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Castan Centre for Human Rights Law

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**Submission to the Senate Select Committee on
the Exposure Draft of the
*Marriage Amendment (Same-Sex Marriage) Bill***

Prepared by Paula Gerber and Caitlin McInnis

Executive summary

The Castan Centre for Human Rights Law thanks the Australian Government for the opportunity to comment on the *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*.

The Castan Centre reiterates its support for marriage equality. In this submission we emphasise the importance of ensuring that the human rights of same-sex couples are fully respected in the drafting of legislation relating to this matter.

We are pleased that the *Exposure Draft* includes the recognition of foreign marriages undertaken by same-sex couples, something we recommended in our previous submissions to government. Recognition of foreign marriages demonstrates respect for same-sex couples and ensures the fulfilment of our obligations under international human rights law, in particular, Article 23 (right to marry) and Article 26 (non-discrimination) of the ICCPR.

We do not support the proposed exemptions for marriage celebrants. While the exemption is posited as protecting the religious freedom of celebrants, in reality it creates a new platform for discrimination, as well as infringing existing domestic and international anti-discrimination laws. Exemptions should only be permitted for religious organisations.

Amending the Exposure draft to disallow exemptions for marriage celebrants will ensure that marriage equality is achieved in a form that is most compatible with human rights.

Amendment to the *Sex Discrimination Act 1984*: Foreign marriages

We are pleased to see that it is proposed that the *Sex Discrimination Act 1984* be amended to legitimise foreign marriages by same-sex couples. We note that this issue was debated in the Senate this year through the *Recognition of Foreign Marriages Bill 2014*.

The Castan Centre submitted its recommendations regarding this issue when the *Recognition of Foreign Marriages Bill 2014* was first introduced, in 2014. Our submission (for convenience, attached here as Appendix 'A') noted the growing global trend towards recognising marriages entered into by same-sex couples in foreign countries, even if a country has not itself legislated for marriage equality. Australia should join other nations in recognising such marriages. To refuse to do so is not only disrespectful to the couples affected, but also to our allies where these marriages have taken place, e.g. New Zealand, Canada, Britain and the United States.

Australia recognising such marriages would be consistent with the actions of the United Nations, which in June 2014, changed its policy to recognise the marriage of any same-sex couple that took place in a country where such marriages are legal. Previously, the laws of the country whose passport a person carried determined a staff member's personal status.

Further to this, not recognising marriages of same-sex couples performed overseas breaches the right to non-discrimination. As stated in our previous submission,

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.¹

Exemptions

The Castan Centre agrees with the proposed exemptions in the Exposure Draft for ministers of religion and religious bodies and organisations. However, this exemption must be voluntary and not mandatory. This is the approach that has been taken in the UK, so that religious organisations that want to officiate same-sex weddings may do so.

The Castan Centre does not support the proposed exemptions for marriage celebrants. These exemptions would create a new platform of discrimination against same-sex couples, as well as undermining existing anti-discrimination protections set out in the *Sex Discrimination Act 1984* and article 26 of the ICCPR.

Marriage celebrants, when they are not acting under the auspices of any religion or religious organisation, are not in a position materially different from any other service provider. Section 4 of the *Sex Discrimination Act 1984* interprets a ‘service’ as including “the kind provided by the members of any profession or trade”. Thus, in providing their service, celebrants should be bound by the same laws as all other service providers. Section 22 of the *Sex Discrimination Act 1984* specifically prohibits discrimination by a service provider on the grounds of sexual orientation, gender identity or intersex status:

- (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
 - (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

Not only does the proposed exemption undermine existing anti-discrimination protections domestically, it is also contrary to international human rights law. It has been firmly established in international law that, under Article 26 of the ICCPR, discrimination on any ground “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” should be prohibited by law. The term ‘other status’ has been determined to include sexual orientation.² Thus, the right to non-discrimination requires the Government not to allow discrimination against people based on their sexual orientation, gender identity or intersex status.

This exemption obviously disadvantages gay, lesbian and bi-sexual couples, but will also disadvantage trans and intersex people. Due to the broad and uncertain nature of

¹ See Appendix A – it should also be noted that Peru just passed a law in January 2017 recognising foreign same-sex marriages.

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

the term ‘conscientious belief’, any marriage celebrant who conscientiously believes that intersex or trans people self-identification of gender is not legitimate, can choose not to provide their services, again breaching the right to non-discrimination.

Further, the term ‘conscientious belief’ is vague and somewhat expansive, creating unacceptable uncertainty. As far as we can tell, the term is unique. In international law there is reference to conscientious objection in relation to military service, but no mention of ‘conscientious belief’.³ With no discourse in international or domestic law to look to for an understanding of the parameters, this term creates uncertainty and potential to be widely construed. This could have the effect of unjustly increasing the instances of discrimination against LGBTIQI couples.

This term is arguably legitimised by international consensus that moral and religious beliefs are equal (see General Comment 22 on Article 18 of the ICCPR). However, there are circumstances in which belief – religious or otherwise – may be legitimately restricted; this is supported by Article 18(3) of the ICCPR which states that religious freedom may be limited when necessary to protect “the fundamental rights and freedoms of others”.

As such, Part 2, section 6 of the Exposure Draft should be amended to read as follows:

A marriage celebrant (not being a minister of religion) may not refuse to solemnise a marriage because they object (morally or otherwise) to the marriage on the basis of one or both of the parties’ sexual orientation, gender identity or intersex status.

Conclusion

When Australia attains marriage equality, it is vital that it does so in a way that fully respects the human rights of LGBTI people, whilst not infringing on religious freedom. The Exposure Draft goes some way to achieving this by ensuring that foreign marriages entered into by same-sex couples are legally recognised in Australia. However, allowing marriage celebrants to discriminate on the basis of a person’s sexual orientation, gender identity or intersex status is a breach of human rights and should be removed from the *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*.

³ United Nations Human Rights Office of the High Commissioner, ‘Conscientious Objections to Military Service’ (2012) http://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf

APPENDIX A

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) 31 July 2014

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*.



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