Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

28 August 2009

Dear Committee Secretary,

Re: Inquiry into the *Marriage Equality Amendment Bill 2009*

Thank you for the opportunity to make a submission to your inquiry into the *Marriage Equality Amendment Bill 2009* (the Bill).

The Sydney Centre for International Law is a leading centre for research and policy on international law in the Asia-Pacific region. In this submission, we highlight the international law issues raised by the Bill.

The Bill is to be welcomed as conforming with Australia's obligations under international law.

1. The right to non-discrimination

International human rights law protects the right to non-discrimination. Article 2 of the Universal Declaration of Human Rights[1] states:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similar provisions are contained in article 2(1) of the International Covenant on Civil and Political Rights[2] (ICCPR) and article 2(2) of the International Covenant on Economic, Social and Cultural Rights[3] (ICESCR).

Article 26 of the ICCPR further states:

[1] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[2] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52.
[3] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49.

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

2. Prohibited grounds of discrimination

In *Toonen v Australia*[4] (*Toonen*), the Human Rights Committee held that "in its view, the reference to 'sex' in articles 2, paragraph 1, and 26 [of the ICCPR] is to be taken as including sexual orientation"[5]. The Human Rights Committee again took this position in *Young v Australia*[6] (holding that the decision to deny Young pension benefits, under legislation only providing pension benefits for surviving partners of married couples and heterosexual co-habiting couples, was discriminatory). The Committee on Economic, Social and Cultural Rights has adopted a similar position, stating that "'[o]ther status' as recognised in article 2(2) [of the ICESCR] includes sexual orientation"[7] and "[in] addition, gender identity is recognised as among the prohibited grounds of discrimination"[8]. Hence, both Committees are of the view that discrimination can be made out on the ground of sexual orientation and at least the Committee on Economic, Social and Cultural Rights is of the view that discrimination can be made out on the ground of gender identity.

It appears this is also the position Australia has adopted. Australia is one of the states on behalf of whom Argentina spoke in their statement to the United Nations General Assembly on 18 December 2008[9]. In this statement, Australia "reaffirm[ed] the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity"[10].

3. The scope of the rights to be protected against discrimination

According to the Human Rights Committee,[11] while article 2 of the ICCPR limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 is not so limited. The Committee is of the view that article 26 does not merely duplicate the guarantee provided for in article 2 but provides an "autonomous right"[12]. According to the Committee, article 26 prohibits:

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[4] *Toonen v Australia*, Communication No. 488/92, 31 March 1994.
[5] *Id.* at [8.7].
[6] *Young v Australia*, Communication No. 941/2000, 6 August 2003.
[7] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 10 June 2009, at [32].
[8] *Ibid.*
[9] "General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social, Humanitarian Issues", available at http://www.un.org/News/Press/docs/2008/ga10801.doc.htm.
[10] The Permanent Mission of the Kingdom of the Netherlands to the United Nations, "Human Rights: Statement on Human Rights, Sexual Orientation and Gender Identity at High Level Meeting", available at http://www.netherlandsmission.org/article.asp?articleref=AR00000530EN, at [3].
[11] Human Rights Committee, General Comment No. 18, Non-discrimination, 10 November 1989.
[12] *Id.* at [12].

> "discrimination in law or in fact in any field regulated and protected by public authorities. [The article] is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory"[13].

4. *Joslin v New Zealand*[14]

In 2002, in *Joslin v New Zealand* (*Joslin*), the Human Rights Committee held that in considering whether the refusal to provide for marriage between homosexual couples violated article 26 of the ICCPR (among other articles), the claim must be considered in light of the specific provision on the right to marriage in the Covenant (article 23). Article 23 refers to the right of "men and women" to marry, whereas all other rights in the Covenant are expressed to be held by "everyone". The Committee stated that article 23(2) "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 recognise as marriage only the union between a man and a woman"[15]. The Committee concluded that in light of article 23, the refusal to provide for marriage between homosexual couples does not violate article 26 of the ICCPR.

Such views, delivered by the Committee under article 5(4) of the Optional Protocol to the ICCPR[16], do not, however, amount to a source of legally binding obligation for all ICCPR parties.[17] Furthermore, the Committee is not bound by its previous jurisprudence.[18] As such, *Joslin* does not represent a statement of Australia's international legal obligations with respect to the exclusion of same-sex couples from the lawful bounds of marriage. Moreover, neither *Joslin* nor the ICCPR itself pose any obstacle to Australia's extension to same-sex couples of the right to marry.

5. International Human Rights Law Scholarship

Despite the Committee's decision in *Joslin*, there is considerable disagreement among international legal scholars surrounding the interpretation of human rights law in this context. Some argue that, taken together, articles 23 and 26 establish same-sex marriage as a fundamental human right.[19]

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[13] *Ibid.*
[14] *Joslin v New Zealand*, Communication No. 902/1999, 17 July 2002.
[15] *Id.* at [4.2].
[16] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59.
[17] The Human Rights Committee's views, read in view of the decision by the state concerned to submit to its jurisdiction and in view of the responsibilities with which the Committee is charged by treaty, are certainly "strong indicators of legal obligations" borne by the state to which they are addressed. See S. Joseph, J. Schultz & M. Castan, *The International Covenant on Civil and Political Rights*, (2004) Oxford University Press, Oxford at 24. Nonetheless, the views of the Committee do not possess the status of an independent source of international legal obligation.
[18] For example, per Messrs Kretzmer, Amor, Yalden & Zakhia in *Thompson v Saint Vincent and the Grenadines*, Communication No. 806/1998, 18 October 2000.
[19] For example, A. Burton, Note, "Gay Marriage - A Modern Proposal: Applying *Baehr v Lewin* to the International Covenant on Civil and Political Rights, *Indiana Journal of Global Legal Studies,* Vol. 3, p177,

Writing in 1999, Sadtler, for example, argued that a broader reading of article 23 (that is, that the article establishes a right for a man or woman to marry any other person, without regard to sex) would be more sound than a restrictive reading (that is, that the ICCPR implicitly defines marriage as between one man and one woman).[20] He reasoned that article 23 does not provide that men and woman have the right to marry "each other" or "a member of the opposite sex", but simply states that men and women have the right "to marry". He further reasoned that even though the drafters of the 1966 Covenant did not use a neutral term (such as "persons"), they likely did not intend the phrase "men and women" to have independent significance and rather used the phrase because it was the terminology used in preexisting international conventions (for example, the European Convention for Protection of Human Rights and Fundamental Freedoms 1950[21]).

In addition, the Committee's decision in *Joslin* has been criticised for ignoring any possibility of evolving social constructions of marriage.[22] The decision is also said to be at odds with views expressed elsewhere by the Committee and other international human rights bodies that "marriage" and "the family" (terms that are not defined in any international standard) are continuously evolving concepts that apply to a diversity of arrangements across cultures and so must be interpreted broadly.[23] For example, in *Goodwin v United Kingdom*, in deciding that a post-operative transsexual woman had the right to marry a non-transsexual man, the European Court of Human Rights noted that "there have been major social changes in the institution of marriage since the adoption of the [European Convention for the Protection of Human Rights and Fundamental Freedoms]", further noting that "[a]rticle 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, ... removing the reference to men and women".[24]

As the brief foregoing discussion highlights, there is a body of expert opinion in favour of an interpretation of the ICCPR such that guarantees against discrimination on the basis of sexual orientation would extend to states parties' legislative definition of marriage. This body of opinion is supportive of the view that this Bill would ensure Australian law's conformity with international law.

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cited in E. Sadtler, "A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?", *Virginia Journal of International Law,* Vol. 40, p405.

[20] E. Sadtler, above n19.

[21] European Convention for the Protection of Human Rights and Fundamental Freedoms, open for signature 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953).

[22] H. Graupner & P. Tahmindjis, *Sexuality and human rights: a global overview*, (2005) Haworth Press Inc.

[23] I. Saiz, "Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN", *Health and Human Rights*, Vol. 7, No. 2, Sexuality, Human Rights and Health (2004), p48.

[24] *Goodwin v United Kingdom* [2002] 2 FCR 577 (Eur. Ct. H.R. July 11, 2002) at [100].

6. Considerations of comity

Given the growing legalisation of same-sex marriage in other countries,[25] Australia will be increasingly called upon to consider the status under Australian law of foreign same-sex unions. The non-recognition of foreign same-sex unions as 'marriages' for the purposes of Australian law (on public policy or other grounds) could well become a point of tension with other nations. Furthermore, since the validity of foreign marriages under Australian law is generally tested by reference to the *lex loci celebrationis*,[26] the recognition of foreign same-sex marriages in Australia could also become a point of tension within Australia, given the differing status afforded to same-sex couples who marry overseas compared to those who marry within Australia.

For the foregoing reasons, the Bill seems a timely reform of Australian law consistent with international law.

Yours sincerely,

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[25] For example, same-sex marriage is now legal in the Netherlands, Belgium, Spain, South Africa, Canada, Norway and Sweden per Canadian Broadcasting Corporation, "Same-sex marriage around the world", 3 June 2009, available at http://www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html.

[26] *Marriage Act 1961* (Commonwealth), ss88C and 88D.