

## DISCRIMINATION

### To the exclusion of all 'others'?

MAGDALENA MCGUIRE reassesses the approach to same-sex marriage in Australia

Marriage equality is an issue that just won't go away. Try as they might, opponents of same-sex marriage have not succeeded in keeping this issue firmly locked in the proverbial closet. In fact, marriage equality is very much 'out' at the moment. The campaign to end marriage discrimination in Australia has received new impetus in light of the national human rights inquiry, set up by the federal government to investigate whether Australia should adopt a Human Rights Act. And the issue of same-sex marriage is likely to be one of the most pertinent — and politically charged — before the inquiry.

If Australia were to adopt a Human Rights Act, it is likely to incorporate certain rights contained in the *International Covenant of Civil and Political Rights* ('ICCPR'). The inquiry will therefore be compelled to consider whether the right to marriage should be protected by a Human Rights Act (as indeed it is in the ICCPR). If Australia does protect marriage as a human right, who would this right apply to? Would it be an inclusive right that applies to all people regardless of sexual orientation? What insights can be gained from the approach under the ICCPR?

The right to marriage is protected by the ICCPR under Article 23(2), which recognises 'the right of men and women of marriageable age to marry and found a family'. At first glance, this could be interpreted as a general right that applies to all consenting adults. However, this was not the approach adopted by the UN Human Rights Committee ('HRC') in the key case on same-sex marriage and the ICCPR. In the 2002 case of *Joslin v New Zealand*,<sup>1</sup> the HRC decided that a state's failure to recognise same-sex marriage did not constitute a breach of the ICCPR. The HRC found that Article 23(2) only requires states to recognise as marriage a union between one man and one woman. The marriage provision of the ICCPR was therefore deemed not to apply to same-sex couples. The decision in *Joslin* is disappointing for equality activists around the globe. However, the case does not, by any means, put to rest the issue of same-sex couples' right to marry. In fact, the cursory legal reasoning in *Joslin* raises more questions than it answers.

Unfortunately, *Joslin* sidesteps a discussion of important public policy issues raised by the applicants in the case. Rather, the majority decision hinges strictly on the interpretation of the definition of marriage. The majority found that, as Article 23(2) is the only provision in the ICCPR to use gender-specific language, it applies to the right of men and women to marry each other (and not the right of men and women 'to marry whomever they please'). The decision found the exclusion of same-sex couples from the definition is not discriminatory because it is a valid form of differential treatment: a state's refusal to provide recognition of marriage between homosexual couples does not constitute discrimination under the ICCPR.

However, the *underlying* criteria for restricting marriage to heterosexual couples are not made apparent. By focusing narrowly on the interpretation of marriage

— without exploring the concepts or values that drive this interpretation — the decision fails to explain why same-sex couples are not entitled to enjoy the same rights as heterosexual couples.<sup>2</sup> In other words, the decision does not provide the underlying justification for excluding a particular group of people from the definition of marriage under the ICCPR.

What the HRC failed to appreciate was that the issue of same-sex marriage cannot be viewed in dry, legal, isolation. It must be set in context of the ongoing systemic discrimination faced by lesbian, gay, bisexual and transgender ('LGBT') people. By failing to give legal recognition to same-sex marriage, states perpetuate systemic discrimination against LGBT people and exclude them from full membership in society. In this context, the idea that a state's 'mere refusal' to recognise same-sex marriage amounts to a form of valid differentiation, rather than discrimination, does not hold true. Like heterosexual couples, not all same-sex couples view marriage as the ultimate endorsement of their relationship. Nonetheless, a state's formal recognition of same-sex marriage constitutes an important public acknowledgment of the equal rights of LGBT people and the value of their relationships. Moreover, it is a public acknowledgment that remains long overdue in Australian law.

The human rights inquiry provides an opportune moment for Australia to remove all forms of sexual orientation discrimination from its laws, including marriage laws. The continued differentiation between heterosexual and same-sex relationships cannot be justified in a society that prides itself on giving all people a fair go. Moreover, in light of the tensions inherent in *Joslin*, and the legal and social developments since the decision, Australia is compelled to rethink the approach to marriage enshrined in the ICCPR. Since *Joslin* was decided in 2002, the movement for marriage equality has steadily gathered momentum in Australia and abroad. On the international front, the number of jurisdictions opting to eliminate marriage discrimination has steadily increased and now includes Canada, South Africa, Belgium and Spain. Australian law currently lags behind. However, earlier this year a Bill was lodged in the Senate seeking to amend the *Marriage Act 1961* (Cth) so that same-sex partners are able to marry in Australia, and same-sex marriages legally entered into overseas are recognised in this country.<sup>3</sup> The lodging of this Bill coincided with recent evidence which indicates that the majority of Australians now support same-sex marriage.<sup>4</sup> These developments should be taken into account by the inquiry in its assessment of how to better protect human rights in Australia. If Australia is to pay more than lip service to the idea of equality, it must adopt an inclusive approach to marriage that respects the human rights of *all* Australians — regardless of their sexual orientation or identity.

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