



MONASH University
Castan Centre for Human Rights Law

**Submission to the Senate Legal and Constitutional Affairs
Legislation Committee**

Inquiry into the Recognition of Foreign Marriages Bill 2014

Prepared by Associate Professor Paula Gerber

(Research Assistance by Nina Calleja)

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Executive Summary

The Castan Centre for Human Rights Law thanks the Australian Government for the opportunity to comment on whether Australia should enact legislation to recognise same-sex marriages validly performed in foreign countries.

The Castan Centre for Human Rights Law strongly recommends that the Australian Government pass the *Recognition of Foreign Marriages Bill 2014*. Such a move would be consistent with international human rights law, in particular, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits discrimination.

There is a growing international trend for countries to recognise same-sex marriages validly performed in foreign countries, even if a country has not itself legislated for same-sex marriages. For Australia to continue to refuse to recognise same-sex marriages legally entered into in countries with which we share close ties – for example, New Zealand, Great Britain, Canada and the United States – is disrespectful to our allies as well as to the couples married in those countries.

Recognising same-sex marriages validly performed in other countries will improve our reputation – both at home and abroad – as a rights respecting country.

International Human Rights Law

In 2001, the UN Human Rights Committee, in *Joslin v New Zealand*, found that Article 23 (right to marry) of the ICCPR did not include the right to same-sex marriage. At that time, only one country (The Netherlands) had legalised marriage for same-sex couples. However, some thirteen years later, when 18 countries have enacted marriage equality, many are questioning whether the *Joslin* decision is still good law.¹ Regardless of the how much (or little) authority that case still has, it cannot yet be said that international human rights law recognises that the right to marry in Article 23 of the ICCPR applies to same-sex couples.

However, Article 23 is not the only provision in the ICCPR relevant to marriage equality. Article 26 must also be considered. It provides 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

¹ See, for example, Sarah Joseph, 'Latest Case Law Trends: The International Covenant on Civil and Political Rights' (2013) *Castan Centre of Human Rights* <http://castancentre.com/2013/10/28/latest-case-law-trends-the-international-covenant-on-civil-and-political-rights/> and Gerber, Paula, Tay, Kristine and Sifris, Adiva 'Marriage: A human right for all?' (2014) *Sydney Law Review*.

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The United Nations has unequivocally established that the term 'other status' includes sexual orientation.² Thus, the right to non-discrimination demands that the Government not discriminate against people based on their sexual orientation.

While 'discrimination' is not defined in the ICCPR, the Human Rights Committee has elaborated on its substance, stating that discrimination is:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.³

To refuse to recognise marriages validly performed overseas solely on the basis of the sexual orientation of the parties, arguably violates Article 26 of the ICCPR. Since Australia recognises as valid marriages those that take place in an overseas country, in accordance with the law of that country, it should not discriminate between such marriages based on grounds prohibited by Article 26 of the ICCPR.

International Trends

Many countries around the world are not yet willing to allow same-sex couples to marry under their domestic laws. However, at the same time, several of these countries are recognising that it is discriminatory and disrespectful to refuse to recognise such marriages that have been legally performed in other countries. Set out below are details of countries that *do not* allow same-sex marriage, but *do* recognise same-sex marriages legally entered into in other countries.

1. Aruba, Curacao and Sint Maarten

Collectively referred to as the Netherlands Antilles or the Dutch Caribbean, these three countries, along with the Netherlands, make up the Kingdom of the Netherlands. The Netherlands Antilles have their own civil codes which define marriage as between a man and a woman, however they recognise marriages within the Kingdom of the Netherlands are recognised as marriages provided one or both of the parties are Dutch.

² Committee on Economic, Social and Cultural Rights, *General Comment 20: The Right to Non-Discrimination in Economic, Social and Cultural Rights*, 42nd sess, E/C.12/GC/20 [32].

³ Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess, CCPR/C/21/Rev.1/Add.10, [7].

2. Israel - 2006

Same-sex marriage is not legal in Israel, but in 2006 the Israeli High Court of Justice ruled that the government must list same-sex marriages performed abroad in the register of the Interior Ministry. Same-sex couples, after having their marriage recognised by the state, have been able to get divorced in Israel.

3. Japan

Although same-sex marriages cannot be performed in Japan, since 2009, Japan has recognised marriages in which a Japanese national has married a foreign same-sex partner in another country. The rule does not extend to couples consisting of two Japanese nationals who have married in a country that allows same-sex marriage and then returned to Japan.

4. Italy

Different parts of Italy are recognising overseas same-sex marriages. For example, in April 2014, a court in Tuscany ordered the city to register the marriage of a gay couple who had wed in New York in 2012, and in July 2014, the Mayor of Naples made it obligatory for his administration to record the marriages of same-sex couples who wed abroad, after a gay couple consisting of an Italian and a Spaniard sought recognition of their marriage which took place in Spain.

5. Malta

In April 2014, Malta passed the *Civil Unions Act* which legalised same-sex civil unions, and recognised marriages of same-sex couples performed abroad as marriages in Malta.

United Nations

It should also be noted that, in June 2014, the UN has changed its policy to honour the marriage of any same-sex couple wed in a country where same-sex marriages are legal. Previously, a staff member's personal status was determined by the laws of the country whose passport he or she carried.

Conclusion

The Government recently announced that it had no objection to officers from the British High Commission solemnising same-sex marriages on consular grounds in Australian cities if at least one person of the marrying couple is a British national. The Government is to be congratulated for adopting this position. The next logical step is to then recognise these marriages as valid marriages. Such a move is consistent with our international human rights commitments not to discriminate pursuant to Article 26 of the ICCPR, and would see Australia join a growing number

of countries which do not themselves allow same-sex marriages, but do recognise such marriages validly performed in other jurisdictions.

The Castan Centre urges the Government to enact the *Recognition of Foreign Marriages Bill 2014*.



Dr Paula Gerber
Associate Professor
Deputy Director, Castan Centre for Human Rights Law