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National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office, Robert Garran Offices
National Circuit, Barton, ACT, 2600

Re: submission to the National Human Rights Inquiry from Australian Marriage Equality

Dear Secretariat,

Please find below, AME's submission to the national Human Rights Inquiry

Best wishes,
Peter Furness.

1. What is AME?

Australian Marriage Equality is a community-based organisation dedicated to removing those discriminatory provisions of the Australian Marriage Act which prevent same-sex partners entering civil marriages and which also prohibit the recognition of overseas same-sex marriages.

AME was established in 2004 in the wake of discriminatory amendments to the Marriage Act, and it has actively lobbied, advocated and educated on the issue of marriage equality ever since.

AME is the only Australian organisation dedicated entirely to marriage equality. AME is also Australia's only national, membership-based, gay and lesbian human rights organisation.

2. What is marriage equality?

In a legal sense, marriage equality refers to the removal of legislative provisions which prevent same-sex partners from entering into civil marriages in Australia or from having their overseas marriages legally recognised in Australia.

More broadly, marriage equality is about treating marriage-like relationships with equal respect and dignity, regardless of the gender of the partners involved.

The failure of governments to grant marriage equality is a form of discrimination as unacceptable as discrimination on the grounds of race and sex. Indeed, the importance of marriage to individual and social well-being makes discrimination in marriage a particularly unacceptable form of legal bias.

3. Marriage and human rights

As the terms suggest, marriage equality and marriage discrimination are matters of fundamental human rights.

These rights have been repeatedly identified by those appellate courts which have upheld equality in marriage, and by the organisations which have successfully advocated on this matter.

Below we list these rights.

a) Equality before the law

Article 7 of the Universal Declaration of Human Rights states,

“All are equal before the law and are entitled without any discrimination to equal protection of the law.”

The failure of the Australian Government to allow same-sex partners to marry is a clear breach of this article. This view has been upheld by a number of appellate courts, particularly in Canada where the national Charter of Rights and Freedoms includes an equality provision.

For example, in *Barbeau v British Columbia* the British Columbia Court of Appeal found that,

*“...Redefinition of marriage to include same-sex couples...is the only road to true equality for same-sex couples.”*¹

Further, the Court stated that the granting of marital rights through an institution that is not marriage is not a remedy for this breach of the equality right.

*“Any other form of recognition of [their] relationships, including the parallel institution of [civil union or civil partnership], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples ‘almost equal’, or leave it to governments to choose among less-than-equal solutions”*².

b) The right to marry, to personal autonomy and to privacy

i) The right to marry in other jurisdictions

Article 16 of the Universal Declaration of Human Rights states,

“Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family.”

Courts in the United States have highlighted a range of other rights which are also breached by discrimination in marriage, including the right to marry, the personal autonomy or “liberty” to decide one’s own marriage partner, and the right to privately pursue consensual family relationships without state interference.

According to the Massachusetts Supreme Court in *Goodridge v Mass. Department of Public Health*

*“Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.”*³

These views were expanded by the California Supreme Court in the *Re Marriage* case,

“the constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own — and, if the couple chooses, to raise children within that

¹ British Columbia Court of Appeal, *Barbeau v British Columbia* (2003); also Ontario Court of Appeal, *Halpern v Canada* (2003).

² *ibid*

³ Massachusetts Supreme Court, *Goodridge v Mass. Department of Public Health* (2003), <http://masscases.com/cases/sjc/440/440mass309.html>

family — constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.”⁴

In regard to marriage and privacy the California Court found

“the state constitutional right to marry, while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual’s interest in personal autonomy by California’s explicit state constitutional privacy clause. (See, e.g., Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at p. 34 [the interest in personal autonomy protected by the state constitutional privacy clause includes “the freedom to pursue consensual familial relationships”]; Valerie N., supra, 40 Cal.3d 143, 161.)”⁵

Furthermore, like Canadian courts before it, the California Supreme Court found that the right to marry the partner of one’s choice is breached by schemes which grant marital rights under different conditions and/or different names.

“One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple’s right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of “marriage” exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.”⁶

ii) The ICCPR and the right to marry

In the case of *Joslin et al v New Zealand*, the UN Human Rights Committee (HRC) found that the right to marry enshrined in Article 23 of the International Covenant on Civil and Political Rights does not permit same-sex marriage. It argued

“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.”⁷

This finding has been widely criticised by human rights experts as an unduly literalist reading of Article 23 which is inconsistent with the general principles of treaty interpretation⁸. One such principle is that treaties should be read as a whole. Clearly, the Human Rights Committee read Article 23 without reference to the general anti-discrimination provisions of Article 2 (see “Freedom from discrimination”, below). Another such principle is that treaty interpretation should be guided by contemporary context not original intent. Again, the HRC clearly allowed itself to be guided by what was intended by the framers of the ICCPR in a way which, if applied to all the Covenant’s provisions, would render that document irrelevant very quickly. For these reasons many human rights experts believe that the HRC’s interpretation of Article 23 is seriously flawed and will not stand.

Regardless of the merits of the HRC’s interpretation of Article 23, we believe that the gender specific terminology of that article has no place in an Australian human rights instrument. Such terminology effectively exempts the right to marry from being read together with the instrument’s anti-discrimination and equality provisions. It would mean a right to marry fails to represent the views of a majority of Australians who support equality in general, and equality in marriage in particular. It could have a potential negative impact on the growing enfranchisement of same-sex couples through their recognition as de facto partners in state and federal law, and their recognition through state civil union schemes. A gender-specific right to marry would also entrench discrimination in any associated right to family life. It is clear from the laws governing parenting in the states and federally, as well as from the practice of the Family Court, that Australian public policy no longer admits gender discrimination

⁴ California Supreme Court, *Re Marriage cases*, 2008, p8, http://www.aclu.org/images/asset_upload_file713_35332.pdf

⁵ *op cit*, p50

⁶ *op cit*, p6

⁷ *Joslin et al. v. New Zealand*, 902/1999

⁸ for a general overview of the *Joslin* decision and its critics see Aleardo Zanghellini, “To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men” 9(1) *Melbourne Journal of International Law*, 2008

in the laws governing familial arrangements. In short, a discriminatory marriage provision would entrench the kind of discrimination that, for those most people, has already disappeared from the laws and hearts of Australia.

If the inquiry supports the inclusion of the right to marry in an Australian human rights instrument that right should make it clear that marriage embraces conjugal relationships regardless of gender. If the inquiry feels that such a provision anticipates the outcome of political and cultural debate that remains unresolved, another option would be to develop a provision that is ambiguous and leaves the final decision in either the hands of the courts, in the case of a constitutional instrument, or the hands of the legislature and judiciary together, in the case of a statutory instrument.

c) Freedom from discrimination

According to article 2 of the Universal Declaration,

“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.”

In the process of establishing that the failure to allow same-sex partners to marry is a breach of the above fundamental human rights, courts around the world have made it clear that discrimination on the grounds of sexual orientation is not acceptable.

Again, according to the California Supreme Court,

“...in contrast to earlier times, our state now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation, and, more generally, that an individual's sexual orientation — like a person's race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights. We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.”⁹

It is incontestable that the same principles generally apply in Australian public policy. The UN Human Rights Committee has established that Australia has an obligation under the International Covenant on Civil and Political Rights to remove laws which discriminate on the grounds of sexual orientation¹⁰. This obligation has been acted upon through the recognition of same-sex de facto relationships at a state and federal level. There is no justification for not extending the principle of anti-discrimination to marriage.

d) Freedom of religion

Freedom of religion is often cited as a right which marriage equality would violate. The argument seems to be that marriage equality would mean religious institutions and their adherents would no longer be able to restrict their solemnisation of marriages, or their teaching about marriage, to different-sex couples.

In reality marriage equality does not infringe religious freedoms. The demand at the core of marriage equality is for civil marriage. If religious bodies wish to retain an exclusive definition of religious marriage they have that right. What they do not have a right to do is impose that religious definition on a secular legal system and a secular society.

If freedom of religion plays a legitimate role in the current debate it is because marriage discrimination breaches the right of churches to officially solemnise same-sex marriages if that is their wish.

The following extract from the Lambda Legal Defence Fund, a litigant in a court appeal for marriage equality in New Jersey, succinctly makes the case¹¹.

“Increasingly, clergy use their religious freedom to affirm gay couples' lifelong commitments because

⁹ *ibid*

¹⁰ see *Toonen v Australia and Young v Australia*

¹¹ http://data.lamdalegal.org/publications/downloads/fs_freedom-of-religion-and-from-discrimination.pdf

*religious values often govern the commitments people make in life, and marriage is one of the most profound commitments. For instance, Maureen Kilian, a church administrator and devout Episcopalian who was a plaintiff in Lambda Legal's New Jersey case seeking access to marriage for gay couples, gave the following testimony: "For me, being married also tells people about your values and your faith, because it is an incredibly important commitment that has a spiritual side. . . . Straight couples whose belief systems place a priority on commitment can, by getting married, show that their actions match the words of their beliefs." Allowing Kilian to marry her partner of over 30 years actually would **respect** her religious freedom to have her actions match the words of her beliefs. At the same time, it would not interfere with the important religious freedom of faith groups that do not wish to marry gay couples, divorced individuals, persons of a different faith, or anyone else."*

We note that a number of religious organisations and officials in Australia currently allow same-sex union ceremonies to be conducted, but are denied the right to legally solemnise these unions in the same way as they solemnise heterosexual marriages. These include Progressive Rabbis, the Quakers, the Metropolitan Community Church, and segments of other protestant churches including the Uniting Church.

4. Human rights in Australia

In this section we address the inquiry's terms of reference in the light of the above discussion.

a) Which human rights (including corresponding responsibilities) should be protected and promoted?

As discussed above, key rights include the right to equality, the right to marry, the right to personal autonomy, personal liberty and privacy, and freedom from discrimination, and freedom of religion.

b) Are these human rights currently sufficiently protected and promoted?

Given the continuing failure of Australia's governments to allow same-sex partners to marry, clearly the rights breached by this failure are not sufficiently protected. Given governmental support for state and national de facto laws and/or civil union schemes as an appropriate response to the demand for equality in marriage, there is clearly little understanding that these schemes are not an adequate remedy for such breaches.

c) How could Australia better protect and promote human rights?

i) Reform of the Marriage Act

A simple amendment of the Marriage Act to remove discrimination against same-sex relationships would remedy the human rights breaches identified above.

This reform would ensure that partners in same-sex relationships are treated with the respect and dignity demanded by fundamental human rights standards.

It would also ensure that the will of a majority of Australians (at least 57% according to the most recent polling¹²) is represented in national law.

However, in the absence of political will to adhere to human rights standards and/or acknowledge popular opinion, it is necessary to consider the role of a human rights instrument in secure full legal equality for same-sex couples.

ii) A human rights instrument

At first glance the overseas experience would tend to suggest that constitutionally-entrenched guarantees of basic human rights are more successful than statutory protections in ensuring marriage equality.

For example, constitutional human rights guarantees in the US, Canada and South Africa have been interpreted to allow same-sex marriage, whereas the statutory guarantees in Britain and New Zealand

¹² Galaxy Poll on same-sex relationships and the law commissioned by Get Up! And released in June 21st 2007

have not.

However, it does not necessarily follow that an Australian human rights statute would fail to ensure equal marriage and a constitutional charter of rights, succeed. There is a range of other factors which would influence the decisions of an Australian human rights tribunal and the impact of these decisions. These factors include the rapidly expanding jurisprudence, rapidly maturing public attitudes and rapidly changing perceptions amongst legislators, all in support of marriage equality.

Therefore, while our first preference is for constitutionally-guaranteed human rights, we also believe a statutory instrument could play a useful role in removing discrimination in marriage. A human rights statute would i) allow the case for and against marriage equality to be aired, ii) allow domestic and international jurisprudence to be given due consideration, iii) prompt debate in the legislature and in the general community, and iv) ensure the issue is kept on the legislative table.

Further to these points, we believe a statutory guarantee of human rights should, as far as possible, compel the legislature to periodically review laws which have been found to breach human rights, and publicly justify any failure on its part to remedy such breaches.

In this regard, we support the recommendations of the Tasmanian Law Reform Institute in its paper on a Tasmanian Charter of Rights published in October 2007¹³.

¹³ http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf