bill is inconsistent with the consensus language of international human rights law. Introduction of this new language needs to be examined for compatibility with original principles and concepts of the agreed language of certain international human rights instruments which Australia has negotiated and ratified.

The title of the Bill [*Medical Services (Dying with Dignity) Exposure Draft Bill 2014]* contains language which contradicts certain agreed foundational principles of modern international human rights law. It is misleading language in that it describes intentionally lethal medical interventions as "medical services". Unlike palliative care, such lethal 'services' are not genuine medical services to the living but rather the illicit means of facilitating arbitrary deprivation of life on a living patient in order to transform that living patient into a corpse. **Facilitating lethal 'services' to patients or clients is not within the competency of either law or medicine.**

The treatment misrepresented in the title language of this Bill is not a medical treatment of the person — it is a **killing** of the person using medication. Nor is it a medical treatment "reasonably available" [28(iii)]. Any "treatment" that is lethal is not "limited" to the relief of pain, suffering, distress and indignity, but actually goes way beyond those limits to killing a living human being. We end up with a corpse, a dead human being. Such a human being has been killed by the intentional administration of lethal medicine, not "with the object of allowing the person to die a comfortable death" [28(iii)] but with the "object" of producing a human corpse from which not only has discomfort been removed but also life itself.

The term "allowing" is a misrepresentation of what actually happens. The correct term is "facilitating" — the phrase should read "with the object of facilitating the medicalized suicide of the person". The "object of allowing the person to die a comfortable death" is the object rightly assigned to the area of palliative care and is existentially a fundamentally different concept to "facilitating medicalized suicide".

States' obligation to protect life is non-derogable

The Draft Bill *is* incompatible with the human rights obligations of the Federal Government to protect every human being from arbitrary deprivation of life.

Facilitating medicalized suicide is inadmissible under international human rights law because it introduces invalid limitations and exceptions to legal protections of the right to life. Such a limitation of or exception to a *non-derogable* right, the right to life, is prohibited under the provisions of the *International Covenant on Civil and Political Rights* (*ICCPR*). Article 4 of the *ICCPR* stipulates that no government can derogate from the right to life even in times of "*public emergency*".

Further, no State party to the commitments of Article 6(1) of the *ICCPR* has any authority to introduce new language such as the term "medical services (dying with dignity)" so as to circumvent, to undermine and to alter the consensus meaning of the universal obligation to provide legal protection for "all members of the human family" from "arbitrary deprivation of life".

States Parties' human rights obligation to provide legal protection for the non-derogable right to life 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 any human being, including the suicidal and the terminally ill.

The "medical services" proposed for legalization in this Bill involve "arbitrary deprivation of life", i.e., an act of *killing*, a deliberate act of a person or persons providing medication intended to kill.

The right to life of persons at risk of suicide must be protected by law, and all actions aimed at promoting and/or facilitating suicide must be condemned.

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*, 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 condoning and encouraging arbitrary deprivation of life involved in suicide.

States Parties' human rights obligation to provide legal protection for persons at risk of suicide means that governments are prohibited from:

- tolerating the promotion of medicalized suicide as an act of 'dying with dignity' through Commonwealth legislation; and
- engaging in the facilitation of assisted suicide through legalizing and funding lethal 'treatments' by medical practitioners.

The Bill contravenes the State's duty to provide legal protection of inherent dignity and worth of the terminally ill

The terminally ill are among the most vulnerable of human beings; and legal systems must not place them at risk of lethal medical treatments. The terminally ill are entitled to have their 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 Australia 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 the terminally ill.

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.

Provision of lethal medical services—complicity in arbitrary deprivation of life

Natural death is an unprovoked, spontaneous event—it comes to inevitably to all human beings. Death is not a human right, but an inevitability. Human rights are applicable to the living. For as long as the terminally ill are alive, their inherent right to life is to be protected by law.

Article 5(1) of the *International Covenant on Civil and Political Rights* states:

> 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Other than strict and very specific provisions for the death penalty, no other limitation is allowed on the right to life—certainly there is no provision for legalized killing of suicidal persons who are terminally ill.

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.

Regarding the concept of arbitrariness, UN Human Rights Committee's *General Comment No 16* explains that it is intended to guarantee that "*even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant...*". The terminally ill may not be deprived "lawfully" of their lives. Laws that arbitrarily deprive terminally ill of their lives are bad laws, impermissible under international human rights law because they allow for unjust deprivation of lives—the only just deprivation of life allowed

for in the *ICCPR* under very limited conditions relates to State imposition of the death penalty for only the most serious crimes, and only after a final judgment rendered by a competent court.

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."[1]

Laws that pretend to establish the legality of routine medicalized killing of suicidal persons who are terminally ill are

- *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. They contravene also the established human rights legal principles of the inherency and inalienability of the right to life.

It is the federal legislature's responsibility to provide both laws and programs that protect *the inherent right to life* and the inalienability of all the rights of the terminally ill, including access to palliative care and to all other necessities required during this last stage of life.

Payment from the public purse for lethal medical services is invalid

In this Bill, Part 3 (16), "Claim for payment for the provision of dying with dignity medical services, proposes government-subsidized medical services used to destroy rather than to ameliorate the human condition of the terminally ill. These proposals seek to facilitate practices contrary to our *Covenant* obligations and must be renounced.

If we replace the euphemistically loaded descriptor "dying with dignity medical services" with a less emotive, more rigorous, more legally accurate and pragmatically measurable term 'lethal medical services', we immediately see the problem in the proposal that a government not only establish as legal but actually commit to "payment for provision of lethal medical services".

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[1] « …arbitraires (c'est-à-dire sans justification pour des motifs valables et contraires à des principes juridiques bien établis)… » 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

The dependency, pain and deep sorrow that often accompany tragic personal failure or terminal illness are part of the human condition—part of life, part of living. Dying is the final natural life event—it should not be transformed into an act of arbitrary killing paid for by the State.

The Bill's reliance on subjective standards is incompatible with law

> I am satisfied that there is no medical treatment reasonably available that is "acceptable to me in my circumstances." (Schedule 1, *Request for dying with dignity medical services*)

"Acceptable to me in my circumstances" is a shoddily ***subjective*** standard that no law can judge to be 'reasonable', even for far less grave matters than are proposed here. It's certainly no rational standard by which to judge the legitimacy of a lethal act.

Human rights principle of inalienability are contravened in this Bill

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/herself. 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.

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".* [2] 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 some medical treatments are so lethal that even the consent of the persons concerned cannot give them legitimacy.

Documents such as the so called 'Request for dying with dignity medical services' (Schedule 1 of this Bill) and other blueprints for facilitating medicalized killing and other forms of lethal self-harm cannot be promoted or offered as a legitimate response to the suicidal distress of any 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.** That is the meaning of 'inalienable' rights.

This Bill threatens the right to security of person of the terminally ill

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

[2] 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"

The terminally ill have a right to security of person which 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 dying process 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.

This Bill ignores 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 all mankind. Relationship between duties and rights remains valid for all human beings, including the terminally ill.

> Everyone has duties to the community. *(Universal Declaration, 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. (*Universal Declaration 28*)

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. (*Universal Declaration 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. (*Universal Declaration 30*).

Unfortunately, those now proposing this *Draft Bill (2014)* 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 have a more profound authority 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.

Consensus meaning of 'dignity' is contravened in this Bill

The meaning of 'dignity' in the novel term introduced in this Bill 'dying with dignity' is glaringly inconsistent with the consensus meaning of 'dignity' as universally agreed in the founding instruments of modern international human rights law. In particular, the use of the term 'indignity' throughout this Bill with the collusive implication that the patient must suffer 'indignity' in being 'terminally ill' is unacceptably contrary to the consensus meaning of human 'dignity'.

The terminally ill have the right to recognition of their inherent dignity, irrespective of physical and material circumstances. Lacking bodily autonomy is not synonymous with lacking 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 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, 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. There is 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 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.

This Bill threatens to renege on those rights.

Many years ago this country did away with legalized killing when it abolished capital punishment. At that time no one had the audacity to canvas future exceptions to the worthy principle on which that abolition was founded, notwithstanding that capital punishment had been rarely dispensed and was only done so as a last resort, on the basis of the most objective evidence available and the most rigorous legal process for evaluating that evidence. Yet now it's proposed that we can do away with a human being merely on the basis of a shoddy criterion of 'personal acceptability'. The affront to our legal system and to human dignity is breathtaking.