Dissenting report by Coalition Senators on the Marriage Legislation Amendment Bill 2015

3.1 The Committee report makes a number of unsupported findings in regard to the *Marriage Legislation Amendment Bill 2015* (the Bill). In particular it finds that the Bill is compatible with, and in some cases promotes, the rights engaged by the relevant human rights treaties. Such conclusions are not merely unsupported by a thorough understanding of the content of the international instruments and the judicial decisions made concerning them; they betray such a degree of ignorance of those instruments and decisions as to render the conclusions unreliable.

3.2 The Bill engages multiple human rights conventions and covenants, and raises serious concerns around breaches of fundamental human rights under applicable instruments. These include: the right to freedom of thought, conscience and religion or belief; the right to freedom of expression; the right to respect for the family; and the rights of the child. The discussion in the report is based on a seriously deficient understanding of the concepts of equality and non-discrimination under the relevant instruments. While the report highlights that the Committee was divided on some of the issues above, the analysis presented does not provide a balanced assessment of all sides of the debate.

Summary

Non-Discrimination and Equality before the Law

3.3 The Committee makes the erroneous claim that the *Marriage Act 1961* (Cth) (the Marriage Act) is directly discriminatory on the basis that it defines marriage as between a man and a woman. It further claims that this direct discrimination will be removed by redefining marriage as a union between '2 people' (1.491-1495). This view is not supported in relevant international human rights law.

3.4 Article 23 of the ICCPR contains the right to traditional (man-woman) marriage, although the Covenant also contains Articles 2 and 26 which confer the right to non-discrimination and equality before the law. The Covenant cannot be internally contradictory; traditional marriage and non-discrimination are compatible.[1]

3.5 The claim that redefining marriage removes direct discrimination conflates identical treatment with non-discrimination and equality before the law. This is beyond the scope of Article 26 according to the Covenant's travaux préparatoires[2] and the UN Human Rights Committee's own General Comment 18 on Article 26.[3] Differentiation of treatment does not necessarily amount to discrimination.

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1 *Human Rights Committee, Decision Communication No. 902.1999, 75th sess, (Joselin et. al v New Zealand), 8.2-9*.

2 Fifth session (1949), sixth session (1950), eighth session (1952), tenth session A/2929, Chap. VI, 179.

3 At paragraph 13.

3.6 The Committee states that interpreting the ICCPR consistent with emerging state practice requires an expansive view of marriage and family (1.524), due to the recognition of same-sex unions by a 'large' number of countries. But there is nothing in this observation that would require the redefinition of marriage. The principle that the ICCPR be interpreted in accordance with emerging state practice is enlivened only insofar as there is consensus amongst the States Parties. There is clearly no consensus around the redefinition of marriage, as only about 19 of 175 States Parties – barely one in ten – have changed the law in this regard.

3.7 This is true even in Europe, which has a relatively high concentration of states with same-sex marriage laws. The European Court of Human Rights (ECHR) this year ruled that there is no consensus amongst European states that would enable a right to same-sex marriage under the European Convention on Human Rights.[4]

3.8 The Committee's reliance on ECHR cases is fundamentally unsound. It hardly needs saying, but Australia is not (and cannot be) signatory to any European conventions to which those cases relate. The rights expressed under those conventions are often differently worded or contextualised, and even a seemingly slight difference in this regard can have very wide impacts on their interpretation and implementation. The Committee's own guide to human rights (current as at June 2015) states that such cases may assist but are not binding. They cannot be validly imported into Australian law; nor can Australian law be validly subjected to them. By contrast, the seven UN treaties have been ratified by the Commonwealth of Australia under the Constitution's external affairs power (section 51(xxix)).

3.9 Nonetheless, the Committee has chosen to refer substantively to ECHR cases on the European Conventions, including *Schalk and Kopf v Austria*, *Hämäläinen v Finland* and *Oliari and Others v Italy*. Far from supporting the Committee's views, those cases actually demonstrate quite the opposite, that the Committee's interpretation of European rights is deeply deficient (further analysis below at 1.37 – 1.39).

3.10 Of particular note in the European cases is the Court's application of the margin of appreciation doctrine, permitting states a certain latitude in the way that they ensure that the rights of same-sex couples are achieved (1.37). It was therefore not contrary to human rights for Austria to maintain traditionalmarriage.[5] The cases also note that same-sex couples are not in "relevantly similar situations" as opposite-sex couples such as to require the right to marry[6] (1.38 – 1.39) – a point overlooked by the Committee's analysis of the "relevantly similar situations" principle.

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4 *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015).

5 *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 105.

6 Above n 4, 165; Ibid, 99.

3.11 Finally, by requiring all civil celebrants to perform same-sex marriages, the Bill places an unjustified and intolerable burden on the consciences of celebrants who adhere to a traditional understanding of the nature of marriage. This amounts to indirect discrimination on religious grounds under Article 26, given that it is a burden on the celebrant's Article 18 right to freedom of religion, by way of a law that is not required under the Covenant but disproportionately affects people with a specific attribute.

Freedom of thought, conscience and religion or belief

3.12 There is no right to same-sex marriage under the relevant covenants, but there is a right to hold and express one's thought, conscience and religion or belief in public and in private.[7]

3.13 The UN Human Rights Committee has described freedom of religion as a "fundamental" right in its General Comment 22. It is also one of a limited number that are non-derogable, meaning it cannot be infringed even in a time of public emergency.[8]

3.14 Article 18(3) provides permissible grounds for limiting this right, including protection of the fundamental rights and freedoms of others, but as same-sex marriage is not a right it cannot therefore be used to limit Article 18, even on the invocation of Article 26.

3.15 The Bill will infringe the Article 18 rights of the following classes of people:

a. Ministers of religion within bodies that have altered their rites or customs in a manner that does not reflect the beliefs of the individual minister (see below 1.52 – 1.57);

b. Civil celebrants and marriage registrars whose beliefs do not reflect those promoted by the Bill (see below 1.58 – 1.69);

c. Indirectly, wedding service providers whose beliefs do not reflect those in the Bill (primarily through enforcement of the Bill through anti-discrimination laws) (see below 1.71 – 1.73);

d. Ethnic and religious minorities (also Article 27) (see below 1.74).

3.16 The Bill's violation of protections for religious freedoms of religious bodies and their members breaches religious freedom as understood in international law. Religious freedom is a right enjoyed by all persons in conjunction with their right to thought, conscience and belief, irrespective of their occupation or memberships.

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7 *International Covenant on Civil and Political Rights* Article 18.

8 ICCPR Article 4(2).

Family and the Rights of the Child

3.17 General Comment 19 on the ICCPR provides that, "The right to found a family implies, in principle, the possibility to procreate and live together." Article 23(2) provides that this right to 'found' a family follows from "the right of men and women of marriageable age to marry." Article 23(1) describes the family as "the natural and fundamental group unit of society" implying its role in producing children. The government's interest in legislating marriage is inextricably linked to the function of marriage as a foundation for children and family. The recognition of same-sex marriages therefore clearly entails the affirmation of the right of same-sex couples to parent children.

3.18 Whilst the Committee states that the Bill does not engage the rights of the child in amending laws relating to such matters as adoption, surrogacy and assisted reproductive technology the remarks above show that it nonetheless qualifies as an action that concerns children. Such actions must be done with the best interest of the child as the primary consideration.[9]

3.19 In view of the above, the Convention on the Rights of the Child (CRC) is critical to the present assessment. The CRC promotes the right of every child to know his or her parents and protects the integrity of the natural family from state interference.[10] By permitting same-sex couples to marry and found a family, the state is sanctioning a family structure that will, by definition, undermine children's rights to know and be raised by their parents. By definition, at least one parent in a family headed by a same-sex couple cannot a biological parent.

3.20 Whilst it cannot be said that there is any requirement not to legislate same-sex marriage on these grounds in paragraphs 1.17-1.19, the language of the CRC and the ICCPR is clear. Those rights may therefore be best promoted according to the highest ideals by preserving the traditional nuclear family and the biological relationships therein as far as possible.

Conclusion

3.21 The discussion in the report fails utterly in its examination of the serious human rights breaches contemplated by the Bill. It does not provide a robust supporting basis for the conclusions that the legislation is compatible with, and in some cases further promotes, the rights engaged by the relevant human rights treaties discussed above.

3.22 The Bill engages multiple human rights conventions and covenants and is demonstrably incompatible with a number of these including the right to freedom of thought, conscience and religion or belief; the right to respect for the family; and the rights of the child.

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9 *Convention on the Rights of the Child* Article 3(1)

10 See generally, Articles 7 and 9; also Article 17 ICCPR.

Background

3.23 Marriage in Australia is regulated by the *Marriage Act 1961 (Cth)* (Marriage Act) and the *Marriage Regulations 1963* (Cth). All marriages in Australia must be conducted in accordance with this legislation. The Marriage Act defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.[11]

3.24 The Bill seeks to make a number of changes to the Marriage Act to permit same-sex couples to marry. The Bill would replace the current definition of marriage with:

> ***marriage*** means the union of 2 people to the exclusion of all others, voluntarily entered into for life.

Compatibility of the Bill with human rights

3.25 The statement of compatibility claims that the Bill engages a number of rights:

- right to equality and non-discrimination;
- right to freedom of thought, conscience and religion or belief;
- right to respect for the family; and
- rights of the child.

In addition, the Bill engages the right to freedom of expression.

Assessment of human rights concerns

The right to equality and non-discrimination

3.26 The statement of compatibility accompanying the Bill claims that the 'Bill engages rights of equality and non-discrimination because it extends the right to marry to any two people regardless of sex, sexual orientation, gender identity or intersex status. In doing so it promotes those rights.'

3.27 The Committee's Report makes the claim that "the current Marriage Act, in restricting marriage to between a man and a woman, directly discriminates against same-sex couples on the basis of sexual orientation … The Bill, in seeking to extend the legal recognition of marriage to same-sex couples, promotes the right to equality and non-discrimination by removing the existing direct discrimination in the Marriage Act.' (at 1.491-1.495). This claim is not supported by the international human rights instruments listed at section 3 of the Act, to which the Committee is to have regard.

3.28 In *Joslin et al. v. New Zealand*[12] the United Nations Human Rights Committee, noting that Article 23(2) of the International Covenant on Civil and

11 *Marriage Act 1961* (Cth) s 5(1).

12 Human Rights Committee, Decision Communication No. 902.1999, 75th sess, (*Joselin et. al v New Zealand*).

Political Rights (ICCPR) states that '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized', held that 'a mere refusal to provide for marriage between homosexual couples' does not violate the State Party's obligations under the ICCPR. The Committee expressed its View as follows:

> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
>
> 8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.
>
> 9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.[13]

3.29 The reasoning of the UN Committee is consistent with the maxim of interpretation *generalia specialibus non derogant*, provisions of a general statute must yield to those of a specific one, which would exclude a definition of marriage contrary to that in Article 23(2) being adopted. Thus the Bill proposes redefinition of a legal institution protected and defined by the Covenant itself.

3.30 The UN Human Rights Committee's View is that whether discrimination exists over marriage is a matter of the meaning that is ascribed to marriage. If it is accepted that the concept of marriage includes a union between two persons who are of the same sex, then discrimination will arise where those persons are precluded from marrying. However if by definition marriage includes only a union between persons of the opposite sex, then by classification, discrimination cannot exist. The UN Committee interpreted the specific language of Article 23(2) to require that the ICCPR's definition of marriage falls within the latter category. The inability of same sex couples to marry does not follow from a differential treatment of same sex couples, or an exclusion or restriction, but from the inherent nature of the institution

13 Ibid, 8.2-9.

of marriage recognized by article 23, paragraph 2, itself. Given the scope of marriage under the ICCPR cannot contain same sex marriage by definition, the UN Human Rights Committee held in *Joslin et al. v. New Zealand* that no discrimination can arise under Articles 2 or 26 of the ICCPR.

3.31 That construction is supported by reputed academic comment. As noted by Harris and Joseph "It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2)."[14] Nowak also notes that "The prohibition of 'marriages' between partners of the same sex is easily upheld by the term 'to marry' ('se marrier') which traditionally refers only to persons of different gender. Moreover, article 23(2) places particular emphasis, as in comparable provisions in regional conventions, on the right of 'men and women' to marry".[15]

3.32 The Bill's proposal to interpret the principle of non-discrimination so as to redefine the institution of marriage seeks not non-discrimination but identical treatment, which is beyond the scope of article 26. The Covenant's *travaux préparatoires* recognize that the right to non-discrimination does not require identical treatment.[16]

3.33 That ICCPR definition is also consistent with Article 16 of the Universal Declaration of Human Rights which provides, in the only gender-specific reference in the Declaration, the right of "[m]en and women … to marry". Such is also consistent with the ordinary meaning of marriage. It is also consistent with Article 16 of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), which provides:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;

3.34 The Committee's Report claims that 'Currently, a very large number of countries recognise same-sex partnerships to some degree (through civil unions, registries and same-sex marriage), and there is a clear trend towards further recognition. Interpreting the ICCPR consistent with emerging state practice requires an expansive view of marriage and family' (at 1.523-1.524). All Australian States have given legal recognition to same sex partnerships through civil unions or partnerships or have amended their laws to recognise same sex partnerships as de facto

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14 Harris, D., Joseph, S, *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Oxford University Press, 1995, 507.

15 *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl, 1993) 407.

16 Fifth session (1949), sixth session (1950), eighth session (1952), tenth session A/2929, Chap. VI, 179.

relationships and have enacted legislation to remove discrimination against same sex couples. The Bill however proposes to alter the definition of *marriage.*

3.35 It cannot be said that a very large number of countries have recognised *marriage*. Of the 175 State Parties to the ICCPR, in total 19 have redefined marriage to include persons of the same sex. There is no emerging ICCPR State Party consensus redefining marriage to include persons of the same sex. Rather, the overwhelming consensus amongst State Parties to the ICCPR remains the definition of marriage as being between persons of the opposing sex. The State Parties that have legislated for same sex marriage are in the vast minority.

3.36 Even in the European context where a higher proportion of states have introduced same-sex marriage laws, those that have done so remain in the vast minority, and there is no consensus. At July 2015 twenty-four of the forty-seven states had given legal recognition in the form of marriage or as a civil union or registered partnership, with those redefining marriage comprising only eleven of those twenty-four.[17] A more marked lack of consensus is evident globally, and in the Asia-Pacific region which Australia occupies. States that have legislated for same-sex marriage remain in the vast minority. The Covenant, including in its Article 26 right to equality before the law and non-discrimination, confers no obligation on those that have not enacted such laws to do so.

3.37 The Committee's responsibility under section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is to 'examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights' as defined under the seven international instruments referenced therein. Those instruments do not include the rights contained within the *European Convention for the Protection of Human Rights and Fundamental Freedoms* or the *European Charter on Human Rights*, to which Australia is not a signatory. The rights contained in (and the surrounding jurisprudence accompanying) those European instruments differ in content and limitation from those the Committee is required to review for compatibility. That this is the approach to be adopted is clarified by the Explanatory Memorandum accompanying the *Human Rights (Parliamentary Scrutiny) Bill 2010*, which provides that the human rights to which the Committee is to have regard are those 'rights and freedoms recognised or declared by the seven core United Nations human rights treaties as that treaty applies to Australia [sic].' The rights are those specifically 'recognised or declared' by the seven treaties, and which specific treaties apply to Australia. Such a reading is also to be preferred as the only possible construction in light of the varying nature of human rights under differing international systems (a matter to which we return). For this reason we consider that the actual human rights to which the Committee is to have regard are those rights (with their specific limitations and extensions) contained in the seven listed instruments, and not the similarly titled rights contained in other international

17 *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015), 55.

instruments. Without detracting from this, it may be helpful for the current analysis, particularly as the Committee has cited that context as authority for various of its propositions, to give some consideration to the European context. As acknowledged within the Committee's June 2015 Guide to Human Rights:

> 3.38 case law from other domestic systems, including cases brought under the European Convention on Human Rights (which is very similar to the ICCPR), can be a valuable resource in understanding how human rights are to be applied in practice. While none of this is binding on how the committee carries out its scrutiny function, it can assist the committee in gaining a broader understanding of the content and application of human rights.

3.39 The European Court of Human Rights (ECHR) has found that there is no right of same-sex couples to be included in the definition of marriage. In *Schalk and Kopf v Austria* [2010] the ECHR upheld the application of the doctrine of the "margin of appreciation" to Austria's refusal to marry a same sex couple, finding that there was no right to same sex marriage under the European human rights charters. In so doing, the Court held that in the European context, 'The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.'[18] The Court affirmed its prior judgements to the effect that although 'the Convention was a living instrument which had to be interpreted in the light of present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States.'[19] In 2014 in *Hämäläinen v. Finland*[20] the ECHR 'held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same sex couples.'[21]

3.40 As noted in the Committee's Report (at 1.495), the ECHR has held that in order for a measure to engage the rights of equality and non-discrimination there must be a difference in the treatment of persons in relevantly similar situations.[22] In *Schalk and Kopf v Austria* the Court held that 'same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' However, as noted in the preceding paragraph, in *Schalk and Kopf v Austria* that 'relevantly similar

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18 *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 105.

19 Ibid, 46.

20 Hämäläinen v. Finland [GC], no. 37359/09, § 62, ECHR 2014.

21 *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015), 191.

22 *D.H. and Others v. the Czech Republic ([GC], no. 57325/00, ECHR 2007-IV);* See also *Burden v. the United Kingdom ([GC], no. 13378/05, ECHR 2008).*

situation' did not extend from the need for legal protection to then encompass a right to marriage. The Court did not hold however that States Parties are required to afford same-sex couples access to marriage. Instead, in an acknowledgement of the differing views concerning the definition of marriage, in light of the 'deep rooted social and cultural connections which may differ largely from one society to another' it instead recognised the rights of States Parties to define marriage autonomously. Having found that the Convention does not impose an obligation to grant same-sex couples access to marriage, the Court found that the prohibition on discrimination under Article 14 was not breached.[23] The existence of legal protections afforded by registered partnerships and equality in access to benefits were relevant to this determination. The majority of Australian States offer registered partnerships and in 2008 the Commonwealth enacted a range of laws to remove vestiges of discrimination in respect of Commonwealth government conferred rights and entitlements.

3.41 In *Oliari v Italy* [2015] the Court held that same-sex couples are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' Again, the Court's ruling pertains only to 'the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection'. The Court held that the extent to which same sex couples are in a relevantly similar situation to different-sex couples did not extend to their inclusion in the definition of marriage. The Court reaffirmed its decisions in *Schalk and Kopf v Austria* and *Hämäläinen v Finland* referred to above.

3.42 In relation to the need for equality in legal protection in Australia, as noted above, all Australian States have undertaken projects to remove discrimination in relation to same-sex partnerships. Furthermore, the Australian Human Rights Commission 'has welcomed the removal of discrimination against same-sex couples and their children from most Commonwealth legislation [which] 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'.[24]

3.43 Although reference to Australian law is not necessitated by section 7(a) of the Act, given the application of the margin of appreciation doctrine by the ECHR to marriage, some comment may also be made on the definition of marriage in the Australian context. In 2013 the High Court held that there was no constitutional prohibition on Parliament legislating to permit same-sex marriage. The Court held

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23 *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 101.

24 Inquiry into the Marriage Equality Amendment Bill 2009 - Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs 2009.

that in order to determine whether the ACT law legislating same sex marriage was inconsistent with the Commonwealth Constitution and the Marriage Act it was necessary to decide whether section 51(xxi) of the Constitution permits the Commonwealth Parliament to enact "a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the Marriage Act if the federal Parliament had no power to make a national law providing for same sex marriage". Neither the Commonwealth, the ACT nor Australian Marriage Equality (as *amicus curiae*), argued that such a determination was necessary. Indeed, as Professor Anne Twomey has noted:

> It is hard to see how this could be the case, given that the court had earlier stated that the object of the ACT Act was to "provide for marriage equality for same sex couples, not for some form of legally recognised relationship which is relevantly different from the relationship of marriage which the federal laws provide for and recognise" (at [3]). If this is so, then how could an ACT law establishing the status of "marriage" for same sex couples, operate concurrently with the Marriage Act 1961 (Cth), if both the Constitution and the Marriage Act defined marriage exclusively as unions of people of the opposite sex and the Commonwealth law covered the field of "marriage"? [25]

3.44 If such be so, then the High Court's determination on the Constitutional sanction of same sex-marriage is *obiter dictum*: influential but not binding. This means that the issue as to whether discrimination occurs remains a definitional one – does marriage by definition include only persons of the opposite sex or does marriage include persons of the same sex? Other respected academic commenters have postulated the opposing views that may have been considered, but were not in the Court's reasoning in the absence of a contradictor.[26]

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25 Anne Twomey, 'Same-Sex Marriage and Constitutional Interpretation' (2014) 88(9) *Australian Law Journal* 613, 613-4.

26 Professors Patrick Parkinson and Nicholas Aroney in 'The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case' (2014) 28(2) *Australian Journal of Family Law* 160, have argued that the Constitutional law principles of 'connotation' and 'denotation' might be applied to shed light on the question. A connotation is the essence of a concept, whereas a denotation is the class of objects which at any time are designated by a word, and which may vary over time. In that article, they advance alternative arguments based on existing judicial authority in support of the proposition that the connotation of the definition of marriage includes persons of the opposite sex. They argue:

3.45 Finally, returning to the ICCPR, whilst under international human rights law the definition of marriage does not include couples of the same sex, and thus the question of discrimination cannot arise, in its General Comment 18, the United Nations Human Rights Committee has explained that conduct is not discriminatory if it is for a purpose that is legitimate under the ICCPR:

> 'the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'

3.46 This statement is not qualified by necessity, nor does it require that the purported differentiation is the most appropriate means of achieving the purpose; rather, the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria. The definition of marriage adopted under the ICCPR is objectively and reasonably justified, for a purpose legitimate under the Covenant. In differentiating between same-sex couples and heterosexual couples, the existing provisions of the Marriage Act rely on clear and historically objective criteria that have shaped the definition of marriage, and which reflect the social and cultural values that that institution represents. As noted above, this purpose is explicitly recognised as legitimate by article 23, paragraph 2, of the Covenant.

3.47 For the foregoing reasons the Committee's conclusion that it 'assessed the bill against article 26 of the *International Covenant on Civil and Political Rights* (the right to equality and non-discrimination) and is of the view that the bill, in expanding the definition of marriage, promotes the right to equality and non-discrimination' is entirely unsupported by human rights law.

> 'If a committed contradictor had been available to scrutinise these propositions, these inconsistencies in reasoning might have been avoided. None of the States chose to intervene in the case, even though, as it transpired, the Court made a very significant determination about the scope of the Commonwealth's power to legislate with respect to marriage. If a State Solicitor-General had the opportunity to question the wide view of Commonwealth power that was in issue, the reasoning of the Court, if not the result, might have been very different. Thus, for example, much reliance was placed on the observation of Higgins J in the Union Label Case, that the constitutional conception of marriage cannot be tied to the state of the law at any particular time, for otherwise the power to make law will become illusory. Reasoning in this way draws attention to only one side of the argument, however, the side that pushes in the direction of expanded Commonwealth legislative power. But Higgins J in that case also drew attention to the other side of the argument: the Commonwealth cannot be allowed to proclaim simply anything to be a marriage, for that would render the specificity of the Commonwealth's enumerated legislative powers similarly illusory. The Commonwealth, he pointed out, cannot be allowed to have power under the Constitution to enact what he called a "sham" law which deems some other entirely different subject matter to be a "trade mark" as a pretext to regulating it.'

3.48 Furthermore, the Bill is not compatible with the rights to freedom from discrimination on religious grounds enshrined in Articles 2(1) and 26 of the ICCPR. For the reasons elaborated below, in its refusal to provide an exemption for religiously conscientious objectors, the Bill discriminates against celebrants, dissenting religious ministers and service providers on the basis of their religious convictions. As noted by the Committee (at 1.488) the ICCPR defines 'discrimination' as a distinction based on a personal attribute (which attributes include religion) which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute. For the reasons now put the Bill disproportionately affects people with a religious conviction.

The right to freedom of thought, conscience and religion or belief

3.49 The Bill is not compatible with the right to freedom of religion for several categories of persons, including dissenting ministers of religion, celebrants and persons supplying services.

3.50 Article 18(1) of the ICCPR provides ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’ Article 18(3) provides that the ‘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.’

3.51 Article 4(2) of the ICCPR reflects the fundamental aspect of the right to religious freedom, listing it amongst a limited suite of the freedoms that may not be infringed upon, even in a time of ‘public emergency which threatens the life of the nation’. This has led the Human Rights Committee in General Comment 22 to describe the right to religious freedom as a ‘fundamental’ right, ‘which is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.’

3.52 The Statement of Compatibility with Human Rights that accompanies the bill provides:

> It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow discrimination on the grounds of a person’s sex,

sexual orientation, gender identity or intersex status would treat one group of people with characteristics that are protected under discrimination legislation differently from other groups of people with characteristics that are also protected. Not providing an exemption for other authorised celebrants is not considered to be an unreasonable limitation on the right to freedom of thought, conscience and religion or belief. For the same reasons, it is not considered appropriate to provide an exemption from discrimination legislation for those who provide goods or services, or who make facilities available, in connection with a marriage.

3.53 However, such is not compatible with the law promulgated by the human rights instruments to which the Committee is to have regard. In the foregoing section it was noted that under the ICCPR the UN Human Rights Committee has held that that no discrimination can arise under Articles 2 or 26 of the ICCPR in relation to same-sex marriage, on the basis that the ICCPR defines marriage to include persons of the opposite sex. (Furthermore, having found that there is no right of same-sex couples to be included in the definition of marriage the European Court of Human Rights has found that the prohibition on discrimination under Article 14 was not breached.)

3.54 As there is no right to same-sex marriage, such cannot be said to be a fundamental right or freedom, and Article 18(3) cannot be enlivened to curtail the right to manifest freedom of religion or beliefs (whether of ministers of religion, celebrants or service suppliers). Accordingly, as is set out below, the Bill proposes limitations that are not compatible with the right to religious freedom; indeed, the Bill if enacted would implement severe breaches of that right.

Ministers of Religion

3.55 In proposing to alter the definition of marriage at section 5 of the *Marriage Act 1961* (Cth) to be "the union of 2 people to the exclusion of all others, voluntarily entered into for life", the Bill leaves unaffected the existing exemption granted to "a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation".[27]

3.56 At paragraphs 1.501-1.502 the Committee makes the claim that the Bill provides that 'ministers of religion would be free not to solemnise a same-sex marriage for any reason, including if this was contrary to their religious beliefs. Importantly, provided that a minister of religion is authorised by their religion to solemnise marriages, that individual minister of religion retains absolute discretion under the law as to whether or not they wish to solemnise a particular marriage. This discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.' That assertion does not withstand scrutiny.

27 *Marriage Act 1961* (Cth) s 5.

3.57 In order to rely on the exemption proposed by the Bill, a minister must be able to claim that he or she has authority to solemnise weddings in accordance with the "rites or customs of the body or organisation". Arguably the tying of the exemption to those rites or customs limits the religious freedom rights of two categories of minister:

(a) ministers with a traditional view of marriage within bodies or organisations that have altered their rites or customs to permit solemnisation of same-sex marriages; and

(b) ministers with a traditional view of marriage within bodies or organisations that have no definitive statement in the application rites or customs that marriage is between persons of the opposite sex.

3.58 On the first of these categories, ministers who wished to decline the solemnisation of same- sex weddings would need to argue the absurd proposition that they hold "authority to solemnise marriages in accordance with the rites or customs of the body or organisation", which rites or customs permit such a ceremony, but that they themselves are under no obligation to perform a same-sex wedding ceremony. How could such persons claim to be authorised to perform marriages in 'accordance with the rites and customs' and yet have authority to object to a sub-category of those marriages?

3.59 Furthermore, to rely on the exemption, a minister must accept the rites and customs of the organisation concerning the solemnisation of same-sex marriage. For many dissenting ministers within a religious body that permits same-sex marriage, this may amount to an acceptance contrary to conscience. This would be the case regardless of whether the religious body's precepts require the altered doctrine to be accepted by the minister. The tying of the exemption to the associated denominational position on marriage has the real prospect that any conservative minister serving within a religious institution that has permitted same-sex marriages to be performed by clergy would not be protected by the exemption, or would not be willing to accept the benefit of the exemption without conflicted conscience. Such an eventuality would likely lead to exodus of such ministers from existing institutions and the associated social disruption to religious communities.

3.60 This same eventuality would apply to the second of the categories identified at paragraph 1.54 where the rules of interpretation of the rites or customs provide that they are to be determined with reference to general principles of law within the wider context of the legal system of the State in which they are located. Where that is the case, references to "marriage" within those canons could be read, in the absence of any official resolution to the contrary, to include same-sex marriage on a change in the definition. Again, this would give rise to the prospect listed at paragraphs 1.55 to 1.56, that ministers who hold a traditional view of marriage could not rely upon the exemption. This would amount to an unnecessary limitation on the religious freedom rights of those individuals.

Celebrants and Registrars

3.61 The amendments in the Bill mean that civil celebrants would be prohibited from refusing to solemnise same-sex marriages. The right to religious freedom under Article 18 of the ICCPR is not limited to religious ministers, but applies to all. The United Nations Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[28] provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue'. The Principles provide that 'Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,

(b) responds to a pressing public or social need,

(c) pursues a legitimate aim, and

(d) is proportionate to that aim.'

3.62 In light of the intended (but as noted above, ultimately unsuccessful) exemptions to be granted to religious ministers, the Bill's requirement that all celebrants solemnise same-sex marriages regardless of religious conviction entails a limitation on the right to religious freedom of those who hold an objection that is not necessary. To the extent that the exemption for individuals who are religious ministers is proposed in recognition of the right to religious freedom, there is no legitimate rationale for limiting the religious freedom of individuals who are marriage celebrants, as both are equally capable of autonomous agency.

3.63 As noted above, it is not acknowledged that the Bill concerns the right to equality as the definition of marriage under the ICCPR has been held not to encompass persons of the same sex. However, even if marriage were to so encompass persons of the same sex, there are less restrictive ways of recognising competing rights. The Bill's proposal is to exhaust a celebrant's religious freedom in favour of the right to freedom from discrimination. A proportionate approach to the balancing of rights would require investigation of means to accommodate competing rights without unduly burdening the right to religious freedom. The proposed Bill has not undertaken to do so in respect of celebrants. The limitation is not proportionate.

3.64 The Committee's Report provides at paragraph 1.507 that 'the UN Human Rights Committee has concluded that the right to exercise one's freedom of religion may be limited to protect equality and nondiscrimination. As set out above, the right to equality and non-discrimination has been extended to sexual orientation. Therefore, it is permissible to limit the right to exercise one's freedom of religion in order to protect the equal and nondiscriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.'

28 U.N. Doc. E/CN.4/1985/4, Annex (1985).

3.65 In addition to the authority cited by the Committee, to support this position the Committee also refers to two decisions of domestic courts (of South Africa and Canada) recognising same-sex marriage. These decisions reflect the unique positions of individual States Parties, and are not references to the matters to which the Committee is to have regard in assessing the compatibility of Bills with human rights.

3.66 The authorities cited by the Committee, however, do not establish that the right to equality in respect of sexual orientation necessitates equality in respect of the concept of marriage. As noted above, the UN Human Rights Committee has held that the ICCPR defines marriage as between a man and a woman, and that therefore discrimination cannot arise under Article 26, as persons of the same sex are not eligible for admission to the concept of marriage. Similarly, the ECHR has not compulsorily required States to extend the recognition of same-sex partnerships to *marriage*, and such a requirement cannot be then relevant to the pursuit of the right to freedom from discrimination. On that analysis there are no contravening rights which would serve to limit the religious freedom rights of celebrants under Article 18(3). They therefore cannot be burdened in the manner the Bill proposes. To do so is inconsistent with the human rights law the Committee is required to have regard to under the Act.

3.67 The same conclusion would also extend to registrars under the Marriage Act and registrars under the respective State and Territory jurisdictions who would be required to enter same-sex marriages on the applicable register. That such persons may seek to express their right to religious freedom has been controversially demonstrated in the recent incarceration of Kim Davis, a county clerk in the Commonwealth of Kentucky who had a conscientious objecttion, founded in her religious beliefs, to a requirement to register same-sex marriages.

3.68 The Committee's Report refers to the ECHR decision in *Eweida and Ors v United Kingdom* as authority for its proposition that 'to the extent that the Bill would result in a requirement that all civil celebrants officiate at same-sex weddings, regardless of their religious views, this is not a disproportionate limit on the right to freedom of religion'. However, the Committee has overlooked two important distinctions between the facts of the Eweida case and the provisions of the Bill.

3.69 First, the case applied to the registration of civil partnerships, not marriage. We have argued above that a definition of marriage that restricts it to a union between a man and woman is not inconsistent with human rights law. Indeed, we argue that marriage is actively defined under Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR) as '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized'. Therefore, a law which imposes an obligation on individuals to recognise marriages defined in a different way is a disproportionate limitation of their freedom of religion or belief.

3.70 The question of whether a law that imposes an obligation on individuals to recognise civil partnerships is completely separate, as civil partnerships are not mentioned in human rights law. Indeed, to the extent that civil partnerships are used

as a means to remove discrimination from same-sex couples there could be an argument that limiting someone's freedom of religion or belief to require him or her to recognise such unions is justified to ensure the right to non-discrimination is not breached. Yet even in that case requiring any particular individual to register a civil partnership could be a breach of human rights given that there could be a less restrictive way of satisfying any concerns about discrimination.

3.71 Second, Ms Ladele was an employee of a UK local authority, not a civil celebrant engaged in private practice. Employees of one organisation do not necessarily have a right to impose their religious or conscientious objections to restrict the practices of an organisation. The particular UK local authority in this case had a policy of duly registering civil partnerships under the law. This is very different from the situation facing civil celebrants who often operate as sole traders and would not be restricting others' freedom by refusing to solemnise same-sex marriages. Nevertheless, even in these cases an employer should give a reasonable accommodation to employees' religious beliefs. Whether the UK Council Authority gave such a reasonable accommodation is not relevant to the interpretation of this decision, however, which deals with the obligations placed on celebrants, not registrars.

3.72 In addition, in the context of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, in the case of Lillian Ladele, a registrar in the United Kingdom who objected to a policy requirement that she officiate at same-sex civil partnership ceremonies, the European Court of Human Rights applied the 'margin of appreciation' doctrine in determining whether the policy was proportionate. The ECHR held that under European law the matter to be determined was "whether the policy pursued a legitimate aim and was proportionate." The ECHR held that the Convention allows States Parties a "wide margin of appreciation" permitting States to reach their own determination as to what comprises a legitimate aim and what comprises the appropriate balance between competing rights, and in this case the determination by first the local authority, the UK Employment Appeal Tribunal, and then the UK Court of Appeal did not exceed that permissible margin. The 'margin of appreciation' doctrine provides that 'According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference [with the right to religious freedom] is necessary'.[29] The Court held:

> In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.

29 *Ladele v the London Borough of Islington* [2009] EWCA Civ 1357, 84.

3.73 Therefore the ECHR ruling that the restrictions placed upon Ms Ladele's religious freedom were proportionate were based upon the ECHR's margin of appreciation doctrine. That doctrine provides that, subject to consideration of the nature of the right, the aims pursued, as well as the presence or absence of a European consensus, the Court will leave to the domestic authorities the determination as to the appropriate balance to be struck between competing rights. The ECHR applies the doctrine as it considers that these local authorities are often best placed to weight the local democratic, cultural, political and other factors. Accordingly, the ECHR ruling is not a statement that the outcome in Ms Ladele's case is required to be applied to all domestic jurisdictions. By that same doctrine, it might be reasonable to conclude that there would be nothing precluding a European State Party from balancing the competing rights by providing that Ms Ladele could object, including where other registrars were made available.

Service Suppliers

3.74 Furthermore, the Bill is not compatible with the right to religious freedom of persons supplying services associated with marriages or persons who are married in their capacity as married persons. Such persons include, but are not limited to caterers, photographers, musicians, florists, operators or hirers of reception halls, wedding planners or advisory services and operators of bridal or honeymoon suites. Also relevant are other service providers engaged in areas not directly related to a wedding ceremony, such as fertility treatment, student accommodation and marriage or relationship counselling, programs, courses and retreats.

3.75 All Australian jurisdictions that prevent discrimination, including the Commonwealth, have enacted provisions that endeavour to "balance" religious freedom with the right to freedom from discrimination. However, Professor Foster concludes that, "the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or 'professionals') is contained in the law of Victoria".[30] Even this provision has been construed very narrowly. In 2014 the Victorian Court of Appeal ruled that a Christian youth camp had breached Victorian law by refusing to take a booking from a homosexual group.[31] Central to that decision was Maxwell P's determination that, due to the commercial nature of the operations undertaken by Christian Youth Camps, it could not rely upon the exemption:

> The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation

30 Neil Foster, Freedom of Religion and Balancing Clauses in Discrimination Legislation (June 2015) http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil_foster, cited 18 September 2015. He notes that a more limited exception exists in Tasmania: *Anti-Discrimination Act 1998* (Tas) s 52(d).

31 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

> services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC's activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.[32]

3.76 The decision is to be contrasted with the 2014 decision of the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al*, where the Court held that closely-held corporations can assert religious freedom rights, proclaiming "[f]urthering their religious freedom also 'furthers individual religious freedom'".[33]

3.77 Article 18 is not limited in its application, it applies to 'everyone', not just religious ministers. The Victorian Court of Appeal decision highlights the concern that discrimination law within Australia fails to ensure that sufficient recognition of religious freedom rights are provided not only to religious institutions but also to businesses and individuals. The expansion of the definition of marriage proposed by the Bill will expand the incidents in which suppliers will be required to supply services against their religiously informed conscience. For these, the Bill is therefore incompatible with the right to religious freedom of those persons.

Ethnic and religious minorities

3.78 We also note that Article 27 of the ICCPR provides that 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' As there is no limitation or restriction placed upon this right to religious freedom for minorities, the Bill will harm the religious freedom rights of those minorities.

The right to freedom of expression

3.79 Article 19 of the ICCPR provides a protection to freedom of expression. It is as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

32 Ibid 269.

33 *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014).

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

3.80 The right to freedom of expression includes religious discourse.[34] The relevance of freedom of religious expression to human rights principles is demonstrated by the Supreme Court of Canada's decision in *Trinity Western University v British Columbia College of Teachers*[35] wherein the Supreme Court of Canada upheld a lower court's ruling prohibiting the TWU's refusal to register teachers who had signed a contract declaring their conservative stance on homosexuality. In Canada, concerns over the right to freedom of religious expression were seen to be sufficiently legitimate to require the inclusion of an acknowledgement in the Preamble to the Canadian *Civil Marriage Act 2005* of 'the freedom of members of religious groups to hold and declare their religious beliefs'. The Bill offers no similar protection.

3.81 In respect of the limitations to freedom of expression contained at Article 19(3), UN Human Rights Committee General Comment 34 provides that 'Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights'.[36] As we have noted, 'human rights' under the ICCPR are inclusive of the right to religious freedom.

3.82 Furthermore, Article 18(4) provides that States Parties must ensure 'the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.' Articles 13(3)-(4) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reinforce that right.

3.83 Parents in Canada and several European countries have been required to leave their children in sex-education classes that teach the virtues of same-sex activity and its equality with heterosexual marital activity. As an example, David and Tanya Parker objected to their kindergarten son being taught about same-sex marriage after it was legalised by the Massachusetts Supreme Judicial Court, leading

34 Human Rights Committee, General Comment 34 Article 19 Freedoms of opinion and expression, 102nd sess, (12 September 2011). See also communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006

35 *Trinity Western University v British Columbia College of Teachers* (2001) 39 CHRR D/357, 2001 SCC 31.

36 See communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

to David being handcuffed and arrested for trying to remove his son from the class for that lesson.

3.84 An alteration in the law of the Commonwealth resulting in a change to a fundamental social institution, as is proposed by the Bill, would require that change to be reflected in public education. Any such requirement in public education, which would logically flow from State endorsement of same-sex marriage, would amount to a limitation on the Article 18(3) rights of the parents to 'ensure the religious and moral education of their children in conformity with their own convictions'. Importantly, it would also amount to a limitation on the right of educators to express their religious beliefs.

The right to respect for the family

3.85 The human rights instruments contained at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* do not support the redefinition of marriage to include couples comprising of persons of the same sex on the grounds of the right to respect for the family. The right to respect for the family is contained at Articles 17 and 23 of the ICCPR and Article 10 of the ICESCR. Article 23 provides :

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.

3.86 As noted by the Committee at paragraph 1.519, the UN Committee on Economic, Social and Cultural Rights General Comment 19 recognises 'that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.' The Committee's report offers this statement along with the inclusion of same-sex orientation as a protected attribute for discrimination law as authority in support of its proposition that 'the CRC [*Convention on the Rights of the Child*] extents [sic] protection of the family to same-sex couples.' However, General Comment 19 reflects the UN's recognition of the ability of States to determine their definition of the family in accordance with local factors and reflects the diversity amongst States Parties at the time of its promulgation. The Report of the Fifth Session of the Committee on the Rights of the Child recognised this diversity and the central importance of the family in the following statement:

> 2.1. The basic institution in society for the survival, protection and development of the child is the family. When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging familial relationships. In this regard, the Convention refers to the extended family and the community and applies

> in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family. Such situations deserve to be studied in the framework of the rights of the child within the family. Relevant measures and remedies have to be identified to protect the integrity of the family (see, in particular, arts. 5, 18 and 19), and to ensure appropriate assistance in the upbringing and development of children.

3.87 The foregoing demonstrates that certain attributes are to be ascribed to the core concept of family under the ICCPR. Article 23(1), describes the family as the 'natural and fundamental group unit of society.' General Comment 19 provides that 'The right to found a family implies, in principle, the possibility to procreate and live together.' Article 23(2) provides that this right to 'found' a family follows from 'the right of men and women of marriageable age to marry' and, as noted above, that Article has been held to determine that the Convention intends that the distinct concept of 'marriage' includes men and women. This contextual reading is strengthened by the use of the word "spouse" in Articles 23(3) and (4). The Convention thus links the family to marriage. It is also consistent with existing views of the Human Rights Committee, where it has considered matters concerning marriage.[37]

3.88 In support of its contention at paragraph 1.518 that the 'right to respect for the 'family' under international human rights law applies to all families, including same-sex couples' the Committee states that the 'ICCPR is a living document and is to be interpreted in accordance with contemporary understanding' (at paragraph 1.522). The Committee's analysis cites the approach adopted by the UN Committee on Human Rights in *Roger Judge v Canada*, a matter concerning the death penalty, but in so doing the Committee omits an important qualification from the UN Human Rights Committee's approach to alterations in human rights law according to 'contemporary understanding'. In *Roger Judge v Canada* the UN Human Rights Committee held (at paragraph 10.3):

> While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of the application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of the abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out …

37 See for example, Human Rights Committee, Decision Communication No. 549.1993, 60th sess, (*Hopu v France*) and Human Rights Committee, Decision Communication No. 35.1978 ,12th sess, (*Amuereddy v Mauritius*).

> The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

3.89 This is similar to the approach adopted by the ECHR, which also requires a consensus amongst States Parties, and which has found that no such shift has occurred in Europe in respect of same-sex marriage. This finding was in the European context, where a greater (but minority) proportion of States have legislated for same-sex marriage.[38] Instead the Committee claims 'Currently, a very large number of countries recognise same-sex partnerships to some degree (through civil unions, registries and same-sex marriage), and there is a clear trend towards further recognition.' As evidenced in paragraphs 1.34 to 1.35, this is an exaggeration bordering on a falsehood.

3.90 The ECHR has held that same-sex couples without children fall within the notion of family, wherein it said 'a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would'.[39] In its decision, however, the Court had regard to the introduction of Article 9 of the *Charter of Fundamental Rights of the European Union*, which was signed on 7 December 2000 and came into force on 1 December 2009, which reads as follows: "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." The Court noted that the grant of the right to marry to "men and women" in Article 12 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, must now be read against the omission of that distinction in the Charter. However, in respect of the interpretation of Article 12 of the Convention, the Court held that absent consideration of Article 9 of the Charter, the following would flow:

> The applicants argued that the wording did not necessarily imply that man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.[40]

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38 See the ECHR's decision applying the same standard in *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010) 46.

39 Ibid.

40 European *Convention for the Protection of Human Rights and Fundamental Freedoms* Rome, 4.XI. 1950.

3.91 In that regard, the European Convention reflects the ICCPR's treatment of the right to marriage (as articulated in respect of Article 23(2) above), which unlike the position for European Union States, has not been altered by subsequent instrument. As noted above, the Joint Parliamentary Committee is required to report specifically with regard to the rights contained in the ICCPR, and Australia is not a State Party to either the ECHR Convention or the Charter. However, the absence of such a change in the applicable instruments to which Australia is a party and to which the Committee is required to report against is illustrative of the absence of an alteration in the applicable international human rights on the right of the family as pertains to Australia.

The rights of the child

3.92 The Bill limits the rights of the child. As noted by the Committee, Article 3(1) of the CRC requires that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The redefinition of the family structure in law that requires a child to miss out on his or her mother or father is incompatible with Article 7, which confers on a child, "as far as possible, the right to know and be cared for by his or her parents."

3.93 The Committee notes that there is some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married [1.539]. However, the Committee's report does not engage with the wide body of scholarship that shows the importance of biological parents to child development. Multiple studies show that child development is best on average when the child lives with the biological mother and father who remain married. As Murray notes:

> Trends in marriage are important not just with regard to the organisation of communities, but because they are associated with large effects on the socialisation of the next generation. No matter what the outcome being examined- the quality of the mother-infant relationship[41], externalising behaviour in childhood (aggression, delinquency, and hyperactivity)[42], delinquency in adolescence[43], criminality as adults[44], illness and injury in

41 Aronson, Stacey R., and Aletha C. Hutson. 2004. The mother-infant relationship in single, cohabitating, and married families: a case for marriage? *Journal of Family Psychology* 18 (1): 5-18

42 Fomby, Paula, and Andrew J. Cherlin. 2007. Family instability and child well-being. *American Sociological Review* 72 (April): 181-204.; Cavenagh, Shannon E., and Aletha C. Hutson. 2006. Family instability and children's early problem behaviour *Social Forces* 85:551-80.

43 Bronte-Tinkew, Jacinta, Kristin A. Moore, and Jennifer Carrano. 2006. The influence of father involvement on youth risk behaviours among adolescents: A comparison of native-born and immigrant families. *Social Science Research* 35:181-209.; Harper, Cynthia C., and Sara S. McLanahan. 1998. Father absence and youth incarceration. Presented at the American Sociological Association, 1998.

childhood[45], early mortality[46], sexual decision making in adolescence[47], school problems and dropping out[48], emotional health[49], or any other measures of how well or poorly children do in life-the family structure that produces the best outcomes for children, on average, are two biological parents who remain married. … All of these statements apply after controlling for the family's socioeconomic status.[50] I know of no other set of important findings that are as broadly accepted by social scientists that follow the technical literature, liberal as well as conservative, and yet are so resolutely ignored by network news programs, editorial writers for the major newspapers, and politicians of both major political parties.

3.94 At paragraphs 1.531 and 1.532, the Committee asserts that the Bill only proposes:

> 'one amendment which would engage the rights of the child, namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child.
>
> 1.532 However, as the bill relates strictly to marriage it does not directly engage the rights of the child.'

3.95 The human rights law to which the Committee is to have regard does not support this proposition. The recognition of same-sex marriage proposed by the Bill

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44 Sourander et al., 2006. Childhood predictors of male criminality: A prospective population-based follow-up study from age 8 to late adolescence. *Journal of the American Academy of Child and Adolescent Psychiatry* 45:578-86.

45 Bauman, Laurie J., Ellen J. Silver, and Ruth E. K. Stein. 2006. Cumulative social disadvantage and child health. *Paediatrics* 117: 1321-27.

46 Warner, David F., and Mark D. Hayward. 2006. Early-life origins of the race in men's mortality. *Journal of Health and Social Behaviour* 47:209-26.

47 Pearson, Jennifer, Chandra Muller, and Michelle L. Frisco. 2006. Parental involvement, family structure, and adolescent sexual decision making. *Sociological Perspectives* 49:67-90.

48 Carlson, Marcia J. 2006. Family structure, father involvement, and adolescent outcomes. *Journal of Marriage and the Family* 68:137-54

49 Brown, Susan L. 2006. Family structure transitions and adolescent well-being. *Demography* 43: 447-61.

50 The citations of specific journal articles are only illustrative of a large literature. Some major review sources are McLanahan, Sara, and Gary Sandefur. 1994. *Growing Up with a Single Parent* Cambridge, MA: Harvard University Press.; Mayer, Susan E. 1997 *What Money Can't Buy: Family Income and Children's Life Chances. Cambridge, MA: Harvard University Press.*; McLanahan, Sara S. 2001. Life without father: What happens to the children? Princeton, NJ: Center for Research on Child Wellbeing.; Aronson and Hutson, 2004; and Hymowitz, Kay S. 2006. *Marriage and Caste in America: Separate and Unequal Families in a Post-Marital Age.* Chicago: Ivan R. Dee.

entails the affirmation of the ability of same-sex couples to parent children, which through their natural inability to procreate independently necessitates the removal of a child from at least one of his or her biological parents. It is therefore concluded that the Bill does impact on the rights of the child under the applicable human rights instruments.

3.96 At paragraph 1.532 the Committee notes that 'The amendments proposed by the Bill do not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children.' Whether existing laws permit same-sex couples to have children is irrelevant to the determination to be made by the Committee under section 7(a) of the Act, which is 'to examine Bills … for compatibility with human rights,' including the rights of the child.

3.97 Article 7 of the CRC provides that each child 'shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.' Article 8(1) of the Convention provides 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.'

3.98 Similarly, Article 9(1) of the *United Nations Convention on the Rights of the Child* (CRC) provides that 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when … such separation is necessary for the best interests of the child.' In addition Article 9(3) provides that 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

3.99 As noted by the Committee, the Convention does not define parents. The provisions of the CRC were struck in 1989 prior to the advent of any legislation regulating assisted reproductive technology. Article 8 in particular was included as a response to the abduction of new-borns within Argentina, giving weight to the conclusion that the rights were intended to apply from the moment of birth, and therefore in relation to the biological parents.

3.100 Article 9(4) obliges States Parties to provide 'the essential information concerning the whereabouts of the absent member(s) of the family' where the separation results from 'any action initiated by the State Party.' The Committee on the Rights of the Child has clarified in its General Comment 14 that this right particularly pertains to circumstances where a child has been separated from his or her 'biological family':

> Regarding religious and cultural identity, for example, when considering a foster home or placement for a child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20, para. 3), and the decision-

> maker must take into consideration this specific context when assessing and determining the child's best interests. The same applies in cases of adoption, separation from or divorce of parents. Due consideration of the child's best interests implies that children have access to the culture (and language, if possible) of their country and family of origin, and the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country (see art. 9, para. 4).

3.101 Article 17 of the ICCPR similarly provides that 'no one shall be subjected to arbitrary or unlawful interference with his … family.' As noted above, in the context of the ICCPR, the term 'family' is to be associated with marriage between a man and a woman. Accordingly, the rights of the child cannot be distinguished from the question of marriage. The UN Human Rights Committee's General Comment 19 acknowledges this link wherein it provides:

> Thus, any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection.

3.102 Article 16 of the CEDAW also associates the rights of parents vis-à-vis their children with male and female parentage and reiterates the recognition of the paramountcy of the interests of the children found in the CRC as follows:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;
>
> …
>
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

3.103 In the European context, the ECHR has held that there is a positive obligation on member States to develop the 'family life' from birth, and that this includes the right of the child to develop a relationship with his or her genetic father.[51]

3.104 We consider that the rights of children to know and to be raised by their parents and to know their identity are engaged by the Bill and that the Bill limits those rights.

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51 See for example *Johnson v Ireland* (1986) 9 EHRR 203 and *Keegan v Ireland* (1994) 18 EHRR 342.

Conclusion

3.105 Accordingly, we do not agree with the Committee's finding that the Bill be included in the committee's report as a 'Bill not raising human rights concerns'.

Dr David Gillespie MP	**Senator Matthew Canavan**	**Mr Michael Sukkar MP**
Committee Member	**Committee Member**	**Committee Member**