Further Submissions to Select Committee on the

Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

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Contents

1. These further submissions to the *Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* complement my earlier written submissions of 10 January 2017 and my verbal submissions of 25 January 2017. In my earlier written submissions I stated that 'For the foregoing reasons I do not consider that the position on the Australian Human Rights Commission as stated in its Position Paper on Marriage Equality reflects a sufficient, nor accurate account of the applicable human rights law.' Having had the benefit of reading the Australian Human Rights Commission's (AHRC) submissions to the current Inquiry, these further submissions elaborate on the reasons why, in my respectful opinion, the AHRC submissions are not accurate.

UN General Comment 18

2. In my verbal submissions to the Inquiry I was asked by Senator Fawcett to respond to a position taken by the AHRC in relation to United Nations General Comment 18. My response to Senator Fawcett's question was to highlight that the United Nations Human Rights Committee (UNHRC) had determined that there was no inequality in respect of the question of marriage because the definitional boundary did not include persons of the same sex. It flows from that analysis that General Comment 18, which concerns Article 26, does not apply to the distinct construct of marriage.

3. I also noted that the European Court of Human Rights (ECHR) had held that the important claims of equality meant that same sex relationships should be guaranteed access to equality in State recognition and in access to entitlement. However, the test that differing constructs be of a 'relevantly similar situation' in order to enliven equality measures did not extend to the inclusion of same sex couples in the definition of marriage. The right to equality in 'legal recognition and protection of their relationship' was met by forms of recognition other than marriage.

Joslin's Case

4. *Joslin et al. v. New Zealand*[1] *(Joslin's case)* is the only decision of the Committee that has considered the question of same sex marriage under the *International Covenant on Civil and Political Rights* (ICCPR or Covenant). In its submission to the Inquiry, the AHRC makes the following claim (at paragraph 47) in respect of *Joslin's case:*

> The Committee did not consider the compatibility of a restrictive reading of the right to marry with the rights to non-discrimination and equality in articles 2 and 26 of the ICCPR.

5. As shown by the following extract from the Committee's reasoning that is not an accurate statement:

> 8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

[1] Human Rights Committee, Decision Communication No. 902.1999, 75th sess, (*Joslin et. al v New Zealand*).

6. Contrary to the AHRC's assertion, the UNHCR clearly states that it had reference to Article 26 in its reasoning. The Committee's specific reference to Article 26 clarifies that the continuing recognition of marriage as between a man and a woman does not amount to discrimination. The protection against discrimination was accordingly not violated.

7. During the Inquiry hearing Australian Lawyers for Human Rights, with whom I appeared, asserted the proposition that the *Joslin case* 'was a long time ago' as one of the bases for their conclusion that human rights equality protections extend to the definition of marriage. *Joslin's case* was decided seventeen years ago. In their study of the average age of judicial authorities cited by courts of appeal in an American context, Landes and Posner found that the unweighted average age to be 18.5 years, and the weighted average age to be 19.1 years.[2] That is, half of the precedents cited were dated prior to those timeframes. Similar conclusions may be observed from the more recent analysis of Fausten, Neilsen and Smyth in their analysis of Victorian Court of Appeal judgements.[3] The proposition that an authority of seventeen years of age can be ignored as 'a long time ago' is not supportable. This is even more so the case in the context of a jurisdiction where no subsequent authority has issued.

European Jurisprudence

8. The AHRC makes the following statement as authority for the proposition (at paragraph 48) that 'the principles of equality and non-discrimination, as set out in articles 2 and 26 of the ICCPR, support the expansion of the definition of marriage to "2 people"':

> the European Court of Human Rights found that 'it would no longer consider that the right to marry enshrined in article 12 [of the European Convention on Human Rights] must in all circumstances be limited to marriage between two persons of the opposite sex.

The case cited by the AHRC for this proposition is *Schalk and Kopf v Austria (Schalk and Kopf).*[4]

9. There are several reasons why this statement is not accurate. The first point to make is that, whilst the jurisprudence of the ECHR may be referenced as informative in interpreting human rights principles, Australia has ratified the ICCPR, not the *European Convention on Human Rights*. That Convention, and the decisions of the ECHR made under it, are not binding upon Australia. Thus it is only *Joslin's case* which exists as authority relevant to Australia in respect of the question of same sex marriage. That authority is not displaced by the subsequent decisions of the ECHR.

10. It is important to note in this context that Australia's ratification of the ICCPR:
    a. identifies an intention on the part of the Commonwealth executive to implement and to be bound by the provisions of the Covenant;
    b. by the *Teoh*[5] principles of interpretation, allows Australian Courts interpreting domestic law to have reference to the ICCPR where ambiguity arises; and

[2] Landes, William M. and Posner, Richard. "Legal Precedent: A Theoretical and Empirical Analysis." *Journal of Law and Economics*, (September 1976).
[3] Fausten, Dietrich; Nielsen, Ingrid; Smyth, Russell "A Century of Citation Practice on the Supreme Court of Victoria" (2007) 31(3) *Melbourne University Law Review* 733.
[4] *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010).
[5] As set out by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

c. means that a breach of the Covenant provides grounds for complaint to the Human Rights Committee once domestic avenues of appeal have been exhausted.

11. The second reason the reliance upon *Schalk and Kopf* is misplaced is that in that case, the basis for the ECHR's finding 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' was the provisions of the *Charter of Fundamental Rights of the European Union 2000*. The provision concerning marriage in that Charter (Article 9) does not contain gender specific references,[6] as does the equivalent Article (Article 12) in the European Convention on Human Rights.[7] Although the European Union Charter establishes a completely distinct jurisdiction, is not binding on States Parties to the Convention, and has a distinct State membership, the ECHR saw fit to reference the Charter in interpreting the Convention. The Court was divided over the issue, with the decision only narrowly passing on a 4-3 majority.

12. Leaving the merits of the conclusion of the Court on that matter aside, the point in our current context is that, Australia being subject to the ICCPR, is not subject to any subsequent definition of marriage that removes the reference to men and women. The recasting of the definition in a subsequent Charter was the reason for the conclusion of the ECHR that marriage no longer is to be considered to be between a man and a woman. Such does not apply to parties to the ICCPR.

13. Similarly the Australian Lawyers for Human Rights, with whom I appeared before the Inquiry, state in their submissions that *Joslin's case*:

> appears to have been superseded by cases such as *Schalk and Kopf v Austria* [2010] ECHR 30141/04, [61] where the European Court of Human Rights found that 'it would no longer consider that the right to marry …. Must in all circumstances be limited to marriage between two persons of the opposite sex'---

14. With respect, as Australia is not a party to the European Convention on Human Rights, it is not subject to that Convention and, in the context of Australia's international human rights obligations, it is not then accurate to state that *Joslin's case* has been 'superseded' by *Schalk and Kopf.*

Evolving State Practice

15. At paragraphs 50-51, the AHRC further cites evolving States practices as authority for its conclusion that 'the principles of equality and non-discrimination, as set out in articles 2 and 26 of the ICCPR, support the expansion of the definition of marriage to "2 people"'. The AHRC bases its assertion on its claim that the ICCPR is a 'living document'. There are several reasons why the interpretive principle that allows reference to evolving State practice in international law does not serve to ground the conclusions of the AHRC.

[6] Article 9 provides 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'
[7] Article 12 provides '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.'

16. In *Roger Judge v Canada*,[8] a matter concerning the death penalty, the UN Human Rights Committee set out its approach to alterations in human rights law according to 'contemporary understanding'. The UN Human Rights Committee held (at paragraph 10.3):

> While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of the application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have **been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of the abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out** ... The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions (our emphasis added).

17. The reference to 'broadening international consensus' is similar to the approach adopted by the ECHR, which also requires a consensus amongst States Parties, and which has found, as recently as June 2016, that in respect of same-sex marriage no such shift has occurred in Europe. In *Schalk and Kopf* the ECHR held that although:

> 'the Convention was a living instrument which had to be interpreted in the light of present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States.'[9]

In that 2010 decision, the ECHR determined that a convergence of standards had not developed amongst the State Parties which would support the contention that marriage was to include persons of the same sex as a human right.

18. The ECHR has subsequently reaffirmed its decision in July 2014, July 2015 and June 2016. Even in the European Convention context, where a higher proportion of States have introduced same-sex marriage laws, those that have done so remain in the vast minority. As at July 2015 (the time of *Oliari v Italy*),[10] twenty-four of the forty-seven States Parties had given legal recognition in the form of marriage or as a civil union or registered partnership, with those redefining marriage comprising only eleven of those twenty-four. In *Oliari v Italy* the percentage of parties who had at that time redefined marriage (23%) was held to be not sufficient to ground the claim that evolving State practice required that equality principles extend to marriage.

19. As mentioned, Australia is subject to the ICCPR. As at the current date, 21 of 169 State Parties to the ICCPR have redefined marriage. This represents 12% of the total of State Parties. In our

[8] UN Human Rights Committee, Roger Judge v Canada, Communication No 829/1998 (5 August 2002).
[9] *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 46.
[10]

own region of the world, the Asia-Pacific region, very few State Parties have legislated for same sex marriage. Thus recognition of same-sex marriage cannot be considered to be representative of an evolving practice. This is supported by the fact that the ECHR has not redefined marriage on the basis of the broadening consensus doctrine, even where higher levels of adoption of same sex marriage have been evidenced than that amongst ICCPR State Parties.

20. I take this opportunity to thank for Committee for the opportunity to make these submissions and would be pleased to answer any further questions that the Committee may have in respect of them.

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