

Marriage: A Human Right for All?

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Abstract

Article 23 of the *International Covenant on Civil and Political Rights* contains an express right to marry. This article analyses this provision, other United Nations human rights treaties, and relevant jurisprudence to determine whether art 23 applies to same-sex couples. In the only authoritative interpretation of art 23, *Joslin v New Zealand*, the United Nations Human Rights Committee found that it does not apply to same-sex couples. However, that decision is more than 12 years old and arguably would not be decided in the same way should a similar case come before the Human Rights Committee in the future. Using the principles of treaty interpretation, this article asserts that *Joslin v New Zealand* is no longer good law, and concludes that the right to marry should be interpreted in a non-discriminatory manner and should not be restricted exclusively to opposite-sex couples. This article also seeks to start a dialogue about the human right to marry's intersectionality with and indivisibility from other human rights. As such, it suggests new, progressive ways of interpreting the norms of the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* as they relate to the human right to marry.

I Introduction

Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere.¹

United Nations Secretary-General Ban Ki-moon

In the past decade, the human rights of lesbian, gay, bisexual, transgender and intersex ('LGBTI')² people have increasingly come to the fore of global human

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¹ Ban Ki-moon, 'Secretary-General's Video Message to Human Rights Council Meeting on Violence and Discrimination Based on Sexual Orientation or Gender Identity' (Geneva, 7 March 2012) <www.un.org/sg/statements/index.asp?nid=5900>.

² The authors acknowledge that sexual orientation and gender identity are fluid, and encompass more than the LGBTI acronym. For example, an increasing number of people have reappropriated the word 'queer' to identify their sexual orientation and/or gender identity, and identities such as asexuality are excluded in this acronym. Additionally, people who are same-sex attracted may not

rights consciousness. However, whether the human right to marry encompasses same-sex couples remains subject to debate and conjecture. The reasons for this are manifold, and have complex political and cultural origins; that are not grounded purely in legal interpretation.

Domestically, the last decade has seen an increasing number of states recognise the right of same-sex couples to marry within their national legal systems. Since the Netherlands became the first state to legalise same-sex marriage in 2001, a further 18 states have followed suit: Belgium, Spain, Canada, South Africa, the United States ('US'), Norway, Sweden, Mexico, Portugal, Iceland, Argentina, Denmark, Brazil, France, Uruguay, New Zealand, and England and Wales.³ Although there appears to be a worldwide trend for states (or at least Western states) to recognise the right of same-sex couples to marry within domestic laws,⁴ there is yet to be global consensus on whether international human rights law includes such a right.

The right to marry is protected under art 23(2) of the *International Covenant on Civil and Political Rights*,⁵ but the question of whether this right includes same-sex couples remains open to interpretation. Domestic courts, treaty committees, charter-based bodies such as the United Nations ('UN') Human Rights Council, and civil society have all proffered various interpretations of art 23.

This article asserts that the *Joslin v New Zealand* decision⁶ is no longer good law, and that international human rights law should be interpreted to include a right for same-sex couples to marry. It does this by taking a holistic approach to the *ICCPR* and critically examining all relevant rights in this instrument, not just art 23 relating to marriage. This is followed by a consideration of relevant provisions in other international human rights treaties, including the *International Covenant on Economic, Social and Cultural Rights*⁷ and the *Convention on the Rights of the Child*.⁸ In so doing, this article aims to interrogate international human rights law in a novel way, and to establish that a good faith interpretation of these treaties requires that the right to marry apply to all couples, regardless of gender.

identify with lesbian, gay and bisexual labels. However, the majority of the current literature cited in this article uses the term 'LGBTI' and therefore the authors have chosen to adhere to this terminology.

³ Same-sex marriage is recognised in 35 states in the US, and in Mexico City and Quintana Roo in Mexico. Australia briefly recognised same-sex marriage, after the Australian Capital Territory ('ACT') legalised it in September 2013. However, the ACT legislation was struck down by the High Court in December 2013, on the basis that it was unconstitutional as power to enact legislation relating to marriage belongs to the Federal Government.

⁴ Jamie Gardiner, 'Same-sex Marriage — A Worldwide Trend?' in Paula Gerber and Adiva Sifris (eds), *Current Trends in the Regulation of Same-sex Relationships* (Federation Press, 2011).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

⁶ Human Rights Committee, *Views: Communication No 902/1999*, 75th sess, UN Doc CCPR/C/75/D/902/1999 (17 July 2002) ('*Joslin v New Zealand*').

⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

II *International Covenant on Civil and Political Rights*

The relevant provisions of art 23 of the *ICCPR* state that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

In interpreting the right to marry, and whether its scope could extend to same-sex couples, it is important to take note of the preamble of the *ICCPR* and the maxim of non-discrimination which is enunciated both as a stand-alone human right and as part of the right to marry.⁹ The preamble provides that the purpose of the *ICCPR* is to recognise ‘the inherent dignity and ... the equal and inalienable rights of all members of the human family’.

The right to marry received its most prominent and frequently cited interpretation in the Human Rights Committee’s (‘HRC’) decision in *Joslin v New Zealand*. The key question in that case was whether the right to marry in art 23 included same-sex couples; the HRC concluded that the article protects only heterosexual couples. The rationale behind the decision has been criticised for its brevity and its inconsistency with both the doctrine of interpretation established by the *Vienna Convention on the Law of Treaties*¹⁰ and norms of human rights treaty interpretation previously elucidated by the HRC itself.¹¹ However, the *Joslin v New Zealand* interpretation of the right to marry remains authoritative opinion, and is commonly cited in documents on international human rights norms with regards to sexual orientation and gender identity.¹² As such, a detailed analysis of the opinion in the case is required in order to determine whether this is a decision made on solid foundations or one that should not be relied upon in the future.

The HRC concluded, in a brief three-paragraph analysis, that art 23 of the *ICCPR* does not protect the rights of same-sex couples to marry. It then summarily dismissed all the other alleged violations of the *ICCPR*, stating that:

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the

⁹ *ICCPR*, above n 5, preamble, arts 2, 26.

¹⁰ Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘*Vienna Convention*’).

¹¹ See, for example, Sarah Joseph, ‘Human Rights Committee: Recent Cases’ (2003) 3(1) *Human Rights Law Review* 91, 101; Paula Gerber and Adiva Sifris, ‘Marriage Equality in Australia’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters 2013) 199–202.

¹² See, for example, United Nations Human Rights Office of the High Commissioner, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, UN Doc HR/PUB/12/06 (2012) <<http://www.ohchr.org/documents/publications/bornfreeandequalwres.pdf>> (‘*Born Free and Equal*’). *Born Free and Equal*, the United Nation’s (‘UN’) first guide to sexual orientation and gender identity in international human rights law, notes that: ‘Under international human rights law, States are not required to allow same-sex couples to marry’ (p 53). *The Yogyakarta Principles on the Application of International Human Rights in Relation to Sexual Orientation and Gender Identity* are noticeably silent on the topic of same-sex marriage.

rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.¹³

The HRC, using a semantic interpretation of the text, found that the use of the phrase ‘men and women’ in art 23(2), rather than the gender-neutral terminology used elsewhere in the *ICCPR* (‘every human being’, ‘everyone’ and ‘all persons’) ‘has been consistently and uniformly understood as indicating that ... marriage [is] only the union between a man and a woman’.¹⁴

There are two criticisms of the HRC’s interpretation. First, the assertion that ‘men and women ... has been consistently and uniformly understood as indicating that ... marriage [is] only the union between a man and woman’ is contrary to the intention of the drafters and is not indicative of a gender specification in art 23. Second, applying the *Vienna Convention* art 23 should not be interpreted as excluding same-sex couples. In addition, the 12 years that have passed since this decision arguably lessen its relevance. This is because many more states have now legislated for same-sex marriage than at the time of the *Joslin v New Zealand* decision — including New Zealand, the State Party in the case. Moreover, the *ICCPR* is a living instrument that should be interpreted and applied in light of present circumstances. These considerations are each examined in-depth below.

A Gendered Language

The *Joslin v New Zealand* opinion noted that art 23 details the only substantive right in the *ICCPR* that uses the term ‘men and women’, and concluded that the use of this language requires a restrictive interpretation. Making reference to the *travaux préparatoires*, the HRC found that references to ‘husband and wife’ in the original drafting process of art 23 indicated the intentionality of the gender specificity of this article.¹⁵

However, this may be a misinterpretation of the drafters’ intention if it is considered outside of its historical context. The words ‘men and women’ in art 23 mirror the wording of art 3 of the *ICCPR*, which requires State Parties to ‘ensure the equal right of men and women’ to enjoy all Covenant rights. The *travaux préparatoires* of the *ICCPR*,¹⁶ as cited by the HRC in *Joslin v New Zealand*, focused on the need for gender equality within a marriage,¹⁷ and the prevention of underage or non-consensual marriages.¹⁸ The reference to ‘husband and wife’ in the *travaux préparatoires* was to defend the importance of including the right to marry in the *ICCPR*, ‘in view of great and unjust inequalities that existed as regards to the rights of husband and wife’.¹⁹ The *travaux préparatoires* suggest

¹³ *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [8.3].

¹⁴ *Ibid* [8.2].

¹⁵ *Ibid* [4.4].

¹⁶ Economic and Social Council, *Report of the 9th Session of the Commission on Human Rights*, 16th sess, UN Doc E/CN.4/689 (7 April 1953) [78]–[86].

¹⁷ *Ibid* [81].

¹⁸ *Ibid* [82].

¹⁹ *Ibid* [81].

that the Commission on Human Rights²⁰ ‘should move forward boldly towards the realization of the principles of equality’.²¹

Thus, the drafting history reveals no intention to exclude same-sex couples. Rather, gendered language was adopted in order to emphasise the principle of equality between men and women. In fact, in the *travaux préparatoires* debate in the Third Committee relating to the right to marry, France noted that ‘the Commission has devoted particular attention to the question of equality of rights as between man and woman. It had agreed that such equality should apply at the moment of contract, during the marriage and at the time of dissolution’.²²

A further examination of the *Universal Declaration of Human Rights* (‘UDHR’) *travaux préparatoires* on the right to marry suggests that the use of ‘men and women’ was believed by some to be a drafting flaw. Brazil noted in an early draft that:

there is, perhaps, a small flaw in drafting technique in this article. It is evident ... that the word ‘men’ comprises both men and women. In this article, however, it has been used in a restrictive sense ... It would be preferable to use here a generic expression, such as ‘everyone’ or ‘every person’.²³

This comment suggests that there had not been any detailed discussion of the use of the term ‘men and women’. Presumably, if this language had been the subject of debate, Brazil would not have felt the need to make this drafting suggestion.

The suggestion that the gendered nature of ‘men and women’ was unintentional is supported by the lack of gendered language in art 23(3) and (4). Here, ‘spouses’ are referred to, rather than husband and wife, or men and women, although, at the time of drafting, this would undoubtedly have been understood as being opposite-sex spouses. If the use of ‘men and women’ in art 23(2) was intended to denote specific genders for the composition of marriage, it seems unusual that this same approach was not carried through the whole article. While the State Party in *Joslin v New Zealand* argued that the use of the word ‘spouse’ was indicative of marriage between parties of the opposite sex,²⁴ there is little evidence to support that this word has any more gendered connotation than the word ‘marriage’. Rather, the term ‘spouse’ generally connotes one of the individuals in a legally recognised marriage under a country’s domestic law. For example, both the *Marriage (Same Sex Couples) Act 2013* (UK) and the *Civil Union Act 2006* (South Africa) refer to partners in a same-sex marriage as ‘spouses’. Thus, in modern times, a spouse is determined by the presence of a legal marriage, regardless of the gender composition of that marriage.

²⁰ The UN Commission on Human Rights was replaced by the UN Human Rights Council in 2006.

²¹ Economic and Social Council, *Report of the 9th Session of the Commission on Human Rights*, 16th sess, UN Doc E/CN.4/689 (7 April 1953), [81].

²² *Summary Record of the 124th Meeting*, UN GAOR, 3rd Comm, 124th mtg, UN Doc A/C.3/SR.124 (6 November 1948) [363].

²³ William A Schabas (ed), *Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press, 2013) vol III, 2458.

²⁴ *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [4.3].

Recourse to the *travaux préparatoires*, in the absence of direct intention, reveals that the drafters did not envisage that the right to marry encompassed same-sex couples. This is unsurprising, given that the drafting of the *ICCPR* took place in the middle of the last century, while UN recognition of sexual orientation as a characteristic protected by non-discrimination provisions did not occur until 1994.²⁵ However, the fact that the drafters of art 23 did not contemplate it applying to same-sex couples does not restrict how it should be interpreted and applied today. The HRC has emphasised that the *ICCPR* should be regarded as a living instrument, with the rights to be ‘applied in context and in the light of present-day conditions’.²⁶ Thus, the words ‘spouse’, and ‘men and women’ in art 23 should be interpreted in a modern context, where sexual orientation is a basis for human rights protection.

There are many examples of modern interpretations being applied to the *ICCPR* and other human rights instruments. For example, the HRC has retreated from a previous opinion that the *ICCPR* does not provide for a right of conscientious objection.²⁷ In 1994, in *General Comment No 22*, the HRC found that a right to conscientious objection derives from art 18 ‘inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief’.²⁸ The HRC noted that there was a ‘growing number of states’ that recognise the right to conscientious objection. It has been suggested that this groundswell of support led to the HRC’s changed opinion.²⁹

A second example of a ‘living instrument’ interpretation of a human right treaty is seen in the Committee on Economic, Social and Cultural Rights (‘CESCR’) opinion on the right to water. In 2003, the CESCR articulated the view that arts 11 and 12 of the *ICESCR* includes a right to water, even though there is no express reference to water, and it is unlikely that the drafters of the *ICESCR*, in the mid-1900s, contemplated the existence of such a right.³⁰ Similarly, the right to marry in art 23, could, in a modern context, be said to contain within it the right of

²⁵ In Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) (*Toonen v Australia*), the HRC found that the criminalisation of homosexuality in Tasmania was a breach of the right to privacy under art 17 of the *ICCPR* and the right to non-discrimination under art 26.

²⁶ Human Rights Committee, *Views: Communication No 829/1998*, 78th sess, UN Doc CCPR/C/78/D/829/1998 (5 August 2002) [10.3] (*Roger Judge v Canada*).

²⁷ Human Rights Committee, *Views: Communication No 185/1984*, 25th sess, UN Doc CCPR/C/25/D/185/1984 (9 July 1985) (*LTK v Finland*).

²⁸ Human Rights Committee, *General Comment No 22*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

²⁹ Joseph, above n 11, 102.

³⁰ Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water*, 29th sess, UN Doc E/C.12/2002/11 (2002). This General Comment generated criticism, with some commentators arguing that the CESCR exceeded its authority: see, eg, Stephen Tully, ‘A Human Right to Access Water? A Critique of General Comment No 15’ (2005) 23 *Netherlands Quarterly of Human Rights* 35. However, the wide acceptance of this comment may be seen in the General Assembly’s adoption of the resolution, *The Human Right to Water and Sanitation*, GA Res 64/292, UN GAOR, 64th sess, 108th plen mtg, Agenda item 48, UN Doc A/RES/64/292 (3 August 2010, adopted 28 July 2010), without any votes against: Paula Gerber and Bruce Chen, ‘Recognition of the Human Right to Water: Has the Tide Turned?’ (2011) 36(1) *Alternative Law Journal* 21.

same-sex couples to wed, particularly in a global context when a growing number of states are recognising such a right.

In the Australian context, the High Court of Australia recently applied a ‘living instrument’ approach to the constitutional definition of marriage. The High Court noted in the context of the ‘marriage power’ contained in the *Australian Constitution* (s 51(xxi)) that ‘the rights and obligations which attach to the status and the social institution [of marriage] ... are not, and never have been, immutable’ and that ‘there is no warrant for reading the legislative power given by s 51(xxi) as tied to the state of the law with respect to marriage at federation’.³¹

B *Treaty Interpretation*

The HRC’s interpretive methodology in *Joslin v New Zealand* follows a narrow semantic reading of art 23. This approach falls short of the comprehensive and established rules of treaty interpretation laid down in the *Vienna Convention*. While the interpretive maxims codified in ss 31 and 32 are routinely applied by State Parties, there are important reasons why non-state actors, such as treaty bodies, should also be guided by these rules.

First, treaty body opinions are unenforceable. As such, the legitimacy of their decisions relies upon how convincingly legal communications are presented, and how readily states accept these opinions as authoritative. Utilising an accepted method of interpretation enables states to trace the logic and consistency of treaty body output to and support such opinion based on more than pure conjecture. Treaty bodies have been criticised for a lack of ‘substantial arguments, coherence, and analytical rigor; the absence of a visible concept of interpretations; and the existence of contradictory remarks by different committee members, which are caused by the absence of a principled approach’.³² Following established maxims of interpretation would mediate this critique.

Second, treaty bodies administering human rights instruments have a particular responsibility to ensure the enjoyment of treaty rights by the intended beneficiaries of these instruments. Treaty bodies, comprising human rights experts, are well placed to provide alternative interpretation of human rights instruments to those that might be propounded by a state.³³

It can be said that the HRC’s decision in *Joslin v New Zealand* is inconsistent with a good faith interpretation of the *ICCPR*. A good faith interpretation requires not only consideration of the words of the section, but the context, object and purpose of the article and the covenant. This requirement of a good faith interpretation is consistent with art 5(1) of the *ICCPR*, which prevents ‘any State, group or person’ from limiting the rights in the *ICCPR* to a ‘greater

³¹ *Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013) [19].

³² Kerstin Mechlem, ‘Treaty Bodies and their Interpretation of Human Rights’ (2009) 42 *Vanderbilt Journal of Transnational Law* 905.

³³ *Ibid* 22.

extent than as stated in the Covenant'.³⁴ Arguably, compliance with art 5(1) and a good faith reading make it difficult to justify discriminating against same-sex couples in an instrument that emphasises non-discrimination.

C *Family and Marriage*

The *ICCPR* regards marriage and family as intrinsically interlinked.³⁵ Article 23(2) and (3) indicates that freedom to marry can be an important precursor to founding a family, stating that the 'right of men and women of marriageable age to marry and to found a family shall be recognized'. However, this article should not be regarded as excluding other ways of founding a family, in the absence of marriage.³⁶ The entitlement of a family to protection 'by society and the State' in art 23(1) is the only place where the power of the state is called upon as a protective device, thus highlighting the high regard the drafters had for the family.³⁷

The diversity of family structures worldwide is such that the HRC has taken a broad approach to what constitutes a family, noting in *General Comment No 19* that families 'may differ in some respects from State to State ... and it is therefore not possible to give the concept a standard definition'.³⁸ Commentators have noted that the criteria to be considered when determining whether persons constitute a family under public international law include cohabitation, financial ties or support, and an intense relationship. These criteria protect the relationship between a child and caregivers, regardless of biological ties. The protection of the family has particular relevance to family units of same-sex couples with children, and their interest in associated legal protections that are afforded to children of married parents in many countries. It is important to note that, under international law, a family unit may comprise of an opposite-sex couple without children. In 2010, the European Court of Human Rights ('ECHR') noted that same-sex couples without children fall within the notion of family, 'just as the relationship of a different-sex couple in the same situation would'.³⁹

Protection of the family through same-sex marriage may be the only comprehensive way a State Party may meet the obligations of *ICCPR* art 23 towards same-sex parented families. The right to marry is regarded as obligating

³⁴ Maria Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 304.

³⁵ See Schabas, above n 23, 2458.

³⁶ Gudmundur Alfredsson and Asbjørn Eide, *Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers, 1999) 340.

³⁷ Johannes Morsink, *Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 32. According to the *travaux préparatoires* of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (which contains similar language), inclusion of a reference to 'society' makes this provision intentionally broader than a clause just reading 'the family shall be protected by the law': Schabas, above n 23, 1327.

³⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008).

³⁹ *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010) [93]–[94].

the state to ‘establish a legal basis for the existence of the family, that is, provisions of family law protecting the union of the parents and their relations with their children’, as well as providing for the protection of children in the case of family dissolution.⁴⁰ Further, the horizontal obligation that families are entitled to protection from society is regarded as placing a positive obligation on the state ‘to ensure through juridical means that the State does not interfere without legitimate purpose’ with the family unit.⁴¹ The protection of the family and the legal status of same-sex parents is discussed further below.

D *Non-discrimination: ICCPR Articles 2 and 26*

Entirely absent from *Joslin v New Zealand* is a consideration of how a restrictive reading of the right to marry is compatible with the right to non-discrimination in *ICCPR* arts 2 and 26. In *Joslin v New Zealand*, the HRC avoided answering this question by stating that, as no right under art 23 had been found, no examination of breaches of other articles was required.⁴²

The right to non-discrimination is both a self-contained right that demands domestic legal protection and a procedural right that applies to every other human right within the covenant. Article 2 prohibits discrimination in relation to the rights within the *ICCPR*, while art 26 provides for equality before the law and equal protection from discrimination by the law.

Importantly, the right to non-discrimination in art 2 is aimed at giving expression to one of the basic provisions of the *Charter of the United Nations*, and enshrines a founding principal of the UN: to combat discrimination in the world.⁴³ More attention is devoted to non-discrimination than any other category of right in the *Charter*.

While ‘discrimination’ is not defined in the *ICCPR*, the HRC has elaborated on its substance, stating that discrimination is:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁴⁴

It is now well established that the grounds protected by the non-discrimination provisions of the *ICCPR* apply to sexual orientation. In *Toonen v Australia*, the HRC held that sexual orientation is included in the class of ‘sex’ for purposes of arts 2 and 26.⁴⁵ The HRC may have ‘arrived at the right conclusion via

⁴⁰ Alfredsson and Eide, above n 36, 343.

⁴¹ *Ibid.*

⁴² *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [8.3].

⁴³ Morsink, above n 37, 92.

⁴⁴ Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) [7].

⁴⁵ *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992, [8.7].

the wrong avenue',⁴⁶ as 'other status' is the more appropriate classification, since it allows for a clear delineation between sex (as it relates to gender) and sexual orientation. The CESCR has noted that, under the *ICESCR*'s identical non-discrimination provision, sexual orientation is recognised under 'other status'.⁴⁷

In *General Comment No 18* on non-discrimination, the HRC noted that equal treatment does not mean identical treatment; however, it went on to state that 'the covenant is explicit' about the areas where this principle applies (for example the segregation of juvenile offenders from adults in art 10(3)).⁴⁸ The HRC also stated that differential treatment 'will not constitute discrimination if the criteria for such differentiation are "reasonable and objective"'.⁴⁹ The HRC has not applied this as a strict test, and its decision about what amounts to reasonableness and objectivity depends largely on the circumstances.

If the HRC was to consider the question of non-discrimination in relation to same-sex marriage, it would first determine whether the grounds for discrimination are direct or indirect, and whether such discrimination was 'reasonable and objective'. Direct discrimination requires an element of intention; the intended outcome of the rule or action is to discriminate. Indirect discrimination — via seemingly neutral laws that may have an effect, rather than an intention or purpose, to discriminate — is increasingly recognised by the HRC.⁵⁰ Indirect discrimination breaches the *ICCPR* 'if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular ... sex ... or other status'.⁵¹

When domestic laws intend to explicitly prohibit the marriage of same-sex couples, or to prevent recognition of same-sex marriages solemnised in another country, the grounds for discrimination may be direct.⁵² Additionally, laws that are neutral as to the gender composition of marriage, but are implemented so as to prohibit same-sex couples from marrying, also contain grounds for direct discrimination.⁵³ Laws that permit the marriage of opposite-sex couples, without

⁴⁶ Sarah Joseph, 'Toonen v Australia: Gay Rights under the ICCPR' (1994) 13(2) *University of Tasmania Law Review* 392.

⁴⁷ Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/GC/20 (25 May 2009) [32].

⁴⁸ *General Comment No 18*, UN Doc HRI/GEN/1/Rev.1, [8].

⁴⁹ *Ibid* [13].

⁵⁰ See, eg, Human Rights Committee, *Views: Communication No 208/1986*, 37th sess, UN Doc CCPR/C/37/D/208/1986 (9 November 1989) ('*Karnel Singh Bhinder v Canada*').

⁵¹ Human Rights Committee, *Views: Communication No 998/2001*, 78th sess, UN Doc CCPR/C/78/D/998/2001 (8 August 2003) [10.2] ('*Althammer et al v Austria*').

⁵² See, eg, Australia's *Marriage Amendment Act 2004* (Cth). In the Explanatory Memorandum to the Marriage Amendment Bill 2004 (Cth), the purpose of the Bill is described as being to 'give effect to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same sex relationships cannot be equated with marriage'.

⁵³ See, eg, *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, where New Zealand's *Marriage Act 1955* (NZ) was interpreted by the Registrar-General as confined to marriage between a man and a woman. This Act was amended in 2013 when New Zealand legalised same-sex marriage. Section 5 of the *Marriage (Definition of Marriage) Amendment Act 2013* (NZ) expanded the definition of 'marriage' to mean 'the union of 2 people, regardless of their sex, sexual orientation, or gender identity'.

revealing intent to prevent the marriage of same-sex couples, may contain indirect grounds of discrimination.

Laws containing grounds of direct and indirect discrimination may *not* be discriminatory if such laws are based on reasonable and objective criteria. However, it is difficult to conceive of reasonable and objective criteria for such differential treatment that the HRC would find acceptable.

Marriage laws based on the protection of public morals may not satisfy a reasonable and objective requirement. The HRC has noted that ‘limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition’.⁵⁴ As such, laws based on the principles of a single religious or cultural tradition may still be classed as discrimination under the *ICCPR*. Further, the HRC has indicated that same-sex attraction, in and of itself, is not a ground on which a state may justify the protection of the ‘morals, health, rights and legitimate interests of minors’, as opposed to heterosexuality or sexuality generally.⁵⁵ By extension, should a communication be brought to the HRC claiming discrimination on the basis of laws preventing same-sex marriage, it could be difficult for the HRC to uphold laws that justify discrimination on the basis of either the morality of sexual orientation or the purported harm that formalising same-sex relationships might pose to a society.

Restrictive marriage laws based on a criterion aimed at the protection of children will find little traction as to being ‘objective and reasonable’, given the irrefutable medical and psychological consensus⁵⁶ that same-sex relationships pose no greater threat either to the individuals involved or children of those individuals than opposite-sex relationships. This is discussed further below.

Thus, it seems unlikely there is a reasonable and objective criterion that would satisfy the HRC that restrictive marriage laws were not discriminatory against individuals based on their sexual orientation. The global shift of the international community, and the UN, towards recognising LGBTI rights, discussed below, further decreases the plausibility of such an argument being accepted by the HRC.

E *Potential Future Consideration of the Right to Marry*

There are some important contextual considerations that must be borne in mind when analysing the *Joslin v New Zealand* decision. Since 2002, 18 states have legalised same-sex marriage, as have several regions within states. Furthermore, bills or proposals have been, or are being, debated in Australia, Scotland and Taiwan, among others. National courts examining the question of same-sex marriage are requiring governments to legalise marriage by same-sex couples based on respect for human rights, thus derogating from the *Joslin v New Zealand*

⁵⁴ *General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8].

⁵⁵ Human Rights Committee, *Views: Communication No 1932/2010*, 106th sess, UN Doc CCPR/C/106/D/1932/2010 (31 October 2012) (*Fedotova v Russian Federation*) [10.6].

⁵⁶ See below n 117.

decision. For example, in *Minister of Home Affairs v Fourie*,⁵⁷ Sachs J found that ‘the reference to “men and women” is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time’.⁵⁸ In *Hollingsworth v Perry*, the United States Supreme Court held that the lack of federal recognition of same-sex marriage ‘demeans the couple ... and humiliates tens of thousands of children being raised by same-sex couples’.⁵⁹ In *Commonwealth v Australian Capital Territory*, the Australian High Court noted that:

[T]he nineteenth century use of terms of approval, like ‘marriages throughout Christendom’ or marriages according to the law of ‘Christian states’, or terms of disapproval, like ‘marriages among infidel nations’, served only to obscure circularity of reasoning. Each was a term which sought to mask the adoption of a premise which begged the question of what ‘marriage’ means.⁶⁰

This clear shift in the global perspective is also reflected in a corresponding growth of civil society organisations using human rights laws to promote and protect LGBTI persons.⁶¹ At the UN level, increasing promotion and acceptance for the protection of LGBTI rights is occurring. In 2010, UN Secretary-General Ban Ki-moon presented a landmark speech on the need for LGBTI rights to be regarded as human rights (an extract of which introduces this paper) and, in 2011, the Human Rights Council adopted a resolution on human rights, sexual orientation and gender identity.⁶² In 2012, the UN Human Rights Office released its first major work on LGBTI human rights,⁶³ a report entitled *Born Free and Equal*, which was followed by the 2013–14 awareness-raising campaign on LGBTI rights under the same name.⁶⁴

Should the HRC be confronted with another individual communication concerning the right of same-sex couples to marry, it seems likely that restricting marriage to opposite-sex couples, as in *Joslin v New Zealand*, would be far less defensible. If forced to consider the right to non-discrimination in relation to marriage, the HRC’s opinion may reflect the growing consensus that marriage should be open to all couples regardless of gender composition. Commentators suggest that a ‘global tipping point’ is rapidly approaching,⁶⁵ and that, should a

⁵⁷ *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19.

⁵⁸ *Ibid.*

⁵⁹ *Perry v Brown*, 265 P 3d 1002 (Cal, 2011), [22]–[23].

⁶⁰ *Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013), [36].

⁶¹ Along with a growth in sexual orientation and gender identity civil society organisations, such as Kaleidoscope Australia Human Rights Foundation and Human Dignity Trust, dedicated sexual orientation and gender identity divisions now exist in many major international and non-governmental institutions, including the UN, Amnesty International, Human Rights Watch and the International Commission of Jurists.

⁶² UN Secretary-General, ‘Confront Prejudice, Speak Out against Violence, Secretary-General Says at Event on Ending Sanctions Based on Sexual Orientation, Gender Identity’ (Press Release, SG/SM/13311, 10 December 2010); Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, GA Res 17/19, UN GAOR, 17th sess, 34th mtg, Agenda Item 8, UN Doc A/HRC/RES/17/19 (14 July 2011).

⁶³ *Born Free and Equal*, above n 12.

⁶⁴ *Ibid.*

⁶⁵ Sarah Joseph, ‘Latest Case Law Trends: The International Covenant on Civil and Political Rights’ on *Castan Centre for Human Rights Law: Official Blog* (28 October 2013)

similar case to *Joslin v New Zealand* be brought before the HRC, there may well be a different outcome.

Even though HRC opinions are only quasi-judicial, the jurisprudence that emerges is widely utilised as the authoritative interpretation of the *ICCPR*. As a result, while strong arguments can be made that art 23 should be interpreted to include same-sex couples, until an HRC opinion reflects this, it is not possible to assert that international human rights law presently provides a right for same-sex couples to marry.

F *Equivalent Benefits and the Right to Non-discrimination*

There is no consensus across the UN system as to what level of relationship benefits same-sex couples must be able to access before a state can be said to be meeting its obligations regarding non-discrimination. The Human Rights Council, in its 2011 report on discrimination based on sexual orientation and gender identity, addressed the question of what states' obligations are vis-a-vis marriage and non-discrimination for same-sex couples.⁶⁶ The Council noted that in *Joslin v New Zealand* the HRC stated that legalising marriage for same-sex couples is not a required human rights obligation. However, the Council went on to note that states must permit same-sex couples to receive equal benefits as *unmarried* couples.⁶⁷ This opinion appears to regress from the suggestion by the individual members of HRC in *Joslin v New Zealand* that legal parity with *married* couples is required for states to be meeting their non-discrimination obligations to same-sex attracted people.⁶⁸

In *Danning v The Netherlands*, the HRC found that having differing benefits for married and unmarried opposite-sex couples was 'reasonable and objective', given that 'by choosing not to enter into marriage Mr Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples'.⁶⁹ Accordingly, differing benefits for married couples and unmarried same-sex couples might not be reasonable and objective when the ability to choose to marry is removed.

By comparison, in *Broeks v The Netherlands*, the law that required married women, but not men, to prove that they were household breadwinners to receive unemployment benefits was deemed a violation of *ICCPR* art 26.⁷⁰ The HRC noted that this was discrimination on the basis of sex, as the law put married women at a

<http://castancentre.com/2013/10/28/latest-case-law-trends-the-international-covenant-on-civil-and-political-rights/>.

⁶⁶ Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity*, 19th sess, UN Doc A/HRC/19/41 (17 November 2011) [68].

⁶⁷ *Ibid* [69].

⁶⁸ *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999 (individual opinion of Committee members Mr Rajsoomer Lallah and Mr Martin Scheinin).

⁶⁹ Human Rights Committee, *Views: Communication No 180/1984*, 29th sess, UN Doc CCPR/C/OP/2 (9 April 1987) ('*Danning v The Netherlands*') [14].

⁷⁰ Human Rights Committee, *Views: Communication No 172/1984*, 29th sess, UN Doc CCPR/C/OP/2 (9 April 1987) ('*Broeks v The Netherlands*').

disadvantage compared with married men. Discrimination on the basis of sexual orientation, just like discrimination on the basis of gender, is now regarded as a breach of the right to non-discrimination. It seems, therefore, that in cases of the receipt of benefits, it will constitute discrimination if individuals, having obtained the highest level of relationship recognition permitted by the state — be that a civil partnership, a marriage, or some alternative — are denied equal benefits to those in similar circumstances. Thus, to meet their non-discrimination obligations, states must make available to same-sex couples unable to marry all the benefits that flow to opposite-sex married couples.

Depending on the domestic law status of *de facto* couples, there may be substantial differences in the benefits that flow to married as compared to unmarried couples. These differences may be in laws relating to adoption and custody of non-biological children, pensions, taxation, and housing, among others. Additionally, same-sex couples may be afforded unpredictable and patchy legal protection across the domestic framework and so may, at best, only receive a selection of the spectrum of rights afforded to married couples.⁷¹

III *International Covenant on Economic, Social and Cultural Rights*

The *ICCPR* is not the only international human rights instrument relevant to a consideration of whether the right to marry includes same-sex couples. Article 10(1) of the *ICESCR* states that:

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. Marriage must be entered into with the free consent of the intending spouses.

The first sentence of art 10(3) provides that:

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

Article 2(2) of the *ICESCR* contains the same non-discrimination provision as art 2 of the *ICCPR*:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷¹ For example, in Australia the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) brought some areas affecting same-sex couples into parity with the rights of opposite-sex couples. See also Normann Witzleb, 'Marriage as the "Last Frontier"? Same-Sex Relationship Recognition in Australia' (2011) 25(2) *International Journal of Law, Policy and the Family* 135, 145. However, much state-based legislation has not been similarly revised: see, eg, Victorian Gay and Lesbian Rights Lobby, *Achieving Equality in Parenting and Adoption Rights for LGBITQ Families* (2011) <www.vglrl.org.au/campaigns/same-sex-adoption>.

The CESCR's *General Comment No 20* on non-discrimination notes that sexual orientation and gender identity are prohibited grounds for discrimination, falling under 'other status' in art 2(2).⁷² The Committee further states that: 'States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights'.⁷³

Articles 10 and 2 read in tandem deliver a strong case for the *ICESCR* providing broad and overarching protection of same-sex families and children. This reading requires the application of the principles of non-discrimination to all rights, and explicitly states that parentage should not be reason for excluding children from access to special measures of protection.

A *Same-sex Marriage or Civil Unions – The Legal Status of Same-sex Parents and Families*

Civil unions, registered partnerships, and other forms of relationship recognition are often raised as 'alternatives' to marriage in marriage equality discourses. The CESCR noted in *General Comment No 20* that 'eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds' and that 'discrimination must be eliminated both formally and substantively'.⁷⁴ Similarly, the HRC noted in *General Comment No 18* that there is an obligation on State Parties to 'diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant'.⁷⁵ The distinction between marriage and civil unions delineates opposite-sex couples from same-sex couples, reinforcing prejudice against LGBTI people and maintaining the stigma historically associated with homosexuality.⁷⁶ While proponents of civil unions may emphasise that this ceremony holds equal status to marriage, civil unions, as a relatively new institution, are still viewed by many as not holding equal cultural significance to marriage. The level of public engagement and debate surrounding the question of whether marriage rights should include same-sex couples signifies the high value and status associated with marriage.⁷⁷ Proponents of an 'equal' but different relationship recognition for same-sex couples echo sentiments of America's infamous 'separate but equal' doctrine.⁷⁸ As a result, affording same-sex couples only civil unions may exacerbate or, worse, institutionalise discrimination.⁷⁹

⁷² *General Comment No 20*, UN Doc E/C.12/GC/20, [32].

⁷³ *Ibid.*

⁷⁴ *General Comment No 20*, UN Doc E/C.12/GC/20, [8].

⁷⁵ *General Comment No 18*, UN Doc HRI/GEN/1/Rev.1, [10].

⁷⁶ American Psychological Association, *Resolution on Marriage Equality for Same-Sex Couples* (3–5 August 2011) <<https://www.apa.org/about/policy/same-sex.aspx>>; M V Lee Badgett, *When Gay People Get Married* (New York University Press, 2009).

⁷⁷ Gregory M Herek, 'Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective' (2006) 61(6) *American Psychologist* 607.

⁷⁸ *Plessy v Ferguson*, 163 US 537 (1896). This doctrine was abolished in the United States in *Brown v Board of Education*, 357 US 483 (1954), as noted in the Castan Centre for Human Rights Law, Submission No 1253 to the NSW Legislative Council Standing Committee on Social Issues, *Inquiry into Same-sex Marriage Law in New South Wales*, 5 March 2013.

⁷⁹ Adiva Sifris and Paula Gerber, 'Same-sex Marriage in Australia: A Battleground for Equality' (2011) 25(2) *Australian Journal of Family Law* 96.

Marriage in many countries is not a legal precursor to starting a family, and many opposite-sex couples do opt for de facto relationships. However marriage still remains the overwhelming choice of relationship recognition for couples with children. For example, according to the most recent data from the Australian Bureau of Statistics, 53 per cent of adults were married, while just eleven per cent were in de facto relationships.⁸⁰ In Australia, in 2011, there were 33 700 same-sex couples, 12 per cent of whom had children, with 6300 children living with same-sex parents.⁸¹ As a result, and also historically, legal recognition and protection of the family unit is often predicated on a presumption of marriage.

The legal provisions for recognising a married couples' relationships to their children, compared to the protections afforded to unmarried same-sex couples and their children, is almost universally unequal.⁸² In countries where same-sex couples can register their partnerships but not access standard marriage rights, an uneasy hierarchy of family rights is often created, offering children in same-sex parented families 'uncertain and patchy recognition'.⁸³ In countries where same-sex couples cannot access any form of relationship recognition, a greater disparity is often created between same-sex parented and opposite-sex parented families.

The resulting situation for same-sex families may be unequal legal recognition and protection for each parent in the family unit, regardless of shared parenting responsibilities. The lack of consistent parental recognition is discriminatory and may be detrimental to the family unit. In the Canadian case of *AA v BB*, which concerned the right of a same-sex parent to be legally recognised as such, Rosenberg JA found that the legislative scheme in question deprived children of 'the equality of status that declarations of parentage provide'.⁸⁴

Responsibilities for the 'care and education of dependent children'⁸⁵ may thus be impaired if only one of the parenting pair is permitted to make formal arrangements for the child's health and educational needs. Couples with an unregistered parenting partner risk the loss of continued custody rights should the biological parent die. In the Australian context, the 2009 same-sex law reforms make such a circumstance less likely.⁸⁶ If parties are living in a de facto relationship, then, subject to satisfying specific conditions, either a presumption of parenthood applies, or a de facto partner may be regarded as the step-parent of a

⁸⁰ Australian Bureau of Statistics, *Australian Social Trends, March Quarter 2012: Crude Marriage Rate — 1990–2010*, cat no 4102.0 (25 June 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30March+Quarter+2012#MARRIAGES>>.

⁸¹ The Australian Bureau of Statistics notes that figures for same-sex couples are typically under-estimations, since same-sex attracted individuals may be reluctant to note their sexuality on the census form. An increase in reported same-sex relationships reflects a change in community acceptance of same-sex attraction: *Australian Social Trends, July 2013* (25 July 2013) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013#children>>.

⁸² For a comprehensive country-by-country examination of the legal rights of same-sex parents, see International Lesbian, Gay, Bisexual, Trans and Intersex Association <<http://ilga.org>>.

⁸³ L Hodson, 'Ties that Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' (2012) 20 *International Journal of Children's Rights* 501, 514.

⁸⁴ *AA v BB*, 2007 ONCA 2 [35].

⁸⁵ ICESCR art 10(1).

⁸⁶ *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

child. Likewise, second parent adoption may be available to same-sex couples.⁸⁷ However, as same-sex parents are still unable to adopt children in a number of Australian states, and second parent adoption is not always available, these families may face a period where neither parent may be legally recognised as a parent.⁸⁸ Such differences clearly do not afford ‘the widest possible protection’ for families as required by art 10 of the *ICESCR*.⁸⁹

In most European countries children born to opposite-sex married couples will have both spouses recognised as the child’s parents at birth (regardless of the biological connection of the non-bearing parent, or how the child was conceived).⁹⁰ Conversely, parentage recognition of a non-biological same-sex co-parent (in countries where same-sex marriage is not permitted) requires a positive act of registration as a second parent, if it is legally permitted at all.⁹¹

With regard to adoption, co-parents are frequently prevented from adopting children jointly. The legalities involved may not be consistent across domestic laws, instead falling to regional regulation. For example, the situation in Australia is inconsistent, with regulation of same-sex couple adoption differing between states and territories.⁹² In some jurisdictions, same-sex couples are still unable to petition a court for joint adoption of a child or to register a step-parent as an adoptive parent of a child.⁹³

In France, both unmarried same-sex and opposite-sex couples are unable to adopt their partner’s biological child without their partner first severing legal ties with the child.⁹⁴ As a consequence, children raised by a non-biological parent and biological parent may not be protected as a family unit in the case of illness or death of the biological parent. In the case of relationship breakdown, the non-biological parent may not be considered a parent for the purposes of custody, parental responsibility and child support. In 2012, the ECHR held that such laws were not discriminatory as the restriction applies to both same-sex and opposite-sex unmarried couples.⁹⁵ No consideration was given to the fact that the latter were able to choose to marry, and thus avail themselves of additional legal protection. In contrast, the ECHR in the 2013 case of *X v Austria* found that it was discriminatory to prevent same-sex second-parent adoption when unmarried opposite-sex couples were able to enjoy this right.⁹⁶

⁸⁷ *Family Law Act 1975* (Cth) ss 4, 60G, 60HA.

⁸⁸ See, eg, Victorian Gay and Lesbian Rights Lobby, above n 71.

⁸⁹ *ICESCR* art 10(1).

⁹⁰ Hodson, above n 83, 515.

⁹¹ *Ibid.*

⁹² Adiva Sifris and Paula Gerber, ‘Jack & Jill or Jack & Bill: The Case for Same-sex Adoption’ (2009) 34(3) *Alternative Law Journal* 168.

⁹³ See, eg, *Adoption Act 1984* (Vic) s 10A. See also Victorian Law Reform Commission, ‘Assisted Reproductive Technology and Adoption: Final Report’ (June 2007); Adiva Sifris and Paula Gerber, ‘Victorian Court Circumvents Prohibition on Adoption by Same-sex Couple’ (2011) 25 *Australian Journal of Family Law* 275.

⁹⁴ *Code civil* (France) art 365.

⁹⁵ *Gas and Dubois v France* (European Court of Human Rights, Fifth Section, Application No 25951/07, 15 March 2011).

⁹⁶ *X v Austria* (European Court of Human Rights, Grand Chamber, Application No 19010/07, 19 February 2013).

These cases illustrate how laws still regulate families through the lens of marriage. While it is arguable that amendments to both French and Austrian laws to permit same-sex second-parent adoptions would give the same substantive right without needing to permit same-sex marriage, this is problematic. Adoption is just one right in a wide spectrum of legal entitlements that would require amendment to give families of unmarried same-sex couples the same entitlements as families of unmarried opposite-sex couples. Depending on the jurisdiction, these entitlements may sit within a state or regional legal system, and so require both local political will and specific amendment of each discriminatory law. The result would be incomplete protection for the families of same-sex couples.

Conversely, same-sex marriage, if mandated under the power of a central government, would require countrywide conformity with regards to marriage benefits. In countries where marriage is legislated on a state-by-state basis, such as the US, amendment of multiple pieces of legislation that impact same-sex couples, rather than simply amending a single piece of marriage legislation, may offer only partial and uncertain protection.

The CECSR has noted that while a diversity of family structures exist, differential treatment in accessing social security benefits must be justified on reasonable and objective criteria,⁹⁷ and that discrimination may occur when ‘an individual is unable to exercise a right protected by the Covenant because of his or her family status’.⁹⁸ Accordingly, a legal system offering patchy or unequal social security and legal protection for same-sex families may mean that a State Party is in breach of its responsibilities under the *ICESCR*. The most comprehensive means for a state to address its responsibilities to diverse families, and enable legal parity for same-sex partners with children, is to expand marriage laws to include same-sex couples. In particular, marriage carries with it a social and institutional weight that is not associated with other forms of relationship recognition.⁹⁹

B *The Right to the Highest Attainable Standard of Physical and Mental Health*

The right of everyone to the ‘enjoyment of the highest attainable standard of physical and mental health’ is enshrined in art 12 of the *ICESCR*. Read in conjunction with art 2 (non-discrimination), it guarantees the right to health for same-sex attracted individuals. The CESCR has acknowledged that the right to health is not constrained to a right to health care, but rather encompasses ‘a wide range of socio-economic factors that promote conditions in which people can lead a healthy life’,¹⁰⁰ and is deeply interrelated with the full spectrum of human rights enshrined in the *UDHR*.¹⁰¹

⁹⁷ *General Comment No 20*, UN Doc E/C.12/GC/20.

⁹⁸ *General Comment No 19*, UN Doc E/C.12/GC/19.

⁹⁹ Emily Zapotocny, ‘My Two Moms: California’s Supreme Court Decision in *KM v EG* and Why Gay Marriage Offers the Best Protection for Same-Sex Families’ (2006) 21 *Wisconsin Women’s Law Journal* 111, 124.

¹⁰⁰ Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, UN Doc DE/C.12/2000/4 (11 August 2000) [4].

¹⁰¹ *Ibid* [3].

There is a growing body of research establishing damage to the mental health of same-sex individuals caused by preventing same-sex couples from marrying.¹⁰² This harm has been linked both to couples wishing to marry and to same-sex attracted individuals who do not have a present desire to wed. Research has shown that bans on same-sex marriage lead to a perception by same-sex couples that others ‘placed less value on their relationship relative to heterosexual relationships’, which ‘significantly lowered their reported levels of psychological well being’.¹⁰³ Peak bodies within psychological and medical professions are showing support for same-sex marriage, noting the health benefits to same-sex couples and families, and the mental harm caused by denial of marriage equality.¹⁰⁴

Other research has noted that legislative bans on same-sex marriage have ‘associated expression[s] of inaccurate, negative, demeaning and hostile viewpoints about same-sex attracted people and their families’ and that these views ‘contribute directly to an increase in psychiatric morbidity’.¹⁰⁵ In addition, for same-sex attracted people (in particular, young people) ‘being denied the right to marry reinforces the stigma associated with a minority sexual identity’ and can negatively impact on a young person’s mental wellbeing.¹⁰⁶

The right to the highest standard of health requires State Parties to move expeditiously and effectively towards the full realisation of this right.¹⁰⁷ The progressive realisation of the right to health does not exempt the state from taking immediate measures towards the right’s achievement. Rather, State Parties have an obligation to abstain from ‘enforcing discriminatory practices as a State policy’.¹⁰⁸ A novel argument can be made that a State Party’s obligation to respect the right to health should prevent it from creating legislation, or interpreting existing legislation, to bar same-sex couples from marrying. Such an action would interfere ‘directly or indirectly with the enjoyment of the right to health’ of same-sex attracted individuals, and thus could constitute a breach of the *ICESCR*.¹⁰⁹

¹⁰² See, eg, Sharon Scales Rostosky et al, ‘Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults’ (2009) 56 *Journal of Counseling Psychology* 56; M V Lee Badgett, ‘Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands’ (2011) 67(2) *Journal of Social Issues* 316.

¹⁰³ Sharon K Dane et al, *Not So Private Lives: National Findings on the Relationships and Well-Being Of Same-Sex Attracted Australians* (University of Queensland, 2010).

¹⁰⁴ See, eg, American Psychological Association, *Marriage Equality and LGBT Health* (2011) <<https://www.apa.org/about/gr/issues/lgbt/marriage-equality.pdf>>; Australian Psychological Society, Submission No 1209 to the NSW Legislative Council Standing Committee on Social Issues, *Inquiry into Same-sex Marriage Law in New South Wales*, 1 March 2013 <[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/84c5ebb54e3beb0dca257b2a0081d254/\\$FILE/1209%20Australian%20Psychological%20Society.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/84c5ebb54e3beb0dca257b2a0081d254/$FILE/1209%20Australian%20Psychological%20Society.pdf)>.

¹⁰⁵ Australian Psychological Society, above n 104, on research by M L Hatzenbuehler et al, ‘The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study’ (2010) 100 *American Journal of Public Health* 452.

¹⁰⁶ W Leonard et al, *Private Lives 2: The Second National Survey of the Health and Wellbeing of Gay, Lesbian, Bisexual and Transgender (GLBT) Australians* (The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012).

¹⁰⁷ *General Comment 14*, UN Doc DE/C.12/2000/4, [31].

¹⁰⁸ *Ibid* [34].

¹⁰⁹ *Ibid* [33].

The obligation in art 12 of the *ICESCR* requires a State Party to ‘adopt legislative ... and other measures towards the full realisation of the right to health’.¹¹⁰ As a result, positive action is required by states to work towards legislative change that would assist in the realisation of the right to health.

C *The ICESCR and the Right to Marry*

Arguably, legalising same-sex marriage offers a comprehensive method for State Parties to meet their obligations under the *ICESCR*. Permitting same-sex couples to marry allows for uniformity and certainty across a range of laws covering parental recognition, social security, and a host of other family protection measures. In contrast, piecemeal reforms to the multitude of legislation that affects same-sex couples and their families leads to patchy protection and uncertainty. Legalising same-sex marriage begins to address State Parties’ obligations to provide protection from discrimination, and to protect the mental health of its citizens. Preventing individuals from accessing marriage has been shown to both promote discriminatory attitudes towards same-sex families and to damage the mental health of same-sex attracted individuals.

IV *Convention on the Rights of the Child*

The *CRC* is another human rights treaty relevant to a consideration of the right to marry in international law.¹¹¹ While the right to marry is an individual right, it can be argued that denial of access to this right has significant implications for children in same-sex families, and for children who may be same-sex attracted.

The preamble notes that a child, ‘for the full and harmonious development of his or her personality, should grow up in a family environment’. Article 2 prohibits discrimination, both in relation to convention rights, and in general, on the basis of the child or a child’s parents’ sexual orientation.¹¹² Article 3 dictates that: ‘[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’.¹¹³ In ensuring child protection, State Parties must take into account the rights and duties of the child’s parents, legal guardians, or other individuals legally responsible for the child, and must take all appropriate legislative measures.¹¹⁴ Additionally, a child is protected from ‘arbitrary or unlawful interference with his or her privacy, family, home or correspondence’.¹¹⁵

¹¹⁰ *General Comment 14*, UN Doc DE/C.12/2000/4.

¹¹¹ This treaty has been ratified by 194 states — every state in the UN except for Somalia, South Sudan and the US. By comparison, the *ICCPR* has 168 parties and the *ICESCR* has 162.

¹¹² *Convention on the Rights of the Child*, art 2(1)–(2); Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33rd sess, UN Doc CRC/GC/2003/4 (1 July 2003) [6] (‘*General Comment No 4*’).

¹¹³ *CRC*, UN Doc CRC/GC/2003/4, art 3(1).

¹¹⁴ *CRC*, UN Doc CRC/GC/2003/4, art 3(2).

¹¹⁵ *CRC*, UN Doc CRC/GC/2003/4, art 16(1).

As outlined in the discussion of the *ICESCR* above, children of same-sex parents who are unable to marry may receive patchy legal protection with regard to parental recognition. Further, eligibility for family social security benefits, health and housing services may be affected by a lack of family recognition of both parents.¹¹⁶ Children in same-sex families may also be subjected to continued societal stigma stemming from the failure of the state to recognise same-sex parents on an equal footing with opposite-sex parents. However, analysis of peer-reviewed medical and social research reveals that:

parenting practices and children's outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families.¹¹⁷

The Committee on the Rights of the Child noted in 1994 that the concept of 'family' includes diverse family structures 'arising from various cultural patterns and emerging familial relationships', stating that the *CRC* is relevant to 'the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family'.¹¹⁸ This statement on family diversity, along with the Committee's more recent inclusion of sexual orientation as a prohibited ground of discrimination against a child and a child's parents,¹¹⁹ points to the protection for same-sex families under the *CRC*.¹²⁰ Further, the Committee has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.¹²¹

Recognising the parental rights and obligations of non-biological parents in same-sex families may improve the 'financial, social and psychological stability' of these children.¹²² As a result, denying same-sex parents the ability to marry may

¹¹⁶ For example, in the US the (now repealed) *Defense of Marriage Act* prevented same-sex couples from accessing a myriad of marital benefits available to opposite-sex married couples: see James G Pawelski et al, 'The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children' (2006) 118(1) *Pediatrics* 349.

¹¹⁷ See, eg, Simon R Crouch et al, 'Parent-reported Measures of Child Health and Wellbeing in Same-sex Parent Families: A Cross-sectional Survey' (2014) 14 *BMC Public Health* 635 <www.biomedcentral.com/1471-2458/14/635>; Elizabeth Short et al, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review Prepared for The Australian Psychological Society* (Australian Psychological Society, 2007); Deborah Dempsey, *Same-sex Parented Families in Australia* (CFCA Paper No 18, Australian Institute of Family Studies, 2013).

¹¹⁸ Committee on the Rights of the Child, *Report on the Fifth Session*, 5th sess, UN Doc CRC/C/24 (8 March 1994) annex 5 ('*Role of the Family in the Promotion of the Rights of the Child*'). See also *General Comment No 4*, UN Doc CRC/GC/2003/4.

¹¹⁹ *General Comment No 4*, UN Doc CRC/GC/2003/4.

¹²⁰ Privacy, family life and home life are protected by art 16 of the *CRC*, as well as by art 17(1) of the *ICCPR*, which states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

¹²¹ Committee on the Rights of the Child, *Report on the Twenty-eighth Session*, 28th sess, UN Doc CRC/C/111 (28 November 2001) [558].

¹²² Guido Pennings, 'Evaluating the Welfare of the Child in Same-sex Families' (2011) 26(7) *Human Reproduction* 1609, 1614.

constitute discrimination against children, and breach a State Party's obligations to act in the best interests of the child in all actions concerning children.¹²³

Recent research has noted that children of same-sex parents 'felt more secure and protected' when their parents were married.¹²⁴ The 'common social understanding' of marriage gave these children a means of describing their parents' relationship in dealing with daily institutions such as schools and other people in the child's life, which had flow-on effects for the mental wellbeing of the child.¹²⁵ As a result, denying marriage to same-sex parents might deprive a child of the mental health benefits that flow from feelings of stability and societal understanding. In complying the *CRC*, State Parties have an obligation to protect the family unit as the optimum context for the 'full and harmonious development of [a child's] personality', regardless of whether a family unit has opposite-sex, or same-sex, parents.¹²⁶

Preventing same-sex couples from marrying may deny the children of such families many of the legal protections afforded to children in married heterosexual families, including, but not limited to, recognition of the non-biological parent's relationship with the child, access to social security and housing rights. Denial of these forms of economic and legal stability is clearly not in the best interests of children with same-sex parents, and does not entitle these families to the 'widest possible protection and assistance ... particularly ... while it is responsible for the care and education of dependent children'.¹²⁷

Additionally, permitting a child's parents' to marry has been shown to have positive effects on the wellbeing of children. One study reported that 93 per cent of children were happier or better off when their same-sex parents were able to marry.¹²⁸ In addition to promoting feelings of stability and security, children were able to benefit from legal protection and, in some jurisdictions, from other tangible benefits such as health insurance.¹²⁹

Conversely, the negative impacts on a child of preventing same-sex couples from marrying have also been recognised. The Australian Psychological Society ('APS') noted that children and young people whose same-sex parents are unable to marry 'experience their families as being stigmatized/marked out as less acceptable and valued than families in which parents are able to marry'.¹³⁰ The

¹²³ Gerber and Sifris, 'Marriage Equality in Australia', above n 11, 199.

¹²⁴ Christopher Ramos, Naomi G Goldberg and M V Lee Badgett, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-sex Couples* (Williams Institute, 2009) 10 <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf>>.

¹²⁵ *Ibid.*

¹²⁶ *CRC*, UN Doc CRC/GC/2003/4, Preamble.

¹²⁷ *CRC*, UN Doc CRC/GC/2003/4, art 3(1); *ICESCR* art 10.

¹²⁸ Ramos, Goldberg and Badgett, above n 124, 1.

¹²⁹ *Ibid.* 9.

¹³⁰ Australian Psychological Society, Submission No 039 the Social Policy and Legal Affairs Committee to *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, 20 April 2012, 11 <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20marriage/subs/sub%20039.pdf>.

APS also observed that there is ‘ample evidence that such discrimination [as conferred by restrictive marriage laws] contributes significantly to the risk of mental ill-health among gay, lesbian, bisexual and sex and/or gender diverse people, especially young people’.¹³¹ Similarly, the American Academy of Pediatrics has noted that ‘if a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interests of their child(ren) that legal and social institutions allow and support them to do so’.¹³²

Thus, it can be argued that a state’s obligations to children pursuant to the *CRC* demand an environment where the family unit is legally recognised and protected, where its members can profit from the benefits conferred upon married families, and where stigma and institutional discrimination are actively reduced and eliminated. The prohibition of marriage for same-sex couples both exacerbates conditions of discrimination and disadvantage and perpetuates societal attitudes as to the ‘legitimacy’ of these families. While not a panacea, marriage equality is an excellent reform to help combat discrimination faced by children being raised in same-sex families.

It is also important to note that children who identify as lesbian, gay, bisexual, transgender or intersex are protected by the non-discrimination provisions of the *CRC*. The Committee on the Rights of the Child has noted that children who are ‘lesbian, gay transgender or transsexual’ are more likely to be exposed to situations of vulnerability and violence due to discrimination,¹³³ and protection against such discrimination should be mainstreamed to national frameworks.¹³⁴ The Committee has recommended that ‘lesbian, bisexual, gay and transgender children and children living with persons from these groups’ are actively protected from discrimination on any grounds.¹³⁵

In the case of children, excluding same-sex couples from the institution of marriage does not merely prohibit a specific sector of society from marrying, it makes an intimidating statement to same-sex attracted children that the quality every relationship they have will always be undeserving of the title of ‘marriage’. An Australian study of 3134 LGBTI-identifying young people aged 14 to 21 years found that young people are ‘increasingly seeing marriage and children as possibilities in their lives’ and ‘plan to marry and have families like everyone else’.¹³⁶ This gap between the desire to marry held as a child and young person and

¹³¹ Ibid 3.

¹³² American Academy of Pediatrics: Committee on Psychosocial Aspects of Child and Family Health, ‘Promoting the Well-Being of Children Whose Parents are Gay or Lesbian’ (2013) 131 *Pediatrics* 829.

¹³³ *General Comment No 4*, UN Doc CRC/GC/2003/4, [6].

¹³⁴ Committee on the Rights of the Child, *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence*, 56th sess, UN Doc CRC/GC/2011/13 (18 April 2011) [72].

¹³⁵ See, eg, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: New Zealand*, 56th sess, UN Doc CRC/C/NZL/CO/3-4 (11 April 2011); Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland*, 49th sess, UN Doc CRC/C/GBR/CO/4 (20 October 2008) [24].

¹³⁶ Lynne Hillier et al, *Writing Themselves in 3* (Australian Research Centre in Sex, Health & Society, La Trobe University, 2010) 96, 104.

being able to wed as an adult has been shown to increase feelings of social exclusion due to being ‘explicitly excluded from an important social institution’.¹³⁷

It is important that conversations on the right to same-sex marriage note the impact of such dialogues regarding the rights of the child on children of same-sex attracted parents and on same-sex attracted children. Maintaining systems of law that prevent same-sex couples from marrying could be construed as being a contravention of art 2 of *CRC*, which prohibits discrimination on the basis of sexual orientation towards children and the parents of children. However, such an interpretation of the *CRC* has yet to be considered by the Committee on the Rights of the Child.

V Conclusion

All humans are born free and equal in dignity and rights.

Universal Declaration of Human Rights art 1

There is a growing trend for Western states to recognise the right of same-sex couples to marry. Although the actual number of countries that have marriage equality is relatively small compared to, for example, the number of countries that still criminalise homosexual conduct,¹³⁸ it has been estimated that 10 per cent of the world’s population now live in countries where same-sex couples can marry.¹³⁹

Progress towards marriage equality at the domestic level is not being replicated within international human rights law, and the 2002 decision in *Joslin v New Zealand* remains the only UN authority regarding the application of art 23 of the *ICCPR* to same-sex couples. However, the growing international climate of support for LGBTI human rights generally, and same-sex marriage in particular, makes it likely that the question of whether same-sex couples have a right to marry will come before a UN treaty body again in the future. Since the HRC’s decision in *Joslin v New Zealand*, the UN treaty body system has increasingly defended the rights of LGBTI people in its General Comments, Concluding Observations and Views on individual communications. Further, the UN Human Rights Office’s prominent *Born Free and Equal* campaign, launched in 2013, further emphasises the UN’s stance as a champion of LGBTI human rights.

An individual communication concerning a prohibition on same-sex couples marrying would not necessarily have to come before the HRC. As this article has demonstrated, denying same-sex couples the right to marry may constitute a breach of the *ICESCR* and the *CRC*. Now that the committees that monitor these two treaties have the jurisdiction to receive individual

¹³⁷ Badgett, ‘Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands’, above n 102.

¹³⁸ Eighty countries still criminalise consensual same-sex sexual conduct: Paula Gerber, ‘Overview’ on *Countries That Still Criminalise Homosexuality* <<http://antigaylaws.wordpress.com/>>.

¹³⁹ Andrew Potts, ‘10% of the World’s Population Now Lives under Marriage Equality’, *Gay Star News*, 3 July 2014 <www.gaystarnews.com/article/10-world%E2%80%99s-population-now-lives-under-marriage-equality030714#sthash.7u2MSxOi.dpuf>.

communications,¹⁴⁰ a same-sex couple, a same-sex attracted youth, or a child with same-sex parents could bring a claim of discrimination arising from restrictive marriage laws. Such a communication could lead to the relevant treaty committee finding that marriage laws excluding same-sex couples breach the applicable treaty, and should therefore be amended to remove any discrimination based on sexual orientation or gender identity. Such a decision would be consistent with the recent trend of the UN recognising that LGBTI persons enjoy the same fundamental, equal and inalienable human rights as all people.

The recognition of the rights of gender-diverse people has long been coupled with the rights of same-sex attracted people in the 'LGBTI' acronym. The rights of transgender people are recognised by the UN as human rights, despite the gender-specific wording of some human rights articles. Any moves towards recognising marriage equality within international human rights law should extend protection to gender-diverse people as well as people of all sexual orientations. Such a non-discriminatory approach would ensure that transgender and transsexual, gender-diverse and intersex people are covered by this human right. Wording of national legislation that uses gender-neutral terms, such as 'married couple' and 'spouse', promotes such inclusion.¹⁴¹

The global understanding of human rights and their application has developed and matured in the 70 years since their first inception. The treaties, as living instruments, should be interpreted and applied to include all people, regardless of their sexual orientation, gender identity or gender expression. States may struggle to justify their prohibition of same-sex marriage on objective and reasonable grounds in light of the UN consensus that the rights of all people are the same. Consistency in the application of the principle of non-discrimination, in light of the understanding of LGBTI rights as human rights, suggests that the right to marry should be interpreted as a human right for all.

¹⁴⁰ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, UN Doc A/63/435 (entered into force 5 May 2013); *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, UN Doc A/RES/66/138 (entered into force 14 April 2014).

¹⁴¹ See, eg, New Zealand's *Marriage (Definition of Marriage) Amendment Act 2013* (NZ).

