

Marriage equality in a changing world

POSITION PAPER ON MARRIAGE EQUALITY

Introduction

The Australian Human Rights Commission considers that the fundamental human rights principle of equality means that civil marriage should be available, without discrimination, to all couples, regardless of sex, sexual orientation or gender identity.

Under the *Marriage Act 1961* (Cth) (Marriage Act), marriage is defined as ‘the union of a man and a woman’.¹ This definition discriminates against same-sex couples by denying them the right to marry. In addition, trans people who are already married, are not able to amend their birth certificates to reflect their true gender identity and still remain married to their spouse.²

Since the enactment of the Marriage Act, the world has changed. There has been an increasing trend for other countries to legislate for marriage equality and a number of international decisions supporting same-sex marriage on the principle of equality. Reflecting this trend, the Commonwealth Parliament, and some state parliaments, are now considering legislation that would provide all couples with the same access to civil marriage that is currently confined to opposite-sex couples.

Four bills are before the federal Parliament – the Marriage Amendment Bill 2012, the Marriage Amendment Bill (No.2) 2012, the Marriage Equality Amendment Bill 2012 and the Marriage Equality Amendment Bill 2010. At the state level, the Tasmanian House of Assembly passed the Same-Sex Marriage Bill 2012 (Tas) on 30 August 2012, now to be considered by the Tasmanian Legislative Council. The Premier of South Australia has declared his support for marriage equality at the state level³ as has the ACT Government.⁴

Australia has legal obligations to protect and promote human rights including those encompassed in the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR includes the principles of equality and non-discrimination. The United Nations Human Rights Committee has concluded that the ICCPR does not prevent the recognition of same-sex marriage, rather the ICCPR does not impose a positive obligation on states to do so.

This paper is based on the Commission’s submissions to parliamentary inquiries into the federal bills and considers how the human rights principle of equality underpins legislative recognition of marriage equality.⁵

Road to equality

In 2008, in response to *Same-Sex: Same Entitlements*, the Commission’s 2007 report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, the Commonwealth Parliament amended most Commonwealth legislation to remove discrimination against same-sex couples and their children. These reforms were a significant step towards equality for people in same-sex

relationships. However, the Commission believes that the Marriage Act continues to discriminate against same-sex couples by explicitly excluding them from the opportunity to have their relationship formally recognised under federal law. Removing the prohibition on civil marriage for same-sex couples is the next step toward legislative equality with opposite-sex couples.

Research indicates that discrimination, social exclusion and homophobia experienced by Australians on the basis of their sexual orientation, sex and/or gender identity contributes to negative health outcomes.⁶ Removing legislative discrimination to recognise marriage for all couples may help reduce the marginalisation experienced by these people, help promote greater acceptance within society and promote better health outcomes.⁷

Sexual orientation and the principle of equality

The principle of equality requires that any formal relationship recognition available under law to opposite-sex couples should also be available to same-sex couples. This includes civil marriage.

Equality is a key human rights principle. It is set out in article 26 of the ICCPR, which states that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. Article 2 of the ICCPR requires State Parties to ensure all individuals are to enjoy the rights set out in the ICCPR without discrimination. Article 26 is broader than article 2(1) because it is a 'stand-alone' right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.⁸

The right to equality before the law guarantees equality with regard to the enforcement of the law. The right to the equal protection of the law without discrimination is directed at the legislature and requires State Parties to prohibit discrimination **and** take action to protect against discrimination.⁹

Article 26 of the ICCPR does not specifically mention 'sexual orientation' or 'sexuality' in the prohibited grounds of discrimination. However, the phrase 'other status' has been interpreted to include 'sexual orientation'.¹⁰ The United Nations Human Rights Committee (Human Rights Committee) has emphasised the obligation on all parties to the ICCPR to provide 'effective protection' against discrimination based on sexual orientation.¹¹

The Human Rights Committee has considered two cases from Australia, *Toonen v Australia* and *Young v Australia*, in which it has expressed the view that one or the other of the categories of 'sex' or 'other status' protect people from discrimination on the basis of sexual orientation under the ICCPR.¹²

Marriage and the principle of equality

To date, the Human Rights Committee has only considered the issue of same sex marriage once, in 1999. In *Joslin v New Zealand (Joslin)*¹³, the authors claimed that failure of the *Marriage Act 1955* (NZ) to provide for same-sex marriage discriminated against them on the basis of their sex and indirectly on the basis of their sexual orientation. The authors argued that the denial of the ability to marry had 'a real adverse impact' on their lives. The authors said they were excluded from full membership of society, their relationship was stigmatised and, unlike heterosexual couples, they did not have the ability to choose whether or not to marry.

The Human Rights Committee found that 'a mere refusal to provide for marriage between homosexual couples' does not violate the State Party's obligations under the ICCPR.¹⁴ This conclusion relied on a narrow consideration of the language in article 23(2) of the ICCPR

which refers to 'men and women' rather than the right to equality in article 26. It did not consider article 23(2) in light of the non-discrimination and equality rights in the ICCPR. Article 23(2) states that '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized'. In *Schalk and Kopf v Austria*, the European Court of Human Rights came to a similar conclusion however found that 'it would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'.¹⁵

Joslin and *Schalk* do not prevent the recognition of same-sex marriage, they merely conclude that the ICCPR does not impose a positive obligation on states to do so.

A changing world

However, some commentators have suggested that the views of the Human Rights Committee may evolve with State practice. For example, Joseph has noted that at the time of *Joslin* only one nation, the Netherlands, recognised same-sex marriages. In those circumstances, the Human Rights Committee was unwilling to look beyond article 23(2) to derive a guarantee of same sex marriage rights from other ICCPR provisions'.¹⁶

The situation in *Joslin* has now changed and there is a trend towards the legislative and judicial recognition of same-sex marriage. The countries now fully recognising same-sex marriage include Argentina, Belgium, Canada, Denmark, Iceland, Mexico, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, and several states in the USA.¹⁷ A marriage equality bill has passed its first reading in the New Zealand Parliament¹⁸, and the Scottish and French Governments have also indicated they will introduce marriage equality bills.¹⁹

In *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs (Fourie)*²⁰, the South African Constitutional Court declined to follow the approach of the Human Rights Committee in *Joslin*.²¹ The Court said the reference to the right of men and women to marry in article 16(1) of the *Universal Declaration of Human Rights* was 'descriptive of an assumed reality, rather than prescriptive of a normative structure for all time'²² before observing 'rights, by their nature, will atrophy if they are frozen'.²³ This is consistent with the view of the Human Rights Committee which has stated that the understanding of the guarantees in the ICCPR evolves 'over time in view of its text and purpose'.²⁴

In his leading judgment Sachs J stated [at 72]:

If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, **given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.**
[footnotes omitted, emphasis added]

In another example, in 2003 the Ontario and British Columbia Courts of Appeal held that it was unconstitutional to deny same-sex couples the right to marry.²⁵ In *Halpern v Canada (Halpern)*, the exclusion of same-sex couples from a fundamental societal institution was found to be a violation of the right to equality. The Court declared the existing common law definition of marriage invalid to the extent that it refers to 'one man and one woman' and to reformulate the definition of marriage as the 'the voluntary union for life of two *persons* to the exclusion of all others'.²⁶ Further, the District Court of Northern California stated that 'tradition' or moral views alone cannot form a 'rational basis for law' or provide sufficient basis for legislative enactment, that is, to deny same-sex couples access to civil marriage.²⁷

The Commission, therefore, believes that the principle of equality as set out in article 26 of the ICCPR supports the recognition of same-sex marriage and that in future the question of marriage equality should be read in light of the principles of equality and non-discrimination.

Alternative forms of relationship recognition

Some international jurisdictions have preferred to recognise same-sex relationships through civil union schemes. In some jurisdictions civil unions or relationship registration systems were introduced prior to the introduction of same-sex marriage, for example Norway and the Netherlands. There are also relationship recognition schemes in some Australian states and territories.²⁸

The Commission does not believe that a civil union scheme alone – either in each of the states or territories, or at the federal level – would provide same-sex couples with full equality. In the absence of a right to civil marriage for same-sex couples, a civil union scheme would continue to reinforce the different value placed on relationships between opposite-sex and same-sex couples.

Balancing other rights

It is important to note that supporting marriage equality need not raise any conflict between the right to equality and the right to freedom of religion and belief. Currently the Marriage Act does not require any religious minister to marry any person contrary to its religious tenets.²⁹ The proposed amendments to the Marriage Act would provide same-sex couples with access to civil marriage only and would not affect the position of religious ministers under the Marriage Act.³⁰

The South African Constitutional Court has directly addressed this issue in *Fourie*.³¹ It has also been addressed in Canada by the British Columbia Court of Appeal.³² The Court in *Halpern* concluded that in considering marriage as a legal institution, it does not interfere with the 'religious institution of marriage'.³³

Conclusion

The world has changed since *Joslin*. Over the past decade there has been an increasing trend for countries to legislate for marriage equality. There has also been an increasing number of judicial decisions finding in favour of marriage equality on the basis of the principles of equality and non-discrimination. The principle of equality supports recognition of marriage equality. Given this, in providing access to civil marriage to all couples, legislators would be supporting human rights and equality for all couples.

¹ *Marriage Act 1961* (Cth), s 5.

² See Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (2009), s 8. At <http://www.humanrights.gov.au/genderdiversity/index.html> (viewed 2 August 2012).

³ S Johnson, 'Tasmania, SA to allow gay marriage', *The Australian*, 11 August 2012. At <http://www.theaustralian.com.au/national-affairs/tasmania-sa-to-allow-gay-marriage/story-fn59niix-1226448236343> (viewed 10 September 2012).

⁴ S Ozturk, 'ACT Government makes marriage equality part of re-election campaign', *Gay News Network*, 4 September 2012. At <http://gaynewsnetwork.com.au/news/northern-territory/8601-act-government-makes-marriage-equality-part-of-re-election-campaign.html> (viewed 10 September 2012).

⁵ See Australian Human Rights Commission, *Submissions*, <http://www.humanrights.gov.au/legal/submissions/index.html> (viewed 10 September 2012).

⁶ See for example J Corboz, G Dowsett, A Mitchell, M Couch, P Agius, M Pitts, 'Feeling queer and blue: A review of the literature on depression and related issues among gay, lesbian, bisexual and other homosexually active people', *Australian Research Centre in Sex, Health & Society* (December 2008), p 14.

⁷ In *Private Lives*, research demonstrated the importance of relationships in the lives of many LGBTI people and that 'legal recognition and rights for couples remain an important reform for the community and are likely to make a contribution to improved health and wellbeing for many GLBTI people': M Pitts, A Smith, A Mitchell and S Patel, *Private Lives: A report on the health and wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health & Society (2006), p 63.

⁸ Human Rights Committee, *General Comment No. 18 – Non-discrimination*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (1989), para 12.

⁹ Human Rights Committee, *General Comment No. 18 – Non-discrimination*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (1989), para 10.

¹⁰ See generally M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), 623–626. Discrimination on the grounds of sexual orientation is also prohibited under art 2(2) of the ICESCR: Committee on Economic, Social and Cultural Rights, *General Comment No. 18 – the Right to Work*, UN Doc E/C.12/GC/18 (2005), para 12(b)(i), and Committee on Economic, Social and Cultural Rights, *General Comment No. 14 – the Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000.4 (2000), para 18, as cited in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), paras 91, 151. The Committee on the Rights of the Child has also indicated that the *Convention on the Rights of the Child* (CRC) prohibits discrimination on the grounds of sexual orientation: Committee on the Rights of the Child, *General Comment 3 – HIV/AIDS and the Rights of the Child*, UN Doc CRC/GC/2003/3 (2003), para 6, as cited in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), para 365.

¹¹ Human Rights Committee, *Concluding observations of the Human Rights Committee: El Salvador*, UN Doc CCPR/CO/78/SLV (2003), para 16; Human Rights Committee, *Concluding observations of the Human Rights Committee: Philippines*, UN Doc CCPR/CO/79/PHL (2003), para 18; Human Rights Committee, *Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, UN Doc CCPR/C/79/Add.57 (1995), para 13; Human Rights Committee, *Concluding observations of the Human Rights Committee: Poland*, UN Doc CCPR/C/79/Add.110 (1999), para 23.

¹² Neither case clarifies whether the prohibited discrimination is on the basis of 'other status'. In *Toonen*, the Human Rights Committee found that the reference to 'sex' in Articles 2(1) and 26 of ICCPR is to be taken to include 'sexual orientation'. The Committee noted that '[t]he State party has sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant' but did not answer Australia's question and confined itself to noting that 'in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation': see Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1994), para 8.7. In *Young*, the Human Rights Committee found that Australia had violated article 26 of the ICCPR 'by denying the author a pension on the basis of his sex or sexual orientation'. Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003), para 10.4.

¹³ Human Rights Committee, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc CCPR/C/75/D/902/1999 (2002).

¹⁴ Human Rights Committee, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (2002), [8.2]–[8.3].

¹⁵ *Schalk and Kopf v Austria* [2010] ECHR 30141/04, [61].

¹⁶ S Joseph, 'Human Rights Committee: Recent Cases' (2003) 3(1) *Human Rights Law Review* 91, 102. It is arguable that the right of men and women to marry in article 23 should be interpreted in light of article 2(1), which provides for the principle of equal treatment and non-discrimination in respect of ICCPR rights, and article 26, which provides the broader right to equality and non-discrimination on the basis of sexual orientation.

¹⁷ States in the USA which recognise same-sex marriage include: Connecticut
Iowa, Massachusetts, New Hampshire, Vermont, New York, Washington D.C. See Australian Marriage Equality, *Marriage Overseas*, [http://www.australianmarriageequality.com/international.htm#United States of America](http://www.australianmarriageequality.com/international.htm#United_States_of_America) (viewed 11 September 2012).

¹⁸ D Schwartz, “‘Overwhelming’ support for NZ gay marriage bill”, *Australia Network News*, 30 August 2012. At <http://www.abc.net.au/news/2012-08-30/an-nz-parliament-gives-strong-support-to-same-sex-marriage/4232162> (viewed 9 September 2012).

¹⁹ ‘Referendum and same-sex marriage bills announced in SNP plans’, *BBC News*, 4 September 2012. At <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19469440> (viewed 11 September 2012); I Landauro, ‘French Government Plans Gay-Marriage Bill’, *The Wall Street Journal*, 25 August 2012. At http://online.wsj.com/article/SB10000872396390444812704577611741069429410.html?mod=google_news_wsj (viewed 11 September 2012). For a list of other countries, see Australian Marriage Equality, *Marriage Equality Overseas*, <http://www.australianmarriageequality.com/wp/overseas-same-sex-marriages/> (viewed 11 September 2012).

²⁰ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19.

²¹ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [99]–[105].

²² *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [100].

²³ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [102].

²⁴ Human Rights Committee, *Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea*, Communication Nos. 1321/2004 and 1322/2004, UN Doc CCPR/C/88/D/1321-1322/2004 (2006), para 8.2: see Castan Centre for Human Rights Law, *Submission to the Senate Legal and Constitutional Committee Inquiry into the Marriage Equality Amendment Bill 2010* (26 April 2012), pp 9–11. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality_2012/submissions.htm (viewed 11 September 2012). The Castan Centre uses the example of the right of people to conscientiously object from participating in military service to demonstrate the evolving nature of Human Rights Committee jurisprudence to recognise rights which were not previously recognised. In referring to the change in view by the HRC, the Castan Centre refers to the ‘increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service’ as instrumental.

²⁵ *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA); *Barbeau v British Columbia (A-G)* 2003 BCCA 251.

²⁶ *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA), [148].

²⁷ *Perry et al v Schwarzenegger et al* (2010) 3:09-cv-02292.

²⁸ See Australian Human Rights Commission, *Submission to Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Marriage Equality Amendment Bill 2010* (29 March 2012), para 30. At http://www.humanrights.gov.au/legal/submissions/2012/20120329_marriageEquality.html (viewed 11 September 2012).

²⁹ *Marriage Act 1961* (Cth), s 47.

³⁰ While the Commission recognises that there may be Constitutional limitations to the power of the Commonwealth and the states to legislate with respect to same-sex marriage, a consideration of this issue is beyond the scope of this issues paper which considers the human rights arguments for marriage equality.

³¹ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [97].

³² *Barbeau v British Columbia (A-G)* 2003 BCCA 251.

³³ *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA), [53].