Chapter Two - Neil Hendriks, *Marriage equality in Australia: A fundamental right?*
Marriage equality in Australia: A fundamental right?

Neil Hendriks

The subject of same-sex marriage has provoked considerable debate in Australia for some years. There are those who strongly support marriage equality and those who equally oppose it. In 2004, the former Howard Government controversially amended the Marriage Act 1961 (Cth) (‘Marriage Act’) to define ‘marriage’ as a heterosexual union. Alistair Nicholson, former Chief Justice of the Family Court of Australia, described it as ‘one of the most unfortunate pieces of legislation that has ever been passed by an Australian parliament.’

The aim of this paper is to examine whether this amendment is consistent with Australia’s obligations under international human rights law and to offer potential reforms to the Marriage Act to ensure that it remains in line with human rights norms. These reforms will likely challenge the heteronormative paradigm that pervades the modern Australian legal system.

What is marriage?

Section 51(xxi) of the Constitution grants exclusive power to the Commonwealth to make laws with respect to ‘marriage’. Interestingly though, marriage in Australia was governed by the States and Territories until 1961. The Marriage Act was the first legislation to regulate the recognition

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1 Paula Gerber and Adiva Sifris, ‘Marriage Equality in Australia’ in Paula Gerber and Melissa Castan (eds), Contemporary Perspectives on Human Rights Law in Australia (Lawbook, 2013) 199.
3 Ibid.
5 Australian Constitution s 51(xxi).
of marriages at a federal level.\textsuperscript{7} However, the Act did not contain a formal definition of ‘marriage’;\textsuperscript{8} meaning that marriage was not exclusively a heterosexual institution.\textsuperscript{9}

This changed with the introduction of the \textit{Marriage Amendment Act 2004} (Cth) which inserted a definition of marriage into the \textit{Marriage Act}.\textsuperscript{10} Marriage was legally defined as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’\textsuperscript{11} and was based on the common law definition of marriage as set out in \textit{Hyde v Hyde & Woodmansee}.\textsuperscript{12}

The amendment also inserted a new s 88EA into the \textit{Marriage Act}.\textsuperscript{13} This section provided that same-sex marriages performed in foreign jurisdictions would not be legally recognised in Australia.\textsuperscript{14} Cooper argues this was in response to media reports that same-sex Australian couples were due to marry overseas which the Australian government would have been forced to recognise.\textsuperscript{15} Once more marriages in Australia were limited to those between a man and a woman.

The Attorney-General of the time, the Honourable Philip Ruddock, claimed that the majority of the Australian population understood ‘marriage’ to be a heterosexual union; despite lacking credible evidence to support this.\textsuperscript{16} Ruddock further argued that the amendments were necessary to avoid ‘the possible erosion of the institution of marriage.’\textsuperscript{17}

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\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{7} Ibid.
\item \textsuperscript{8} Ibid.
\item \textsuperscript{9} Gerber and Sifris, above n 1, 208.
\item \textsuperscript{10} \textit{Marriage Amendment Act 2004} (Cth) sch 1 cl 1.
\item \textsuperscript{11} \textit{Marriage Act 1961} (Cth) s 5(1) (definition of ‘marriage’).
\item \textsuperscript{12} (1866) LR 1 P & D 130, 133.
\item \textsuperscript{13} \textit{Marriage Amendment Act 2004} (Cth) sch 1 cl 3.
\item \textsuperscript{14} \textit{Marriage Act 1961} (Cth) s 88EA.
\item \textsuperscript{15} Cooper, above n 2.
\item \textsuperscript{16} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 27 May 2004, 29536 (Philip Ruddock).
\item \textsuperscript{17} Ibid.
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While both major political parties were in support of the legislation, the Australian Greens party labelled it as being blatantly discriminatory against the gay, lesbian, bisexual and transgender (‘GLBT’) community.\(^\text{18}\) These comments were an early indication that the Marriage Act, in its current form, potentially jeopardises Australia’s human rights record.\(^\text{19}\)

There have been several attempts to address this problem of discrimination.\(^\text{20}\) For example, at a state level, the Marriage Equality (Same Sex) Act 2013 (ACT) sought to legalise same-sex marriage in the Australian Capital Territory.\(^\text{21}\) Some same-sex couples were able to marry during the operation of this Act.\(^\text{22}\) Unfortunately, the High Court found that the legislation could not operate concurrently with the federal Marriage Act and the marriages were invalidated.\(^\text{23}\)

**Human rights and marriage**

Gerber and Sifris claim that Australia is committing a human rights violation by denying marriage equality.\(^\text{24}\) The human rights framework in regards to this issue is quite complex as there is no single international human rights instrument dealing with gender identity and sexuality.\(^\text{25}\) However, GLBT people enjoy all of the fundamental human rights set out in other instruments.\(^\text{26}\)

\(^{18}\) Anthony and Drabsch, above n 6, 21.


\(^{20}\) See, eg Marriage Equality Amendment Bill 2009 (Cth); Marriage Equality Amendment Bill 2012 (Cth).

\(^{21}\) *Marriage Equality (Same Sex) Act 2013* (ACT) s 7.


\(^{23}\) *Commonwealth v Australian Capital Territory* [2013] HCA 55, [5].

\(^{24}\) Gerber and Sifris, above n 1, 201.


\(^{26}\) Ibid.
These rights include those provided for in the International Covenant on Civil and Political Rights (‘ICCPR’),27 the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’)28 and the Convention on the Rights of the Child (‘CRC’).29 Australia has ratified each of these instruments and has made a commitment to honour the internationally agreed standards.30 The terms of these treaties, as they impact on same-sex marriage, will be analysed in turn.

**ICCPR**

Article 2(1) of the ICCPR assures that all of the rights recognised in the Covenant are to be enjoyed by all individuals ‘without distinction of any kind.’31 Article 26 of the ICCPR also states:

All persons are equal before the law ... [T]he 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.32

The United Nations (‘UN’) recognised that the term ‘other status’ includes sexual orientation and gender identity33 in the milestone case of *Toonen v Australia*.34 From this position it can be argued that the definition of marriage in the *Marriage Act* is discriminatory against GLBT people; heterosexual couples are given the right to marry, while same-sex couples are denied the same right.35 This is incompatible with Australia’s human rights obligations.

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27 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976) (‘ICCPR’).


30 Gerber and Sifris, above n 1, 201.

31 ICCPR art 2(1).

32 ICCPR art 26(1).


35 *Marriage Act 1961* (Cth) s 5(1) (definition of ‘marriage’).
Article 23 of the ICCPR is also relevant to the issue of same-sex marriage. It provides that ‘[t]he right of men and women of marriageable age to marry and to found a family shall be recognised.’ This could point towards a fundamental right to marriage equality.

Unfortunately, the UN Human Rights Committee (HRC) interpreted this provision narrowly in *Joslin v New Zealand*. The majority held that Article 23 only requires States to recognise unions between a man and a woman. The rationale for this was that the text of the article has the only use of gender specific language in the ICCPR. This decision failed to take into account important public policy and did not address how the broader principles of equality under the ICCPR relate to same-sex marriage.

The *Joslin* decision has subsequently been challenged at the domestic level by the Constitutional Court of South Africa in *Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*. This case found that the term ‘men and women’ was merely ‘descriptive of an assumed reality, rather than prescriptive of a normative structure for all time.’ In effect, this means that the law can evolve in accordance with contemporary values.

There is now a growing trend internationally to recognise marriage equality. At the time of writing, twenty countries have approved the right of same-sex couples to marry. This adds weight to an argument that Art 23 applies equally to same-sex couples.

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36 ICCPR art 23(2).
39 Gerber and Sifris, above n 1, 203.
40 Human Rights Law Resource Centre, above n 38, [15].
42 Ibid 100.
44 Ibid.
Moreover, in *Schalk and Kopf v Austria* the European Court of Human Rights stated that it ‘would no longer consider that the right to marry enshrined in Art 12 [of the European Convention of Human Rights] must in all circumstances be limited to marriage between two persons of the opposite sex.’ This further indicates that GLBT people are entitled to a right to marry.

**ICESCR**

The ICESCR is also a relevant consideration in deciding whether same-sex couples have the right to marry. Article 2(2) of the ICESCR provides a similar non-discrimination provision as the one mentioned above. Article 10(1) of the ICESCR also states:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...

The HRC has acknowledged the diversity of family structures between States. In *Schalk and Kopf v Austria* same-sex couples were unequivocally found to ‘fall within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.’ This means same-sex families are afforded rights under the ICESCR.

According to Geber, Tay and Sifris, laws that prohibit same-sex marriage or prevent recognition of same-sex marriages solemnised in another country only perpetuate prejudice against GLBT people. This is the opposite of providing protection and assistance.

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46 Ibid [61].
47 *ICESCR* art 2(2).
48 Ibid art 10(1).
51 Ibid [94].
Furthermore, the ICESCR provides that children should not be discriminated against ‘for reasons of parentage or other condition.’ It has been shown that children of same-sex families experience discrimination because of their family structure. This discrimination is accordingly due to their parentage.

Based on this reasoning, the Marriage Act does not comply with the ICESCR and Australia is therefore in breach of its international responsibilities. To enable legal parity for diverse families, the Act should be amended to allow same-sex marriage.

CRC

Article 2 of the CRC prohibits ‘all forms of discrimination or punishment [against children] on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents ...’ The UN Committee on the Rights of the Child have stated this includes a child’s parents’ sexual orientation. Article 3(1) of the CRC also states:

[i]n 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.

While the right to marry is an individual right, denying access to this right is likely to impact negatively on children of same-sex families. This is not in the best interests of the child and arguably constitutes discrimination; particularly given that ‘the human rights of children cannot

53 ICESCR art 10(3).
54 Gerber, Tay and Sifris, above n 52, 663.
55 CRC art 2(2).
57 CRC art 3(1).
58 Gerber and Sifris, above n 1, 207.
59 Ibid.
be realised independently from the human rights of their parents, or in isolation from society at large.\footnote{Committee on the Rights of the Child, Report on the Twenty-eighth Session, 28th sess, UN DOC CRC/C/111 (28 November 2001) [558].}

Pennings claims that if same-sex marriage were to be allowed, the ‘financial, social and psychological stability’ of these children would improve.\footnote{Guido Pennings, ‘Evaluating the Welfare of the Child in Same-sex Families’ (2011) 26(7) Human Reproduction 1609, 1614.} Research has also demonstrated that children feel more secure and protected when their parents are married.\footnote{Gerber, Tay and Sifris, above n 52, 664.} In this respect, marriage equality is consistent with the best interests’ principle under the CRC.\footnote{Gerber and Sifris, above n 1, 208.}

**Hague Convention**

Australia is also party to the *Hague Convention on Celebration and Recognition of the Validity of Marriage*.\footnote{Anthony and Drabsch, above n 6, 27.} Article 9 of the Convention states that ‘[a] marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States...’\footnote{Hague Convention on Celebration and Recognition of the Validity of Marriages, opened for signature 14 March 1978, [1991] ATS 16 (entered into force 1 May 1991) art 9 (‘Hague Marriage Convention’).}

The Convention requires Australia to recognise all marriages validly entered into in foreign States, regardless of whether that State is also a party to the Convention.\footnote{Jennifer Norberry, *Marriage Legislation Amendment Bill 2004*, No 155 of 2004, 4 June 2004, 5.} However, s 88EA of the *Marriage Act* makes it clear that same-sex marriages solemnised in another country will not be legal in Australia.\footnote{Marriage Act 1961 (Cth) s 88EA.} Australia does not have a reasonable defence to this position. Same-sex marriages are not listed in Art 8 of the Convention as marriages to which the recognition...
provisions do not apply;\textsuperscript{68} nor are they included in the exhaustive list of exceptions to the general obligation.\textsuperscript{69}

Moreover, same-sex marriage does not require international consensus to be considered ‘marriage.’\textsuperscript{70} This is because the Convention refers to marriage in its ‘broadest, international sense.’\textsuperscript{71} Even so, the recent growth in marriage equality around the world would mean that marriage of this kind is encompassed within that term.\textsuperscript{72} As such, Australia is arguably in breach of the Hague Convention and has denied basic human rights to same-sex couples. According to Professor Nygh ‘[i]t is difficult to see on what basis public policy could be invoked’ as justification for committing this human rights violation.\textsuperscript{73}

**Potential reform**

It would appear clear that the amendments to the *Marriage Act* are not consistent with Australia’s obligations under international human rights law. Gerber and Sifris maintain that further amendments must be made to remove all barriers to same-sex marriage.\textsuperscript{74} Such reform can only be achieved through a human rights framework; based on the principles of equality and non-discrimination.\textsuperscript{75} This would signal an inclusive approach to marriage in Australia.\textsuperscript{76}

The first revision should be the adoption of a broader definition of marriage.\textsuperscript{77} Section 5(1) of the *Marriage Act* should be amended to read, “‘Marriage’ means the union of two people to the

\textsuperscript{68} Hague Marriage Convention art 8.

\textsuperscript{69} Hague Marriage Convention art 11.

\textsuperscript{70} Norberry, above 66, 6.

\textsuperscript{71} Ibid.

\textsuperscript{72} Ibid.


\textsuperscript{74} Gerber and Sifris, above n 1, 220.

\textsuperscript{75} Human Rights Law Resource Centre, above n 38, 2 [7].

\textsuperscript{76} Ibid, 1 [4].

\textsuperscript{77} Ibid, 2 [7].
exclusion of all others, voluntarily entered into for life.\textsuperscript{78} Further references to gendered terms, such as ‘man and woman’ or ‘husband and wife’, should be removed from the \textit{Marriage Act}.\textsuperscript{79} For example, under s 46(1) marriage celebrants are required to explain the nature of marriage between a ‘man and woman.’\textsuperscript{80} Again, this should be replaced with the words ‘two people.’\textsuperscript{81}

Section 47 of the \textit{Marriage Act} should also be extended. The provision currently specifies that ministers of religion are not bound to solemnise any marriage they object to.\textsuperscript{82} This exemption should include all marriage celebrants, at least with respect to same-sex marriages, so as to allow the exercise of individual conscience on the issue.\textsuperscript{83}

Finally, same-sex marriages validly entered into overseas need to be recognised in Australia.\textsuperscript{84} As such, the entirety of s 88EA must be repealed in order to comply with human rights principles.\textsuperscript{85}

\textbf{Conclusion}

This paper has shown that the 2004 amendments to the \textit{Marriage Act} are incompatible with international human rights standards. Urgent reform is required to address this problem.

It is hoped that the recommended reforms can be achieved in the not too distant future. To do this we must transcend the historical, political and religious arguments surrounding same-sex marriage and recognise the universal virtue of marriage.\textsuperscript{86} If we do not, our domestic policies will be out of step with the developments across the world and Australia will be left on the ‘wrong

\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} \textit{Marriage Act 1961} (Cth) s 46(1).
\textsuperscript{81} Human Rights Law Resource Centre, above n 38, 2 [7].
\textsuperscript{82} \textit{Marriage Act 1961} (Cth) s 47.
\textsuperscript{84} Human Rights Law Resource Centre, above n 38, 2 [7].
\textsuperscript{85} Ibid.
\textsuperscript{86} Shirleene Robinson (ed) \textit{Homophobia: An Australian History} (Federation Press, 2008) 246.
side of history’. Until then the right to marry represents an ongoing battle for GLBT people in Australia.

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87 Gerber and Sifris, above n 1, 220.

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