# *Submission to the Department of Health and Aged Care on the December 2023 Exposure Draft of the Aged Care Bill 2023*

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## Executive Summary

It is our contention that:

1. The Aged Care Bill cannot be enacted in reliance on the external affairs power in section 51 (xxix) of the Australian Constitution, because:
    a. the Bill does not bear the necessary nexus to the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention on the Rights of Persons with Disabilities (Disabilities Convention), according to the interpretation of the external affairs power by the High Court of Australia;
    b. the Bill fails substantially to adhere to the fundamental condition that implemention of the ICESCR and/or the Disabilities Convention, requires domestic implementation to be compatible with fundamental human rights, including those recognised in parallel United Nations (UN) human rights conventions. The Bill makes no proper accommodation for conscientious objection to participation in voluntary assisted dying, insofar as voluntary assisted dying is contemplated by the Aged Care Rights integral to the Bill, and is coerced by prohibitive civil and criminal liability under the Bill.
2. If it were possible for the Government to overcome the shortcoming mentioned at 1.a above, the simplest course open to the Government, to cure the defect mentioned at 1.b above, would be to amend the Bill to include conscientious objection as a right of the aged person, aged care provider, its employees, or any other person subject to the operation of the proposed Act, in sufficiently wide terms to allow those raising such objection not to be coerced into participating in voluntary assisted dying, or associated steps, under threat of liability under the Bill and/or loss of employment.

## Introduction

At present, there is no shortcoming in implementation by the Commonwealth of Australia in a failure to take necessary steps under either the ICESCR or Disabilities Convention in domestic law. Existing legislation, in the form of the *Aged Care Act 1997,* the *Aged Care (Transitional Provisions) Act 1997* and the *Aged Care Quality and Safety Commission Act 2018* so far satisfies Australia's obligations under the ICESCR, and The *Disability Services Act 1986* and *Disability Discrimination Act 1992* satisfy Australia's obligations under the Disabilities Convention.

The current aged care legislation was enacted under the corporations power of section 51 (xx) of the Commonwealth of Australia Constitution. The Bill is proposed to be enacted under the external

[1] Both make this submission in a personal capacity, and do not hold out that the views expressed are shared by the institutions with which they are respectively associated.

affairs power of section 51 (xxix) of the Constitution, in reference to the ICESCR and Disabilities Convention, to create what it calls a 'rights-based legislative framework'.[2]

The ICESCR provides for 'progressive realization', acknowledging that constraints may exist in some countries due to the limits of available resources. However, Australia has not been constrained by resources in that sense.

In reality, the Bill represents a collection of policy adjustments to existing legislation so that the orientation of aged care services is refocused. Its proclaimed aim is to adopt a 'rights-based' approach to aged care, focusing on older people and their individual rights, in a shift away from the traditional 'focus on the provider' adopted by the current *Aged Care Act*. The fulfilment of that aim goes well beyond anything contemplated by the ICESCR or any UN convention.

The following objects of the *Aged Care Bill* are of greatest relevance for the purposes of this submission:

> (a) in conjunction with other laws, give effect to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights…and the Convention on the Rights of Persons with Disabilities
>
> (b) provide a forward-looking aged care system that is designed [to] (i) uphold the rights of individuals under the Statement of Rights.[3]

The objects, in combination with a scheduled 'Statement of Rights' and 'Statement of Principles' underpin the resulting system and are aimed at ensuring quality and safe care for individuals.[4]

Criminal penalties and civil penalties apply for failure to meet requirements under the proposed Act, and compensation can be sought in cases of serious failures.

Voluntary assisted dying (VAD) is permitted in six Australian states (Victoria, Western Australia, Tasmania, South Australia, Queensland, and New South Wales), by means of (in chronological order of enactment) the following legislation ('VAD legislation'): *Voluntary Assisted Dying Act 2017* (Vic), the *Voluntary Assisted Dying Act 2019* (WA), the *End-of-Life Choices (Voluntary Assisted Dying) Act 2021* (Tas), the *Voluntary Assisted Dying Act 2021* (SA), the *Voluntary Assisted Dying Act 2021* (Qld), and the *Voluntary Assisted Dying Act 2022* (NSW). Queensland's VAD legislation will be used in this submission for the purpose of illustration.

The Statement of Rights in the Bill includes the right to exercise choice and make decisions, to have those decisions respected, a right to equitable access to palliative care and end-of-life care when required, in combination with a right to be treated with dignity and respect. VAD legislation is underpinned by equivalent rights, to provide as of right access to voluntary assisted dying services.

The following issues are raised in this submission:

1. The appropriateness of the external affairs head of power for the Bill, given the interpretation by the High Court of Australia with respect to any act of Parliament seeking to implement a treaty under section 51 (xxix) of the Constitution. We contend the Bill does not bear sufficient connection to the ICESCR or Disabilities Convention, whether in terms of subject matter, or as an appropriate legislative means of performing the obligations imposed or securing the benefits conferred by those treaties. The Bill does not represent implementation of either convention. Essentially, the Bill extends well beyond any requirements of the ICESCR, and barely touches on the subject matter of the Disabilities Convention. In addition, the Bill fails substantially to adhere to the fundamental

[2] Department of Health and Aged Care, *A New Aged Care Act: the foundation* (2023) Consultation paper No. 1, 10-11.
[3] *Exposure Draft of the Aged Care Bill 2023*, s 5.
[4] Ibid, s 6.

requirement of ICESCR and other convention implementation, that it must not be incompatible with fundamental human rights.

2. The impact of the Bill, on its own, and in combination with existing VAD legislation, is seriously incompatible with the fundamental human rights of those individuals who are required to participate in voluntary assisted dying contrary (inter-alia) to their freedom of thought, conscience and religion guaranteed by article 18 of the International Covenant on Civil and Political Rights ('ICCPR'). It also represents discrimination on grounds of religion, by failing to make suitable accommodation for the conscientious objection to participation in killing, contrary to articles 2 and 26 of the ICCPR.

Under Queensland's VAD legislation, certain provision is made for the conscientious objections of registered health practitioners and speech pathologists (sections 84 and 85) because of the obvious and severe conscientious implications raised by voluntary assisted dying procedures. However, such VAD legislation makes no other allowance in support of the above rights, whether in reference to the age care provider, its employees, its volunteers, or any other person.

If the proposed Act is to adopt a rights-based approach, entailing as it does obligations that support VAD within the 'Statement of Rights' and other requirements of the Act, it is our contention that the Bill must be amended to include conscientious objection as a right of the age care provider, its employees, its volunteers, or any other person (including the aged person), as defined in the Bill, to allow those raising such objection not to be coerced into participating in voluntary assisted dying, or associated steps, under threat of liability under the Bill and/or loss of employment. The Bill is not merely consonant with VAD obligations under VAD legislation, it introduces in Commonwealth legislation new obligations and liabilities to provide VAD and VAD-related services, overlapping and strengthening existing VAD legislation, in the aged care sector. The Bill does not spell this out in terms, but it is the inevitable legal consequence of the Bill's text. If the Bill were explicit about this aspect of its operation, it would advert to the lack of any convention-based mandate for the Bill in either the ICESCR or Disabilities Convention. The provision of VAD services is not an implementation of either treaty. In our submission the Bill should be amended to make it abundantly clear that it either intends no such VAD-related operation, or consequence, or if it does, that it takes effect subject to a generous conscientious objection carve out in the terms outlined.

**The External Affairs within the *New Aged Care Act* Legislative Head of Power**

The external affairs power of section 51 (xxix) of the Australian Constitution has three dimensions: comity, extraterritoriality, and the implementation of international treaties, of which the latter is germane to the Bill. The main point of contention in this submission is whether the principles governing reliance on that aspect of section 51(xxix) for the Bill are satisfied so that the resulting legislation can be considered constitutionally valid. As we demonstrate below, they are not.

Mason CJ exemplified the strictly dualist nature of Australia's legal system in *Teoh* when explaining that 'the provisions of an international treaty to which Australia is a party do not form part of Australian law unless these provisions have been validly incorporated into our municipal law by statute'.[5] This means that for an international obligation or agreement entered by the federal executive to have force in Australia, it needs to be translated into domestic law.[6] While the federal executive can enter international treaties, these treaties are not self-executing.[7] The Commonwealth Parliament must enact specific legislation with respect to the same subject-matter of the international treaty to implement it in Australia.

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[5] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-287.

[6] *Bradley v Commonwealth* (1973) 128 CLR 557, Barwick CJ, Gibbs J; *Chow Hung Ching v King* (1948) 77 CLR 449, Dixon J.

[7] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, Gibbs CJ, 193.

There are recognisable limits involved in the enactment of legislation for the implementation of treaties based on the external affairs powers. One is the *bona fide* requirement, that the Commonwealth Parliament must only act in good faith, within the constitutional boundaries and the proper division of legislative powers in the federal system. For this reason, Mason J dismissed as beyond power those laws pursuant to treaties 'into which Australia has entered solely for the purpose of attracting to the Commonwealth Parliament the exercise of legislative power over a subject-matter not specifically committed to it by the Constitution'.[8] The second requirement pertains to compliance with the limits imposed by the relevant treaty. This ensures that the Commonwealth Parliament refrains from exercising powers *ultra vires*, that is, beyond the treaty's terms, scope, and effects.

*Rules concerning the implementation of international treaties*

The High Court of Australia is constitutionally empowered to determine the validity of the exercise of power by the federal Parliament. In relation to the exercise of the external affairs power, a key issue concerns the character or nature of the treaty itself. The Court accepts that the constitutionality of legislation that implements treaties is predicated on its conformity or adherence to the applicable treaty. Critically, the Commonwealth Parliament cannot surpass what is stipulated in the treaty.

The Court has declared invalid federal laws that fail to conform to, or deviate from, the terms and scope of a treaty. In *R v Burgess*,[9] Regulations derived from the *Air Navigation Act* 1920 (Cth) exceeded the *Convention for the Regulation of Aerial Navigation*. It was sufficient that variations of substance between the Regulations and the treaty had been introduced upon the wrong assumption that the Parliament had full power to legislate with respect to the whole subject matter of that treaty. Conformity to the strict terms of a treaty is necessary for the constitutional validity of the implementing legislation.

More recently, in *Airlines of New South Wales*,[10] Barwick CJ said that 'the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia'. The High Court of Australia will scrutinise legislation to ensure it substantially adheres to the terms and scope of the international treaty.

In *Aldridge v Booth*,[11] the Federal Court affirmed the validity of the *Sex Discrimination Act* 1984, insofar as it applied to women, in line with the *Convention on the Elimination of All Forms of Discrimination against Women*. However, extending the legislation to men by gender-neutral language was invalidated for exceeding the scope of the treaty. The law was found not to give effect to the international convention. This echoes the High Court's understanding that, while legislating in the same general subject-matter of the international treaty the Commonwealth Parliament may not go beyond its scope or terms.

As expressed in the *Tasmanian Dam Case*,[12] implementing legislation must necessarily and substantively conform to and carry into effect the provisions of its applicable treaty. The High Court will analyse the constitutionality of such legislation according to the degree to which it gives effect to the treaty: implementation only falls within the scope of section 51 (xxix) if the legislation operates in fulfillment of the treaty.[13]

Ultimately, to *implement*, *give effect*, or *conform* to a treaty demands enactment that faithfully pursues the purpose of the treaty, namely, by carrying out the obligation or securing the specific benefit that

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[8] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, Mason J, 231.
[9] *R v Burgess, ex parte Henry* (1936) 55 CLR 608.
[10] *Airlines of New South Wales v State of New South Wales (No. 2)* (1965) 113 CLR 54.
[11] *Aldridge v Booth* (1988) 80 ALR 1.
[12] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[13] *Richardson v Forestry Commission* (1988) 164 CLR 261, at 326.

the treaty provides.[14] The implementing legislation must be commensurate with the obligations and rights that the Commonwealth may assume under the treaty.[15] This is not to say that the Commonwealth law must carry the whole treaty into effect or completely discharge Australia's convention obligations in detail. Nevertheless, where a federal law purports to implement a treaty, that law must conform to the treaty and faithfully carry its provisions into effect – or be rendered invalid.

The above demonstrates that the Bill will only be constitutionally valid if it closely relates, that is, conforms to the conventions it aims to implement. Any failure to substantially adhere to the terms and scope of the ICESCR and/or the Disabilities Convention, as required to ground it in the external affairs power, will expose the resulting Act to constitutional challenge before the High Court.

**The nature of the obligations assumed under the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR) and International Covenant on Civil and Political Rights 1966 (ICCPR)**

A key aspect of whether the above requirements for exercising the external affairs power are met concerns the nature of the obligations assumed under a treaty, since this determines the content of the legislation directed by the relevant treaty.

The treaties relied on for the Bill, as is clear from its objects, are the ICESCR and Disabilities Convention. However, in addition to those conventions, the ICCPR must also be considered, since certain ICCPR rights are thoroughly engaged by the Bill, and their requirements must be satisfied.

*ICESCR*

The obligations under the ICESCR differ from the much stricter regime of the ICCPR (with its command immediately to respect and ensure all ICCPR rights). The ICESCR requires 'progressive realization', acknowledging constraints due to the limits of available resources of many States Parties. The two ICESCR obligations of immediate effect are the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination', and the undertaking 'to take steps'. Taken together, they mean that while the full realisation of the relevant ICESCR rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the treaty's entry into force for the country concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the ICESCR.[16]

The means which should be used to satisfy the obligation to take steps are described in article 2(1) as "all appropriate means, including particularly the adoption of legislative measures".

General Comments Nos. 3, 6 and 14 of the Committee on Economic, Social and Cultural Rights (ICESCR Committee) address issues relating to the nature and scope of States Parties' obligations under the ICESCR, and may be paraphrased as follows.

<u>General Comment No 3: Implementation</u>

The ICESCR Committee, as the ICESCR monitoring body, has noted that the undertaking 'to take steps ... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system as the vehicle for the steps in question (whether a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy), provided only that it is democratic <u>*and that all human rights are thereby respected*</u>. The important qualification is the last, 'that all human rights are thereby respected'. It should already be self-evident that a party to ICCPR, such as Australia, cannot implement the

[14] *Airlines of New South Wales v State of New South Wales (No. 2)* (1965) 113 CLR 54, Barwick CJ [86].
[15] *R v Burgess, ex parte Henry* (1936) 55 CLR 608, Starke J, 658.
[16] E/1991/23, General comment No. 3: The nature of States parties' obligations, Fifth session (1990), [1]-[2].

ICESCR in a way that fails to respect and uphold any ICCPR right. The principle is explicit and broadened to human rights generally in the ICESCR Committee's General Comment.[17]

It is necessary to put in context the key ICESCR terminology 'to the maximum of its available resources'. A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every ICESCR States Party. A country in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the ICESCR. The phrase 'to the maximum of its available resources' was intended by the drafters to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.[18] That explanation puts the nature of the obligations in perspective.

A fundamental question in the context of this Bill is whether it constitutes implementation of the ICESCR at all, and if so, to what extent, given the standard of implementation already achieved by Australia since ratification, in excess of that required by the ICESCR. Put another way, can aged care legislation, in the form of the Bill, or to the effect of the Bill, be regarded as implementation at all, where it is so over and above the implementation standard expected by the ICESCR, already achieved by existing legislation in Australia. We firmly suggest that it cannot. The matters covered by the Bill do not appear to be necessary to be pursued by States Parties as a matter of ICESR obligation. The aspirations of the Bill are unlikely even to have been contemplated at the time of the ICESCR.

The legislation's burden is also not in the nature of an obligation common to different forms of government or economic system, when it is clearly intended that the ICESCR imposes obligations acceptable to different governmental and economic models. This legislation is a specific policy and legislative choice, by a country which has already comprehensively satisfied its article 12 obligations.

Since General Comment No.3, the ICESCR Committee has indicated in General Comment No.9, that the ICESCR does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for.[19] The determination of whether or not a treaty provision is self-executing is a matter for the courts, not the executive or the legislature. In making that determination, as a matter of practical expediency the relevant courts must be made aware of the nature and implications of the ICESCR and of the important role of judicial remedies in its implementation. The Committee suggested that when governments assist courts in making such a determination, they should promote interpretations of domestic laws which give effect to their ICESCR obligations. The present legislative reform package cannot feasibly be attributed to particular ICESCR obligations, of a nature capable of being self-executing.

General Comment No. 6: Ageing

General Comment No. 6 offers some interesting commentary on the '[g]eneral obligations of States Parties',[20] with particular regard to the fact that, 'unlike other population groups such as women and children, no comprehensive international convention exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in that area.' There is no specific age-related convention on which the Government may rely when exercising the external affairs power in connection with the Aged Care Bill.

[17] Ibid [8].
[18] Ibid [10].
[19] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24 [11].
[20] CESCR, *General Comment No.6: The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995, E/1996/22, [13].

ICESCR obligations are not specific to the aged but 'side by side with older persons who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, even in developed countries, and who feature prominently among the most vulnerable, marginal and unprotected groups. In times of recession and of restructuring of the economy, older persons are particularly at risk.'[21] The methods that States Parties use to fulfil the obligations they have assumed under the ICESCR in respect of older persons 'will be basically the same as those for the fulfilment of other obligations…They include the need to determine the nature and scope of problems within a State through regular monitoring, the need to adopt properly designed policies and programmes to meet requirements, the need to enact legislation when necessary and to eliminate any discriminatory legislation and the need to ensure the relevant budget support or, as appropriate, to request international cooperation'.[22]

This is merely in keeping with the objectives of the ICESCR as a whole, to create the necessary conditions, free from deprivation, discrimination and want, necessary for everyone to enjoy their economic, social and cultural rights, as well as their civil and political rights. The Bill operates at a quite different stratospheric altitude.

General Comment No. 14: Right to health

General Comment No. 14 provides essential guidance on the right to health, and similarly emphasises that health is a fundamental human right indispensable for the exercise of other human rights, and that every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.[23] The objective is 'the highest attainable standard of health conducive to living a life'. It applies to the elderly, since they in general have greater requirement for healthcare needs, but the treaty does not apply specifically to the elderly, and does not specify any particular modalities for attaining the appropriate health standard (conducive to living a life).

The Bill does not introduce health-related legislation for the elderly for the first time. It is confined in ambit to policy remodelling of aged care service provision. It merely makes incremental adjustment on standards of health in Australia already achieved well in excess of treaty requirements. It essentially substitutes one legislative model for aged care for another with different policy settings. The remoteness of the Bill from the implementation obligations under the treaty provision directed at 'health conducive to living a life' is clear. A claim that the Bill's connection to this right is sufficient to attract the external affairs power, does not rise above the level of it being related vaguely, in terms of subject matter, to the convention.

The right to health in article 12 reads as follows:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The related rights stressed in General Comment No. 14, to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement may be said to comprise

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[21] Ibid, [17].
[22] Ibid, [18].
[23] CESCR, *General Comment No. 14, The right to the highest attainable standard of* health, (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4 [1].

integral components of most rights. The selection made of related rights in General Comment No. 14 suggests it has in mind the negative impact, e.g. on human dignity, that follows from deprivation or shortfall in appropriate standards of health of a severe kind. At base it contemplates higher standards of health as the means of escape from degrading conditions.[24]

However, as General Comment No. 14 went on to explain, the drafting history of the ICESCR and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. [25] Still none of this comes close to anything covered in the Bill.

The right to health contains both 'freedoms and entitlements', using familiar language in that convention context, but this does not imply entitlements in the nature of the extensive suite of rights guaranteed by the Bill, or the strictness of the obligations imposed on aged care providers and others. As described in General Comment No. 14 the 'freedoms' include the 'right' to control one's health and body, including sexual and reproductive freedom, and the 'right' to be free from interference, such as the 'right' to be free from torture, non-consensual medical treatment and experimentation.[26] By this language it is obviously preserving generally accepted fundamental human rights. It is impossible to derive from this the rights contemplated by the Bill.

General Comment No. 14 specifically addresses the position of 'older persons', by reaffirming the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and 'enabling them to die with dignity'.[27] In terms understood by the drafters of the ICESCR 'enabling a person to die with dignity' would not include voluntary assisted dying, but the establishment of appropriate conditions in which those who are already dying may do so with dignity.

It is difficult to see how the right to health could extend to right to voluntary assisted dying. It is not possible to 'enjoy' the 'highest attainable standard of physical and mental health' in death. Many of the steps required to be taken pursuant to article 12 pursue the explicit aim of avoiding death. Yet the Bill encompasses voluntary assisted dying in the direct equivalence of terminology with existing VAD legislation.

The other reference to elderly persons in General Comment No. 14 is in relation to physical accessibility: 'health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.'[28]

As regards the formulation and implementation of national health strategies and plans of action, the General Comment mentions that these should 'respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning,

[24] Ibid [3].
[25] Ibid [4].
[26] Ibid [8].
[27] Ibid [25].
[28] Ibid [35].

implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.'[29] This does not direct a participation model of any particular kind, and certainly not one that prioritises to the extent the Bill, does individuals accessing aged care services, when giving effect to the specific aged care related policy choices pursued by the Bill.

*Convention on the Rights of Persons with Disabilities*

The Disabilities Convention has little relevance to aged care legislation, as the convention primarily concerns non-discrimination and equality, effective participation and inclusion in *society*, acceptance of those with disabilities, and equality of opportunity.

In principle, it is wrong to conflate age and disability.

The closest touch-point between the Bill and the Disabilities Convention is article 19, concerned with living independently and being included in the community. By it, 'States Parties …recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that…[p]ersons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community'.

Residential support is only one such service. According to the General Comment on this provision '*access* to a range of individualized support services is a precondition for independent living within the community. Persons with disabilities have the right to choose services and service providers according to their individual requirements and personal preferences, and individualized support should be flexible enough to adapt to the requirements of the "users" and not the other way around. This places an obligation on States parties to ensure that there are *sufficient numbers* of qualified specialists able to identify practical solutions to the barriers to living independently within the community in accordance with the requirements and preferences of the individual.'[30]

The issues of disability with which the Disabilities Convention is concerned cannot be shoehorned into a Bill concerned with policy changes to aged care service provision. The Disabilities Convention is not concerned with the particular choices made in legislation when simply switching from one form of protection for those in aged care for another.

To summarise, the Bill does not give effect to the ICESCR because (a) the context and background of the ICESCR contemplates standards of health already far exceeded by the those achieved in Australia; (b) the ICESCR has no specific age-related rights to ground the proposed Act on the external affairs power; (c) the right to health ('the highest attainable standard of health conducive to living a life') expressed in the ICESCR does not envisage merely adopting a particular model of aged care and governance; (d) implementation of either convention relied for exercising the external affairs power is conditioned on respect for human rights, which for the ICCPR rights engaged by the Bill is a precondition which is not met. In addition, the Disabilities Convention is too remote from the context of the Bill. The Bill fails to meet the demands of section 51 (xxix) to achieve substantive implementation of commensurate provisions and obligations expressed in the applicable treaties, namely the ICESCR and/or the Disabilities Convention.

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[29] Ibid [54].

[30] Committee on the Rights of Persons with Disabilities, General comment No. 5 (2017) on living independently and being included in the community, 27 October 2017, CRPD/C/GC/5, [28]-[ 31].

**The ethos of religious aged care providers, and the conscience-driven dictates of many who work and live in Aged Care facilities**

The ethos of many religious aged care providers, and the deeply held beliefs of many staff members and volunteers who choose to work for those providers, as well as many aged care residents, does not countenance participation in the administration of a voluntary assisted dying substance, or in any steps related to that administration. Catholic aged care providers, for example, have been places of work which to many individuals, until the advent of VAD legislation, have been the only available employer in the sector not imposing professional duties which conflict with their fundamental beliefs concerning the sanctity of life.

That ethos holds as fundamental the principle that killing any human being through the administration of a 'voluntary assisted dying substance' by any means is unequivocally and irredeemably wrong. It is diametrically and irreconcilably in opposition to the biblical understanding underpinning that ethos and the individuals' beliefs. For many religious aged care providers, this belief is embedded in the ethos on which they were founded and continue to support and care for the elderly.

*Freedom of conscience*

The following sources are relevant to the freedom of thought, conscience and religion protected by article 18 of the ICCPR.[31]

The UN Human Rights Committee, the monitoring body for the ICCPR, has emphasised that freedom of thought, conscience and religion in article 18 has elements that are absolute, especially concerning conscience:

> 3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1.[32]

In reference to killing, conscientious objection to the taking of life in certain situations has been recognised as part of the *absolute* protection of article 18, such that the State is never entitled to interfere with it. The 2019 Annual report of the United Nations High Commissioner for Human Rights, noted the Human Rights Committee's[33]

> constant jurisprudence according to which the prosecution and conviction of complainants who had refused to perform compulsory military service owing to their religious belief and conscientious objection had violated the complainants' rights under article 18, paragraph 1 of the Covenant [i.e. the part that is protected absolutely].[34]

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[31] Article 18:

> 1. 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.
> 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.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[32] UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 3.

[33] A/HRC/41/23, para 5.

[34] See for example CCPR/C/124/D/2268/2013, para. 7.4. See also A/HRC/23/22, paras. 8–13, A/HRC/35/4, paras. 4–8 and OHCHR, Conscientious Objection to Military Service (United Nations publication, Sales No. E.12.XIV.3)

This 'constant jurisprudence' has resulted in repeated findings of violation of article 18(1), not the right to manifest religion or belief under article 18(3), which is not absolute. The following passage is representative of the Human Rights Committee's position:

> 7.3 The Committee recalls its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, in which it considered that the fundamental character of the freedoms enshrined in article 18 (1) was reflected in the fact that that provision could not be derogated from, even in times of public emergency, as stated in article 4 (2) of the Covenant. The Committee recalls its prior jurisprudence according to which although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of thought, conscience and religion. The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature; it must be a real service to the community and compatible with respect for human rights.

Relevantly, freedom of religion is also enjoyed collectively through institutions:

> Article 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* provides:
>
> '…. the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: … (b) the right to establish and maintain appropriate charitable or humanitarian institutions'[35]

Restrictions on an entity or collectivity, in the form of impositions on it, are therefore capable of affecting and do affect the rights of individuals. A range of employees and volunteers of health care providers are affected by compelled participation in voluntary assisted dying, and in related steps. It is also directly contrary to the foundational ethos of certain aged care facilities which they are entitled to uphold.

There is also the separate question of discrimination on grounds of religion, an issue which raises articles 2 and 26 of the ICCPR. Failure to make suitable accommodation is a feature of existing Commonwealth legislation. For example, section 5(2) of the Disability Discrimination Act 1992 (Cth), imposes a "reasonable adjustments" obligation i.e. a positive duty to accommodate religious belief or activity where this could be done without imposing an "unjustifiable hardship".

Necessary adjustments are needed to the Bill, to bring any purported implementation of the ICESCR (or any other convention) within the terms required by the convention, in particular to uphold and give effect to the above rights.

*The Bill's interaction with existing VAD legislation*

The Bill interacts with VAD legislation through the Bill's 'Statement of Rights', the strictness of their application and the severity of the Bill's criminal and civil penalties that apply for failure to meet its requirements.

The Statement of Rights in clause 20 of the Bill specify that '(1) An individual has a right to: (a) exercise choice and make decisions that affect the individual's life…(b) be supported (if necessary) to make those decisions, and have those decisions respected…(2) An individual has a right to equitable access to…(b) palliative care and end-of-life care when required…(3) An individual has a right to (a) be treated with dignity and respect'.

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[35] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Resolution 36/55 of 25 November 1981.

Queensland's VAD legislation is underpinned by the following, largely matching, principles: '(a) human life is of fundamental importance; and (b) every person has inherent dignity and should be treated equally and with compassion and respect; and (c) a person's autonomy, including autonomy in relation to end of life choices, should be respected; and (d) every person approaching the end of life should be provided with high quality care and treatment, including palliative care, to minimise the person's suffering and maximise the person's quality of life; and (e) access to voluntary assisted dying and other end of life choices should be available regardless of where a person lives in Queensland; and (f) a person should be supported in making informed decisions about end of life choices; and (g) a person who is vulnerable should be protected from coercion and exploitation; and (h) a person's freedom of thought, conscience, religion and belief and enjoyment of their culture should be respected'.[36]

As already noted, the scope of the freedom of conscience, which Queensland's VAD legislation recognises, is inadequate, compared with the above ICCPR support for freedom of conscience, and freedom from discrimination, when it comes to the taking of life.

The Bill, if enacted, would create a range of *new* obligations, on aged care providers and others, to a very strict standard, backed by civil and criminal liability, with overlapping operation in conjunction with existing VAD legislation in various Australian states. Existing VAD legislation speaks unequivocally and powerfully to a particular understanding of 'dignity', 'respect' and 'end-of-life decisions'. These correspond with the choices and decisions which an individual has a right to exercise under the Bill, with support from others, at the end-of-life. The difference between VAD legislation and the Bill is that VAD legislation makes at least some, though inadequate, provision for the conscience dictates of those in the VAD environment, while the Bill, though it clearly contemplates 'end-of-life decisions', does not.

As clause 21 of the Bill states:

> An individual is entitled to the rights specified in section 20 when accessing, or seeking to access, funded aged care services…It is the intention of the Parliament that registered providers delivering funded aged care services to individuals must not act in a way that is incompatible with the rights specified in section 20, taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals.

The qualification concerning 'competing conflicting rights and freedoms of other individuals' is no comfort at all to those obliged to participate in voluntary assisted dying under the Bill. They have an unequivocal obligation, with serious adverse consequences, 'not to act in a way that is incompatible with the rights specified in section 20'. If the purpose of the Clause 21 qualification is to satisfy the condition of human rights compatibility of implementation when relying on the external affairs power, it is woefully inadequate. It also fails to satisfy basic properties of the law needed for such a purpose, namely foreseeability and predictability.[37] It does not even signal effectively that conscientious objection is an issue which it has in mind. Clearly such a Bill should satisfy basic requirements of the principle of legality, if it is to claim transparency.

The Bill on its own creates new voluntary assisted dying rights, over and above those which exist in state and territory levels, and an accompanying statutory imperative for aged care providers and others, with severe consequences for those who dissent. It does so without proper regard for the fundamental conscience-based rights of those engaged in the chain of responsibility for deliberate ending of life that ensues.

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[36] S.5, Principles.

[37] See e.g. Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020), at 433-5, 444, 552-3.

The Bill unavoidably engages the ICCPR conscience rights of various actors participating in aged care service provision, for reasons indicated by the above UN Human Rights Committee authorities, and those rights are engaged to a very high standard.

The Bill, in proposing a 'rights-based approach', disregards these significant rights that permeate the aged care system and its players. Even if all other implementation requirements were met (which they are not) the Government may not rely on the external affairs power for enacting the Bill, for as long as any such purported implementation fails to comply with human rights standards established under the ICCPR.

**Conclusion**

There is insufficient connection between the Aged Care Bill on the one hand, and the right to health in the ICESCR and the Convention on the Rights of Persons with Disabilities, on the other, to satisfy the necessary requirements for reliance on the external affairs power.

The implementation requirements in the General Comments on implementation of the ICESCR, and the right to health specifically, and the General Comment on implementation of the Disabilities Convention, are not directed at this type of legislation, which is a remodeling of existing aged care legislation which already satisfies Australia's obligations under those conventions.

It is a specious claim that a legislative enhancement loosely referable to the subject of regulation of aged care satisfies those requirements.

The aged care and disability related aspects of the Bill only make incremental adjustments to existing legislation for policy reasons, which are not directed by either convention. Neither convention contemplates revision in this particular form, or any similar form. The only connection with the ICESCR, which is far too indirect to permit reliance on the external affairs head of power, is that the legislation may be said in a non-specific sense to adjust the existing healthcare system in Australia, in a way that relates only to the elderly, through a particular modality that is not contemplated by the convention.

Fundamentally, implementation of the ICESCR, and any other UN convention, is conditioned on upholding human rights found in other UN human rights conventions. The Aged Care Bill compels providers and their staff and volunteers to participate in, and otherwise facilitate, voluntary assisted dying without safeguarding the rights of those concerned under article 18 of the ICCPR, guaranteeing freedom of thought, conscience and religion, or articles 2 and 26, guaranteeing freedom from discrimination on grounds of religion. No accommodation is made for those compelled to participate in the voluntary assisted dying on pain of criminal or civil liability, or loss of employment.

'Aged Care Rights' demand participation in a sequence of voluntary assisted dying activities by age care providers and others, by requiring their support in enabling the individual exercising choice and making decisions that affect the individual's life, and in securing their equitable access to 'end-of-life care when required'.

The Bill makes it clear (in section 21) that it is the intention of the Parliament that registered providers delivering funded aged care services to individuals must not act in a way that is incompatible with the rights specified in section 20, taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals. That proviso is insufficient to secure the article 18, 2 and 26 rights which are engaged by the new standards established by the Bill, or even to acknowledge them. Even if all other preconditions were satisfied for the reliance on the foreign affairs power the crucial condition, that implementation (in the form of the Bill) must respect fundamental human rights, is not.

VAD legislation acutely burdens religious aged care providers. It involves their employees, volunteers and others in conduct which is diametrically and irreconcilably opposed to the institutional ethos of

the aged care provider. For most religious providers that ethos holds as fundamental the principle that killing any human being in their care through the administration of a 'voluntary assisted dying substance' by any means is unequivocally and in all circumstances wrong.

None of the provisions of the Bill which relate to or concern participation in voluntary assisted dying has any basis in either the right to health in the ICESCR or the concerns for those with disability in the Disabilities Convention.

VAD legislation at state and territory level (such as in Queensland) offers some, though insufficient, protection for those affected by being compelled to participate in voluntary assisted dying. Queensland's VAD legislation makes certain provision for the conscientious objections of registered health practitioners and speech pathologists (sections 84 and 85), acknowledging the obvious and severe conscientious implications among those otherwise required to participate in voluntary assisted dying. However, there is no possibility for conscientious objection under that legislation for religious aged care providers or their respective employees and others, beyond those provisions. Their ethos does not admit participation in the administration of such a voluntary assisted dying substance, or in any steps related to that administration. The ethos so values and respects human life as to render it anathema to participate in any way in voluntary euthanasia.

It is well established that the collective enjoyment of individual rights under article 18 extends to the establishment and operation of religious bodies. Religious aged care facilities constitute such bodies. The claim that entities are incapable of enjoying human rights has no place in the context of legislation which burdens religious bodies in such a way as to impact individuals engaged in the operation of those bodies. Staff, volunteers and aged care recipients are all impacted severely by voluntary assisted dying practices conducted on the premises. Furthermore, religious bodies formed and operated specifically in accordance with a particular ethos are entitled to maintain that ethos by resisting practices on its premises and compulsion of its staff inimical to that ethos.

In its present form, therefore, and considering the Bill's reliance on the external affairs power of section 51 (xxix) of the Constitution, the Bill is unconstitutional for failing to implement or give effect to, the ICESCR and the Disabilities Convention, and even breaches a key requirement established in connection with those treaties.