



Submission to the Constitutional Convention regarding Marriage Equality

March 2013

“The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly is not a small and tangential inconvenience...it represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples...It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than of heterosexual couples.”

Justice Sachs of the South African Supreme Court
“To Have and To Hold: The Making of Same-Sex Marriage in South Africa”,
Gala and OUT LGBT Well-Being, 2008

Introduction

Amnesty International Ireland (AI) welcomes the consultation process being undertaken by the government-established Constitutional Convention in advance of its deliberations on what, if any, constitutional provision should be made for “same-sex marriage”. AI submits the following observations to this process.

AI’s position in favour of marriage equality

AI opposes discrimination in civil marriage laws on the basis of sexual orientation or gender identity, and calls on states to recognise families of choice. AI encourages the Irish Government to ensure that persons are not denied the right to civil marriage on the basis of their sexual orientation or gender identity. AI is conscious that many civil society groups have set out the social and domestic legal arguments in favour of marriage equality. AI confines its input here to the international human rights law dimension of this discussion. AI is also aware that academic arguments have been advanced that constitutional amendment may not be required in order to give statutory effect to marriage equality, and we do not enter into this debate here. If the equal entitlement to civil marriage requires amendment of Ireland’s Constitution, AI urges that such amendment be undertaken as expeditiously as possible.

Rationale for AI’s position

Denial of equal civil recognition of same-sex relationships prevents many people from enjoying a whole range of other rights protected through marriage, such as rights to housing and social security. But even if those rights were equalised under a separate regime, such as civil partnership, this is not equality. It is important to note of course that when legislating for or implementing partnership systems that are not full marriage, the result is often unequal application of rights, entitlements and duties. A report published in October 2011 by Marriage Equality, entitled *Missing Pieces*, found 169 legal differences between civil marriage and civil partnership in Ireland. The consequences for children of same-sex couples in Ireland are also significant.

For instance, failure of the state to give equal recognition to these relationships prohibits one partner from making certain important decisions for her/his child. Again however, if Irish law were to correct this situation and provide for full parental rights and responsibilities for both parents, this still is not full equality.

Separate systems are not only discriminatory, but they send a message that discrimination is permissible, since the reason for this separate approach is entrenched prejudices. Denial of an equal right to marriage stigmatises those relationships in ways that can fuel discrimination and other human rights abuses against people based on their sexual orientation or gender identity.

We can see today around the world today some of the most brutal forms that this discrimination can take, including ill-treatment and violence in the community. AI has long campaigned against persecution, violence and discrimination against people based on their sexual orientation or gender identity. Today we work on a wide range of issues, including opposing laws that would criminalise same sex sexual conduct; vilify lesbian, gay, bisexual, transgender and intersex (LGBTI) people; restrict freedom of expression and assembly; and otherwise exclude these individuals and communities from human rights protections. Uganda's draft Anti-Homosexuality Bill is a case in point. AI has also reported on how the issue of sexuality has been manipulated for political purposes by governments across the globe, usually to deflect attention from other issues or to target a particular constituency by fuelling homophobic sentiment.

In countries where survival for LGBTI individuals is no longer the primary issue, we fight other forms of discrimination they experience. In this context, we call for the right to marry and found a family for same-sex couples. Article 23 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to marry and found a family. Article 2 provides that all provisions of the ICCPR must be applied without discrimination, including on the ground of sexual orientation. As explained below, AI believes that Article 23 of the ICCPR must today be interpreted more widely than its initial 1966 formulation and permit the view that denial of entitlement to marry on the basis of sexual orientation or gender identity is discrimination by today's standards. Therefore Amnesty International opposes discrimination in civil marriage laws on the basis of sexual orientation or gender identity.

What we mean by 'sexual orientation'

The Yogyakarta Principles were developed and adopted by a distinguished group of human rights experts in 2007 to outline the application of issues of sexual orientation and gender identity to the broad range of international human rights standards. The Yogyakarta Principles define 'sexual orientation' as "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".

What we mean by 'gender identity'

The Yogyakarta Principles define 'gender identity' as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".

International human rights law

The right of adults to enter into consensual marriage is enshrined in existing international human rights standards. Article 16 of the Universal Declaration of Human Rights (UDHR) and Article 23 of the International Covenant on Civil and Political Rights (ICCPR) both explicitly recognise such a right. However, the only time where the denial of a right to marriage equality for same-sex couples came before the UN Human Rights Committee, which oversees state compliance with the ICCPR, was in *Joslin v New Zealand*, where the Committee decided in 2002 that such denial was not discrimination. Noting that Article 23(2) is the only substantive provision in the Covenant which defines a right by using the term “men and women”, the Committee stated that this term “has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from [Article 23(2)] ... is to recognise as marriage only the union between a man and a woman”. The Committee decided that a failure to allow same-sex couples to marry did not violate any provision of the ICCPR and was not a form of discrimination.

AI considers that the decision of the UN Human Rights Committee in *Joslin* did not fully follow the spirit of Article 2 of the ICCPR nor of the UDHR. Sometimes human rights bodies are reluctant to make decisions too far ahead of the prevailing attitudes and practices of member states. Non-discrimination on grounds of sexual orientation is an internationally recognised principle however, affirmed by the international community for more than a decade. The key decision in 1994 of the UN Human Rights Committee in *Toonen v Australia* creates the basis for interpreting discrimination based on sexual orientation as a violation of the prohibition against discrimination on the basis of sex. As a crosscutting principle, it applies to the full range of human rights guaranteed in international standards. AI further considers that there has been an evolving view of discrimination in the intervening 11 years since *Joslin* was decided. So the question today is whether the wording adopted in 1966 in Article 23 of the ICCPR should be reinterpreted in light of how the international community’s view of discrimination on the grounds of sexual orientation or gender identity has changed in recent decades.

The right to be free from arbitrary discrimination in the enjoyment of the full range of human rights is a basic principle clearly underlined in all major human rights instruments, including Article 2 of the ICCPR. Article 26 of the ICCPR provides for equal protection before the law. AI considers that, even if Article 23(2) can only be interpreted to recognise as marriage only the union between a man and a woman, Articles 2 and 26 should today be interpreted to prohibit any arbitrary discrimination in the enjoyment of the right to marry, including on ground of sexual orientation or identity. It is of particular note that the European Court of Human Rights has more recently decided in *Schalk & Kopf v Austria* (2010) that the reference to “men and women” in Article 12 of the European Convention on Human Rights (ECHR) – wording which, incidentally, has been deleted from Article 9 of the EU Charter of Fundamental Rights - no longer means that “the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”. In addition, in 2001 the Netherlands became the first country to offer full civil marriage to same sex couples and there has been a global state trend since *Joslin* was decided towards protecting the equal right of same-sex couples to have their relationships recognised in civil law.

European Court of Human Rights

In 2010, the European Court of Human Rights decided in *Schalk & Kopf v Austria* that it could not interpret Article 12 of the European Convention on Human Rights as *requiring* Council of Europe member states to allow same-sex couples to marry. However, as abovementioned, the Court decided that the reference to “men and women” in Article 12 is capable of applying to same-sex couples. In addition, the Court implied that this conclusion might change when more member states have ended the exclusion of same-sex couples from civil marriage. AI’s position on this decision is that, in affording a wide margin of appreciation to states in this area, we acknowledge that the Court looks not just to what the ECHR says, but makes decisions based on the political climate and prevailing social attitudes in the member states. Where more member states are ready to take the leap to true, formal equality, the Court’s jurisprudence changes.

Definition of family

It is important to note that even while in *Joslin* the UN Human Rights Committee declined to find in favour of marriage between individuals of the same sex, both it and the UN Committee on the Rights of the Child (CRC) have pushed for an expansive definition of family. The UN Human Rights Committee has noted that “the concept of the family may differ in some respects from state to state, and even from region to region within a state, and it is therefore not possible to give the concept a standard definition”. The Committee on the Rights of the Child has stated that in “considering the family environment”, it should reflect “different family structures arising from various cultural patterns and emerging family relationships”. The CRC clarifies that “all these questions seem to place the essential value of the principle of non-discrimination in the forefront of the general discussion [on family]”.

Conclusion - Ireland as champion

Ireland is a champion of equality on the basis of sexual orientation and gender identity in its foreign policy and at the United Nations. It is incompatible with this approach for its domestic laws to fail to fully realise equality in its marriage laws. AI encourages Ireland to be to the fore rather than lagging behind in the global trend toward domestic protection of the equal right of same-sex couples to have their relationships recognised in civil marriage. It should work towards a time when de facto equality can be realised for LGBTI people, and can help achieve this by addressing social norms that are based on prejudice and discrimination, including by providing marriage equality for same-sex couples. Over time then, AI believes that the tide will continue to shift, and decisions such as *Joslin* and *Schalk & Kopf* will be overtaken and all states required to follow Ireland’s example.

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