



Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs

Dear Mr Hallahan

Inquiry into the Marriage Equality Amendment Bill 2009

Thank you for the opportunity to make this submission to the Inquiry into the Marriage Equality Amendment Bill 2009 (the Amendment Bill).

The ACT Human Rights Commission (the Commission) is an independent agency established under the *Human Rights Commission Act 2005* (ACT). The objects of this Act include the promotion of the human rights and welfare of people living in the ACT by making recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community. The Commission comprises the Human Rights & Discrimination Commissioner, and Children & Young People Commissioner, Health and Disability Services Commissioner.

The Commission strongly supports the Amendment Bill, which seeks to remove all discrimination on the basis of sexuality and gender identity from the Commonwealth *Marriage Act 1961* and to permit marriage regardless of sex, sexuality and gender identity.

As the Committee will be aware, in 2006, the ACT Legislative Assembly passed the Civil Unions Bill which sought to give effect to the right to equality protected under the ACT *Human Rights Act 2004* (HR Act), and to give same-sex couples in the Territory the same recognition and equality under the law as heterosexual couples. This ground-breaking legislation was disallowed by the former Federal government under the Territories power, with blatant disregard for the democratic will of the people in the ACT. Disappointingly, the current Federal government threatened to disallow the ACT civil partnerships legislation which was to be re-introduced in 2008, because it would 'mimic marriage.'¹ The Amendment Bill would overcome the fundamental inequality in the Commonwealth *Marriage Act* which the ACT civil partnerships legislation sought to mitigate, and would provide real equality for couples in committed relationships throughout Australia, regardless of sexuality and gender identity.

Marriage is the central social institution for validating intimate and committed relationships and it is our view that unless and until same sex couples are granted the right to marry they are being denied equality. Reports on homophobia have confirmed that nationally gay men and lesbians continue to experience discrimination, harassment and exclusion especially in

¹ As reported in the Age 'Federal veto forces ACT backdown on gay unions' 5 May 2008.

regards to same-sex marriages.² However, it is encouraging to note that a recent poll commissioned by Australian Marriage Equality found that three in five Australians are in support of the right of same-sex couples to marry with 60 per cent agreeing that Australian law should recognise same-sex marriages that are legal in other countries.³ Equal treatment of same sex couples under Australian laws, including the *Marriage Act* is vital to ensure that those who do harbour hostility towards homosexuality and sexual diversity do not have their prejudices legitimated and reinforced by the legal framework. Freedom of sexuality and gender identity are fundamental human rights and it is critical that same-sex relationships are not accorded 'second-class' status.

Marriage equality is a human right

Australia is a party to the International Convention on Civil and Political Rights ('ICCPR') which has been implemented into domestic law in the ACT through the HR Act, but not yet at Federal level in a comprehensive way.⁴ The ICCPR requires Australia to protect the rights of equality and non discrimination, the right to privacy and the rights of children and families. The Amendment Bill would give full effect to our international human rights obligations in this sphere by rectifying the current inequality in the treatment of same sex relationships in Australia.

Right to non-discrimination

Articles 2(1), 3 and 26 of the ICCPR set out the rights of equality and non-discrimination. There is a heavy emphasis on non-discrimination in the ICCPR because "discrimination is at the root of virtually all human rights abuses."⁵ Article 26 (equality before the law, equal protection of the law) requires that laws themselves as well as their application are non-discriminatory. The Human Rights Committee confirmed in the case of *Toonan v Australia* that sexual orientation is a prohibited ground for differentiation or discrimination under Article 26 of the ICCPR.⁶

Legitimate distinctions, where the criteria for any differential treatment "are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant", may not amount to prohibited discrimination.⁷ However, in the case of *Young v Australia*, where the Human Rights Committee found that Australia had violated Article 26 of the ICCPR by denying Mr Young a pension on the basis of his sexual orientation, it was noted that Australia provided no arguments on how the distinction between same-sex partners and unmarried heterosexual partner is reasonable and objective.⁸

In Canada, the Supreme Court has found that the definition of spouse in social security statutes as a person of the opposite sex, contravened the non-discrimination and equality provisions in the Canadian Charter of Rights (section 15). It said that:

² Flood M and Hamilton C, Mapping Homophobia in Australia, Australia Institute Webpaper, July 2005

³ Senator Sarah Hanson Young, Senate Speech, Senate 24 June 2009.

⁴ We refer the Committee to the Commission's submission to the National Consultation on Human Rights available on our website at www.hrc.act.gov.au.

⁵ Joseph, Schulz, Castan, *The ICCPR: Cases, Materials, Commentary*, Oxford University Press, 2000, p.519

⁶ see *ibid* para 23.23, p.530.

⁷ UN General Comment 18 on ICCPR para 13

⁸ Communication No 941/2000: Australia 18/09/2003 CCPR/C/78/D/941/2000 para 10.4.

the definition of 'spouse' as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same way as heterosexual couples. The effect of the impugned provision is clearly contrary to s.15's aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation.⁹

In *Halpern* the Ontario Court of Appeal considered all facets of the issue and concluded that "it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage..."¹⁰ It declared the common law definition of marriage to be invalid to the extent that it referred to "one man and one woman." In this case the Court investigated at length whether restrictions on the right in question were justified (including religious and biological arguments for privileging heterosexual marriage), and concluded that they were not.

As commentary on these cases has pointed out, the societal status and significance of marriage and the corresponding benefits that are available only to married persons cannot be overlooked. Exclusion of same sex couples from a fundamental institution of society perpetuates the view that same-sex relationships are of less value than opposite sex relationships.

In a subsequent Canadian case, brought by five same-sex couples who had been denied a licence to marry in Saskatchewan, the court ordered that the "the common law definition of marriage for civil purposes is declared to be 'the lawful union of two persons to the exclusion of all others', and civil marriage between two persons of the same sex who otherwise meet the substantive and procedural requirements of federal law governing capacity to marry...is declared to be a lawful and valid marriage in Saskatchewan."¹¹

In the UK case of *Ghaidan v Godin-Mendoza*, the House of Lords asked 'what could be the legitimate aim of singling out heterosexual couples for more favourable treatment than homosexual couples?' It concluded that if there ever was a legitimate aim none now applied.¹²

Privacy and reputation

Article 17 of the ICCPR provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This Article has been said to impose positive obligations that "require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."¹³

⁹ *Egan v Canada* [1995] 2SCR 513; See also *Vriend v Alberta* [1998] 1SCR 49; *MvH* [1999] 2SCR 3.

¹⁰ *Halpern v Toronto (City)* (2003), 36 R.F.L (5th) 127 (Ont, CA) para 108.

¹¹ *N.W. and others v The Attorney General of Canada, the AG of Saskatchewan, the Marriage Unit etc* 2004 SKQB 434. See also the decision of the Canadian Supreme Court in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

¹² *Ghaidan v Godin-Mendoza* [2004] UKHL 30; 3 WLR 113.

¹³ UN General Comment 16 on ICCPR.

The European Court of Human Rights has taken a consistently broad approach to ‘private life’, and has held that it covers the right to develop one’s own personality and the right to create relationships with others.¹⁴ Sexuality is an element of private life. Indeed in *Dudgeon v United Kingdom*¹⁵ the European Court of Human Rights¹⁶ considered a person’s sexual life to be ‘a most intimate aspect’ of his or her private life.

At present gay and lesbian couples are required to establish proof of their relationship in ways that may constitute an invasion of their privacy – including for example having to prove that they have lived together, that their relationship is of a sexual nature, and/or that they have been financially dependant on each other for a certain length of time. While heterosexual defacto partners may be subject to invasions of privacy they can avoid this by choosing to marry. This difference of treatment between heterosexual and homosexual couples is itself a breach of Article 17.

Protection of family and children

Articles 23 and 24 of the ICCPR provide for the protection of the family and children. The Human Rights Committee has noted that ‘Family has a broad interpretation’ and includes all those comprising the family as understood in the society of the State Party concerned.¹⁷ The Human Rights Committee, in its General Comment 19 on Article 23 ICCPR from which these provisions derive, gives States ‘a certain cultural leeway in determining the definition of family.’¹⁸ However, a State cannot limit the definition by applying structures or values which breach international human rights standards. In *Ghaidan v Godin-Mendoza*, Lord Nicholls held that “a homosexual couple, as much as a heterosexual couple, share each other’s life and make their home together.”¹⁹ Families including same sex families are entitled to protection by society. Protection by society includes the right to be treated with dignity and respect.

Under Article 24, children have the right to protection ‘without distinction or discrimination of any kind’. Children in same-sex families may experience discrimination or social exclusion if their parents are denied the opportunity to validate their relationship through marriage. The lack of legal recognition of the role of the non biological parent in same sex relationships also disadvantages children in same sex relationships as this critical parental bond may not be protected where families separate or the biological parent dies or is unable to care for the child.

International trends

Legislation to provide for same-sex marriage is in place or in train in an increasing number of jurisdictions around the world, including the Netherlands, Belgium, the US States of Massachusetts, Connecticut, Iowa and Vermont, Spain, South Africa, Sweden and Canada. As a key participant in the development of the international bill of human rights, we hope that Australia will once again take a leading role in the promotion of the right to equality

¹⁴ *Niemietz v Germany* (1992) 16 EHRR 97, cited in Blackstone’s Guide to The Human Rights Act 1998, 3rd ed p 159.

¹⁵ (1982) 4 EHRR.

¹⁶ Applying Article 8 of the European Convention on Human Rights: Right to respect for private and family life.

¹⁷ UN Human Rights Committee, *General Comment 19* (1990).

¹⁸ See Joseph et al para 20.06, p.444.

¹⁹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 17.

and non-discrimination by adopting the Amendment Bill and giving same sex couples the same rights as heterosexual couples under the *Marriage Act*.

We would welcome the opportunity for further discussion of the issues raised by the Amendment Bill. Please contact Gabrielle McKinnon (available Wednesday-Friday) 6205 2222 if you require further information about any of the issues raised in this submission.

Yours sincerely,

Dr Helen Watchirs
Human Rights & Discrimination Commissioner

4 September 2009