

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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Inquiry into Same Sex Marriage Law in NSW

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO
THE NSW LEGISLATIVE COUNCIL STANDING COMMITTEE ON
SOCIAL ISSUES**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the New South Wales (NSW) Legislative Council Standing Committee on Social Issues Inquiry into Same Sex Marriage Law in NSW (Inquiry).
2. The Inquiry was established on 6 December 2012 to inquire and report into legal issues surrounding the passing of marriage laws at a State level. The terms of reference were referred by the Premier Hon Barry O'Farrell MP.
3. In addition, a cross-party working group of NSW Members of Parliament (MPs) (Marriage Working Group) convened in 2012 to explore options for progressing marriage equality at the state level. On 20 November 2012 three MPs from this working group gave notice in the Legislative Council of a 'State Marriage Equality Bill'. On 13 February 2012 the Marriage Working Group provided a Consultation Draft of the State Marriage Equality Bill 2013 (the Bill) to the Inquiry. In doing so it also advised of its intention to introduce the Bill into the Legislative Council in the coming months.¹ The objects of the Bill include providing for marriage between adults of the same-sex.
4. In this submission the Commission considers the potential issues that may arise under federal law as a result of a same-sex couple marrying under a state marriage law. It also considers options for ensuring all people who cannot marry under the *Marriage Act 1961* (Cth) (Commonwealth Marriage Act) are included in a state marriage regime. The Commission defers to others on issues of constitutionality and recognition of same-sex couples in NSW law and other state jurisdictions.

2 Summary

5. The Commission strongly supports marriage equality and has consistently advocated for amendments to the Commonwealth Marriage Act. The Commission believes that amending the Commonwealth Marriage Act is the best way to achieve marriage equality.
6. The Commission is encouraged by ongoing consideration, including at the state and territory level, to progress marriage equality in Australia. These efforts would allow same-sex couples the opportunity to solemnise their relationship as a marriage in front of family and friends, overseen by an authorised celebrant.
7. Ultimately, the Commission is of the view that any steps taken at the state level must be an interim step towards achieving marriage equality in the Commonwealth Marriage Act. Further, state parliaments should ensure that their efforts do not inadvertently have a negative impact on recent advances under federal law in recognising same-sex couples.

8. A state marriage is unlikely to be recognised as a legal marriage under federal laws. Given this, it appears that under the Bill NSW same-sex couples will still need to prove their de facto status in order to be recognised as a couple.
9. To ensure that same-sex couples can continue to be recognised under federal law as de facto couples, for example for the purposes of accessing the property division regime of the Family Court, the NSW Parliament should ensure there are no barriers to a couple being recognised as de facto in federal laws.
10. Further, given the complexities identified below, the introduction of state marriage will require complementary education to ensure same-sex couples understand what a state marriage is and understand how their relationships will be recognised under federal laws and in other jurisdictions.
11. Finally the Bill appears to exclude people who are not legally recognised as a man or a woman. This means that some intersex people may not be able to marry. To address this exclusion, the Bill could be amended to include all marriages that are not between a man and a woman.

3 Recommendations

12. The Australian Human Rights Commission recommends:

Recommendation 1: That the State Marriage Equality Bill 2013 be amended to ensure there are no barriers to the full recognition of couples, who marry under the Bill, as de facto couples in federal laws, including by:

- clarifying in the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) that a de facto relationship includes marriages entered into under the State Marriage Equality Bill 2013
- providing for marriages entered into under the State Marriage Equality Bill 2013 to be registered as relationships under the *Relationship Registers Act 2010* (NSW) and amending the *Relationship Registers Act 2010* so a state marriage is not a bar to registration.

Recommendation 2: That a complementary education campaign is developed to ensure same-sex couples understand what the institution of 'state marriage' means and understand how their relationships will be recognised in federal laws and in other jurisdictions.

Recommendation 3: That the definition of marriage in the State Marriage Equality Bill 2013 be broadened to be inclusive of those couples who would otherwise meet the requirements to marry under the Commonwealth Marriage Act but are excluded by the requirement to be a 'man and a woman'.

Recommendation 4: That the NSW Parliament should give consideration to amending section 32B of the *Births, Deaths and Marriages Act 1995* (NSW) to

remove the requirement that a person be unmarried in order to change the sex on their birth certificate.

4 Achieving marriage equality in Australia

13. The Commission strongly supports marriage equality for all couples, regardless of sex, sexual orientation or gender identity. The Commission has provided submissions in support of marriage equality to federal parliamentary inquiries² and in September 2012 released a position paper supporting marriage equality on the basis of the human rights principle of equality (**Appendix A**). The Commission believes that the best way to achieve this is through amendment to the Commonwealth Marriage Act. This view is shared by the Marriage Working Group.³
14. However, the Commission is encouraged by ongoing efforts at the state and territory level about how to progress marriage equality in Australia, including the steps taken by the Premier and the Marriage Working Group to consider options for promoting such equality in NSW. The passage of the Bill in NSW would demonstrate that the NSW Parliament respects and values the relationships of all people in NSW and that it is taking the steps, within its power, to afford same-sex couples the option to marry. The Bill will also provide same-sex couples with the opportunity to solemnise their relationship as a marriage in front of family and friends, overseen by an authorised celebrant.
15. Ultimately, the Commission is of the view that any steps taken at the state level must be an interim step towards achieving marriage equality in the Commonwealth Marriage Act. Further, state parliaments should ensure that their efforts do not inadvertently have a negative impact on recent advances under federal law in recognising same-sex couples.⁴

5 Equality of same-sex couples in federal laws

16. Relationships in federal law are generally recognised as either marriages or de facto relationships.⁵ A de facto relationship is defined to include couples who are 'not legally married to each other'.⁶ In 2008, in response to *Same-Sex: Same Entitlements*⁷, the federal Parliament amended most federal legislation to remove discrimination against same-sex couples and their children. These reforms ensured that same-sex cohabiting couples are recognised as de facto partners in almost all federal laws.
17. The 2008 reforms were a significant step towards equality for people in same-sex relationships in federal law. However the Commonwealth 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 as a marriage.

5.1 Will NSW married couples be recognised as legally married under federal law?

18. It is unlikely that a couple married under the Bill would be recognised as legally married under federal law. Under the Commonwealth Marriage Act marriage is defined as ‘the union of a man and a woman’.⁸ This definition clearly expresses Parliament’s intention as to what will be recognised as a marriage at the federal level and raises the possibility of inconsistency between the laws and therefore the potential application of s 109 of the Constitution.
19. Putting the inconsistency issue aside, although the Australian Constitution requires that ‘[f]ull faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceeding of every State’⁹ the application of this section is not certain. There is little Australian jurisprudence on the matter, although the High Court has found in obiter that s 118 may ‘preclude the refusal of one State to apply the law of another on the grounds of public policy where the law of that other State is otherwise applicable’.¹⁰ The Minister outlined in his Second Reading Speech at the time of the Amendment Act that the policy of the Commonwealth is to exclude same-sex couples from the definition of marriage and to ‘provide certainty to all Australians about the meaning of marriage into the future’.¹¹
20. While this requires further constitutional consideration, it appears that without federal amendment it is unlikely that a couple married under state law will be recognised as married under federal law.

5.2 Will NSW married couples be considered as de facto couples under federal law?

21. Given a state marriage is unlikely to be recognised as a legal marriage under federal laws, same-sex couples will still need to prove their de facto status in order to be recognised as a couple.
22. De facto relationships are not automatically recognised. Both opposite-sex and same-sex couples who are not married are required to satisfy that they are in a committed relationship in line with established criteria.¹² Since the 2008 reforms same-sex couples in NSW can be recognised as de facto couples in federal laws.

(a) The referral of powers

23. However, some submissions¹³ have questioned the legal capacity for the Commonwealth to recognise same-sex couples as de facto if they marry under the Bill. This is because of the definition of de facto relationship in the NSW referral of powers. The Commonwealth’s power to make laws with respect to same-sex de facto relationships is derived from a referral of power in the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW). Section 3 of this Act provides that a de facto relationship means ‘a marriage-like relationship (other than a legal marriage)

between two persons'. The Bill defines 'lawfully married' as including a same-sex marriage for the purposes of NSW law. To ensure that same-sex couples can continue to be recognised under federal law, for example for the purposes of accessing the property division regime of the Family Court, the NSW Parliament should clarify that in its referral of powers a de facto relationship includes a marriage under the Bill.

(b) *The NSW Relationship Register*

24. The other key issue to consider is the exclusion of couples in a same-sex marriage from the NSW Relationship Register. The evidence of a registered relationship may be persuasive in establishing a de facto relationship in federal law.¹⁴ In other cases the registration of a relationship may provide for automatic recognition as a de facto couple in federal laws¹⁵ or waive time periods for establishing a de facto relationship.¹⁶
25. However, as the note to section 5 of the Bill indicates, the *Relationships Register Act 2010* provides that the registration is revoked once a person is married. This will include a state marriage due to proposed amendments to the *Interpretation Act 1987* (NSW). Therefore, unless this is amended a same-sex married couple will not be able to rely on registration to prove their relationship and will need to rely on the other criteria. This means that married same-sex couples may be in a more disadvantageous position than they would be if they didn't marry.
26. To ensure the 2008 reforms apply to state marriages, the Bill should be amended so that a state marriage is automatically registered under the Relationships Register Act. The Relationships Register Act should also be amended so that such a marriage is not a bar to registration.

(c) *What if the state marriage law is invalid?*

27. The Commission defers to constitutional experts on whether a state can constitutionally legislate for marriage. Ultimately it is a question which will remain unanswered until the High Court rules on a challenge brought before it. However the NSW Parliament needs to consider the impact on couples married under a state law if it is subsequently found to be constitutionally invalid.
28. If the state marriage law is found to be invalid, anything done pursuant to it will also be invalid. Therefore any state marriages authorised under it will also be invalid. However, other orders such as those relating to property division, will have been made under federal legislation such as the Family Law Act on the basis of their de facto status and not their state marriage. That is, at the federal level at least, it appears that if the law is invalidated then a couple married under the Bill will be in the same position as they were before they were married. However the NSW Parliament should give consideration to whether any other orders could be made in which the court relies entirely on the basis of the existence of the marriage. These orders would be invalid.

6 Educating the public about state marriage

29. This submission has not considered how NSW same-sex married couples will be recognised in NSW or other states, however it appears that in federal law these couples will only be recognised as de facto couples. This means that while those couples who want to marry, will be able to in name, the Bill will not afford same-sex couples automatic recognition of their relationship as a marriage in federal laws.
30. Given these complexities, the introduction of state marriage will require complementary education to ensure same-sex couples understand what a state marriage is and understand how their relationships will be recognised under federal laws and in other jurisdictions.

7 Marriage equality, gender identity and intersex

7.1 Validity of marriages

31. In *Re Kevin (Validity of Marriage of Transsexual)*¹⁷ the Court held that a transgender person can be recognised in marriage law as the 'opposite' gender to their sex assigned at birth, because the relevant time to determine a person's sex is the time of the marriage.¹⁸ The decision also found that marriage is between a man and a woman.¹⁹
32. This means that for an intersex person to be entitled to marry, they will need to be recognised as either a man or a woman at the time of the marriage. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex.
33. In the Bill a note confirms the intention to include people who are of indeterminate sex but who are recognised as being of the same sex as the other person in the marriage.²⁰ This means that if an intersex person has been legally recognised as a man or woman they can marry a person of the same sex. By implication, those who are not legally recognised as a man or a woman cannot marry.
34. An intersex person can now elect to have an 'X' (indeterminate/unspecified/intersex) on their passport instead of 'M' (male) or 'F' (female).²¹ The Commission has heard evidence of a state registry of births, deaths and marriages amending an intersex person's birth certificate to leave the 'sex marker' blank or specify 'indeterminate sex'. Under the notice requirements of the Bill parties intending to marry are required to provide a birth certificate or passport as evidence of the birth of the parties.²² To address this exclusion, the definition of marriage in the Bill should be broadened to be inclusive of those couples who would otherwise meet the requirements to marry under the Commonwealth Marriage Act but are excluded by the requirement to be a 'man and a woman'

7.2 The ‘requirement to divorce’

35. There is an additional barrier for transgender and intersex people who are already married. Under Section 32B of the *Births, Deaths and Marriages Registration Act 1995* (NSW) (BDMR Act) a married person (as currently defined under the Commonwealth Marriage Act) cannot apply to have their sex changed on their birth certificate even if the person meets all other criteria. This means that a married person will not be able to amend their birth certificate to represent their true sex or gender identity unless they first obtain a divorce.²³
36. The Commission previously highlighted this issue in its Sex Files Report.²⁴ The Report noted the rationale for the discriminatory treatment under the BDMR Act appears to be the need to avoid a potential conflict with the requirement under the Commonwealth Marriage Act that a marriage must be between a man and a woman.²⁵ That is, it could appear to be a ‘same-sex marriage’.²⁶ Whether this would affect the validity of the marriage under the Commonwealth Marriage Act has not been squarely considered by the courts however in *Re Kevin (Validity of Marriage of Transsexual)* the Court held that ‘[f]or the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage’.²⁷
37. The requirement in the BDMR Act will also impact on people who marry under the Bill given the proposed amendments to the *Interpretation Act 1987* (NSW). The NSW Parliament should give consideration to amending s 32B of the BDMR Act to remove the requirement to be unmarried.

¹ State Parliamentary Marriage Equality Working Group, *Submission to the NSW Legislative Council Standing Committee on Social Issues Inquiry into Same Sex Marriage Law in NSW* (13 February 2013).

² See, for example, Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Marriage Equality Amendment Bill 2010* (29 March 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120329_marriageEquality.html (viewed 27 February 2012).

³ NSW Marriage Equality, *Why state based marriage equality?*, <http://nswmarriageequality.com.au/> (viewed 26 February 2013).

⁴ In 2008 federal reforms established equality for same-sex couples in de facto recognition: Australian Human Rights Commission, *Same-Sex: Same Entitlements – National; Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007). At: http://www.humanrights.gov.au/human_rights/samesex/index.html (viewed 11 March 2013).

⁵ For a general discussion, see G Kassisieh, ‘Same-sex couples and their families’ in *The Law Handbook: Your practical guide to the law in New South Wales* (2012), s 37.20.

⁶ See for example the definition of de facto relationship in *Acts Interpretation Act 1901* (Cth), s 2F(1) and *Family Law Act 1975* (Cth), s 4AA. Definitions of de facto relationship may change slightly in different Acts however this element is consistent.

⁷ The Commission’s 2007 report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits: Australian Human Rights Commission, *Same-Sex: Same Entitlements – National; Inquiry into Discrimination against People in*

Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (2007). At: http://www.humanrights.gov.au/human_rights/samesex/index.html (viewed 11 March 2013).

⁸ *Marriage Act 1961* (Cth), s 5.

⁹ *Constitution of Australia Act* (Cth), s 118.

¹⁰ *Pfeiffer v Rogerson* 203 CLR 503 at 533 [63]-[5].

¹¹ Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, p 26503 (The Hon Ian McDonald MP, Minister for Fisheries, Forestry and Conservation).

¹² See for example *Acts Interpretation Act 1901* (Cth), s 2F(1) and *Family Law Act 1975* (Cth), s 4AA.

¹³ For example, Professor Patrick Parkinson AM, *Submission to the NSW Legislative Council Social Issues Committee Inquiry into Same sex marriage law in NSW* (2 February 2013), pp 14–16.

¹⁴ See for example, *Family Law Act 1975* (Cth), s 4AA(2)(g) and s 90SB(d) and for a general discussion, see G Kassisi, 'Same-sex couples and their families' in *The Law Handbook: Your practical guide to the law in New South Wales* (2012), s 37.30.

¹⁵ See for example *Social Security Act 1991* (Cth), s 4(2)(aa).

¹⁶ See for example *Family Law Act 1975* (Cth), s 90SB.

¹⁷ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

¹⁸ The Commission acknowledges the significance of terminology and that inappropriate terminology can be disempowering. The Commission is also conscious that not all gender identities exist in the binary of male and female. Some people may describe themselves as pan-gendered, androgynous, intergender or genderqueer. However the Commission has used 'opposite' in this context because the Court in *Re Kevin* considered the recognition of a person to marry within the binary of man and woman.

¹⁹ The Court found that '[u]nless the context requires a different interpretation, the words "man" and "woman" when used in legislation have their ordinary contemporary meaning according to Australian usage': *Re Kevin Attorney-General (Cth) v Kevin* 172 FLR 300 at 364. The Court also considered the factors for determining if Kevin was a man for these purposes: at 364.

²⁰ State Marriage Equality Bill 2013 (NSW), clause 3(1).

²¹ See Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants*, <https://www.passports.gov.au/web/sexgenderapplicants.aspx> (viewed 5 March 2013).

²² State Marriage Equality Bill 2013 (NSW), clause 8(1)(b).

²³ For further discussion see Australian Human Rights Commission, *The sex and gender diversity project: Concluding paper* (2009), ss 9,10. At: http://humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 4 March 2013).

²⁴ Australian Human Rights Commission, *The sex and gender diversity project Concluding paper* (2009), s 10.3. At: http://humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 11 March 2013).

²⁵ For an example of these concerns in Victoria see *Hansard*, Legislative Assembly, Robert Hulls, 11 May 2004, p 1107, quoted in *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; [2007] FCAFC 14 at [69] (Kenny J).

²⁶ For further discussion see Australian Human Rights Commission, *The sex and gender diversity project Concluding paper* (2009), s 10.3. At: http://humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 11 March 2013).

²⁷ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, [330].

APPENDIX A



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’.²⁸ 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.²⁹

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 level³⁰ as has the ACT Government.³¹

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.³²

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.³³ 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.³⁴

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.³⁵

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.³⁶

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'.³⁷ 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.³⁸

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.³⁹

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)*⁴⁰, 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.⁴¹ 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'.⁴²

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'.⁴³

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.⁴⁴ A marriage equality bill has passed its first reading in the New Zealand Parliament⁴⁵, and the Scottish and French Governments have also indicated they will introduce marriage equality bills.⁴⁶

In *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs (Fourie)*⁴⁷, the South African Constitutional Court declined to follow the approach of the Human Rights Committee in *Joslin*.⁴⁸ 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'⁴⁹ before observing 'rights, by their nature, will atrophy if they are frozen'.⁵⁰ 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'.⁵¹

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 to 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.⁵² 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'.⁵³ 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.⁵⁴

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.⁵⁵

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.⁵⁶ The proposed amendments to the Marriage Act would provide same-sex couples with access to civil marriage only and the would not affect the position of religious ministers under the Marriage Act.⁵⁷

The South African Constitutional Court has directly addressed this issue in *Fourie*.⁵⁸ It has also been addressed in Canada by the British Columbia Court of Appeal.⁵⁹ The Court in *Halpern* concluded that in considering marriage as a legal institution, it does not interfere with the 'religious institution of marriage'.⁶⁰

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.

²⁸ *Marriage Act 1961* (Cth), s 5.

²⁹ 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).

³⁰ 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).

³¹ 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).

³² See Australian Human Rights Commission, *Submissions*, <http://www.humanrights.gov.au/legal/submissions/index.html> (viewed 10 September 2012).

³³ 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.

³⁴ 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.

³⁵ Human Rights Committee, *General Comment No. 18 – Non-discrimination*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (1989), para 12.

³⁶ Human Rights Committee, *General Comment No. 18 – Non-discrimination*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (1989), para 10.

³⁷ 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.

³⁸ 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.

³⁹ 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.

⁴⁰ Human Rights Committee, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc CCPR/C/75/D/902/1999 (2002).

⁴¹ Human Rights Committee, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (2002), [8.2]–[8.3].

⁴² *Schalk and Kopf v Austria* [2010] ECHR 30141/04, [61].

⁴³ 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.

⁴⁴ 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 (viewed 11 September 2012).

⁴⁵ 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).

⁴⁶ ‘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=googlenews_ws (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).

⁴⁷ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19.

⁴⁸ *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].

⁴⁹ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [100].

⁵⁰ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [102].

⁵¹ 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.

⁵² *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA); *Barbeau v British Columbia (A-G)* 2003 BCCA 251.

⁵³ *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA), [148].

⁵⁴ *Perry et al v Schwarzenegger et al* (2010) 3:09-cv-02292.

⁵⁵ 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).

⁵⁶ *Marriage Act 1961* (Cth), s 47.

⁵⁷ 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.

⁵⁸ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [97].

⁵⁹ *Barbeau v British Columbia (A-G)* 2003 BCCA 251.

⁶⁰ *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA), [53].