
Dear Committee Secretary,

I am writing to you on behalf of the Women's Law Centre of WA, a community legal centre aimed at advancing women's rights and access to justice, in regards to the inquiry into the Marriage Equality Amendment Bill 2010.

Marriage is the social institution under which a man and a woman establish their decision to live as husband and wife. But it is more than just that; it's a celebration and a milestone, it's the creation and sustainability of a psychological and social status. Marriage is both a legal and psycho-social commitment representing the love two people have for each other.

However, in Australia love is not blind; by prohibiting same-sex couples from engaging in the institution of marriage, we are sending a clear message to our youth, to our society and to the international community- that the love of same-sex couples is not of the same standards or worth as the love of hetero-sexual couples.

In its current form, the *Marriage Act 1961* legalises and entrenches unacceptable discrimination against same-sex couples. The exclusion of same-sex couples from the Marriage Act denies them a right that is afforded to all other Australians. The Marriage Act is underpinned by the view that the relationships and commitments of homosexual people are somehow different and inferior to those

of heterosexuals, and that they themselves can never be full and equal members of Australian Society.

By prohibiting same-sex couples from engaging in the institution of marriage, Australia is falling behind other comparable nations in formal relationship recognition, is breaking a number of international laws and breaching several human rights:

Right to marry

The most obvious breach in regards to forbidding same-sex marriage is the right to marry; article 23(2) of the International Covenant on Civil and Political Rights (ICCPR) recognises “the right of men and women of marriageable age to marry and to found a family.” In the 2002 case of *Joslin v New Zealand*, the Human Rights Committee (HRC) found that under article 23(2), states are only required to recognise marriage between a man and a woman, the main reason for this being that article 23 is the only article in the convention that specifically makes reference of men and women, rather than people or persons (United Nations Human Rights Committee, 2003). However, this is not an unequivocal position as international jurisprudence; state practice and other international instruments demonstrate that this issue remains unresolved. The jurisprudence of the HRC itself in both the 1994 case of *Toonen v Australia* and the 2000 case of *Young v Australia* confirms that the reference to “sex” in articles 2 and 26 of the ICCPR should be taken to include sexual orientation and that sexual orientation is a prohibited ground of discrimination under Article 26 which pertains to the concept of all people being equal under the law. To interpret Article 23 in isolation would be to ignore the developments in international law since the ICCPR was drafted. An example of this is the fact that the Hague Convention on the Recognition and Celebration of Marriages, to which Australia is a signatory, intentionally avoids defining marriage, with the objective that the term should be understood in its broadest international sense. Furthermore, Article 23 can only be understood meaningfully if it is interpreted in light of other ICCPR rights including the right to freedom from discrimination.

Recommendations 86.69 and 86.70 provided by the Human Rights Council at the Universal Periodic Review of Australia last year, confirm the points raised above, as they prescribe the recommendation that Australia equalise the recognition of same-sex relationships across and between states and allow and recognise same-sex marriage including recognising overseas marriages.

Right to equality and non-discrimination before the law

Another observable right that is breached by forbidding same-sex marriage is the right to equality and non-discrimination before the law. Article 26 of ICCPR states that: “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”. As stated previously, jurisprudence by the HRC indicates that the term sex also represents sexuality and thus, shall not be used as a ground for discrimination. As a signatory to ICCPR and with reservations only to Articles 10, 14 and 20 (none of which have any direct relation to the rights breached by the prohibition of same-sex marriage), Australia has an obligation to protect the rights of ALL of its citizens equally and without discrimination.

The Concluding Observations of the Human Rights Committee in May 2009 as response to the submission of Australia’s periodic report for the International Covenant on Civil and Political Rights, confirms the points raised above by stating that “the Committee remains concerned that the rights to

equality and non-discrimination are not comprehensively protected in Australia in federal law” and suggested that the state party should adopt federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.

Rights to freedom of thought, conscience and religion

The prohibition of same-sex marriage also is a breach of the rights to freedom of thought, conscience and religion. Article 18(1) of ICCPR states that: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”.

Believing in and engaging in marriage (whether of a religious nature or not) is a right that is afforded to all other Australians, except those who are in same-sex relationships, who may in fact (or not) religiously believe in the institution of marriage. It is unfair that a person who believes in and supports the notion of evolution can get married in a religious ceremony, while a person who believes in and supports the notion that the love of homosexual couples is of the same worth as the love of heterosexual couples, may not get married.

As article 18(3) indicates, “freedom to manifest one’s religion or beliefs may be subject to only such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. Same-sex couples who engage in the act and commitment of marriage are not putting the public at any risk of health, safety or order, are not breaching the rights or freedoms of other people, and as such should not be subject to such limitations.

The right to found a family

The right to found a family is an additional right that may be affected by the prohibition of same-sex marriage. Article 23(1) of ICCPR states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state,” while Article 23(2) recognises “the right of men and women of a marriageable age to marry and found a family”.

Families come in diverse forms and if a family with same-sex parents wish to use the status of marriage to socially and psychologically confirm their commitment and representation of the family unit, as heterosexual parents are permitted, then they too should be permitted to do so.

The right to participate in cultural life

In addition to rights breached in the ICCPR, forbidding marriage to same-sex couples also breaches the right to participate in cultural life, which is contained in Article 15(1a) of the International Covenant on Social, Economic and Cultural Rights (ISECR) which Australia is a signatory to without reservation. The Article states that “the state parties to the present Covenant recognise the right of everyone to take part in cultural life”. Engaging in a legal commitment of marriage is a recognised part of Western culture. Homosexuals are expected to attend, participate in, recognise and respect the marriages of others within their culture, even though they are not afforded the right themselves. This is clearly unfair, is discriminatory and is a breach of the individual’s right to participate in cultural life.

As a community legal centre funded to assist women in achieving access to justice, we see on a daily basis the ways in which the law directly or indirectly discriminates against women. Additional discrimination faced by disadvantaged or minority groups that women are a part of, sees them

further marginalised, not only due to the additional form of discrimination, but also because of the specific gender implications that may also be involved.

We acknowledge and support the campaigns and hard work undertaken by groups such as ***Get Up Australia*** and ***Equal Love*** in advocating for the rights of homosexual couples in Australia and therefore strongly support the *Marriage Equality Amendment Bill 2010* which seeks to remove all discriminatory references from the *Marriage Act 1961* to allow all people regardless of sex, sexuality and gender identity, the opportunity to marry.

The Bill is an important step towards providing legal equality and removing discrimination for same sex-partners, it will aid Australia in promoting and celebrating diversity and will assist the Australian State with its obligations to comply with international law. We oppose civil unions as substitute for full marriage equality.

Yours truly,

Heidi Guldbaek

Law Reform Coordinator
WOMEN'S LAW CENTRE