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2 February 2017

Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill
Department of the Senate
PO Box 6100
Canberra ACT 2600

Dear Committee,

Amnesty International Australia provides this supplementary submission in response to questions taken on notice during hearings of the abovementioned inquiry on Monday 23rd January in Melbourne.

This submission also seeks to clarify Amnesty International's position on marriage equality in International Human Rights Law. We did not provide a comprehensive human rights analysis in our original submission due to this being beyond the scope of the Terms of Reference for the inquiry. However given we received several questions on this subject during hearings we believe it would be of benefit to the Committee to provide further detail.

Marriage equality and international human rights law[1]
In response to questions from Senator Fawcett

The right of adults to enter into consensual marriage is enshrined in existing international human rights standards. Article 16 of the Universal Declaration of Human Rights (UDHR) and Article 23 of the International Covenant on Civil and Political Rights (ICCPR) both explicitly recognise such a right.

The only time where the denial of a right to marriage equality for same-sex couples came before the UN Human Rights Committee, which oversees state compliance with the ICCPR, was in *Joslin v New Zealand*, where the Committee decided in 2002 that such denial was not discrimination. Noting that Article 23(2) is the only substantive provision in the Covenant which defines a right by using the term "men and women", the Committee stated that this term "has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from [Article 23(2)] … is to recognise as marriage only the union between a man and a woman". The Committee decided that a failure to allow same-sex couples to marry did not violate any provision of the ICCPR and was not a form of discrimination.

Amnesty International considers that the decision of the UN Human Rights Committee in *Joslin* did not fully follow the spirit of Article 2 of the ICCPR nor of the UDHR. Sometimes human rights bodies

[1] The following is an excerpt from Amnesty International's Submission to the Constitutional Convention regarding Marriage Equality, Ireland, March 2013, available from: http://hearourvoices.ie/images/uploads/downloads/AttachmentDownload(15).pdf

are reluctant to make decisions too far ahead of the prevailing attitudes and practices of member states.

Non-discrimination on grounds of sexual orientation is an internationally recognised principle affirmed by the international community for more than a decade. The key decision in 1994 of the UN Human Rights Committee in *Toonen v Australia* creates the basis for interpreting discrimination based on sexual orientation as a violation of the prohibition against discrimination on the basis of sex.

As a cross-cutting principle, non-discrimination applies to the full range of human rights guaranteed in international standards. Amnesty further considers that there has been an evolving view of discrimination in the intervening 11 years since *Joslin* was decided. So the question today is whether the wording adopted in 1966 in Article 23 of the ICCPR should be reinterpreted in light of how the international community's view of discrimination on the grounds of sexual orientation or gender identity has changed in recent decades. In Amnesty's view such a changed interpretation is warranted, and in Australia's case, overdue.

The right to be free from arbitrary discrimination in the enjoyment of the full range of human rights is a basic principle clearly underlined in all major human rights instruments, including Article 2 of the ICCPR. Article 26 of the ICCPR provides for equal protection before the law. Amnesty International considers that, even if Article 23(2) can only be interpreted to recognise as marriage only the union between a man and a woman, Articles 2 and 26 should today be interpreted to prohibit any arbitrary discrimination in the enjoyment of the right to marry, including on ground of sexual orientation or identity.

It is of particular note that the European Court of Human Rights has more recently decided in *Schalk & Kopf v Austria* (2010) that the reference to "men and women" in Article 12 of the European Convention on Human Rights (ECHR) – wording which, incidentally, has been deleted from Article 9 of the EU Charter of Fundamental Rights - no longer means that "the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex". In addition, in 2001 the Netherlands became the first country to offer full civil marriage to same sex couple and there has been a global state trend since *Joslin* was decided towards protecting the equal right of same-sex couples to have their relationships recognised in civil law.

Denial of equal civil recognition of same-sex relationships prevents many people from enjoying a whole range of other rights protected through marriage, such as rights to housing and social security. But even where these rights are equalised under a separate regime, such as civil partnership, this is not equality. Separate systems are not only discriminatory, but they send a message that discrimination is permissible, since the reason for this separate approach is entrenched prejudices. Denial of an equal right to marriage stigmatises those relationships in ways that can fuel discrimination and other human rights abuses against people based on their sexual orientation or gender identity.

For these reasons Amnesty International strongly supports marriage equality as an important step on the journey towards lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) Australians achieving full equality.

Conscientious objection

Question by Senator Pratt: How do you respond to the proposal for civil celebrants to be able to discriminate on the basis of conscience? You have to weigh that up, as Amnesty International has a record for upholding the rights of people who exercise their conscience. There are many prisoners of conscience that Amnesty does a lot of work to support, so I am interested to hear how you think those rights sit alongside each other.

Everyone has the right to freedom of thought, conscience and religion.[2] Under the ICCPR: "freedom to manifest one's religion or beliefs may be subject only to 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".[3] The manifestation of religious beliefs may therefore be regulated in order protect the fundamental right to non-discrimination.

On this basis Amnesty opposes giving civil celebrants the power to discriminate on the basis of sexual orientation, as is the case with Section 47A of the Exposure Draft.[4] Section 47A gives marriage celebrants the right, in manifesting their religious beliefs, to refuse to marry same-sex and otherwise non-heterosexual couples, but not the right to refuse heterosexual couples. It is therefore discrimination, not religious freedom or freedom of conscience, that is at the heart of the exemption.

Amnesty International campaigns for the release of prisoners of conscience around the world. Prisoners of conscience are people who have been jailed because of their political, religious or other conscientiously-held beliefs, ethnic origin, sex, color, language, national or social origin, economic status, birth, sexual orientation or other status, provided that they have neither used nor advocated violence.

The removal of Section 47A from the bill would not create such a prospect. It would not criminalise refusal to solemnise a marriage. Nor would it explicitly *oblige* marriage celebrants to solemnise all marriages, as no such positive obligation currently exists in the Marriage Act.[5] By removing section 47A marriage celebrants would still be free to decide who to marry on a commercial basis, but they would need to do so without unlawful discrimination. There are some obvious implications of this: for example, marriage celebrants would not be able to lawfully advertise "heterosexual couples only" marriage services, just as they cannot advertise "white couples only" services.

Amnesty International recommends removal of section 47A from the Exposure Draft. If the Committee does not believe the bill can be passed without exemptions for marriage celebrants, Amnesty International would suggest a better approach to that taken by 47A would be something like the New Zealand model.

In New Zealand a marriage licence "shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates".[6] Section 29 of the Marriage Act 1955 (NZ) also stipulates clarifies that "no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or

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[2] ICCPR Article 18(1).

[3] Exposure Draft, section 47A, https://www.attorneygeneral.gov.au/Mediareleases/Documents/Exposure-Draft-Marriage-Amendment.pdf

[4] Marriage Amendment (Same-Sex Marriage) Bill, section 47A(1)(a)

[5] The Marriage Act "does not impose a positive obligation on such a celebrant to solemnise any marriage. An authorised celebrant with concerns about whether to solemnise a marriage is entitled not to proceed", see Guidelines on the Marriage Act 1961 for Marriage Celebrants, Australian Government, July 2014, https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Guidelines%20on%20the%20Marriage%20Act%201961%20for%20Marriage%20Celebrants.pdf, p119.

[6] Marriage Act 1955, section 29(1), available from http://www.legislation.govt.nz/act/public/1955/0092/latest/DLM292322.html.

humanitarian convictions of the approved organisation".[7] This enables marriage celebrants to exercise their right to freedom of religion without infringing upon the rights of LGBTQI not to be discriminated against under the law. The legislation is therefore aligned with New Zealand's Bill of Rights Act 1990.

While there was some debate in New Zealand around the time marriage equality was legislated about how adequately the legislation protected freedom of religion, since the legislation has come into effect it is seen as uncontroversial.[8]

Experience in other jurisdictions without exemptions for religious bodies
Question from Senator Smith

As stated in our submission, Amnesty International does not support explicit exemptions for religious bodies and organisations to provide services to same-sex or otherwise non-heterosexual couples, as set out in Section 47B of the Exposure Draft.

I was able to seek advice from Amnesty New Zealand and the NZ Human Rights Commission about the operation of the New Zealand Marriage Act, which does not include specific exemptions for religious bodies or organisations.

The absence of exemptions for religious organisations and bodies has not caused controversy or conflict in the New Zealand experience. The NZ Human Rights Commission recalls receiving only one inquiry about the use of religious organisation facilities (such as a church hall) for a same-sex marriage, and they have received no complaints regarding situations arising where such a facility has been requested but refused.

Amnesty International restates our recommendation that Section 47B of the Exposure Draft is removed. If it is not removed, we recommend at least amendment to remove reference to "organisations" and retain "religious bodies" (consistent with wording of the Sex Discrimination Act) and delete reference in 47B(1) to "purposes reasonably incidental to the solemnisation of a marriage".

We hope this bill can be amended and introduced to the Parliament at the earliest possibility for a vote. LGBTQI Australians have waited too long for their loving unions to be recognised and treated equally. The majority of the Australian public and the Parliament want this change, and now is the time to make it happen.

Please do not hesitate to contact me if you have any queries regarding the above.

Sincerely,

Stephanie Cousins
Advocacy and External Affairs Manager
Amnesty International Australia

[7] Marriage Act 1955, section 29(2), available from http://www.legislation.govt.nz/act/public/1955/0092/latest/DLM292322.html.
[8] Feedback received by the New Zealand Human Rights Commission and Amnesty New Zealand in response to inquiries for this submission.