Submission No 1253

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: Castan Centre for Human Rights Law

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Submission to the NSW Legislative Council Standing Committee on Social Issues

Inquiry into Same Sex Marriage Law in NSW

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EXECUTIVE SUMMARY

We congratulate the Committee for tackling the important issue of same-sex marriage laws in New South Wales.

The Castan Centre for Human Rights Law submits that the Federal *Marriage Legislation Amendment Bill* 2004 (cth), amending the *Marriage Act 1961* breached the fundamental human rights principles of equality and non-discrimination enshrined in the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and other international agreements to which Australia is a party

We submit that a NSW marriage equality law would redress this imbalance in Australia's most populous state and represent a great leap forward for human rights protections in Australia. Such reform would provide equal recognition before the law to same-sex couples and bring NSW's domestic practices into line with the increasing list of countries that have already legalised same-sex marriage. Only extension of marriage to same-sex couples can bring true equality, as evidenced by the decision of Denmark to replace its civil unions law with a same-sex marriage law in 2012, and the intention of the UK Government to do the same this year.

Regarding the constitutionality of any NSW marriage equality law, it is unclear whether the law would survive a High Court challenge, however there are certainly strong arguments to suggest that it would. Further, the passing of a marriage equality law by one state government would not be unprecedented: nine states and the District of Colombia in the United States, and Mexico City in Mexico have legalised same-sex marriage. A recent court decision has similarly legalised same-sex marriage in Sao Paulo, Brazil and the same may soon occur in Oaxaca State, Mexico.

The Castan Centre suggests that Australia's marriage laws further fail to advance the best interest of children and families, especially since same-sex marriages have not been shown to have any detrimental effect on the children of these unions. It is asserted that fundamental international human rights principles of equality and non-discrimination, enshrined in various international human rights treaties to which Australia is a party, must be afforded to same-sex couples in the same way as they are afforded to heterosexual couples.

Section 2 of this submission asserts that Australia's marriage laws are out of step with legal advancements in other Western countries. There is an increasing trend towards legalisation of same-sex marriage, and Australia should embrace these reforms, or risk being left behind.

INTRODUCTION

The Australian Legal Landscape

At the Federal level, the Howard Government passed the *Marriage Legislation Amendment Bill 2004* (MLAB) in order to amend the *Marriage Act 1961* (Cth) to define 'marriage' as 'the union of a man and a woman to the exclusion of all others'.[1] This was done for the express purpose of excluding same-sex couples from marriage. The passing of the Bill ensured that:

(a) same-sex couples cannot legally marry in Australia; and

(b) same-sex marriages legally performed in accordance with the laws of another country are not recognised in Australia as valid marriages.[2]

Until the passage of the MLAB, Australia had always recognised a marriage as legal if it was legal in the country where it was performed. On becoming part of Australian law, the amending legislation was described by Alistair Nicholson, former Chief Justice of the Family Court, as 'one of the most unfortunate pieces of legislation that has ever been passed by an Australian Parliament'.[3] It was a retrograde step that represented a retreat from human rights, rather than an effort to further advance respect for universal human rights in this country.

There are currently no marriage laws enacted in Australian states or territories.

Historical Background

Eskridge states that: "…marriage is an institution that is constructed, not discovered, by societies. The social construction of marriage in any given society is fluid and mobile…".[4] Stadtler adds that the civil recognition of marriage evolved to support the economic and cultural benefits of the institution, rather than to protect cultural norms.[5] Nevertheless, marriage has long been regarded as being limited to a relationship between a man and a woman,[6] and Black's Law Dictionary defines marriage as "the legal union of a couple as husband and wife".[7]

The definition of 'marriage' in the MALB reflects the nineteenth century English common law definition contained in the 1866 case of *Hyde v Hyde & Woodmansee,*[8] where Lord Penzance held that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others." Lord Penzance's assertion that marriage is derived from

[1] *Marriage Amendment Act 2004* (Cth) Sch 1 s 1 (subsection 5(1)).
[2] *Marriage Act 1961* (Cth) s 88EA.
[3] Alastair Nicholson, 'The Legal Regulation of Marriage' (2005) 29 *Melbourne University Law Review* 556, 557. The Bill also proposes to prevent same-sex couples adopting children from overseas countries under arrangements involving multilateral or bilateral treaties. See <http://www.aph.gov.au/library/pubs/BD/2003-04/04bd155.pdf>.
[4] William N. Eskridge, Jr., 'A History of Same-Sex Marriage' (1993) 79 *Virginia Law Review* 1419, 1436.
[5] Edward H. Sadtler, 'A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?' (1999) 40 *Virginia Journal of International Law* 406, 406.
[6] Angelo Pantazis, 'An Argument for the Legal Recognition of Gay and Lesbian Marriage' (1997) 114 *South African Law Journal* 556, 557-559.
[7] *Black's Law Dictionary* (8th ed, 2004) 'Marriage'.
[8] (1866) LR 1 P. & D. 130 at p. 133.

Christian values was echoed by the Commonwealth Government in a recent Family Court case.[9]

The institution of marriage, however, has roots further back in history than the birth of Christianity. Same-sex relationships were integrated into the culture of many societies from which western society sprung, and these relationships appear to have been treated similarly to heterosexual marriages, and generally accepted.[10] This general acceptance and inclusion into societal norms diminished towards the end of the Roman Empire.[11] The banning of same-sex marriage went hand-in-hand with the broader legal limitations imposed on homosexual behaviour, particularly in European society from the 13th century onwards.[12]

Over the past 50 years, the influence of Christian religions in Australia has waned, as church attendances have plummeted.[13] As an increasing section of Australian society rejects religious belief, so must we move away from an outdated Christian definition of marriage. This is particularly important in a secular country such as Australia.

[9] *Kevin and Jennifer* (2003) 30 Fam LR 1, 18 (Nicholson CJ, Ellis and Brown JJ).
[10] Eskridge, above n 4,1437 and 1453.
[11] Ibid 1447.
[12] Ibid 1469.
[13] 'A Decline in the Community of Believers', *The Age* (Melbourne), 27 March 2005 <www.theage.com.au/news/Editorial/A-decline-in-the-community-of-believers/2005/03/26/1111692674302.html> at 3 September 2009.

1. LEGAL ISSUES AFFECTING A NSW MARRIAGE LAW

1.1 Interaction of NSW law with Commonwealth Marriage Act

Any proposed NSW same-sex marriage law will potentially conflict with the Commonwealth Marriage Act 1961, raising the possibility that it would be declared unconstitutional by the High Court.

Under s. 51(xxi), the Commonwealth has power over the subject matter of "marriage": this provision provides the Commonwealth's authority to enact the Marriage Act. However, the powers in s.51 are "concurrent" powers, meaning they are shared between the Commonwealth and the States. Hence, the States too have power over marriage.

Given that the Commonwealth and the States can legislate in the same area, there is the potential for inconsistency. Section 109 of the Constitution, which deals with inconsistency of laws, states that

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

It is difficult to know how the inconsistency between NSW and Commonwealth marriage laws would be determined, particularly as no draft law has yet been produced for NSW. Nevertheless, obviously it is possible to assume the broad parameters of a potential NSW law.

The first test of inconsistency is to ask whether simultaneous obedience is impossible. Does one law compel what the other demands? This test will not apply. For a start, neither the Commonwealth Act or any proposed Tasmanian Act will compel anybody to get married.

The second test is to ask whether one law confers a right taken away by the other. Certainly, the NSW law would grant a right for same-sex couples to get married, a right which is not recognised under Commonwealth law. But the Commonwealth does not take away such a right: it does not prohibit same-sex marriage at the State level. The Marriage Act has nothing to say about that matter.

The most likely source of inconsistency, if one exists, lies under the third test of "cover the field" inconsistency. Under this test, a State law will be deemed to be inconsistent if it is found that the Commonwealth intended for its law to be the sole law on the topic in question (ie. it intends to "cover the field").

With regard to the Commonwealth's intention, section 6 of the Marriage Act explicitly preserves the validity of State and Territory laws relating only to the registration of marriage. Section 6 therefore seems to implicitly exclude the validity of State and Territory laws relating to other aspects of marriage. That is, the Commonwealth has signalled an intention to cover the field of all aspects of marriage besides registration.

However, much turns on what in fact "the field" of the Commonwealth law is. Identifying the field (ie the topic) of a law for the purposes of section 109 is notoriously unpredictable.

If the field is "marriage", then the NSW law would in all likelihood be struck down.

However, Professor George Williams stated in an advice given to the Tasmanian Gay and Lesbian Rights Group about a 2005 Tasmanian same-sex marriage bill that the field of the Commonwealth's Marriage Act is in fact "opposite sex marriage", thus leaving the field of "same-sex marriage" open for the States.[14] In this regard, he points to the parts of the Commonwealth Act dealing with the recognition of marriage solemnised in foreign countries. Section 88EA makes it clear that same-sex marriages conducted overseas are not recognised as "marriages" under the Commonwealth law. Given the Parliament clearly turned its mind to this issue, it is significant that the law says nothing about the recognition of same-sex marriages conducted in Australia. That may indicate that that field was simply vacated for the States. On the other hand, given that s88EA deals to a small extent with same-sex marriage, that may make it more difficult to argue that the field of the law is confined to "opposite sex marriage".

The explicit reference to marriage being between a man and a woman in the Marriage Act was introduced by amendments in 2004, and was clearly designed to head off arguments that the Act allowed same-sex marriage. Ironically, if Professor Williams is correct, the Howard government amendments may also have the effect of reducing the field of the Commonwealth law, and opening up space for NSW to fill.

There are international precedents for same-sex marriages being performed at a provincial rather than national level. Same-sex marriage is permitted and recognised in a number of US states, but not at the federal level. They are also performed in Mexico City, and these marriages must be recognised throughout Mexico.

Ultimately, it is difficult to predict how the High Court would rule, were a NSW same-sex marriage law to be enacted, however there are strong arguments on both sides of the equation.

[14] George Williams *Advice re Proposed Same-Sex Marriage Act*, March 2005 (see http://tglrg.org/more/82_0_1_0_M3/)

2. THE RESPONSE OF OTHER JURISDICTIONS TO MARRIAGE EQUALITY

Prior to discussing the laws enacted in other jurisdictions, we believe that it is necessary to outline the status of same-sex marriage in international law, as this provides essential background to the debate about a NSW same-sex marriage law.

2.1 International Human Rights Law

2.1.1 Equality and Non-Discrimination

The principle assertion in the Universal Declaration of Human Rights (UDHR) is that 'all human beings are born free and equal in dignity and rights.'[15] The UDHR also states that:[16]

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

In its design and application, the UDHR has put equality and non-discrimination at the heart of international human rights.[17]

The UDHR was adopted without dissenting vote (although eight states abstained[18]) and most human rights law experts consider that many parts of the UDHR now constitute customary international law binding on all states.[19] Its Preamble states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[20] The UDHR sets forth a list of fundamental human rights which, as the Preamble states, are guaranteed to all persons. The principles contained in it are the basic universal human rights to which all individuals are entitled, and is the foundation on which all subsequent human rights treaties are built.

2.1.2 The Human Right to Marriage

The importance of marriage and the family unit have been emphasised since the beginning of the international human rights law movement, after World War II. The right to marry is guaranteed in Article 16(1) of the UDHR, which states that:

> men and woman of full age … have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

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[15] *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN Doc A/810 at 71, art 1 (entered into force 10 December 1948) (hereinafter "UDHR").
[16] Ibid.
[17] Grant Evadne, 'Dignity and Equality' (2007) 7:2 *Human Rights Law Review* 299-329.
[18] Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukraine SSR, USSR, Union of South Africa and Yugoslavia.
[19] Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *The American Journal of International Law* 866, 867.
[20] *UDHR*, preamble.

The rights in the UDHR laid the foundations for the creation of two legally binding international treaties,[21] the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR)*[22] and the *International Covenant on Civil and Political Rights (ICCPR)*.[23] The *ICESCR* reiterates the importance of the family unit and its position as the fundamental group unit in society,[24] while the *ICCPR* codifies the existence of the right to marriage as a human right.[25] Article 23 of the ICCPR states that:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Thus the *ICCPR* grants men and women the fundamental right to marry. The right to marry is also embraced in the *European Convention on Human Rights,*[26] Article 12 of which states "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[27]

2.1.3 The Right to Same-Sex Marriage

Approximately ten years ago, the UN Human Rights Committee (HRC),[28] had an opportunity to consider the right of same-sex couples to marry in *Joslin et al v New Zealand.* The HRC refused to extend the right of marriage guaranteed by Article 23 of the *ICCPR* to same-sex couples.[29] In *Joslin*, four individuals sought review of the Registrar's refusal to accept a notice of intended marriage on the basis that New Zealand's *Marriage Act* was limited to marriage between a man and woman.[30] It was alleged that:

> The failure of the Marriage Act to provide for homosexual marriage discriminates against them directly on the basis of sex and

[21] Australia has ratified both Covenants.
[22] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976).
[23] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966*,* 999 UNTS 171, (entered into force 23 March 1976*).*
[24] *ICESCR,* art 10(1).
[25] *ICCPR,* art 23.
[26] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5, art 12 (entered into force 3 September 1953)('*European Convention on Human Rights'*).
[27] Ibid.
[28] The body charged with monitoring State Parties' compliance with the ICCPR, and hearing complaints from individuals regarding alleged violation of rights contained in the ICCPR.
[29] *Joslin et al v. New Zealand,* United Nations Human Rights Committee, UN Doc CCPR/C/75/D/902/1999, (2002) para 2.2 ('*Joslin'*).
[30] Ibid 2.2.

> indirectly on the basis of sexual orientation… they are denied the ability to marry, a basic civil right, and are excluded from full membership of society… and they do not have ability to choose whether or not to marry, like heterosexual couples do.[31]

It was argued that the phrase 'men and women' in Article 23(2) 'does not mean that only men may marry women, but rather that men as a group and women as a group may marry'.[32] However, the HRC, in a brief ruling, concluded that the *Marriage Act* was not discriminatory,[33] relying solely on the argument of the New Zealand Government that homosexual couples fail to fall under the definition of the term "men and women" in Article 23. The HRC stated:

> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.[34]

The reference to "men and women" in Article 23, however, is more ambiguous than the HRC implied. It is not, for example, as clear as the term "the union of a man and a woman to the exclusion of all others", which was used in the MLAB.[35]

It was also argued in *Joslin*, that the *Marriage Act* breached Article 16 (the right to recognition as a person before the law), Article 17 (unlawful interference with privacy and family) and, most importantly, Article 26, which prohibits discrimination (see discussion below). The HRC did not address these arguments on the basis that the specific rule in Article 23 overruled the other more general rules. It is likely that the HRC would have struggled to justify an argument that New Zealand's *Marriage Act* is not discriminatory, if it had specifically considered the Article 26 claim.

With changing societal attitudes to same-sex marriage and homosexuality in general, the Castan Centre submits that Article 23 of the ICCPR will, over time, come to be interpreted through the lens of Article 26. A discussion of same-sex marriage and non-discrimination follows.

2.1.4 Non-Discrimination

(a) The Evolution of Gay Rights and the Principle of Non-Discrimination

Since 2002, the notion of what constitutes "marriage" has evolved in many jurisdictions. At the time of the *Joslin* decision (2002), only the Netherlands had

[31] Ibid 3.1.
[32] Ibid 3.8.
[33] Ibid 8.2-9.
[34] Ibid.
[35] *Marriage Amendment Act 2004* (Cth) Sch 1 s 1 (subsection 5(1)).

legalised same-sex marriage. However, since then, a further ten countries have followed suit, as well as several regional governments (discussed in section 3 below). In implementing human rights doctrines it is important to recognise that the task is not to reaffirm cultural and religious principles that have been drawn upon to construct human rights law, but rather to constantly strive to ensure that laws and practices support the principles of dignity, equality and justice.[36] Although various arguments have been raised by opponents of same-sex marriage, legal scholars and advocates have noted that all are essentially religious in nature, and increasingly out of step with community attitudes.[37]

Societies have denied basic human rights to their minority populations for centuries. In early democracies, women and racial minorities were typically denied the right to vote, a right now seen as fundamental to any functioning democracy. Women in the United States were not granted the right to vote until 1920.[38] In Australia, Aborigines were denied the vote until 1967.[39] Today, no one argues that all individuals in democracies have the right to vote. Yet for centuries, this basic fundamental right was systematically denied to certain groups of people.

Simply because a human right is not granted to certain people by society at a given point in time, does not mean that it does not exist. Even over the past few decades the protection of human rights has evolved. For example, the HRC has moved to recognise the right of people to conscientiously object from participating in military service. Initially, the HRC considered that the general protection of freedom of conscience in Article 18 *ICCPR* was not sufficient to override the specific protection of compulsory military service in Article 8 *ICCPR*. Article 8(3)(c)(iii) states that the prohibition on forced labour and slavery does not preclude:

> Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors.

In its 1984 decision in *LTK v Finland,*[40] the HRC found that:

> the Covenant does not provide for the right to conscientious objection; neither Article 18 nor Article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of Article 8, can be construed as implying that right.[41]

The HRC in *LTK* further stated that *"according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service"*.[42] By this reasoning the HRC avoided considering whether the author's freedom of conscience had been infringed, in much the same way that it focussed on the right to marriage in *Joslin* to avoid considering the issue of discrimination.

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[36] Elaine Pagels, 'The Roots and Origins of Human Rights' in Alice Henkin (Ed.) *Human Dignity: The Internationalisation of Human Rights* (1979) 1, 7

[37] Margaret Denike, 'Religion, Rights and relationships: The Dream of Relational Equality' (2007) 22.1 *Hypatia* 71, 78.

[38] *United States Constitution* amend XIX.

[39] Sarah Joseph and Melissa Castan, *Federal Constitutional Law a Contemporary View* (2nd ed, 2006) 447-8; *United States Constitution* amend XV.

[40] *LTK v. Finland,* UN Human Rights Committee, UN Doc CCPR/C/25/D/185/1984 (1990), para 5.2.

[41] Ibid.

[42] Ibid.

Twenty years later, in 2004, the HRC changed its position. In *Yoon and Choi v Republic of Korea*[43] it declared that punishing conscientious objectors for their "genuinely held religious beliefs" was a breach of Article 19. In its decision, the HRC stated that Article 18 "evolves as that of any other guarantee of the Covenant over time in view of its text and purpose".[44]

Instrumental in the HRC's decision was the changing attitude to conscientious objection in the territories of State Parties to the *ICCPR*. It stated that *"an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service".*

In the case of marriage, many societal and legislative changes have also occurred to alter the husband-dominated model of marriage. The most significant of these — save for the various *Married Women's Property Acts*, which gave married women the power to acquire, hold, dispose of and deal with property on the same basis as others[45] — have occurred only in recent decades, both in Australia and elsewhere. In this country, prohibitions on rape in marriage,[46] the *Family Law Act 1975* (Cth) removal of non-consummation as a ground for nullity of marriage,[47] the removal of spousal immunity in contract and in tort,[48] and the enactment of the *Sex Discrimination Act 1984* (Cth), are but a few examples.

Considering this trend, the Castan Centre submits, that it is time that the discriminatory nature of the prohibition on same-sex marriage is acknowledged in international human rights law.

(b) The Broad Principle of Non-Discrimination – Article 26

While the *ICCPR* does not explicitly provide for the recognition of same-sex marriage, it does prohibit all forms of discrimination.[49] It prohibits discrimination in regard to the application of the rights listed within the treaty,[50] and also prohibits general discrimination.[51] According to the HRC, 'discrimination' as used in the *ICCPR* shall be understood to imply any distinction, exclusion, restriction or preference which is based on any ground … which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[52]

Article 26 states:

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[43] *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, UN Doc CCPR/C/88/D/1321-1322/2004, UN Human Rights Committee.
[44] Ibid 8.2.
[45] *Married Persons' Property Act 1986* (ACT); *Married Persons (Equality of Status) Act 1996* (NSW); *Married Persons (Equality of Status) Act 1989* (NT); *Married Women's Property Act 1890* (Qld); *Law of Property Act 1936* (SA); *Married Women's Property Act 1935* (Tas); *Marriage Act 1958* (Vic); *Married Women's Property Act 1892* (WA).
[46] See, eg, *R v L* (1991) 174 CLR 379, 389 (Mason CJ, Deane and Toohey JJ), 403 (Brennan J), 405 (Dawson J); *Criminal Law Consolidation Act 1935* (SA) s 73(3).
[47] *Family Law Act 1975 (Cth)* s 51; *Marriage Act 1961* (Cth) ss 23, 23A, 23B.
[48] *Family Law Act 1975 (Cth)* s119.
[49] *ICCPR, A*rts 2 and 23.
[50] Ibid, Art 2.
[51] Ibid, Art 26.
[52] *General Comment No. 18: Non-discrimination*, CCPR (37th session), (1989) [para 2] UN Doc HRI/GEN/1/Rev.1, 26 (1994) ('*General Comment 18*'). 6-7.

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[53]

The HRC has stated that Article 26 is itself an "autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities."[54] Thus, the prohibition against discrimination set out in Article 26 applies broadly to all state action.[55]

The HRC first declared in *Toonen v Australia,*[56] that 'in its view, the reference to "sex" in Article 26 and Article 2 [see below] should be taken as including sexual orientation'.[57] Thus, the prohibition against discrimination within the *ICCPR* extends to discrimination on the basis of sexual orientation.[58]

In 2000, the HRC confirmed this opinion in *Young v Australia.* Mr Young was denied a widow's pension under the *Veterans Entitlement Act 1986* (Cth).[59] Mr Young did not fall within the criteria of that Act as he was neither married to, nor a heterosexual de facto spouse of, the deceased. The HRC found that the Act, in excluding a member of a same-sex couple from benefits available to a member of an opposite-sex couple in the same circumstances, violated Article 26 of the *ICCPR*. The basis of the HRC's view was the protection that Article 26 provides to people discriminated against on the ground of their sexual orientation.

There are several distinctions between *Toonen* and *Young* on the one hand, and *Joslin* on the other. First, the HRC in *Joslin* was able to rely on an interpretation of another right (the Article 23 right to marriage) to avoid addressing the issue of discrimination under Article 26. Second, both *Toonen* (potential criminal sanction) and *Young* (denial of financial benefits) involved easily-quantifiable damage flowing from the discrimination, while in *Joslin* it was alleged that the discriminatory prohibition on same-sex marriage was itself the damage, rather than any financial loss. *Joslin* reflects the current situation in Australia, where the Commonwealth Government has afforded same-sex couples many of the benefits that heterosexual

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[53] Ibid.
[54] Ibid 12.
[55] Ibid. Note that The prohibition against discrimination is also enshrined in other international human rights instruments. For example, Article 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* requires States to take measures to eliminate discrimination against women in regards to marriage and family matters. It explicitly requires that women and men have an equal right to enter into marriage, and that they have the right to freely choose a spouse.
[56] *Toonen v Australia*, UN Human Rights Committee, UN Doc CCPR/c/50/D/488/1992, para 8.7.
[57] Ibid 8.7.
[58] The Committee on the Elimination of Discrimination against Women conducted a survey in 2003 to determine if other UN committees considered sexual orientation to be a component of the prohibited grounds of discrimination. It found that the Committee on Economic, Social and Cultural Rights, the Committee against Torture and the Committee on the Rights of the Child all supported this principle. See *Working Paper for the Committee on the Elimination of discrimination against Women on how the other treaty bodies have dealt with sexual orientation as it relates to discrimination and the enjoyment of human rights*, UN Doc CEDAW/2003/II/WP.3 ('*CEDAW Working Paper'*).
[59] *Veterans Entitlement Act 1986* (Cth).

couples receive in areas such as superannuation and taxation, but continue to deny same-sex couples the right to marry.[60]

Although there are still laws which discriminate against same-sex couples, such as adoption laws,[61] the Castan Centre argues for the recognition of same-sex marriage on the simple premise that the prohibition represents unlawful discrimination. Creating a similar institution for homosexual couples e.g. civil unions, that provided them with equivalent rights, would not remove the discrimination. As Justice Lafome, of the Ontario Supreme Court, has noted:[62] 'any "alternative" to marriage … simply offers the insult of formal equivalency without the promise of substantive equality."[63]

A number of other courts around the world have recently expressed similar sentiments, including the California Supreme Court, which, in 2008, ruled that giving the unions of same-sex couples a name that was separate and distinct from marriage, reduced gays to "second-class citizens".[64] This opinion was reiterated in the recent case of *Perry v Brown* where the Californian Court of Appeal held that denying same-sex couples the right to marry was "unconstitutional".[65] The case – now known as Hollingsworth v Perry – has been appealed to the Supreme Court and oral arguments will be heard shortly (see below). This echoes America's infamous 'Separate but Equal Doctrine',[66] which provided for the separation of black and white citizens through the establishment of parallel institutions and systems. The human right to marry cannot be fully realised if same-sex couples only receive a right to a restricted civil union. While equal access to some of the benefits and opportunities that married couples receive is a step in the right direction, incomplete-marriage models simply do not suffice.[67]

Considering:

(i) the semantic ambiguity of Article 23 discussed above;

(ii) the fact that prohibiting on same-sex couples marrying is clearly discriminatory; and

(iii) the changing attitudes to homosexual behaviour and marriage,

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[60] *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth). A total of 84 legislative provisions were amended. See Australian Human Rights Commission, *Same Sex: Same Entitlements* (2007) <http://www.hreoc.gov.au/human_rights/samesex/index.html> at 4 September 2009.

[61] See Adiva Sifris and Paula Gerber, 'Jack & Jill or Jack & Bill: The case for same-sex adoption' (2009) 34(3) *Alternative Law Journal* 168, which analyses the legislation in various Australian states and territories that prohibit same-sex couples from adopting children. See *also* Standing Committee on Law and Justice, Parliament of New South Wales, *Adoption by Same Sex-Couples*, *Repor*t no. 39 (2009) 115-116.

[62] *Halpern v. Canada (A.G.),* [2002] OJ No. 2714 (Ont. Div. Ct.).

[63] Peter Furness, 'Submission to the National inquiry Into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits' (2006) Australian Marriage Equality Inc. 2 <http://www.hreoc.gov.au/Human_RightS/samesex/inquiry/submissions/238.doc> at 1 September 2009.

[64] Re *Marriage Cases*, 43 Cal.4th 757, 845-847.

[65] *Perry v Brown,* 9th Circ No. 10-16696

[66] See *Plessy v Ferguson*, 163 US 537 (1896). This doctrine was eventually abolished in the United States in *Brown v Board of Education*, 357 US 483 (1954).

[67] Raimond Gaita, 'Same-sex Marriage-A Philosophical Perspective' (speech delivered at the Castan Centre for Human Rights Law Same-Sex Marriage Forum, Melbourne, 26 May 2005).

there is a strong likelihood of the HRC, in due course, holding that Article 23 protection must be extended to same-sex couples.

2.1.5 The Requirement to Extend Human Rights to All – Article 2

In addition to the broad prohibition on discrimination under Article 26, Article 2(1) of the *ICCPR* states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(1) is limited only to the human rights guaranteed in the *ICCPR*. As the text suggests, it requires the rights in the Covenant to be granted to all people without discrimination. It can therefore be argued, that State Parties are required to grant the right to marriage to all same-sex couples in order to fulfil their obligations under Article 2(1).

2.1.6 Best Interests of Children and Family

Article 10 of ICESCR states that:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Article 10 is recognition of the importance of the family unit in the rearing of children, and the importance of marriage to the family unit. Since the drafting of *ICESCR* in 1966, the rearing of children by same-sex couples has become common-place in many parts of the world. The HRC, in its *General Comment 19,*[68] acknowledged the changing nature of the family when it stated that *"the concept of the family may differ in some respects from State to State … and it is therefore not possible to give the concept a standard definition".*[69]

(a) The Growth in Same-Sex Parenting – Providing a Stable Home

Many countries already recognise that families include same-sex couples. Indeed, New Zealand specifically acknowledged this principle in *Joslin.*[70] With the advent of assisted reproductive technology, greater numbers of same-sex couples are providing for the nurture and support of children and forming their own family units. According to the 2011 Australian census, there were 33,714 same-sex de facto couples, 32% higher than the number in 2006. The census also found that children

[68] UN Treaty bodies publish their interpretation of the content of human rights provisions, in the form of General Comments.
[69] *General Comment No. 19: Protection of the Family, the right to marriage and equality of the spouses (Art. 23)*, Human Rights Committee, 39th sess, [2] UN Doc A/45/40(Vol.1)(Supp) (1990).
[70] *Joslin,* UN Doc CCPR/C/75/D/902/1999, 4.8.

were present in 3% of male same-sex households and 22% of female same-sex households.

According to Millbank, comprehensive studies in the United Kingdom and the United States over 20 years, have found that children of same-sex couples showed:

- no difference in terms of gender role or gender identity (and Patterson notes that in the more than 300 children studied there was absolutely no evidence of gender identity disorder);
- no difference in psychiatric state;
- no differences in levels of self esteem; and
- no differences in quality of friendships, popularity, sociability or social acceptance.[71]

Further, in studies which looked at adult children of lesbians and gays, there was no difference in the proportion of those children who identified as lesbian or gay themselves, when compared with children of similarly situated heterosexual parents.[72]

Gallagher and Baker refer to the address made by Judith Stacey to the U.S. Senate where, drawing on extensive research on gay parenting, she stated that:

> …the research on children raised by lesbian and gay parents demonstrates that these children do as well if not better than children raised by heterosexual parents. Specifically, the research demonstrates that children of same-sex couples are as emotionally healthy and socially adjusted and at least as educationally and socially successful as children raised by heterosexual parents. [73]

Millbank also refers to studies of children with lesbian parents that showed that children raised in families with no father were no more likely to develop behavioural problems, and felt equally accepted by their peers and mothers, as children in families that had a father.[74] Similarly, Meezan and Rauch, in their overview of four recent studies in the United States,[75] found that there was generally no developmental, social or emotional differences in children and adolescents that were raised by same-sex couples as opposed to those from heterosexual families

(b) The Importance of Same-sex Marriage for Children of Same-sex Couples

Gallagher and Baker argue that marriage can be an important institution for creating safe homes for raising well-adjusted children.[76] Their conclusion that "marriage is more than a private emotional relationship", but rather, "also a social good", reflects the fact that for many individuals, the choice to marry is about making a public

[71] Jenni Millbank, 'Same Sex Couples and Family Law' (Paper presented at the Third National Family Court of Australia Conference, Melbourne, 19–23 October 2001) 9.
[72] Ibid.
[73] Maggie Gallagher and Joshua K. Baker, *Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being* (2004) Institute for Marriage and Public Policy 2 <http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf > at 4 September 2009.
[74] Ibid.
[75] William Meezan and Jonathan Rauch, 'Gay Marriage, Same-Sex Parenting and America's Children' (2005) 15(2) *The Future of Children* 97.
[76] Gallagher and Baker, above n 72, 2.

declaration of one's love, and the desire to create a stable and loving home in which to raise children. This attitude is not limited to only heterosexual couples, and is one shared by many same-sex couples, who also wish to express their relationship through marriage.

The UN Committee on the Rights of the Child (CRC) has expressed concern that discrimination based on sexual orientation impacts adversely on the children of those discriminated against.[77] Article 2(1) of the *Convention of the Rights of a Child* (*CROC*), to which Australia is a party, provides that states must ensure that children enjoy their *CROC* rights without discrimination. More specifically, Article 2(2) creates a stand alone right that protects children against all forms of discrimination on the basis of the status of their parents, including their parents' sexual orientation.[78] Article 2(2) adopts a broad approach and requires State Parties to protect the child from discrimination, whether it be direct or indirect discrimination against children, their parents or legal guardian, regardless of whether such discrimination is related to a specific right under the *CROC*.[79]

Article 3(1) of the *CROC* also stipulates that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[80]

Recent research indicates that children whose same-sex parents do not enjoy the recognition and support that comes with marriage, may suffer psychological harm as a result of the prohibition on their parents marrying.[81] It has been noted that:

> Civil marriage is a legal status that promotes healthy families by conferring a powerful set of rights, benefits, and protections that cannot be obtained by other means. Civil marriage can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support. Legal recognition of a spouse can increase the ability of adult couples to provide and care for one another and fosters a nurturing and secure environment for their children. Children who are raised by civilly married parents benefit from the legal status granted to their parents.[82]

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[77] *CEDAW Working Paper*, 11 and 12; *Children Living in a World with AIDS*, excerpt from UN Doc CRC/C/79 Annex VI, 19th sess (1998), para 236.

[78] Human Rights & Equal Opportunities Commission. *Same-sex: Same Entitlements. National Enquiry into Discrimination against people in Same-sex Relationships: Financial & Work Related Entitlements and Benefits*, Final Report (2007) 48.

[79] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the convention on the rights of a child*, UNICEF (2002) 35.

[80] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990).

[81] Gerber, Paula 'The Best Interests of Children in Same-Sex Families' in Gerber, Paula and Sifris, Adiva (eds) *Current Trends in the Regulation of Same-Sex Relationships* (2010) Federation Press, Sydney.

[82] Pawelski, J. G., Perrin, E.C., Foy, J.M., Allen, C.E., Crawford, J.E., Del Monte, M., Kaufmann, M., Klein, J.D., Smith, K., Springer, S., Tanner, J.L. and Vickers, D.L. (2006) 'The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children' 118(1) *Pediatrics* 349, 350.

Not allowing same-sex couples to marry, means that any children they may have, are potentially subjected to inequities, indignities and insecurities that can flow from being part of a family that is not legally sanctioned by society.[83] Laws influence societal attitudes;[84] if legislation is discriminatory – as the ban on same-sex couples marrying is – it signals that it is acceptable for society to also discriminate against such families. As long as governments treat same-sex couples differently, there will be members of society who feel justified in stigmatising and marginalising the children that these couples have and raise.

Same-sex couples are just as capable as heterosexual couples of raising healthy, well-adjusted children, but they have to do so within discriminatory legal frameworks that operate contrary to the best interests of their children. Application of the best interests of the child principle, as articulated in Article 3 of CROC, requires the Government to acknowledge that more and more children are being raised in same-sex families, and these children are entitled to the same rights and benefits as children raised in 'traditional' family structures, i.e. that their parents be allowed to marry.[85]

Legalising same-sex marriage allows same-sex couples to conduct their familial affairs within the framework of a publicly recognised institution. This creates a more stable environment for children of a same-sex marriage, whose parents wish to solidify their relationship in law. The general consensus of social science research is that children of same-sex relationships do not suffer any disadvantage as the result of being raised by same-sex parents. However, they may suffer disadvantage by the fact that their parents cannot marry and their relationship is not legally recognised in the same was as heterosexual couples and parents.

Legal recognition of same-sex marriage would encourage the community to be more accepting of these couples, and their children, by removing the stigma of discrimination. This would in turn contribute to their personal well-being and reduce their social exclusion.

2.1.7 Privacy

Article 17 of the *ICCPR* states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation'.[86] Arguably, Article 17 provides for an individual to choose their own preferred expressions of sexual activity, and to establish private relationships. In the case of *Toonen,*[87] the HRC held that the concept of privacy in the *ICCPR* encompasses consensual sexual activity between adults. It is arguable that choosing to marry a person of the same-sex is a private matter, within the

[83] Snyder, A. M. 'The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children: In Reply' (2006) 118 *Pediatrics* 2259.
[84] Sifris, A. 'Lesbian Parenting in Australia: Demosprudence and Legal Change' in Gerber, P. and Sifris, A. (eds) *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, Sydney.

[85] Gerber, Paula 'The Best Interests of Children in Same-Sex Families' in Gerber, Paula and Sifris, Adiva (eds) *Current Trends in the Regulation of Same-Sex Relationships* (2010) Federation Press, Sydney.
[86] *ICCPR*, art 17.
[87] *Toonen v Australia*, United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992.

meaning of Article 17, and that by demanding that marriage take place between a man and a woman, the State must necessarily enquire into the sex of two consenting adults who wish to marry.[88]

Additionally, the United States Supreme Court, when concluding on the effect of its privacy precedents, held "that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."[89] As such, some have argued that the right to privacy actually places a distinct obligation on the state, not only not to interfere with a person's choice as to whom to marry, but also to provide marriage laws which render the sex of the parties immaterial.[90] Others have gone even further to argue that by the state requiring that marriage be between a man and woman, it is in fact imposing an identity on persons – namely that of heterosexuality – and that such an imposition is an interference with one's privacy rights.[91]

2.2 Same-Sex Marriage in Specific International Jurisdictions

To date, 11 countries in the world have legalised same-sex marriage and thereby afforded such couples equivalent legal rights and social recognition to heterosexual married couples (see table 1). In addition, regional governments in a number of countries including the United States of America, Brazil and Mexico permit marriage equality.

This number is continually increasing, with other nations including the UK, France, Uruguay and Colombia at advanced stages of considering similar legislation (see below).

Table 1: Countries in which same-sex marriage is legal

Country	Date of Legalisation
Netherlands	2001
Belgium	2003
Spain	2005
Canada	2005
South Africa	2006
Norway	2009
Sweden	2009
Portugal	2010

[88] It should be noted that New Zealand, in its submission to the HRC in *Joslin*, argued that "unlike the criminal legislation at issue in *Toonen v Australia*, the Marriage Act neither authorises intrusions into personal matters otherwise, nor interferes with the author's privacy or family life, nor generally targets the authors as members of a social group." The HRC did not address this argument in its consideration of the merits. See *Joslin,* UN Human Rights Committee, UN Doc CCPR/C/75/D/902/1999, 4.7.

[89] *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) at 2806 as cited in Hohengarten, William M, 'Same-Sex Marriage and the Right of Privacy', (1994) 103(6) *Yale Law Journal* 1495, 1526.

[90] Hohengarten, William M, 'Same-Sex Marriage and the Right of Privacy', (1994) 103(6) *Yale Law Journal* 1495, 1523.

[91] Rubenfeld, J, 'The Right of Privacy' (1989) 102 *Harvard Law Review* 737 as cited in Hohengarten, William M, 'Same-Sex Marriage and the Right of Privacy', (1994) 103(6) *Yale Law Journal* 1495, 1527.

Iceland	2010
Argentina	2010
Denmark	2012
USA (Massachusetts, Iowa, Connecticut, Maine, New Hampshire, Vermont, Maryland, New York, Washington State, Washington DC)	2004 onwards
Mexico (Mexico City)	2009
Brazil (Sao Paolo)	2011 onwards

2.2.1 The Netherlands

In 2001, the Netherlands became the first country to legalise same-sex marriage, thereby granting homosexual spouses the same legal rights and responsibilities as heterosexual spouses. In particular, homosexual spouses are bound by the same rules regarding spousal maintenance and children of the family.[92]

In a press release heralding the passing of the Dutch legislation, the Dutch Government acknowledged that, because the interpretation of 'marriage' in international treaties usually refers only to marriage between a man and a woman, same-sex marriages may not be recognised abroad.[93] It was a stark reminder of the international legal landscape at the time.

In the 12 months following the legalising of same-sex marriages in the Netherlands, 2,400 same-sex couples married. In the same period, there was a drop in the rate of heterosexual marriage in the Netherlands from 88,000 in 2000, to 82,000 in 2001.[94] While some critics of same-sex marriage have pointed to these statistics as 'proof' of the damaging effect of legalising same-sex marriage on the traditional institution of heterosexual marriage,[95] it appears that the phenomenon was just a one-year glitch. In particular, that many heterosexual couples waited until 2002 to take advantage of auspicious marriage dates arising in that year such as 2-2-2002, 20-02-2002, and 22-2-2002. This is supported by the fact that there were 1,700 more heterosexual marriages in February 2002 than February 2001, and in 2002, the number of marriages between men and women rose to 87,000.[96] Thus the 2001 decline in heterosexual marriages was due to unrelated factors.

In addition, two thirds of registered civil partnerships in the Netherlands are between heterosexual couples who have changed their status from married to civil partnership. It has been claimed that this trend is a form of protest by heterosexual couples to the introduction of same-sex marriage. However, Statistics Netherlands

[92] Netherlands Ministry of Justice, 'Upper house approves bill allowing same-sex marriages' (Press Release 19 December 2000) < http://english.justitie.nl/currenttopics/pressreleases/archives2000/-upper-House-approves-bill-allowing-same-sex-marriages.aspx> at 26 April 2012.
[93] Ibid.
[94] Ibid.
[95] Stanley Kurtz, 'Standing Out', *National Review Online* (online), 23 February 2006, <http://www.nationalreview.com/kurtz/kurtz200602230800.asp> at 26 April 2012.
[96] Statistics Netherlands. accessed at www.cbs.nl at 26 April 2012.

has asserted, that the main reason that couples change their partnership status is to avail themselves of the "flash divorce" option available to those in civil partnerships.[97]

2.2.2 Belgium

In 2003, Belgium became the second country to legalise same-sex marriage, with the bill passing through the Belgian Parliament by a large majority.[98] The bill was grounded in the desire to afford homosexual couples equal treatment in marriage. According to Fiorini, the drafters believed that "considering the evolution in public opinion in recent years, no objective ground remained that could possibly justify the prohibition of marriage between same-sex partners." [99]

The Belgian law is more modest than the Dutch law, particularly in matters relating to children. In particular, although same-sex couples are now free to marry in Belgium, adoption remains unavailable to them.

2.2.3 Spain

In 2005, Spain became the third country to legalise same-sex marriage.[100] Despite strong opposition from catholic conservatives, polls show that 55 - 65% of Spaniards support same-sex marriage.[101] The language adopted to reform marriage laws is the most liberal to date with same-sex married partners in Spain now enjoying all the rights and responsibilities of marriage.[102] Article 44 of the *Spanish Civil Code* provides "Marriage will have the same requirements and effects when both parties are the same or different sex."[103]

Spain has long standing political ties between church and State, and it is therefore not surprising that the Archbishop of Barcelona Cardinal Ricard Maria Carles Gordo strongly criticised the reforms. He compared the government workers who implemented the same-sex marriage laws to the government workers who opposed, but carried out the laws of Nazi Germany. In response, the Spanish President José Luis Rodríguez Zapatero said:

> There is no damage to marriage or to the family in allowing two people of the same-sex to get married. Rather, these citizens now have the ability to organize their lives according to marital and familial norms and demands. There is no threat to the institution of

[97] Ending marriage by changing it to a registered partnership and then dissolving the partnership: Definitions – Statistics Netherlands <www.cbs.nl/en-GB/menu/themas/bevolking/methoden/begrippen/default.htm?ConceptID=2685> at 26 April 2012.
[98] Aude Fiorini, 'New Belgium Law on Same Sex Marriage and its PIL Implications' (2003) 52 *International and Comparative Law Quarterly* 1039, 1039.
[99] Ibid 1042.
[100] 'Spanish MPs approve gay marriages' *BBC News* (online), 30 June 2005 <http://news.bbc.co.uk/2/hi/europe/4636133.stm> at 26 April 2012.
[101] Renwick McLean, 'Spain Legalises Same-sex Marriage' *New York Times* (New York), 30 June 2005, <http://www.nytimes.com/2005/06/30/international/europe/30cnd-spain.html> at 26 April 2012.
[102] Ibid.
[103] Civil Code of Spain – Book One, Part IV, Chapter II, Article 44, English translation available at: <http://translate.google.com.au/translate?hl=en&sl=es&u=http://noticias.juridicas.com/base_datos/Privado/cc.html&ei=DTyOSpiaOIHs6APF9NzlCg&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dhttp://noticias.juridicas.com/base_datos/Privado/cc.html%26hl%3Den%26sa%3DG>.

> marriage, but precisely the opposite: this law recognizes and values marriage.[104]

Despite the lack of support for same-sex relationships from most church groups, it has been found that some same-sex couples incorporated their spiritual/religious values into the understanding of their relationships.[105] Furthermore, such couples were likely to negotiate differences in religious beliefs within the relationship as opposed to foregoing religious beliefs.[106] In addition, though Spain has seen decreasing heterosexual marriage rates since the introduction of legal same-sex marriage, this decrease follows the general trend in Spain since 1976.[107] The same can be said for other parts of Europe where there has also been a 'declining interest' in the institution of marriage amongst heterosexual couples for years before the introduction of same-sex marriage legislation in some countries.[108]

2.2.4 Canada

In 2005, Canada enacted the nationwide *Civil Marriage Act* which legalised same-sex marriage. The relevant section of the Act pertaining to same-sex marriage reads "*Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.*"[109] According to Cotler, the enactment of the legislation was 'inspired by the [Canadian Charter of Rights and Freedoms], advanced by individuals and groups, [and] sanctioned by the courts'.[110]

The catalyst for the *Civil Marriage Act* was a series of judicial decisions at both the provincial and federal levels. In particular, two court rulings from British Columbia and Ontario[111] held that the limitation of marriage to heterosexual couples discriminated against gay and lesbian Canadians and that 'such discrimination was not justifiable in a free and democratic society'.[112] The Canadian Government decided not to appeal the decisions, and instead proposed the same-sex marriage bill.[113]

The Supreme Court of Canada gave a unanimous legal opinion as to the constitutionality of the proposed legislation legalising same-sex marriage and held that it was consistent with Charter guarantees such as equality rights and religious freedoms.[114] After the Canadian Parliament enacted the Charter and incorporated it as part of the Canadian Constitution, the courts of eight out of ten provinces and one

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[104] Andrew Shaw, 'Spain reinforces same-sex marriage' *MCV Magazine*, (Evolution Publishing) 3 June 2009 <http://mcv.e-p.net.au/news/spain-reinforces-same-sex-marriage-5566.html> at 1 September 2009.
[105] Sharon Scales Rostosky et al 'An exploration of lived religion in same-sex couples from Judeo-Christian traditions' (2008) 47(3) *Family Process* 389.
[106] Ibid.
[107] National Institute of Statistics Spain, 'Vital Statistics: Provisional Data 2008' (Press Release, 4 June 2009) <http://www.ine.es/en/prensa/np552_en.pdf> at 26 April 2012.
[108] Patrick Festy, 'Legal recognition of same-sex couples in Europe' (2006) 61 *Population* 417, 417.
[109] *Civil Marriage Act*, SC 2005, c 33.
[110] Irwin Cotler, 'Marriage in Canada – Evolution or revolution?' (2006) 44(1) *Family Court Review* 60, 62.
[111] *EGALE Canada Inc. v. Canada (Attorney Gen.)* [2001] 95 BCLR.3d 122; and *Halpern v. Toronto (Attorney Gen.)* [2002] 215 DLR (4th) 223 (Ont. Div. Ct.).
[112] Cotler, above n 103, 62-63.
[113] Ibid 63.
[114] Ibid.

out of three territories held that the requirement that parties to a marriage be of opposite sex was unconstitutional.[115]

2.2.5 South Africa

In 2006, South Africa enacted the *Civil Unions Act* legalising same-sex marriage. The Act followed a ruling by the South African Constitutional Court in December that a prohibition on same-sex couples marrying was unconstitutional.[116] The South African Constitution expressly prohibits discrimination on the basis of sexual orientation.[117] The case arose when Marie Adriaana Fourie and Cecilia Johanna Bonthuys were unable to register their intended marriage in Pretoria. They argued before the Constitutional Court, which held in their favour, that the common law definition of marriage should evolve such that marriage between homosexuals should be authorised. In a second case (*Equality Project)* heard together with *Fourie*, the 'Lesbian and Gay Equality Project' contended that the requirements in the *Marriage Act*, that a marriage officer must put to the parties the question 'do you take AB to be your law wife (or husband)?' was unconstitutional as it excluded same-sex marriage.[118] They also contended, similarly to Ms Fourie and Ms Bonthuys, that the common law definition of marriage should be changed.

The court unanimously held for Fourie, Bonthuys and the Equality Project. Sachs J noting that:

> South Africa has a multitude of family formations that are evolving rapidly as our society develops … there was an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians … there is no comprehensive legal regulation of the family law rights of gays and lesbians; and finally our constitution represents a radical rupture with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect for all.[119]

Sachs J went on to state that the exclusion of same-sex couples from marriage:

> represented a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples. The intangible damage to same-sex couples is as severe as the material deprivation…By both drawing on and reinforcing discriminatory social practices, the law has failed to secure for

[115] Ibid.
[116] *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19.
[117] *Constitution of the Republic of South Africa 1996.* Section 9(3).
[118] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others* (CCT 60/04) [2005] ZACC 19 – media summary <http://www.saflii.org/za/cases/ZACC/2005/19media.pdf> at 26 April 2012.
[119] Ibid.

> same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples.[120]

Under the *Civil Union Act*[121] a 'civil union' is defined as:

> …the voluntary union of two persons who are both 18 years of age or older. which is solemnised and registered by way of either marriage or a civil partnership in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others.

In direct response to *Equality Project* case, s11 of the Act provides that the marriage officer must put to each party the following question:

> Do you, **A.B.,** declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take **C.D.** as your lawful *spouse/civil partner*?"[122] (emphasis added)

Thus in South Africa, all references to gender have been removed from the language used by marriage officers.[123]

2.2.6 Norway

In January 2009, Norway became the sixth country in the world to legalise same-sex marriage.[124] The move led to gender neutral marriage law where under s1 of The Marriage Act "*Two persons of opposite sex or of the same-sex may contract marriage."*[125]

As part of the legislation, the Parliament repealed the *Registered Partnerships Act*, which had previously given same-sex couples the right to register their relationships.[126] The amending legislation also granted lesbian couples access to reproductive technologies, and all gay couples access to adoption, on the same basis as heterosexual couples.[127]

2.2.7 Sweden

Sweden legalised same-sex marriage in May 2009 by rendering the definition of marriage in its *Marriage Code* gender neutral.[128]

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[120] Ibid.
[121] No 17, of 2006: *Civil Union Act*, 2006 South Africa.
[122] Ibid s 11.
[123] For a comprehensive discussion of same-sex marriage in South Africa, see Heaton, Jacqueline 'The Right to Same-Sex Marriage in South Africa' in Gerber, Paula and Sifris, Adiva *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, Sydney.
[124] 'Norway adopts gay marriage law' *AFP* (online) 11 June 2008 <http://afp.google.com/article/ALeqM5jko_BIHizUFFqUtmEaUrAEoPXFWw> at 26 April 2012.
[125] ACT 1991-07-04 NO. 47: The Marriage Act, Norway.
[126] *A Marriage Act for All – Entering into Force,* Norway Ministry of Children and Equality <http://www.regjeringen.no/en/dep/bld/Topics/Homosexuality/a-marriage-act-for-all--entering-into-fo.html?id=509376# > at 26 April 2012.
[127] Ibid.
[128] *Gender-Neutral Marriage and Marriage Ceremonies* (Government Offices of Sweden Fact Sheet, May 2009).

Similar to Norway, the Swedish Government simultaneously ended the system of "registered partnerships", although those people who had previously registered their partnerships will remain registered until they either convert their partnership to marriage, or dissolve the partnership.[129]

In a fact sheet released to coincide with the change of laws, the Swedish Ministry of Justice addressed the issue of religious ceremonies, stating:

> A religious community or authorised wedding officiant (sic) within a religious community are not under any obligation to officiate at a marriage ceremony. This may mean that a marriage ceremony that a couple would like to have in a specific religious community cannot be held there, even if the couple fulfil the requirements of the Marriage Code. This may involve situations in which the religious beliefs of the religious community or the wedding officiant (sic) prevent a marriage because the parties do not practice the same religion or because one of the parties is divorced.

There was strong support for the legalisation of same-sex marriage in Sweden, with the Lutheran Church indicating its support, at minimum, for the blessing of same-sex unions in 2007[130] and six of the seven parliamentary parties ultimately supporting the bill.[131]

2.2.8 Portugal

After the government of Prime Minister José Sócrates introduced a bill in December 2009, same-sex marriage became legal in Portugal on 5 June 2010.[132] Although the bill was passed by the Assembly of the Republic in February 2010, the President sought the Constitutional Court's opinion on its constitutionality before he authorised it. The Constitutional Court, in line with its previous ruling in *Pires and Paixão*[133] held that the Portuguese constitution permits same-sex marriage but does not require it.[134]

2.2.9 Iceland

In June 2010, Iceland became the ninth country to legalise same-sex marriage, with legislation that provided a gender-neutral marriage definition being passed unanimously by the Icelandic parliament.[135]

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[129] Ibid.
[130] Peter Kenny "Disagreement on same-sex relations riles Lutheran body" *Christian Century*, 17 April 2007.
[131] 'Sweden Allows Same Sex Marriage', *BBC News* (online) 2 April 2009 <http://news.bbc.co.uk/2/hi/europe/7978495.stm> at 4 September 2009.
[132] Jamie Gardiner, 'Same-Sex Marriage: A Worldwide Trend?' in Gerber, Paula and Sifris, Adiva *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, Sydney.
[133] That case involved a lesbian couple, who, in 2006, were refused a marriage licence because they were both female. They commenced legal proceedings alleging that the marriage law restriction to mixed sex couples was unconstitutional. The Constitutional Court held, by three votes to two, that the Constitution permitted, but did not require, marriage equality (Judgment 359/2009, *Case 779/2007*).
[134] Judgment 121/2010, *Case 192/2010* and Jamie Gardiner, 'Same-Sex Marriage: A Worldwide Trend?' in Gerber, Paula and Sifris, Adiva *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, Sydney.
[135] Dwyer Arce 'Iceland parliament approves same-sex marriage legislation' June 11 2010 *Jurist*

As in Norway and Sweden, this legislation ended the system of registered partnerships that had been in place since 2006, and permitted same-sex couples who had previously registered their partnership to convert it into a marriage.[136] The Icelandic marriage law contains a religious exception that allows the Church of Iceland to decline to perform marriages between same-sex couples.[137]

The social acceptance of gay unions in Iceland is illustrated by the Fact that then-Prime Minister Johanna Sigurdardottir was elected in 2009 as the first openly gay head of state and married her partner in 2010.[138]

2.2.10 Argentina

Argentina became the first Latin American country to enact marriage equality legislation,[139] after a marathon thirteen hour debate in the Senate which saw the bill passing by a narrow vote of 33 in favour and 27 against. The bill was assented to by President Cristina Fernandez de Kirchner despite fierce debate and the Roman Catholic Church's strong disapproval.

2.2.11 Denmark

In June 2012, Denmark's parliament passed a law legalising same-sex marriage. The very progressive law gave couples the right to be married in any Church of Denmark church, but preserved the right of priests to decline to preside over gay marriages.[140]

Denmark's law was the end of a long journey, after it had become the first country in the world to permit civil unions for gay couples, in 1989.[141]

2.2.12 The United States of America

Nine of the fifty states, plus the District of Colombia, have legalised same-sex marriage, and the issue is under active consideration in several other states.

At the time of the 2012 Presidential election, four states considered the issue of marriage equality in voter-initiated referenda, known as ballot initiatives. In a whitewash, Maine, Maryland and Washington State voted to legalise same-sex marriage, while Minnesota rejected a proposal to restrict marriage to heterosexual relationships.[142] The initiatives in Maine, Maryland and Washington State

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[136] Jamie Gardiner, 'Same-Sex Marriage: A Worldwide Trend?' in Gerber, Paula and Sifris, Adiva *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, Sydney.
[137] Dwyer Arce 'Iceland parliament approves same-sex marriage legislation' June 11 2010 *Jurist*
[138] Jacey Fortin 'The Politics of Gay Marriage: Why Liberal Denmark Waited 23 Years for Legalization', International Business Times, 8 June 2012 <http://www.ibtimes.com/politics-gay-marriage-why-liberal-denmark-waited-23-years-legalization-705554> at 4 March 2013
[139] *Ley 26,618 of 21 July 2010.*
[140] Richard Orange 'Gay Danish couples win right to marry in church' *The Telegraph*, 7 June 2012 <http://www.telegraph.co.uk/news/worldnews/europe/denmark/9317447/Gay-Danish-couples-win-right-to-marry-in-church.html> at 4 March 2013
[141] 'Denmark approves same-sex marriage and church weddings' *BBC News*, 7 June 2012 http://www.bbc.co.uk/news/world-europe-18363157 at 4 March 2013
[142] Gizelle Lugo 'Same sex marriage ballot initiatives: voters in strong backing for equality' *The Guardian*, 7 November 2012 <http://www.guardian.co.uk/world/2012/nov/07/same-sex-marriage-ballot-initiatives> at 4 March 2013

represented a sea change as marriage equality was approved for the first time by popular vote.[143]

The decision of the United States Court of Appeal in *Perry v Brown* represents an important step forward in realising the right of same-sex couples to marry.[144] Proposition 8, a Californian initiative designed to prohibit same-sex couples from marrying, was found to be a violation of the Equal Protection Clause of the Federal Constitution, first by the US District Court, and then by the Ninth Circuit Court of Appeals.

The decision was based on the principle that people cannot use the initiative power to single out a disfavoured group for unequal treatment and strip them, without legitimate justification, of a right as important as the right to marry. The Court found that Proposition 8 had no purpose beyond lessening the status and human dignity of gays and lesbians in California, and officially reclassifying their relationships and families as inferior to those of heterosexual couples. This recognition of the harmful effects of such laws represents a powerful affirmation of the rights of all individuals to equality and equal protection.

The matter – now known as *Hollingsworth v Perry* – is currently under consideration by the Supreme Court, which is expected to hear oral arguments on 26 March 2013, and to rule later this year.[145]

2.2.13 Mexico

Same-sex marriage was legalised in Mexico City on 21 December 2009 by the Legislative Assembly and signed into law by Head of Government Marcelo Ebrard on 29 December 2009. The bill was assented to by a majority of 39 to 20 and changed the definition of marriage in the city's Civil Code from a "free union between a man and a woman to a "free union between two people".[146]

The law was opposed by the Catholic Church and conservative groups,147 with Mexico's centre-right wing government challenging the marriage law in the Supreme Court. The majority of the court held "that the Constitution did not define 'family' or restrict it as contended but, rather, protected all types of family and guaranteed the principle of equality."[148]

In December 2012, the Supreme Court invalidated Oaxaca State's law banning same-sex marriage. Further cases confirming this decision must be heard in the

[143] Elizabeth Diaz 'Ballot Initiatives: Roundup: What Won, What Lost' *Time*, 7 November 2012 <http://swampland.time.com/2012/11/07/ballot-initiatives-roundup-what-won-and-what-lost/> at 4 March 2013
[144] *Perry v Brown*, 9th Circ No. 10-16696 (2012).
[145] For updates on the status of *Hollingworth v Perry*, see http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/
[146] 'Associated Press (2009) 'Mexico CityLegalises same-sex marriage' *The Guardian* 22 December 2009 < http://www.guardian.co.uk/world/2009/dec/22/mexico-city-same-sex-marriage> at 19 March 2012.
[147] Gay Marriage Law Comes into Effect in Mexico City, Thursday 4 March 2010.
[148] Jamie Gardiner, 'Same-Sex Marriage: A Worldwide Trend?' in Gerber, Paula and Sifris, Adiva *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, Sydney.

state before marriage equality is legalised, however the Oaxaca State legislature is also considering a same-sex marriage law.[149]

2.2.14 Brazil

As a result of a Supreme Court decision in May 2011, same-sex couples are able to marry by way of a complicated two-step process. First they must register their civil union under existing legislation, then they may apply to a court to have their relationship "upgraded" to a marriage.[150]

In December 2012, a court in the Brazilian state of Sao Paulo ruled that same-sex couples could alter their civil unions to marriages without having to petition a court. As of February 2013, same-sex couples will be able register their marriages automatically with state notaries, effectively legalising marriage equality in Sao Paulo.[151]

2.2.15 Other Countries

United Kingdom

Since 2004, the United Kingdom has permitted same-sex couples to enter into civil unions. However, in March 2012, the Government announced its intention to open up the institution of marriage to same-sex couples, and the Home Office launched a 12-week consultation process to elicit views from the public.[152]

In February 2013, a second reading for the proposed *Marriage (Same Sex Couples) Bill 2012-13* passed in the House of Commons, after which the bill was referred to committee.[153] It is expected to be passed by the House later this year when it returns. However, it is unclear whether the law will pass through the House of Lords.[154]

France

In February 2013, after months of impassioned debate and large demonstrations for and against marriage equality, France's lower house passed the Marriage for All Act. The bill will now be debated by France's upper house, which is controlled by the

[149] Rachel Glickhouse 'Steps toward Same-Sex Marriage in Brail, Colombia, Mexico, the U.S., and Uruguay' *as-coa.org*, 20 December 2012
[150] Rachel Glickhouse 'Steps toward Same-Sex Marriage in Brail, Colombia, Mexico, the U.S., and Uruguay' *as-coa.org*, 20 December 2012
[151] 'Brazil: Court ruling effectively legalises same-sex marriage in Sao Paulo' *SDGLN.Com*, 27 December 2012
[152] 'Gay marriage: Government consultation begins', *BBC News,* 15 March 2012 <http://www.bbc.co.uk/news/uk-17375736> at 19 March 2012.
Alan Travis, 'Gay Marriage plans on track despite criticism', *The Guardian* , 15 March 2012, <http://www.guardian.co.uk/world/2012/mar/14/gay-marriage-government-public-consultation> at 19 March 2012.
[153] Nick Miller 'Gay marriage vote passes in UK' *Sydney Morning Herald,* 6 February 2013 <http://www.smh.com.au/world/gay-marriage-vote-passes-in-uk-20130206-2dx53.html> at 4 March 2013
[154] Robert Watts 'Tory rebels may scupper gay marriage in the Lords' *The Telegraph*, 9 February 2013 <http://www.telegraph.co.uk/news/politics/conservative/9859914/Tory-rebels-may-scupper-gay-marriage-in-the-Lords.html> at 4 March 2013

ruling Socialist Party and is expected to pass the bill into law. Public opinion polls in France consistently show that a majority of the public is in favour of marriage equality.[155]

Colombia

On 4 December 2012, a marriage equality bill passed the first vote in the lower house and is now due to be debated in the upper house. The bill follows a Constitutional Court decision in August 2011 requiring the parliament to pass a bill by mid 2013.[156]

Uruguay

In December 2012, Uruguay's lower house voted overwhelmingly in favour of a marriage equality bill, which is expected to also pass the upper house soon. The bill follows on from the legalisation of same-sex civil partnerships.[157]

2.2.16 European Court of Human Rights

The European Court of Human Rights in its decision regarding same-sex marriage, *Shalk & Kpof v Austria*,[158] failed to find that exclusion of same-sex marriage violated the European Convention on Human Rights (The Convention). However, the case provides some useful insights into the future direction of this area of law.

When discussing the right to marry under Article 12 of the Convention, the court observed that marriage has 'deep rooted social and cultural connotations which could differ largely from one society to another'. For this reason the court reiterated that it would not rush to substitute its own judgement in place of that of the national authorities, who are best placed to assess and respond to the needs of society.[159]

While the court consistently noted that the Convention is a living instrument which must be interpreted in light of present day conditions, it has only used this approach where it perceives a convergence of standards among member states. Therefore in the absence of consensus in regards to same-sex marriage, States will continue to enjoy a wide margin of appreciation and no obligation will be placed upon them to provide either a right of same-sex couples to marry, or an alternative means of legal recognition for same-sex relationships.[160]

Although the Court's decision contains progressive elements and hints at a future in which the right to marry is extended to same-sex couples, the current position in Europe is that the right of same-sex couples to marry is only enjoyed in countries, where a Government has decided, for itself, not to discriminate against same-sex couples.

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[155] 'France gay marriage: National Assembly backs law' *BBC News*, 12 February 2013 <http://bbc.co.uk/news/world-europe-21433198> at 4 March 2013
[156] Rachel Glickhouse 'Steps toward Same-Sex Marriage in Brail, Colombia, Mexico, the U.S., and Uruguay' *as-coa.org*, 20 December 2012
[157] Rachel Glickhouse 'Steps toward Same-Sex Marriage in Brail, Colombia, Mexico, the U.S., and Uruguay' *as-coa.org*, 20 December 2012
[158] *Shalk & Kpof v Austria* [2010] ECHR 1996.
[159] *B and L v United Kingdom* [2005] ECHR 584 Para 33.
[160] Ibid 46.

4. CONCLUSION

The social landscape, both in Australia and around the world, is changing rapidly in relation to same-sex marriage and gay rights in general. Support for same-sex marriage, and legal recognition of the institution, is growing, with recent polls in Australia showing that there is majority support for equal marriage rights for all.[161]

Further, not only are more countries recognising marriage equality, but so are regional governments within states, which often creates greater momentum for change. For instance, the list of US states recognising marriage equality is steadily growing and a second jurisdiction in Mexico – Oaxaca State – is on the verge of recognising the right there. In Australia, we acknowledge that a state-based law would not be guaranteed to survive a constitutional challenge, however there are strong arguments in favour of such an approach and – as has been the case elsewhere – a NSW law would almost certainly act as a catalyst for further recognition of marriage equality in Australia.

In international law, it is likely that this change in societal attitudes will be reflected in a move away from the reliance on the traditional interpretation of the right to marriage in the ambiguously-worded Article 23 of the *ICCPR*, in favour of an interpretation which opens the institution of marriage to all couples, in line with the anti-discrimination provisions of the *ICCPR* and other international instruments.

The issue of same-sex marriage is one, ultimately of equality and non-discrimination. No longer can we justify the "separate but equal" regimes currently in place. The Castan Centre therefore requests that consistent with human rights principles, and international trends, the Committee recommend the enactment of a marriage equality law in NSW.

[161] 'Majority Support Same-Sex Marriage – Poll', *AAP,* 21 June 2007 <*www.news.com.au/story/0,23599,21942737-1702,00.html*> at 1 September 2009.
'New poll backs same-sex marriage', *Sydney Morning Herald*, 13 February 2012 <http://www.smh.com.au/national/new-poll-backs-samesex-marriage-20120213-1t1h4.html> at 13 March 2012.