



Australian
Human Rights
Commission

Marriage Equality Amendment Bill 2010

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Legislation Affairs Legislation Committee Inquiry into the Marriage Equality Amendment Bill 2010.
2. The Marriage Equality Amendment Bill 2010 (the Bill) was introduced in the Senate by Greens Senator Sarah Hanson-Young, and was referred to the Committee on 8 February 2012 for consideration and report. The Bill seeks to amend the *Marriage Act 1961* (Cth) (Marriage Act) to remove discriminatory references based on sexual orientation and gender identity, and allow marriage regardless of sex, sexual orientation or gender identity.
3. This submission is based largely on a previous submission made by the Commission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Marriage Equality Amendment Bill 2009.
4. The Commission has also made a submission to the current Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012 conducted by the House of Representatives Standing Committee on Social Policy and Legal Affairs Committee, containing the same recommendations as this submission.

2 Summary

5. The Commission believes that formal relationship recognition should be available to same-sex couples on an equal basis with opposite-sex couples. Therefore, the Commission supports the amendments allowing the civil marriage of two people, regardless of their sex, sexuality or gender identity.
6. The Commission also supports the recognition in Australia of same-sex marriages entered into in other jurisdictions, as provided for in the Bill before the Inquiry.
7. Equality is a fundamental principle of international law. The Commission believes that a human rights analysis based on the principle of equality supports the recognition of same-sex marriage.
8. The 2008 reforms to remove discrimination against same-sex couples and their children from most Commonwealth legislation were significant steps towards equality for people in same-sex relationships. However, systems of formal relationship recognition are not available to same-sex couples on an equal basis. Removing the prohibition on civil marriage for same-sex couples is the next step toward their full equality with opposite-sex couples.

3 Recommendations

9. **Recommendation 1:** All forms of relationship recognition should be available to same-sex couples on an equal basis with opposite-sex couples. This includes civil marriage, which should be available to two people, regardless of their sex, sexuality or gender identity.

10. **Recommendation 2:** Civil marriages between same-sex couples lawfully entered into in other jurisdictions should be recognised in Australia.

4 How does the principle of equality apply to same-sex marriage?

11. In 2008, the Commission welcomed the removal of discrimination against same-sex couples and their children from most Commonwealth legislation. These reforms followed the release of *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.
12. The Commission also welcomes the Australian Government's commitment to including protection from discrimination on the basis of sexual orientation and gender identity in federal law, as part of its project to consolidate federal anti-discrimination legislation.¹
13. 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. Same-sex couples do not have access to relationship registration, civil unions or civil marriage under federal law.
14. The principle of equality requires that any formal relationship recognition available under federal law to opposite-sex couples should also be available to same-sex couples. This includes civil marriage.
15. The Commission also believes that the maintenance of laws that discriminate on the ground of sexuality and gender identity tend to support and perpetuate beliefs likely to lead to violence and other anti-social conduct against members of the GLBTI community.

4.1 Equality is a key human rights principle

16. Equality is a key human rights principle. It is set out in article 26 of the *International Covenant on Civil and Political Rights (ICCPR)*, which states that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'.
17. 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.
18. 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'.² 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.³

19. 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.⁴

4.2 The Joslin case

20. To date, the Human Rights Committee has only considered the issue of same sex marriage once, in 1999. In *Joslin v New Zealand (Joslin)*⁵, 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.
21. 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.⁶ This conclusion relied on article 23(2) of the ICCPR rather than article 26. 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'.⁷
22. However, *Joslin* does not prevent the recognition of same-sex marriage. It merely concludes that the ICCPR does not impose a positive obligation on states to do so.

5 Same-sex relationships are recognised in many other nations on the grounds of equality

23. There is an increasing international trend towards the recognition of same-sex marriage. The countries now fully recognizing same-sex marriage include Argentina, Belgium, Canada, Iceland, Mexico, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, and several states in the USA.⁸
24. 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'.⁹ This situation has now changed and there is a trend towards the judicial and legislative recognition of same-sex marriage.
25. For example, in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs (Fourie)*¹⁰, the South African Constitutional Court declined to follow the approach of the Human Rights Committee.¹¹ The Court also 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 time¹² before observing ‘rights, by their nature, will atrophy if they are frozen’.¹³

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

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

27. 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.¹⁴ In *Halpern v Canada*, 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’.¹⁵

28. 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.

6 Are there any other ways in which same-sex relationships may be formally recognised?

29. The Commission acknowledges that some jurisdictions have preferred to recognise same-sex relationships through civil union schemes. Schemes such as these exist in Andorra, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greenland, Hungary, Italy, Luxembourg, New Zealand, Slovenia, Switzerland, the United Kingdom and Uruguay.¹⁶ 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.

30. In Australia, the current approach to formal recognition of same-sex couples varies between state and territory jurisdictions. Queensland, Tasmania and the ACT have civil union schemes through which couples may have an official ceremony. These three jurisdictions also provide mechanisms for recognising civil unions entered into in other states and other countries.¹⁷ New South Wales has a relationship registration scheme which recognises civil unions entered into in other states.¹⁸ However, there is no allowance for an official ceremony. Victoria also has a relationship registration scheme, although it does not recognise civil unions entered into in other states, and does not allow for an official ceremony.¹⁹ In South Australia, the Northern Territory and Western Australia, same-sex couples can only be recognised as a de-facto partnership – these jurisdictions do not, as yet, have civil union or relationship registration schemes.²⁰

31. This inconsistency in the recognition of same-sex relationships in the states and territories reinforces the need for federal legislative changes.
32. 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.
33. However, should a civil union scheme be established in any jurisdiction, it should be open to both same-sex and opposite-sex couples. This is because the principle of equality requires that any form of relationship recognition be equally available to same-sex couples.

7 Would allowing same-sex marriage restrict any other human rights?

34. It is important to note that supporting same-sex marriage need not, and does not, raise any conflict between the right to equality and the right to freedom of religion. Currently the Marriage Act does not require any religious minister to marry any person contrary to its religious tenets, and the amendments in the Bill would not affect this position.
35. The proposed amendments to the Marriage Act would provide same-sex couples with access to civil marriage only.²¹ The Marriage Act need not require any religious institution to marry two people of the same sex if that is against the tenets of that institution. The South African Constitutional Court has directly addressed this issue in *Fourie*.²² It has also been addressed in Canada by the British Columbia Court of Appeal.²³ There is nothing in the Canadian *Civil Marriage Act 2005* (Can) that impairs the freedom of officials or religious groups to refuse to perform marriages not in accordance with their religious beliefs.

8 Conclusion

36. The Commission believes that the fundamental human rights principle of equality means that civil marriage should be available, without discrimination, to all couples, regardless of sex, sexuality or gender identity. Consequently the Commission fully supports the amendments contained in the Bill under Inquiry, to remove all discrimination on these grounds.
37. **Recommendation 1:** All forms of relationship recognition should be available to same-sex couples on an equal basis with opposite-sex couples. This includes civil marriage, which should be available to two people, regardless of their sex, sexuality or gender identity.
38. **Recommendation 2:** Civil marriages between same-sex couples lawfully entered into in other jurisdictions should be recognised in Australia.

¹ See, for example, Australia's appearance before the UN Human Rights Council: Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review: Australia*, 10th session (2011), Geneva, A/HRC/WG.6/10/L.8, pp 6-7. At: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx>.

² 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: ESCR Committee, General Comment 18, (2005), [12(b)(i)], in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), 151. See also ESCR Committee, General Comment 14, (2000), [18], in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), 91. 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, (2003), [6], in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), 365.

³ Concluding observations of the UNHRC: *El Salvador*, CCPR/CO/78/SLV (2003), [16]; Concluding observations of the UNHRC: *Philippines*, CCPR/CO/79/PHL (2003) at [18]; Concluding observations of the UNHRC: *United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, CCPR/C/79/Add.57 (1995), [13]; Concluding observations of the UNHRC: *Poland*, CCPR/C/79/Add.110 (1999), [23].

⁴ Neither case clarifies whether the prohibited discrimination is on the basis of 'other status'. In *Toonen* the United Nations 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 the 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 *Toonen v Australia*, (488/1992) UN Doc. CCPR/C/50/D/488/92, [8.7]. In *Young* the Committee found that the Committee finds that Australia had violated article 26 of the Covenant 'by denying the author a pension on the basis of his sex or sexual orientation'. *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, [10.4].

⁵ (902/1999) UN Doc. CCPR/C/75/D/902/1999.

⁶ UN Doc. CCPR/C/75/D/902/1999 [8.2]-[8.3].

⁷ On the right to marry, a recent case in the European Court of Human Rights found that Austria did not breach Article 12 of the European Convention of Human Rights (the right to marry) by not allowing a same-sex couple to marry: *Schalk and Kopf v. Austria* [2010] ECHR 30141/04.

⁸ States in the USA which recognise same-sex marriage include: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, New York, Washington D.C. http://www.australianmarriageequality.com/international.htm#United_States_of_America

⁹ S Joseph 'Human Rights Committee: Recent Cases', (2003) 3(1) *Human Rights Law Review* 91-103, 102. It is arguable that the right of men and women to marry in article 23 should be interpreted in light of article 21, 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 sexuality.

¹⁰ CCT60/04; CCT10/05.

¹¹ CCT60/04; CCT10/05 [99]-[105].

¹² CCT60/04; CCT10/05 [100].

¹³ CCT60/04; CCT10/05 [102].

¹⁴ *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA); *Barbeau v British Columbia (A-G)* 2003 BCCA 251.

¹⁵ *Halpern v Canada*, [148].

¹⁶ See Australian Marriage Equality, http://www.australianmarriageequality.com/international.htm#Rest_of_World (viewed 2 March 2012).

¹⁷ Clause 4, *Civil Partnerships Regulation 2012* (Qld); Section 65A, *Relationships Act 2003* (Tas); Clause 4, *Civil Partnerships Regulation 2010* (ACT).

¹⁸ Clause 4, *Relationships Register Regulation 2010* (NSW).

¹⁹ *Relationships Act 2008* (Vic). The Melbourne and Yarra City Council also have relationships registers which do not confer legal rights, but allow couples to make a declaration that they are mutually committed to sharing their lives together.

²⁰ See Australian Marriage Equality, <http://www.australianmarriageequality.com/wp/> (viewed 2 March 2012).

²¹ While the Commission recognises that there may be Constitutional limitations to the Commonwealth's power to legislate with respect to same-sex marriage, a consideration of this issue is beyond the scope of this submission.

²² CCT60/04; CCT10/05, [97].

²³ *Barbeau v British Columbia (A-G)* 2003 BCCA 251