

## A SHIFT IN THE UNITED NATIONS HUMAN RIGHTS COMMITTEE'S JURISPRUDENCE ON MARRIAGE EQUALITY? AN ANALYSIS OF TWO RECENT COMMUNICATIONS FROM AUSTRALIA

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*The United Nations Human Rights Committee has not considered whether the International Covenant on Civil and Political Rights ('ICCPR') encompasses a right to marry a person of the same sex since 2002 in *Joslin v New Zealand*. In *Joslin v New Zealand* the Committee determined that the right to marry contained in article 23(2) of the ICCPR referred only to opposite-sex marriage, and it foreclosed any separate claim based on the general right of non-discrimination contained in article 26 of the ICCPR. This article maintains that two recent communications to the Committee from Australia, *C v Australia* and *G v Australia*, prefigure a shift in the Committee's jurisprudence on marriage equality. Although the Views adopted in 2017 by the Committee in each communication do not expressly disapprove of *Joslin v New Zealand*, on close analysis they support a re-interpretation of the right to marry which encompasses a right to marry a person of the same sex. In the alternative, in the event that the Committee continues to adhere to the *Joslin v New Zealand* interpretation of the right to marry, *G v Australia* and *C v Australia* support a determination that a State Party which fails to provide for marriage equality violates the article 26 right to non-discrimination.*

### I INTRODUCTION

The Australian debate on marriage equality reached a crescendo during 2017, when the Commonwealth government chose, in an almost unprecedented

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departure from ordinary legislative practice,<sup>1</sup> to put the question ‘[s]hould the law be changed to allow same-sex couples to marry?’ to the Australian electors in the form of a legally non-binding postal survey. After 61.60 per cent of the 79.52 per cent of the electors who validly completed the survey form and returned it to the Australian Bureau of Statistics responded ‘Yes’,<sup>2</sup> the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (*Marriage Amendment Act*) was enacted by the Commonwealth Parliament. Schedule 1 of the *Marriage Amendment Act* changed the definition of ‘marriage’ in section 5(1) of the *Marriage Act 1961* (Cth) (*Marriage Act*) – which had previously defined marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’ – by substituting the words ‘2 people’ for the words ‘a man and a woman’. This slight change in the text of the *Marriage Act* belied years of fierce and, at times, acrimonious debate; the passage of the Bill by the House of Representatives on Thursday, 8 December 2017 was followed by emotional scenes of jubilation amongst marriage equality supporters, and more muted expressions of disappointment by those who had long opposed the reform. On Friday, 9 December 2017, when the 2017 Amendment Act commenced, Australia became the 26<sup>th</sup> country to allow same-sex couples to marry.<sup>3</sup>

1 There was some discussion about whether there would be a plebiscite on this subject, which was ultimately defeated. The Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) was introduced in the House of Representatives on 14 September 2016, and passed on 20 October 2016. However, it did not pass the Senate: Department of Parliamentary Services (Cth), *Bills Digest*, No 54 of 2017–18, 24 November 2017, 6. Plebiscites, while rare, have been used in Australia, whereas surveys have not. Kildea writes:

The debates of the past year have placed a spotlight on the use of the plebiscite as a democratic device. Its pros and cons have been debated, and some have suggested it should be used for other issues (such as physician assisted suicide) and more frequently. This is significant for a mechanism that has been used sparingly at the federal level: there have been just three national plebiscites since Federation, and the most recent, on the national song, was held in 1977.

Paul Kildea, ‘The Constitutional and Regulatory Dimensions of Plebiscites in Australia’ (2016) 27 *Public Law Review* 290, 291 (citations omitted).

2 Australian Bureau of Statistics, ‘Australian Marriage Law Postal Survey’ (Publication No 1800.0, 15 November 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>>.

3 The following countries had legalised same-sex marriage prior to Australia: The Netherlands (2000, effective 2001), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), the United Kingdom (with the exception of Northern Ireland) (England and Wales in 2013, effective 2014, and Scotland in 2014), Luxembourg (2014, effective 2015), Finland (2015 effective 2017), Greenland (2015) Ireland (2015), United States (2015), Colombia (2016), Germany (2017), Austria (2017, effective 2019) and Malta (2017): Ben Winsor, ‘Same-Sex Marriage around the World: How Many Countries Have Legalised It?’, *SBS News* (online), 8 December 2017 <<https://www.sbs.com.au/news/same-sex-marriage-around-the-world-how-many-countries-have-legalised-it>>. A 2017 court ruling in Taiwan held that laws that do not allow for same-sex marriage in Taiwan are unconstitutional and gave the government two years to rectify the situation: Shizi No. 748 Jieshi (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] (2017). See also David KC Huang, ‘The Court and the Legalisation of Same-Sex Marriage: A Critical Analysis of the Judicial Yuan Interpretation No.748 [2017]’ (2019) 14 *University of Pennsylvania Asian Law Review* 63; ‘Taiwan’s Top Court Rules in Favour of Same-Sex Marriage’ *BBC News* (online), 24 May 2017 <<https://www.bbc.com/news/world-asia-40012047>>. In response to a referendum in November 2018 the Taiwanese public voted in favour of retaining the heterosexual definition of marriage. Media reports have suggested that the government is still intending to legalise same-sex marriage, but the legislation ‘may now be weaker’: ‘Taiwan Voters Reject Same-Sex Marriage in Referendums’ *BBC News* (online), 25 November 2018 <<https://www.bbc.com/news/world-asia-46329877>>.

These historic local events may have distracted attention from two significant victories for Australian lesbian, gay, bisexual and transgender ('LGBT') authors in the United Nations Human Rights Committee ('HRC') in the same year. In *G v Australia*, in Views adopted on 17 March 2017,<sup>4</sup> the HRC found that Australian laws which prevented a married male to female transgender person from changing her sex on her birth certificate violated the right to privacy in article 17 of the *International Covenant on Civil and Political Rights*<sup>5</sup> ('ICCPR') and the right to non-discrimination in article 26 on the grounds of marital and transgender status. In *C v Australia*, in Views adopted on 28 March 2017,<sup>6</sup> the HRC found that Australian laws which prevented an Australian woman, who had married another woman in Canada, from obtaining a divorce in Australia violated the right to non-discrimination in article 26 on the grounds of sexual orientation. Although the relevant Australian laws have been changed as a consequence of the 2017 Commonwealth marriage equality reforms,<sup>7</sup> this article explores how both decisions may have enduring significance in the struggle for marriage equality across the globe, particularly in other countries that, like Australia, do not have comprehensive domestic human rights protections.<sup>8</sup> A parallel may be drawn with an earlier view from the HRC relating to the ICCPR and LGBT rights. In *Toonen v Australia*,<sup>9</sup> in 1994, the HRC found that the Tasmanian Criminal Code's provisions which criminalised consensual sex between adult males in private 'violated the right to privacy ... on the basis of sexual activity or orientation, and amounted to the unequal treatment of homosexual men in

4 Human Rights Committee, *Views: Communication No 2172/2012*, 119<sup>th</sup> sess, UN Doc CCPR/C/119/D/2172/2012 (17 March 2017) ('*G v Australia*').

5 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

6 Human Rights Committee, *Views: Communication No 2216/2012*, 119<sup>th</sup> sess, UN Doc CCPR/C/119/D/2216/2012 (28 March 2017) ('*C v Australia*').

7 In *C v Australia*, s 88EA of the *Marriage Act* was discussed. This stipulates 'a union solemnised in a foreign country between: (a) a man and another man, or (b) a woman and another woman, must not be recognised as a marriage in Australia.' Section 88EA was repealed by the *Marriage Amendment Act* sch 1 pt 1 item 58. See also *Marriage Amendment Act* sch 1 pt 5 item 70(2); Department of Parliamentary Services (Cth), above n 1, 12–16. This includes the Statement of Compatibility with Human Rights prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) pt 3. The Commonwealth Government's response to *C v Australia* confirms that these changes have removed the discrimination both in relation to C and others in a similar situation. This response is detailed in Part IV. In relation to *G v Australia*, the *Sex Discrimination Act 1984* (Cth) s 40(5) specifically permitted state and territory governments to refuse to make, issue or alter an official record of a person's sex if a law of a state or territory requires the refusal because the person is married. This provision was repealed by the *Marriage Amendment Act* sch 2 item 2. *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B(1)(c) stipulated a person must be unmarried at the time of their application to register a change of sex. This section was repealed by *Miscellaneous Acts Amendment (Marriages) Act 2018* (NSW) sch 3 item 1, which received Royal Assent on 15 June 2018.

8 See Johnson and Tremblay's comparison of the significance of the Canadian Charter (where same-sex marriage was legalised in Canada in 2005) with the absence of national level human rights protections in Australia: Carol Johnson and Manon Tremblay, 'Comparing Same-Sex Marriage in Australia and Canada: Institutions and Political Will' (2016) 53 *Government and Opposition* 131.

9 Human Rights Committee, *Views: Communication No 488/1992*, 50<sup>th</sup> sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*').

Tasmania'.<sup>10</sup> That finding increased 'litigation and advocacy concerning rights violations based on sexual orientation immediately ... at both the domestic and international level'.<sup>11</sup>

Of the 172 States Parties to the *ICCPR*,<sup>12</sup> only 26 allow same-sex couples to marry.<sup>13</sup> Currently the sole HRC authority specifically on same-sex marriage is the HRC's 2002 decision in *Joslin v New Zealand*.<sup>14</sup> In *Joslin v New Zealand* the HRC cursorily rejected the authors' arguments that the right to marry under article 23 should be interpreted to encompass a right to marry a person of the same sex, and that New Zealand law, which confined marriage to opposite-sex couples, violated the rights to non-discrimination under articles 2 and 26. Although the HRC in *G v Australia* and *C v Australia* did not have to deal *directly* with prohibitions on same-sex marriage, and the HRC in each decision did not *expressly* disapprove of its reasoning in *Joslin v New Zealand*, this article will argue that, on close analysis, both decisions undermine the HRC's reasoning in *Joslin v New Zealand* and its continuing authority.

The focus of this article is a comparative analysis of the HRC's reasoning in a series of its Views. It is acknowledged at the outset that any position the HRC adopts in relation to the interpretation of the *ICCPR* and marriage equality will be influenced by a host of factors, many of which fall outside that focus.<sup>15</sup> This article does not, for example, consider the extent to which an interpretation of the *ICCPR* which encompasses marriage equality can be accommodated within the rules of treaty interpretation prescribed by the *Vienna Convention on the Law of Treaties*<sup>16</sup> (a question which we have considered elsewhere);<sup>17</sup> nor does this article consider, in any detail, what might be termed 'non-legal' factors. However, the authors maintain that the fine-grained legal analysis of the HRC's Views undertaken in this article is still valuable for several reasons.

10 Paula Gerber and Joel Gory, 'The UN Human Rights Committee and LGBT Rights: What Is It Doing? What Could It Be Doing?' (2014) 14 *Human Rights Law Review* 403, 429.

11 Ibid 429, quoting Lawrence R Helfer and Alice M Miller, 'Sexual Orientation and Human Rights: Towards a United States and Transnational Jurisprudence' (1996) 9 *Harvard Human Rights Journal* 61, 63. For an overview of the 'international petitions' concerning LGBT rights, see Malcolm Langford, 'Revisiting *Joslin v New Zealand*: Same-Sex Marriage in Polarised Times' in Eva Brems and Ellen Desmet (eds), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (Edward Elgar Publishing, 2017) 119, 123.

12 *ICCPR*. See Office of the United Nations High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard* (2018) <<http://indicators.ohchr.org/>>.

13 See Oscar I Roos and Anita Mackay, 'The Evolutionary Interpretation of Treaties and the Right to Marry: Why Article 23(2) of the *ICCPR* Should Be Reinterpreted to Encompass Same-Sex Marriage' (2017) 49 *George Washington International Law Review* 879, 944–5 for a list of the 22 countries that had legalised same-sex marriage as at September 2017. Since then, Australia, Austria and Malta have legalised same-sex marriage (or taken steps to do so) and all of these countries are signatories to the *ICCPR*.

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

15 See generally Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 261.

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

17 Roos and Mackay, above n 13.

First, although it could be argued that the HRC is more constrained than, for example, the Inter-American Court of Human Rights, or the European Court of Human Rights, by its larger and more diverse constituency of States Parties, and that it must wait for a critical mass (howsoever defined) of States Parties to recognise same-sex marriage domestically, the HRC has some form in moving in advance of any consensus amongst States Parties concerning the rights of sexual minorities: its aforementioned Views in *Toonen v Australia* are a case in point.<sup>18</sup>

Secondly, the HRC is a quasi-judicial body and the authoritative *legal* interpreter of the *ICCPR*.<sup>19</sup> It aims for internal coherence and consistency of interpretation<sup>20</sup> and has adopted the position that '[a]lthough the terms of the [*ICCPR*] are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning'.<sup>21</sup> Accordingly, when the HRC publishes its Views 'in the style of a judicial opinion',<sup>22</sup> it often 'recalls its earlier jurisprudence',<sup>23</sup> and further developments are frequently built on not only its General Comments but also its established case law (which, it is recognised, has 'precedential value'),<sup>24</sup> and sometimes previous dissents.<sup>25</sup> It is thus extremely likely (as well as highly desirable) that legal reasoning and analysis will play a highly significant role in any shift in the HRC's jurisprudence on marriage equality from the position it espoused in *Joslin v New Zealand*.

Furthermore, although the HRC may 'overturn'<sup>26</sup> a previous interpretation of the *ICCPR*, it can attract both internal<sup>27</sup> and external criticism for doing so.<sup>28</sup>

18 Ibid 883–5.

19 See Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905, 913–14, 917–19, 924–6.

20 Schlütter, above n 15, 268, 289.

21 Human Rights Committee, *Views: Communication No 50/1979*, 15<sup>th</sup> sess, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) [10.2] ('*Van Duzen v Canada*').

22 Nathan Crombie, 'A Harmonious Union? The Relationship between States and the Human Rights Committee on the Same-Sex Marriage Issue' (2013) 51 *Columbia Journal of Transnational Law* 696, 702.

23 See, eg, Human Rights Committee, *Views: Communication No 1361/2005*, 89<sup>th</sup> sess, UN Doc CCPR/C/89/D/1361/2005 (30 March 2007) [7.2] ('*X v Colombia*').

24 Crombie, above n 22, 713.

25 See, eg, the vigorous dissenting individual opinions of HRC Members Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by HRC Member Francisco José Aguilar Urbina, of HRC Member Christine Chanet, co-signed by HRC Member Julio Prado Vallejo, and of HRC Member Prafullachandra Bhagwati in Human Rights Committee, *Views: Communication No 538/1993*, 58<sup>th</sup> sess, UN Doc CCPR/C/58/D/538/1993 (1 November 1996) ('*Stewart v Canada*') and the HRC's subsequent 2011 Views in Human Rights Committee, *Views: Communication No 1557/2007*, 102<sup>nd</sup> sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('*Nystrom v Australia*').

26 See, eg, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 417 [12.46] ('The strict interpretation of "own country" in *Stewart v Canada* (538/93) was overturned in *Nystrom v Australia* (1557/07) and *Warsame v Canada* (1959/10)'). Note that the decisions referred to in this passage are *Stewart v Canada*, UN Doc CCPR/C/58/D/538/1993; *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007; and Human Rights Committee, *Views: Communication No 1959/2010*, 102<sup>nd</sup> sess, UN Doc CCPR/C/102/D/1959/2010 (21 July 2011) ('*Warsame v Canada*').

27 See, eg, *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007, individual dissenting opinion of HRC Members Gerald L Neuman and Yuji Iwasawa at [1], [3.1]–[3.2] and individual dissenting opinion of

Hence, a departure from *Joslin v New Zealand* is more likely to be seen as both legal *and* legitimate – and is thus more likely to occur – if it can be linked to, and made to cohere with, the HRC’s developing corpus of Views,<sup>29</sup> and anticipated in the light of prior legal authorities.<sup>30</sup> As we have noted elsewhere, this is particularly relevant in relation to any interpretation of the *ICCPR* which embraces marriage equality ‘because the decisions of the HRC are not backed by their own enforcement powers and such interpretation is likely to arouse considerable hostility’;<sup>31</sup> many States Parties may be prepared to eliminate discrimination on the grounds of LGBT status in many aspects,<sup>32</sup> and even to provide for civil registration of same-sex relationships, but balk at marriage equality.<sup>33</sup>

In sum, if a communication like *Joslin v New Zealand* is submitted to the HRC again (and it is probably a matter of when, not if),<sup>34</sup> we maintain that it can be inferred from the developments in HRC’s jurisprudence analysed in this article that the HRC is unlikely to adopt similar views to those adopted in *Joslin v New Zealand*.

The remainder of this article is set out as follows. Part II recounts the HRC’s reasoning in *Joslin v New Zealand*. Part III analyses the HRC’s Views in *G v Australia* and explains why the relevant Australian laws failed to satisfy the proportionality test applied by the HRC in relation to articles 17 and 26. Part IV analyses the HRC’s Views in *C v Australia* and explains how the HRC confined C’s claim, why it found that C was subject to differential treatment, and why relevant Australian laws failed to satisfy the proportionality test applied by the HRC in relation to article 26. Part V then explains how the HRC’s Views in *G v Australia* and *C v Australia* undermine the authority of *Joslin v New Zealand* by supporting a reinterpretation of the right to marry which encompasses a right to marry a person of the same sex. In the alternative, Part V also explains why the HRC’s Views in *G v Australia* and *C v Australia* support a determination that a State Party which fails to provide for marriage equality violates the article 26 right to non-discrimination. Part VI is a conclusion.

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HRC Members Sir Nigel Rodley, Ms Helen Keller and Mr Michael O’Flaherty. See also Devon Whittle, ‘*Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011)’ (2012) 19 *Australian International Law Journal* 235, 238–40, 243; Joseph and Castan, above n 26, 416 [12.43].

28 See Mechlem, above n 19, 908.

29 See Roos and Mackay, above n 13, 885–6. See also Mechlem, above n 19, 922. See generally Crombie, above n 22, 732–6.

30 See Robert Scott and Paul Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press, 2006) 118.

31 Roos and Mackay, above n 13, 886.

32 See, eg, the recent position taken by the Human Rights Commission of Malaysia (Suhakam) reported at Boo Su-Lyn, ‘Suhakam Does Not Support Gay Marriage’, *Malay Mail* (online), 22 September 2018 <<https://www.malaymail.com/s/1675357/suhakam-does-not-support-gay-marriage>>.

33 See also Roos and Mackay, above n 13, 922–4.

34 Ibid 942. See also Langford, above n 11, 121–3; Luca Paladini, ‘Same-Sex Couples before *Quasi-Jurisdictional Bodies: The Case of the UN Human Rights Committee*’ in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer-Verlag, 2014) 535–6, 556–7.

## II THE HRC'S CURRENT POSITION ON MARRIAGE EQUALITY: *JOSLIN V NEW ZEALAND*

In 2002 the HRC expressed their views in *Joslin v New Zealand* in response to a communication from two lesbian couples who had made an application to the New Zealand Registrar of Births, Deaths, and Marriages for marriage licences pursuant to the *Marriage Act 1955* (NZ). In the Registrar's view, the Act only permitted marriage between a man and a woman and, accordingly, he rejected the application. The Registrar's interpretation of the Act was then confirmed by the Full Bench of the New Zealand Court of Appeal.<sup>35</sup>

The authors' communication claimed that New Zealand was in breach of article 23(2) of the *ICCPR*,<sup>36</sup> in conjunction with the right to non-discrimination contained in article 2(1),<sup>37</sup> and the autonomous right to non-discrimination in article 26.<sup>38</sup>

Although by 2002 it was the 'established view'<sup>39</sup> of the HRC that discrimination on the grounds of 'sex' for the purposes of articles 2(1) and 26 encompassed discrimination based on sexual orientation,<sup>40</sup> the authors' communication was unsuccessful. In its brief views on the merits, expressed in the HRC's 'familiar skeletal, oracular and somewhat cryptic style',<sup>41</sup> the HRC noted 'that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry'<sup>42</sup> and stated:

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2 of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in

35 *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [2.1]–[2.4].

36 *ICCPR* art 23(2) states '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized'.

37 *ICCPR* art 2(1) provides:

Each State Party to the [*ICCPR*] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the [*ICCPR*], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

38 *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [3.1], [3.8]. See *ICCPR* art 26, which stipulates: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

39 See *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, app: Individual Opinion of Committee Members Mr Rajsoomer Lallah and Mr Martin Scheinin (Concurring).

40 This was established in 1994 by the views expressed by the HRC in *Toonen v Australia*, where the HRC noted: 'in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation': *Toonen v Australia*, UN Doc CCPR/C/5/50/D/488/1992, [8.7]. See also Paula Gerber, Kristine Tay and Adiva Sifris, 'Marriage: A Human Right for All?' (2014) 36 *Sydney Law Review* 643, 651.

41 Langford, above n 11, 119.

42 *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [8.2].

Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation ... is to recognise as marriage only the union between a man and a woman wishing to marry each other.

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 rights of the authors under articles ... 23, paragraphs 1 and 2, or 26 of the Covenant.<sup>43</sup>

*Joslin v New Zealand* is controversial and several commentators have opined that article 23(2) can, or should, be re-interpreted so as to encompass a right to marry a person of the same sex.<sup>44</sup> But since 2002, the HRC has not been called upon to reconsider their views about article 23(2) and the relationship between it and article 26.<sup>45</sup>

### III THE HRC'S 2017 VIEWS ON DISCRIMINATION AGAINST A TRANSGENDER MARRIED INDIVIDUAL: *G V AUSTRALIA*

*G v Australia* was a communication by an Australian who was male to female transgender. Prior to undergoing sex affirmation surgery, G married a woman. After undergoing surgery, she applied to the New South Wales Registry of Births, Deaths and Marriages three times to have her sex changed on her birth certificate from male to female.<sup>46</sup> Each application was refused because section 32B(1)(c) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) (*'Births, Deaths and Marriages Act'*) provided that only an unmarried person could apply to the Registrar for alteration of the record of their sex on their birth certificate, and section 32D(3) provided that: 'An alteration of the record of a person's sex must not be made if the person is married'.<sup>47</sup>

43 Ibid [8.2]–[8.3]. See also Paladini, above n 34, 544–5.

44 Gerber, Tay and Sifris, above n 40; Roos and Mackay, above n 13, 911. Cf Langford, above n 11.

45 This has been described as 'somewhat [surprising]': Roos and Mackay, above n 13, 881. See also *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex II: Individual Opinion of Committee Member Sarah Cleveland (Concurring) [10]. Here, Member Cleveland (as discussed in more detail below) noted: 'Nor has the relationship between article 23 and the Covenant's non-discrimination prohibitions been addressed in the Australian context'.

46 Human Rights Committee, *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [2.1], [2.3], [2.6].

47 These provisions had been inserted into the *Births, Deaths and Marriages Act* in 1996 by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) (*'Transgender Amendment Act'*) sch 2 cl 4. In *G v Australia*, the HRC claimed that the purpose of the *Transgender Amendment Act* was 'to ensure that amendments granting certain transgender persons the right to apply for new birth certificates showing their new sex would operate consistently with s 5(1) of the *Marriage Act* which defines marriage as being between a man and a woman': *G v Australia*, UN Doc CCPR/C/119/D/2216/2012, [4.7]. See also [4.9], [4.11]–[4.13]. However, this claim is not entirely accurate. Despite the Second Reading Speech for the *Transgender Amendment Act* highlighting that the amendments were 'not intended to overturn the provisions of the Commonwealth *Marriage Act* [and] a new certificate will not be issued where the applicant is married': New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 1996, 644 (Kim Yeadon), the explicitly heterosexual definition of marriage was not inserted into s 5 of the *Marriage Act* until 2004 – eight years after the NSW amendments: *Marriage Amendment Act 2004* (Cth) sch 1 cl 1. In 1996, the *Marriage Act* did not contain a definition of marriage, although the *Marriage Act* s 46(1) did (prior to the December 2017 amendments) require marriage celebrants to state that marriage was between a man and a woman. In addition, as a former Chief Justice of the Family Court of Australia has opined: '[d]espite the lack of a definition ... it would have been impossible to have successfully argued that 'marriage', as used in the

## A G's Communication

G claimed that Australia violated her rights under article 17 of the *ICCPR* because it arbitrarily interfered with her privacy and her family. She argued that it arbitrarily interfered with her privacy because the Registry's refusal to change her sex on her birth certificate meant that her current sex and her sex as recorded on her birth certificate were different, revealing that she is transgender. She also argued that it arbitrarily interfered with her family because Australia understood that couples of the same-sex constituted a family,<sup>48</sup> and she was required to divorce her wife to have the sex recorded on her birth certificate changed.<sup>49</sup>

G also claimed that Australia violated her rights under first, articles 2(1) and 26 of the *ICCPR* '[b]y failing to implement legislation which prohibits discrimination on the basis of marital and transgender status and guarantees to all persons equal and effective protection against such discrimination'; and secondly, article 2(3) by failing to provide her with an effective remedy against such violations.<sup>50</sup> The *Sex Discrimination Act 1984* (Cth) did not, at the time of the initial submission of the author's communication on 2 December 2011, prohibit discrimination based on transgender status<sup>51</sup> and, although it prohibited discrimination based on marital status, subsection 40(5) specifically permitted state and territory governments 'to refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married'.<sup>52</sup> The *Anti-Discrimination Act 1977* (NSW) prohibited discrimination generally on transgender grounds,<sup>53</sup> and additionally protected a 'recognised transgender person' from being treated 'as being of the person's former sex',<sup>54</sup> or from a requirement to comply with an unreasonable condition or requirement which they cannot satisfy and 'with which a substantially higher proportion of persons who are not transgender persons ... comply or are able to comply'.<sup>55</sup> However, a 'recognised transgender person' was defined as 'a person the record of whose sex is altered under ... the [*Anti-*

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*Marriage Act*, contemplated same-sex marriage': Alastair Nicholson, 'The Legal Regulation of Marriage' (2005) 29 *Melbourne University Law Review* 556, 560. Hence, it is probably more accurate to state that the purpose of the *Transgender Amendment Act* was to ensure that those amendments would operate consistently with the implicit presumption of the *Marriage Act* that marriage was only open to opposite-sex couples — a presumption that was explicitly reinforced by the *Marriage Act* s 46(1). Such consistency between NSW and Commonwealth laws was required for the NSW amendments to have legal operation (in accordance with s 109 of the *Australian Constitution*).

48 See also Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (8 April 1988) [5].

49 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [7.2].

50 *Ibid* [3.4]–[3.5].

51 The Act was subsequently amended in July 2013 to include protection against discrimination on 'intersex status': *ibid* [5.2].

52 This subsection has since been repealed by *Marriage Amendment Act* sch 2 s 2.

53 *Anti-Discrimination Act 1977* (NSW) ('*Anti-Discrimination Act*') s 38C, as amended by *Transgender Amendment Act*. See also *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [4.17]–[4.18].

54 *Anti-Discrimination Act* s 38B(1)(c), as amended by *Transgender Amendment Act* sch 1 cl 4.

55 *Ibid*. Cf *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [2.8], [4.16], [4.19].

*Discrimination Act*] or under the corresponding provisions of a law of another Australian jurisdiction<sup>56</sup> and hence excluded G.

## B The HRC's Views

The HRC found, with no separate concurring or dissenting opinions amongst the 16 members who participated in the examination of the communication, that G's communication was admissible<sup>57</sup> and that Australia was in violation of articles 17 and 26.<sup>58</sup>

### 1 Violation of the Right to Privacy

In relation to the article 17 claim, the HRC had little difficulty finding that Australia had interfered with G's privacy and her family, based on (i) the HRC's established jurisprudence that 'privacy' under article 17 'refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone';<sup>59</sup> (ii) the HRC's established jurisprudence that privacy 'includes protection of a person's identity, such as their gender identity';<sup>60</sup> (iii) the difference between G's actual sex and the sex on her birth certificate, which meant that the production of her birth certificate disclosed her transgenderism;<sup>61</sup> (iv) the inflexible requirement of the *Anti-Discrimination Act* that she divorce in order to obtain a birth certificate that correctly reflects her sex;<sup>62</sup> and (v) the exception inserted into the *Sex Discrimination Act 1984* (Cth) to accommodate the inflexible requirement of the *Anti-Discrimination Act*.<sup>63</sup>

Although the HRC accepted Australia's contention that the interference with privacy was lawful because it was provided for in legislation,<sup>64</sup> the critical consideration for the HRC was arbitrariness. The HRC first recalled:

its jurisprudence that the concept of arbitrariness is intended to guarantee that any interference should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. Any interference with privacy and family accordingly must be

56 *Anti-Discrimination Act* s 4(1) (definition of 'recognised transgender person').

57 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [6.5]–[6.6], [6.9]. The author's discrete article 2(3) claim was, however, found to be inadmissible because 'article 2(3) can be invoked by individuals only in conjunction with other substantive articles of the Covenant': [6.8].

58 The HRC considered that it was unnecessary to review the author's claim that article 2(1) had been violated because 'the Committee does not consider examination of whether the State party violated its nondiscrimination obligations under article 2(1), when read in conjunction with article 26, to be distinct from examination of the violation of the author's rights under article 26': *ibid* [6.7].

59 *Ibid* [7.2], quoting Human Rights Committee, *Views: Communication No 453/1991*, 52<sup>nd</sup> sess, UN Doc CCPR/C/52/D/453/1991 (31 October 1994) [10.2] ('*Coeriel and Aurik v The Netherlands*').

60 *Ibid*, citing Human Rights Committee, *Views: Communication No 1621/2007*, UN Doc CCPR/C/100/D/1621/2007 (28 October 2010) [8.3] ('*Raihman v Latvia*'); *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992, [8.2].

61 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [7.2].

62 *Ibid* [7.3].

63 *Ibid* [7.2]–[7.3].

64 *Ibid* [7.4].

proportionate to the legitimate end sought and necessary in the circumstances of any particular case.<sup>65</sup>

It then determined that Australia's interference with G's privacy and the privacy of her family was not necessary and proportionate.

The legal underpinning of the HRC's determination was supplied by its previous jurisprudence in *Toonen v Australia*,<sup>66</sup> where the HRC had determined that Tasmanian laws criminalising certain male homosexual acts violated article 17. In *Toonen v Australia* the HRC had implied from (i) the full decriminalisation of homosexual activity in all Australian jurisdictions apart from Tasmania; (ii) the lack of consensus within Tasmania as to whether its laws should be repealed; and (iii) the failure of Tasmanian authorities to enforce its laws, that the Tasmanian laws criminalising certain male homosexual acts '[did] not meet the "reasonableness" test',<sup>67</sup> in terms of article 17, as means to achieve the purported aims of the protection of morals and the effective control of HIV/AIDS.<sup>68</sup> In accordance with that jurisprudence, in *G v Australia* the HRC identified a number of inconsistencies in Australia's laws concerning transgenderism and in the administration of those laws,<sup>69</sup> and inferred from those inconsistencies – in the absence of convincing explanations for them by Australia – that the prohibition on a married transgender person changing her sex on her birth certificate under the *Anti-Discrimination Act* was not a necessary and proportionate means of achieving the stated aim of consistency with the *Marriage Act*.

## 2 Violation of the Right to Non-Discrimination

In relation to the article 26 claim, the HRC recalled its *General Comment No 18*<sup>70</sup> and found that:

The test for the Committee therefore is whether, in the circumstances of the present communication, the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and request to amend

65 Ibid.

66 Ibid [7.10].

67 *Toonen v Australia*, UN Doc CCPR/C/5/50/D/488/1992, [8.6].

68 Ibid [6.5], [8.4]–[8.5]. It should be noted that this argument was made by the Tasmanian authorities but was not supported by the Commonwealth, which represented Australia as the State Party.

69 Those inconsistencies included: (i) G had been permitted to change her sex on her Australian passport, and to change her name on her birth certificate, driver's licence and Medicare card; (ii) the Commonwealth had left it to the states to decide whether to allow married transgender persons to change their sex on their birth certificate; (iii) the *Marriage Act* did not provide that a foreign marriage between two persons of the opposite sex must not be recognised as a marriage in Australia when one of the parties to the marriage subsequently changed their sex; and (iv) Australia's refusal to allow G to change her sex on her birth certificate was inconsistent with the 'lawful reality' that:

Gender reassignment is lawful in Australia and post-operative transgender individuals are provided with the opportunity to be legally recognized as their reassigned sex and are protected from discrimination on transgender grounds [and that] the author has lived on a day to day basis in a loving, married relationship with a female spouse that the State party has recognized in all respects as valid.

*G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [2.1], [2.2], [2.3], [5.15], [7.9].

70 Human Rights Committee, *General Comment No 18: Non-discrimination*, 37<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.9 (Vol. 1) (10 November 1989) [24] ('*General Comment No 18*').

their sex on their birth certificate meets the criteria of reasonableness, objectivity and legitimacy of aim.<sup>71</sup>

The HRC noted that both the New South Wales Anti-Discrimination Board and the Australian Human Rights Commission had previously found that prohibiting a married person from changing her sex on her birth certificate constituted discrimination based on marital status.<sup>72</sup> It then reiterated its reasoning in relation to the article 17 claim and determined that Australia ‘is failing to afford the author ... equal protection under the law as a married transgender person’<sup>73</sup> and was thus discriminating against G in violation of article 26 of the *ICCPR* based on both marital and transgender status.<sup>74</sup>

#### IV THE HRC’S 2017 VIEWS ON SAME-SEX DIVORCE: *C V AUSTRALIA*

*C v Australia* was a communication brought by an Australian who had entered a legal same-sex marriage in Canada with A. At the time of C’s complaint, the *Marriage Act* provided that an overseas same-sex marriage, even if valid in accordance with the law of that country, ‘must not be recognised as a marriage in Australia’.<sup>75</sup>

C had lived as a couple in Australia with A for about 10 years. They had a daughter (of whom C was the birth mother) in 2001, and in 2004 they travelled to Canada and married. They separated in December 2004 and after several years of separation, C wished to divorce. However, she was ineligible to apply for a divorce in Canada because she lived in Australia and an applicant for divorce under Canadian law had to be ordinarily resident in Canada for 12 months.<sup>76</sup> Her ineligibility to apply for a divorce in Australia, her country of citizenship, was therefore the subject of an individual communication to the HRC that Australia was in breach of both article 14(1) (which provides that: ‘All persons shall be equal before the courts and tribunals’), read together with article 2(1), and article 26 of the *ICCPR*.

##### A C’s Communication

C claimed that the denial of access to divorce under Australian law for same-sex couples who have validly married abroad amounted to a violation of article

71 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [7.12].

72 *Ibid* [7.13]. See also [2.10] regarding the NSW Anti-Discrimination Board; [2.13] in relation to the Australian Human Rights Commission.

73 *Ibid* [7.14].

74 *Ibid* [7.15].

75 *Marriage Act* s 88EA stipulated: ‘a union solemnised in a foreign country between: (a) a man and another man, or (b) a woman and another woman, must not be recognised as a marriage in Australia’.

76 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [2.1]–[2.3], [2.9]. It appears that C had only travelled to Canada briefly in 2004 with her spouse to get married. Although same-sex marriage did not become legal nationwide in Canada until the commencement of the *Civil Marriage Act*, SC 2005, c-33 on 20 July 2005, by 2004, several Canadian provinces allowed same-sex couples to marry: Edmondo Mostacci, ‘Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa’ in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer-Verlag, 2014) 82–5.

14(1) read together with article 2(1). She argued that (i) if she were in an opposite-sex marriage, she would be entitled to file an application for divorce in an Australian court and have that court hear her application; (ii) '[t]he same-sex nature of her marriage is a characteristic pertaining to her sexual orientation as a lesbian';<sup>77</sup> and (iii) the distinction made by Australian law based on her sexual orientation could not be justified on any objective and reasonable grounds.<sup>78</sup>

Specifically, in relation to (iii) above, C mounted several arguments.

First, there were some categories of foreign opposite-sex marriages (such as polygamous opposite-sex marriages, and marriages between a man and a woman over 16 years of age but under the Australian marriageable age of 18 years) which, like foreign same-sex marriages, could also not be entered into in Australia, but were deemed to be marriages for the purposes of the *Family Law Act 1975* (Cth) ('*Family Law Act*'). This indicated that foreign same-sex marriages had been singled out for unfavourable treatment<sup>79</sup> and 'that non-objective and discriminatory reasons [were] behind the less-favourable treatment given to same-sex couples who marry overseas'.<sup>80</sup>

Secondly, over several years beginning in 1999, all Australian states and territories and the Commonwealth had amended their laws to recognise and treat same-sex and opposite-sex unmarried couples equally in almost all areas, including, for example, inheritance, victim's compensation, medical treatment, stamp duty, superannuation and tax benefits, and, on the breakdown of a relationship, child support, spousal maintenance and property division.<sup>81</sup> Australian laws also recognised C, A and their daughter as a family, and A specifically as a parent of their daughter.<sup>82</sup> C argued that the anomalous discriminatory treatment of the right to marry and divorce, and the recognition of foreign same-sex marriages, also suggested 'that discrimination in this area alone cannot be considered objectively or reasonably justified'.<sup>83</sup>

Thirdly, C claimed that 'the objectives of divorce laws in Australia ... are to facilitate an inexpensive and civil resolution to marital breakdowns in a manner which encourages minimal conflict and protects the welfare of children',<sup>84</sup> but that '[t]he denial of access to divorce mechanisms for same-sex couples does not further [those] objectives ... and may even prevent their realization'.<sup>85</sup> Rather, that denial of access:

prolongs conflict and prevents separating spouses from formally dissolving their marriage and putting an end to their separation ... [a situation which] places

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77 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [3.1].

78 *Ibid* [3.2].

79 *Ibid* [3.3].

80 *Ibid*.

81 *Ibid* [3.8].

82 *Ibid* [3.9].

83 *Ibid* [3.8].

84 *Ibid* [3.4].

85 *Ibid*.

spouses and children at greater risk of psychological and physical health problems and financial and economic stress.<sup>86</sup>

C pointed specifically to the legal uncertainty in relation to intestacy and succession, which was created by the relationship between Commonwealth divorce laws and state laws. In Queensland, where she lived, she was unable to enter into a civil partnership under the *Civil Partnerships Act 2011* (Qld) with her new female partner, because section 5 provided that '[a] person may enter into a civil partnership only if ... the person is not married'; there was also a risk that Queensland would amend its laws so that her Canadian marriage would be retrospectively recognised as a civil partnership (Tasmania had already passed such amendments).<sup>87</sup>

Fourthly, C claimed that Australia's discriminatory laws:

directly and indirectly help foster the prejudicial environments which enable homophobic abuse, harassment and discrimination to occur ... Studies have shown that such laws may contribute to negative mental health outcomes for non-heterosexual persons'.<sup>88</sup>

Fifthly, C pointed to the 'great public support in Australia for the equal treatment of same-sex couples'.<sup>89</sup>

Sixthly, C cited 'jurisprudence from different countries finding that denying same-sex couples access to marriage and its corollary benefits under law, including the right to divorce, constitutes unlawful discrimination'.<sup>90</sup>

## B The HRC's Views

### 1 Admissibility

The HRC found that C's communication was admissible but confined her claims to those 'direct effects in Australia as her country of residence by lack of access on an equal legal basis to divorce proceedings'.<sup>91</sup> In doing so, the HRC rejected Australia's principal argument on admissibility (that is, that C's claims were wholly inadmissible *ratione loci* because 'as the author was married in Canada, she should seek a divorce in that country. The fact that she is not entitled to access this order is a matter for her to pursue with the Canadian Government').<sup>92</sup> However, the HRC implicitly accepted Australia's alternative argument on admissibility that C's claims were, first, partly inadmissible *ratione loci* 'to the extent that they relate to alleged violations of the Covenant that

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid [3.5]. See *Relationships Act 2003* (Tas) s 65A, as amended by *Relationships Amendment (Recognition of Registered Relationships) Act 2010* (Tas).

<sup>88</sup> *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [3.6].

<sup>89</sup> Ibid [3.7].

<sup>90</sup> Ibid [3.10]. The HRC's views do not indicate which countries the author referred to, but this may have included the decisions of the South African Constitutional Court like *Minister of Home Affairs v Fourie* [2005] 1 SA 524 (Constitutional Court) and decisions from Canada such as *Halpern v Canada (Attorney General)* (2003) 65 OR (3<sup>rd</sup>) 161 (Ontario Court of Appeal).

<sup>91</sup> *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [7.5].

<sup>92</sup> Ibid annex IV [2].

occurred or may occur outside Australia's territory and jurisdiction';<sup>93</sup> and, secondly, partly inadmissible because:

A number of the claims relate to alleged violations of the Covenant that have not actually occurred, and instead rely on conjecture and speculation as to events in the future. In the absence of any actual interference with the author's rights, the Committee should rule these aspects of the communication inadmissible.<sup>94</sup>

## 2 Merits

The HRC determined (with three of the 17 members dissenting<sup>95</sup> and another writing a separate concurring opinion)<sup>96</sup> that C was subject to prohibited discrimination in breach of article 26 because she was subject to differential treatment based on her sexual orientation, and that the criteria for such differential treatment were not reasonable and objective.<sup>97</sup> It did not examine C's claim under article 14(1).

In relation to the first stage of the discrimination analysis (that is, whether C was subject to differential treatment), the HRC rejected the arguments of Australia that C was not subject to differential treatment because, first, the parties to *some* unrecognised foreign opposite-sex marriages were also unable to obtain a divorce under Australian law;<sup>98</sup> and, secondly, there was a 'general principle'<sup>99</sup> that 'foreign marriages which are not recognized in Australia do not need access to divorce proceedings'.<sup>100</sup> Rather, the HRC identified unrecognised foreign opposite-sex marriages which *could* obtain a divorce under Australian law as the relevant comparator. Hence, it found that C was subject to differential treatment. Specifically, while (i) foreign same-sex marriages; (ii) opposite-sex polygamous marriages; and (iii) opposite-sex marriages where either party was aged between 16 and 18 years were all not recognised under the *Marriage Act*, opposite-sex polygamous marriages and opposite-sex marriages *were* subject to divorce proceedings under the *Family Law Act*, whereas foreign same-sex marriages were *not*.<sup>101</sup>

The HRC then recalled its established jurisprudence that 'the prohibition against discrimination under article 26 comprises discrimination based on sexual orientation',<sup>102</sup> but that 'not every differentiation of treatment will constitute

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93 Ibid annex IV [1], [3].

94 Ibid annex IV [4].

95 Member Ben Achour wrote a single dissenting opinion and Member Seibert-Fohr wrote a dissenting opinion that was joined by Member Pazartzis.

96 Member Sarah Cleveland.

97 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [8.6]. Note that the HRC, having found that the differential treatment was not based on objective and reasonable criteria, did not proceed expressly to make a determination in relation to legitimacy of aim. Nevertheless, it can be strongly inferred that it considered the aim of the differential treatment was illegitimate.

98 Ibid [5.8].

99 Ibid [5.7].

100 Ibid.

101 Ibid [6.3].

102 Ibid [8.4].

discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].<sup>103</sup>

Australia had contended (in the alternative, that is, on the assumption that its principal argument that C was not subject to differential treatment was unsuccessful) that the differential treatment of C, in terms of her access to divorce proceedings in Australia, met the criteria of reasonableness, objectivity and legitimacy of aim because (i) the Australian divorce law framework is aimed at ensuring that those whose foreign marriages are recognised in Australia have the ability to divorce in Australia; (ii) the general proscription of divorce for foreign marriages not recognised in Australia ‘is laid down in legislation and is therefore objective’; and (iii) the exceptions to the general proscription are based on reasonable and objective criteria.<sup>104</sup> But the HRC described the State Party’s contentions as ‘not persuasive’.<sup>105</sup> Specifically, it found that, first, ‘compliance with domestic law does not in and of itself establish the reasonableness, objectiveness, or legitimacy of a distinction’;<sup>106</sup> and, secondly, Australia had failed to explain why its reasons for allowing some categories of foreign opposite-sex marriages, which were not recognised in Australia, to be subject to divorce proceedings under the *Family Law Act* did not also apply to foreign same-sex marriages.<sup>107</sup>

### C Additional Opinions in *C v Australia*

There were three annexures to the HRC’s Views, comprising a concurring opinion by Professor Sarah Cleveland, a dissenting opinion by Mr Yadh Ben Achour, and a dissenting opinion by Ms Anja Seibert-Fohr joined by Ms Photini Pazartzis.

#### 1 Professor Cleveland’s Concurring Opinion

Professor Cleveland agreed with the HRC’s finding that article 26 had been breached. However, while the HRC’s Views (and the dissenting opinion of Ms Seibert-Fohr, joined by Ms Pazartzis discussed below) focused on whether

103 Ibid, citing *General Comment No 18*, UN Doc HRI/GEN/1/Rev.1, [13].

104 Ibid [8.5]. For example, the exception in relation to foreign polygamous marriages ‘is to enable ... access to the assistance, relief and help provided by the family law courts’: [8.5].

105 Ibid [8.6].

106 Ibid.

107 Ibid. It should be noted that the Commonwealth Government formally responded to the views of the HRC and confirmed that, pursuant to the December 2017 amendments to the *Marriage Act*, the author will be eligible to apply for a divorce, and that the legal impediment has been removed for others in a similar situation. The response notes: ‘The changes have therefore addressed the Committee’s views not only in respect of the author personally, but also in relation to the recurrence of a similar situation in the future’: Australian Government, *Response of the Australian Government to the Views of the Human Rights Committee in Communication No 2216/2012 (C v Australia)* 11 <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/c-v-australia-2216-2012-aus-gov-response.PDF>>. This is rather exceptional. Generally speaking, Australia does not have a good record of amending laws in response to the views of HRC: see Kate Eastman, ‘Australia’s Engagement with the United Nations’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights in Australia* (Thomson Reuters, 2013) 97, 112–19.

Australia could justify allowing some categories of unrecognised foreign opposite-sex marriages (but not foreign same-sex marriages) access to divorce proceedings,<sup>108</sup> Professor Cleveland focused directly on whether the denial of access to domestic divorce proceedings itself constituted sexual orientation and sex discrimination. In her opinion, whether Australia had discriminated against C on the grounds of sex and sexual orientation in denying foreign same-sex couples access to divorce under the *Marriage Act* was the *primary* issue; whether Australia could justify excepting some categories of unrecognised foreign opposite-sex marriage from the general rule that parties to an unrecognised foreign marriage did not have access to divorce proceedings under the Act was merely a *secondary* issue.<sup>109</sup> Moreover, in relation to that primary issue Australia bore ‘the heavy burden of demonstrating that the distinction drawn in its laws regarding access to divorce, based on prohibited grounds of sex and sexual orientation, is not discriminatory’<sup>110</sup> and had to explain ‘why monogamous same-sex unions between consenting, unrelated adults, which otherwise are fully protected in Australia, are properly analogized to the “void” (and criminal) bigamous, incestuous, non-consensual and child marriages for purposes of marriage and divorce’.<sup>111</sup>

Also, in contrast to the HRC’s Views, Professor Cleveland was prepared to question the reasoning in *Joslin v New Zealand* explicitly. Whereas *Joslin v New Zealand* had reasoned that article 23(2) excluded same-sex marriage and precluded any application of the rights of non-discrimination on the grounds of sexual orientation to the ‘mere refusal to provide for marriage between homosexual couples’,<sup>112</sup> she stated that:

Yet nothing in the text of the affirmative protection of the right of ‘men and women’ to marry in article 23 grammatically excludes same-sex marriage ... Nor has the relationship between article 23 and the Covenant’s non-discrimination prohibitions been addressed in the Australian context.<sup>113</sup>

## 2 Member Ben Achour’s Dissenting Opinion

According to Mr Ben Achour ‘[t]he chief claim considered by the Committee is that Australia afforded differentiated treatment to different categories of persons who are in comparable situations’.<sup>114</sup> Those categories of persons were:

homosexuals, for whom marriage and divorce are not recognised in Australia; polygamists, for whom marriage is prohibited in Australia but who can apply for and obtain a divorce in Australia; and persons between the ages of 16 and 18, for

108 See *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex I [2].

109 Ibid annex II [1].

110 Ibid [8]; see *ibid* [12]. See also Human Rights Committee, *Views: Communication No 919/2000*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/919/2000 (26 March 2002) [6.7] (*‘Muller v Namibia’*).

111 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex II [9].

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

113 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex II [10].

114 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex I [2] (emphasis added).

whom marriage in Australia is not possible, who have married abroad but who can, in their case as well, apply for divorce in Australia.<sup>115</sup>

C's claim failed because 'homosexuals' were not in a comparable situation to the two other categories of persons 'from the perspective of the Covenant':<sup>116</sup>

Article 23 ... stipulates ... [t]he right of *men and women* ... to marry', and 'therefore establishes heterosexuality... as the requirement *sine qua non* for a valid marriage. Without it, any marriage is not only held invalid but is also *non-existent* and not capable of producing any legal effect'.<sup>117</sup>

Hence:

Of the three categories of persons ... only the category of homosexuals fails to meet this requirement for a valid marriage, as set forth in article 23 .... Given that divorce is intrinsically related to marriage, it is possible to recognize the ability to divorce in respect of two of the above-mentioned categories while denying it in respect of the third, since the situations of persons in the three categories are not comparable. ... [T]he differentiation of treatment afforded persons whose situations are not comparable under article 23 of the Covenant, read in conjunction with article 26, does not constitute discrimination, inasmuch as it is possible to consider such treatment as having been based on acceptable, that is, reasonable and objective, criteria.<sup>118</sup>

Mr Ben Achour also criticised the HRC majority for going beyond its 'competence in interpreting the Covenant':

The Committee's competence in interpreting the Covenant cannot extend beyond what is clearly delimited by any of its provisions. The solution adopted by the Committee is not consistent with the provisions of positive international law that are set forth in article 23 of the Covenant, which the Committee is required to apply ... In reaching such a decision, the Committee seems to have dispensed with the law of the Covenant and to have instead decided the case *ex aequo et bono*. That is unacceptable ... In order to justify its reasoning, the Committee has resorted to the traditional formula 'in the absence of more convincing explanations from the State party'. But, in the present case, there was no need to seek further explanations from the State party, since the law was compelling in and of itself.<sup>119</sup>

### 3 Member Seibert-Fohr's Individual Dissenting Opinion (Joined by Member Pazartzis)

Members Seibert-Fohr and Pazartzis dissented from the HRC majority for two reasons.

The primary reason Members Seibert-Fohr and Pazartzis dissented was that, unlike the majority, they determined that the differential treatment under Australian divorce law of, on the one hand, 'adolescents between 16 and 18 years and persons in polygamous marriages formed overseas [sic]'<sup>120</sup> and, on the other hand, 'same-sex partners who were married abroad',<sup>121</sup> was reasonable, objective and directed at the purpose which was legitimate (and indeed required) under the

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115 Ibid.

116 Ibid [3].

117 Ibid (emphasis added).

118 Ibid [4], [6].

119 Ibid [5].

120 Ibid annex III [1].

121 Ibid.

*ICCPR*. Hence, in accordance with *General Comment No 18*,<sup>122</sup> it was not discriminatory. In relation to adolescents in foreign marriages specifically, Members Seibert-Fohr and Pazartzis invoked article 24(1) of the *ICCPR* (which provides that: 'Every child shall have, without any discrimination ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'). They reasoned that C's situation was different from that of such adolescents because denying the latter 'access to divorce when they are considered legally married could amount to a denial of protection in violation of article 24 of the Covenant'.<sup>123</sup>

In relation to persons in polygamous marriages specifically, Members Seibert-Fohr and Pazartzis focused particularly on the position of women in those marriages and invoked article 3 of the *ICCPR* (which provides that: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant'). They reasoned that C's situation was different from that of such women because:

Women who were married abroad and live in a polygamous relationship can find themselves in a difficult situation. Though their marriage is not legally recognized in the State party, access to divorce proceedings may be the only way to leave a disparate relationship and to seek assistance ... [D]ivorce proceedings in such situations can be essential to establish and reinforce the rejection of polygamy vis-à-vis the polygamous husband. This is a matter of equal protection of women, which State parties have undertaken to ensure under article 3 of our Covenant ... The author has not convincingly argued that she is or was in a situation comparable to that of women in polygamous marriages, which would require that she be accorded similar treatment ...<sup>124</sup>

In the opinion of Members Seibert-Fohr and Pazartzis (and in strong contrast to Professor Cleveland's individual opinion detailed above), although 'the State party has not presented its arguments in a profound and well-argued way', the HRC 'cannot rely solely on burden of proof considerations when it comes to the protection of Covenant rights'.<sup>125</sup> In this instance, the HRC majority had failed 'to take due consideration of the particularly vulnerable position that adolescents and persons in polygamous marriages formed oversees [sic] may find themselves in'.<sup>126</sup> Once due consideration was given to that vulnerable position it became apparent that '[t]he reason for the difference in treatment is not the author's sexual orientation but the particular vulnerability of adolescents between 16 and 18 years and women in polygamous marriages'.<sup>127</sup>

The second reason Members Seibert-Fohr and Pazartzis dissented was that C had not:

substantiated that she was denied rights in a manner amounting to discrimination under article 26. ... Upon separation, the author was able to enter a formal

122 *General Comment No 18*, UN Doc HRI/GEN/1/Rev.1, [13].

123 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex III [4].

124 *Ibid* [2]–[3].

125 *Ibid* [6].

126 *Ibid* [2].

127 *Ibid* [5].

separation deed regarding property matters and she had access to remedies available under the parenting provisions of the Family Law Act. Both partners are considered unmarried under Australian law and they can enter a new relationship and benefit from the Relationships Act 2011.<sup>128</sup>

## V WHY *C v AUSTRALIA* AND *G v AUSTRALIA* PREFIGURE A SHIFT IN THE HRC'S JURISPRUDENCE ON MARRIAGE EQUALITY

With the exception of Professor Cleveland's individual concurring opinion in *C v Australia*, the HRC in *C v Australia* and *G v Australia* did not directly question the continuing authority of *Joslin v New Zealand*. However, both communications prefigure a shift in the HRC's jurisprudence on marriage equality. First, they place the exclusively heterosexual interpretation of article 23(2) in *Joslin v New Zealand* under strain, and secondly, even if the HRC continues to adhere to the *Joslin v New Zealand* interpretation of article 23(2), it can be inferred from the HRC's Views in *C v Australia* and *G v Australia* that a separate article 26 claim in a subsequent *Joslin v New Zealand* type communication now has a real prospect of success.

### A Why *C v Australia* and *G v Australia* Place the *Joslin v New Zealand* Interpretation of Article 23(2) under Strain

*C v Australia* and *G v Australia* place the exclusively heterosexual interpretation of article 23(2) in *Joslin v New Zealand* under strain because, for the first time, the HRC recognised the actual and juridical significance of same-sex marriage, and equated same- and opposite-sex marriage. Those two claims will first be established, before the relationship between them and the interpretation of article 23(2) is explicated.

#### 1 Recognising Same-Sex Marriage

##### (a) *G v Australia*

In *G v Australia*, it was not disputed that G was a woman and that she was married to another woman, and the HRC found that Australia had discriminated against her in breach of article 26 on the grounds of marital status. Moreover, in determining that Australia's laws arbitrarily and unlawfully interfered with her privacy and her family in breach of article 17, the HRC acknowledged G's 'loving, *married* relationship with a female spouse'<sup>129</sup> and accepted that her marriage was an aspect of her privacy and family, which was protected by the right.

128 Ibid [3].

129 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [7.9] (emphasis added).

(b) *C v Australia*

In *C v Australia*, the HRC recognised that C was ‘validly married’,<sup>130</sup> accepted that her ‘marital status’ was recognised in several jurisdictions where she travelled,<sup>131</sup> and recognised that many of the legal incidents of her ‘same-sex foreign marriage’ could only be removed by a legally valid divorce.<sup>132</sup> Hence, the HRC recognised that same-sex marriage could be (to appropriate the words of Member Ben Achour) valid, existent and capable of producing legal effects.<sup>133</sup>

## 2 *Equating Same- and Opposite-Sex Marriage*

The second claim that the HRC recognised that same- and opposite-sex marriage can be equated is based on *C v Australia*. In *C v Australia*, the HRC explicitly equated the two in its consideration of admissibility and implicitly equated the two in its consideration of the merits.

As already noted, in relation to admissibility, the HRC stated:

To the extent that the author claims direct effects in Australia as her country of residence by the lack of access *on an equal legal basis* to divorce proceedings, the Committee considers that her communication is not inadmissible *ratione loci* under article 1 of the Optional Protocol.<sup>134</sup>

In relation to merits, the HRC compared the treatment of foreign same-sex marriages with some categories of foreign opposite-sex marriages and found that article 26 was breached because the two were not treated equally (that is, they were subject to differential treatment), and the State Party was unable to provide a persuasive justification for such inequality.<sup>135</sup> An implicit presumption of both these findings was the fact that same- and opposite-sex marriage can be equated; hence (one suspects) the strident dissenting opinion of Member Ben Achour who, while defending ‘the freedom of all persons to *choose* their sexual orientation’(!),<sup>136</sup> found that ‘homosexuals’ are not in a ‘comparable situation’ to (one assumes) heterosexuals in relation to marriage.<sup>137</sup> Indeed, the HRC determination of differential treatment selected as its relevant comparator (*contra* the argument of the State Party)<sup>138</sup> those unrecognised foreign opposite-sex marriages under Australian law that received *more* favourable treatment (that is, those that were granted access to domestic divorce, namely polygamous marriages and underage marriage where either of the parties was between the ages of 16 and 18),<sup>139</sup> rather than those unrecognised foreign opposite-sex marriages that received *less* favourable treatment (that is, those that were

130 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [8.2].

131 *Ibid*.

132 *Ibid* [8.3].

133 *Ibid*; *ibid* annex I [3].

134 *Ibid* [7.5] (emphasis added).

135 *Ibid* [8.6]; *General Comment No 18*, UN Doc HRI/GEN/1/Rev.1.

136 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex I [5] (emphasis added).

137 *Ibid* [2].

138 *Ibid* [5.8].

139 *Ibid* [8.3]. In ‘exceptional’ and ‘unusual’ circumstances a judicial officer may grant permission for a party who is over 16 years of age, but not yet 18, to be married: *Marriage Act* s 12.

excluded from access to domestic divorce). Although Australia sought (in the alternative) to justify differential treatment by reference to its domestic policy ‘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*’,<sup>140</sup> as noted previously, the HRC did not find that argument persuasive.<sup>141</sup> Thus, the HRC rejected the counterproposition (which is identified and explicitly advanced in Member Ben Achour’s dissent) that same- and opposite-sex marriage cannot be equated, such that differences in treatment cannot be characterised as differential treatment – in terms of the first stage of its discrimination analysis – or as a justification for differential treatment.

### 3 *Explicating the Likely Influence of G v Australia and C v Australia on the Interpretation of Article 23(2)*

*G v Australia* and *C v Australia* reframe the interpretative task which confronted the HRC in *Joslin v New Zealand*, from one which was focused on whether same-sex marriage can be *included* within the right to marry, to one which is focused on whether same-sex marriage can be differentiated from opposite-sex marriage and *excluded* from the right to marry. At the time *Joslin v New Zealand* was decided, the question confronting the HRC was: should the article 23(2) right be interpreted to include a right to marry a person of the same sex, where such an interpretation would spawn the almost entirely novel, unrecognised and unprecedented phenomenon<sup>142</sup> of ‘same-sex marriage’? As observed by Langford: ‘Jurisprudentially, the Committee had scant legal practice upon which to build an affirmative answer’.<sup>143</sup> By contrast, after *G v Australia* and *C v Australia*, the question confronting the HRC is: should article 23(2) be interpreted to *exclude* a right to marry a person of the same sex, where the HRC has previously recognised the actual and juridical significance of same-sex marriage and equated it and opposite-sex marriage?

In *Joslin v New Zealand*, the HRC, unencumbered as it was by the jurisprudence of *G v Australia* and *C v Australia*, merely asserted that:

article 23, paragraph 2 is the only substantive right protected under the Covenant expressed in the gender-specific terms of ‘men and women’ ... Use of the term ‘men and women’, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the

140 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [2.7] (emphasis added), citing Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth). See *ibid* [5.10]. Here, Australia submitted: ‘It is reasonable that Australia reflect its domestic policy and laws on which parties may marry in its recognition of foreign marriages’. This point seems to have been ignored by Members Seibert-Fohr and Pazartzis in their determination that ‘[t]he reason for the difference in treatment is not the author’s sexual orientation but the particular vulnerability of adolescents between 16 and 18 years and women in polygamous marriages’: *ibid* annex III [5].

141 *Ibid* [8.6].

142 When the HRC expressed their views in *Joslin v New Zealand* in July 2002, The Netherlands was the only country that had legalised same-sex marriage in 2000.

143 Langford, above n 11, 120.

treaty obligation ... is to recognize as marriage only the union between a man and a woman wishing to marry each other.<sup>144</sup>

By reframing the interpretative task, *C v Australia* and *G v Australia* subject that assertion to intensified scrutiny, notwithstanding concerns about the HRC's 'sociological legitimacy' if it re-interprets article 23(2) to encompass a right to marry a person of the same sex.<sup>145</sup> It is suggested that it may not survive that scrutiny.

First, although article 23(2) refers to the right of 'men and women' to marry and found a family,<sup>146</sup> it is expressed in the plural (cf the right of 'a man and a woman to marry'),<sup>147</sup> and does not expressly limit that right to the right of men to marry women, and women to marry men (as observed by Professor Cleveland in her individual concurring opinion in *C v Australia* and by a number of commentators previously)<sup>148</sup> unless the verb 'to marry' necessarily refers to an exclusively heterosexual institution.<sup>149</sup> It is beyond the scope of this article to explore possible interpretations of the verb 'to marry' in article 23(2) fully to assess that qualification; it suffices to state that the HRC's recognition of the actual and juridical significance of same-sex marriage in *G v Australia* and *C v Australia*, and its preparedness to equate same- and opposite-sex marriage in the latter communication, militate powerfully against the proposition that the verb 'to

144 *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999 (17 July 2002), [4.3], [8.2]. See also Paladini, above n 34, 544–5.

145 Langford, above n 11, 120. See also 124, 139–40; Paladini, above n 34, 555–6; Elena Abrusci, 'A Tale of Convergence? Discrimination Based on Sexual Orientation in Regional Human Rights Bodies and the Human Rights Committee' (2017) 35 *Nordic Journal of Human Rights* 240, 256.

146 Cf *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 9 ('*Charter of Fundamental Rights*'): 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'.

147 See Langford, above n 11, 127.

148 Ibid 141. Cf Paladini, above n 34, 544–6; Abrusci, above n 145, 245.

149 Aleardo Zanghellini, 'To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?' (2008) 9 *Melbourne Journal of International Law* 125, 130, 149; *Schalk v Austria* (2010) IV Eur Court HR 409, 428 [55]. Here, the European Court of Human Rights when interpreting the terms of art 12 of the *European Convention on Human Rights* ('[m]en and women of marriageable age have the right to marry and to found a family') (*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 16*), which are very similar to art 23(2) of the *ICCPR*, observed: 'looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women'. The wording of art 9 of the *Charter of Fundamental Rights* is slightly different again as it does not mention 'men and women' ('[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'): *Charter of Fundamental Rights* [2000] OJ C 364/1, art 9. The Commentary to the *Charter* appears to assume that the explicit reference to 'men and women' in the *ICCPR* precludes the recognition of a right to marry a person of the same sex, in contrast to *Charter of Fundamental Rights* art 9:

[Article 9] is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to 'men and women' as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage.

See also *Schalk v Austria* (2010) IV Eur Court HR 409, 424 [43]. Here, the State Party argued that the 'clear wording' of the *European Convention on Human Rights* art 12 'indicated that the right to marry was by its very nature limited to different-sex couples'; see also at 444 (Judge Malinverni and Judge Kovler).

marry' refers to an exclusively heterosexual institution, *provided that* the interpreter accepts that the verb is capable of bearing an evolutionary, dynamic or ambulatory meaning.<sup>150</sup>

Secondly, as the authors have pointed out previously:

the text of Article 16 of the [Universal Declaration of Human Rights]<sup>151</sup> – from which Article 23 is directly derived – was altered from its original 'everyone' to 'men and women', by the UN Economic and Social Council Commission on Human Rights Drafting Committee (based on the suggestion of the Commission on the Status of Women)<sup>152</sup> to emphasize that both men and women enjoyed equal rights in relation to marriage.<sup>153</sup> Thus, the words 'men and women', which appear only in Article 23(2), in contrast to the less gender specific 'spouse',<sup>154</sup> which appears in Article 23(3) and (4), were inserted to emphasize gender equality between men and women in marriage, *not* to fix marriage as an exclusively heterosexual institution (as was incorrectly suggested in *Joslin*).<sup>155</sup>

Thirdly, the HRC in *Joslin v New Zealand* explicitly excluded from consideration the context provided by the rights of non-discrimination on the grounds of sexual orientation in articles 2(1) and 26 of the *ICCPR*.<sup>156</sup> This appears to be inconsistent with article 31 of the *Vienna Convention*,<sup>157</sup> which requires the interpreter to consider context (and as article 31(2) makes explicit, the text of a treaty is itself part of the context for the purposes of interpretation),<sup>158</sup> developments in comparative national jurisprudence,<sup>159</sup> and the HRC's previous jurisprudence in *Toonen v Australia*<sup>160</sup> and *Fedotova v Russian*

150 See also Langford, above n 11, 130–6, 141–2; Paladini, above n 34, 545–6, 555; Roos and Mackay, above n 13, 890–905.

151 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

152 See United Nations Economic and Social Council, *Commission on Human Rights. Drafting Committee. Second Session. Report of the Drafting Committee to the Commission on Human Rights*, UN Doc E/CN.4/95 (21 May 1948) 3 [8], 8. See also United Nations Economic and Social Council, *Commission on Human Rights. Drafting Committee on an International Bill of Human Rights. First Session. Report of the Drafting Committee to the Commission on Human Rights*, UN Doc E/CN.4/21 (1 July 1947) 13, 55, 76; United Nations Economic and Social Council, *Commission on Human Rights. Drafting Committee. Draft Outline of International Bill of Rights (Prepared by the Division of Human Rights)*, E/CN.4/AC.1/3 (4 June 1947) 6.

153 See generally Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) 121–2. See also Glenda Sluga, "'Spectacular Feminism': The International History of Women, World Citizenship and Human Rights" in Francisca de Haan et al (eds), *Women's Activism: Global Perspectives from the 1890s to the Present* (Routledge, 2013) 44; Gerber, Tay and Sifris, above n 40, 646–7; Langford, above n 11, 129.

154 See Gerber, Tay and Sifris, above n 40, 647. *Contra Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [4.3].

155 Roos and Mackay, above n 13, 900–1 (emphasis in original). See also Langford, above n 11, 141.

156 See Zanghellini, above n 149, 146–7, 149. See also *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, app: Individual Opinion of Committee Members Mr Rajsoomer Lallah and Mr Martin Scheinin (Concurring) [3]–[4].

157 Cf Paladini, above n 34, 545.

158 See Langford, above n 11, 141; Roos and Mackay, above n 13, 890–2.

159 See Langford, above n 11, 125; Roos and Mackay, above n 13, 902–5, 918–22.

160 Paladini, above n 34, 541.

*Federation*.<sup>161</sup> It is also almost certainly inconsistent with the *travaux préparatoires* which strongly support the contention that article 23 of the *ICCPR* was intended to be read in conjunction with the rights of non-discrimination when it was framed.<sup>162</sup>

Fourthly, it appears that the HRC in *Joslin v New Zealand* failed to take into account '[t]he object and purpose of the *ICCPR* [which], as stated in its preamble, includes the "recognition of the inherent dignity and of *the equal* and unalienable rights of *all* members of the human family"<sup>163</sup>. This appears to be inconsistent with article 31 of the *Vienna Convention*, which requires the interpreter to interpret a treaty 'in the light of its object and purpose', developments in comparative national jurisprudence, and other HRC jurisprudence,<sup>164</sup> including the HRC's recent Views in *Fedotova v Russian Federation*, which connected LGBT rights, the object and purpose of the *ICCPR* and the interpretation of *ICCPR* provisions.<sup>165</sup>

### **B Why a Separate Article 26 Claim in a Subsequent *Joslin v New Zealand* Type Communication Has a Real Prospect of Success, Even if the HRC Does Not Depart from the *Joslin v New Zealand* Interpretation of Article 23(2)**

In *Joslin v New Zealand*, the HRC found that article 23(2) only encompassed opposite-sex marriage and then determined (consistently with the maxim *generalialia specialibus non derogant*, translated as 'general things do not derogate from specific things')<sup>166</sup> that any separate finding that article 26 had been violated was foreclosed by the exclusively heterosexual character of the specific right to marry.<sup>167</sup> However, it can be inferred from the HRC's Views in *C v Australia* and *G v Australia* that there is a real prospect that the HRC will not foreclose an article 26 claim again in any subsequent *Joslin v New Zealand* type communication (even if it adheres to the exclusively heterosexual *Joslin v New Zealand* interpretation of article 23(2)), and that a separate article 26 claim may now succeed.

161 Human Rights Committee, *Views: Communication No 1932/2010*, 106<sup>th</sup> sess, UN Doc CCPR/C/106/D/1932/2010 (31 October 2012) [10.4]–[10.5], [10.8], [12] ('*Fedotova v Russian Federation*'). See also Paladini, above n 34, 542–3.

162 Roos and Mackay, above n 13, 898–901.

163 Roos and Mackay, above n 13, 936 (emphasis in original) (citations omitted). See Zanghellini, above n 149, 146–7, 149.

164 See Paladini, above n 34, 546.

165 *Fedotova v Russian Federation*, UN Doc CCPR/C/106/D/1932/2010, [10.4].

166 Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2009).

167 *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [4.5], [8.2]–[8.3]; See also Paladini, above n 34, 544–5.

### ***1 Why There is a Real Prospect that the HRC Will Not Close Off an Article 26 Claim in a Subsequent Joslin v New Zealand Type Communication***

The *generalialia specialibus non derogant* technique of interpretation is discretionary. It needs to be used with ‘special care’,<sup>168</sup> and ‘might well produce wrong results if followed slavishly’.<sup>169</sup> Accordingly, it has not been consistently used by the HRC.<sup>170</sup> The HRC in both *G v Australia* and *C v Australia* could have used it to defeat the authors’ article 26 claims consistently with Australia’s observations on the merits of each communication and the authority of *Joslin v New Zealand*, but it did not.<sup>171</sup> Hence there is a real prospect that the HRC will not do so again to defeat a separate article 26 claim in any subsequent *Joslin v New Zealand* type communication, even if the HRC adheres to the exclusively heterosexual *Joslin v New Zealand* interpretation of article 23(2).

In *G v Australia* specifically, Australia expressly relied on *Joslin v New Zealand* (‘the right to marry under article 23 of the Covenant only applies to heterosexual marriages’)<sup>172</sup> in arguing that any differential treatment of G based on her marital or transgender status was ‘reasonable, proportionate and objective, and that the aim of the treatment is to achieve a purpose which is legitimate under the Covenant’.<sup>173</sup> It was uncontested that sections 32B(1)(c) and 32D(3) were inserted into the *Births, Deaths and Marriages Act* in 1996<sup>174</sup> to ensure consistency with the operation of the *Marriage Act* which, at the time, confined marriage to opposite-sex marriage,<sup>175</sup> and which would prevail over any inconsistent state legislation under section 109 of the *Australian Constitution*. In Australia’s submission that that aim was legitimate,<sup>176</sup> the distinction drawn by these provisions was ‘based on reasonable and objective criteria’,<sup>177</sup> and the measures were proportionate:<sup>178</sup> the *Births, Deaths and Marriages Act*, the *Sex Discrimination Act 1984* (Cth) and the *Marriage Act*, operating conjointly, ‘go no further than is necessary to achieve their objective’<sup>179</sup> to protect a definition of marriage that was consistent with the HRC’s determination in *Joslin v New Zealand* ‘that the right to marry under article 23 of the Covenant only applies to heterosexual marriages’.<sup>180</sup>

168 Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> ed, 2013) 221. See also Richard Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 475.

169 Ibid.

170 Joseph and Castan, above n 26, 690 [20.42].

171 Only the dissenting views of Committee Member Ben Achour argues similarly: *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex I [3], [6].

172 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [4.12].

173 Ibid [4.15].

174 Inserted by the *Transgender Amendment Act* sch 2 cl 4.

175 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [4.7]. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 1996, 644 (Kim Yeadon); discussion at above n 47.

176 See *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [4.20]. Cf [5.1], [5.12]–[5.13], [7.6].

177 Ibid [4.12]. See also [4.6].

178 See *ibid* [4.13], [4.6].

179 Ibid [4.13].

180 Ibid [4.12]. See also [4.8]–[4.9], [4.15], [4.20]. Cf [5.12].

Similarly, in *C v Australia*, Australia expressly built its primary submission that C had not been subject to differential treatment on *Joslin v New Zealand*.<sup>181</sup> Moreover, although its alternative submission (that is, that any differential treatment of C was reasonable, based on objective criteria, and a proportionate way of achieving a legitimate aim) mainly focused on the argument that C had not suffered any real detriment, its alternative submission was also inevitably linked (as illustrated by Member Ben Achour's dissent) to the fundamental purpose of the overall legislative scheme to maintain and protect heteronormative marriage: 'Since no group is treated detrimentally, a divorce framework that reflects Australian domestic policy on the recognition of marriage is a proportionate way to achieving its aim'.<sup>182</sup>

Thus, in both *G v Australia* and *C v Australia*, the HRC could have reasoned, (consistently with Australia's arguments, the authority of *Joslin v New Zealand* and the interpretative maxim) that first, the general article 26 right to non-discrimination should not be applied to derogate from the specific right to marry in article 23(2) which recognised marriage as an exclusively heterosexual institution; and secondly, upholding the authors' 26 claim would derogate from article 23(2) because it would undermine the legitimate efforts of States Parties to protect the exclusively heterosexual character of marriage by legislative means which were proportionate, objective and reasonable. But (as again, the contrast to Member Ben Achour's dissent illustrates) it did not do so in either communication.<sup>183</sup> Hence our forecast that there is a real prospect that the HRC will not foreclose a separate article 26 claim in any subsequent *Joslin v New Zealand* type communication, even if the HRC adheres to the exclusively heterosexual *Joslin v New Zealand* interpretation of article 23(2).

In making our forecast, we concede that there is a significant difference between, on the one hand, the article 26 claims in *G v Australia* and *C v Australia*, and, on the other hand, a prospective article 26 claim in any subsequent *Joslin v New Zealand* type communication. In the case of the former, any impact on the heteronormativity of marriage was *indirect*, whereas in the case of the latter, the impact would be *direct*: the *ICCPR*, as interpreted and applied by the HRC, would require States Parties to allow same-sex couples to marry to comply with their obligations under article 26, albeit that article 23(2) would continue to confer a right to marry a person of the opposite sex only. Hence, we express our forecast cautiously, in terms of a 'real prospect of success'. But the prospect is real because the rights of non-discrimination are a fundamental, 'cross-cutting theme' of the *ICCPR*,<sup>184</sup> prohibiting both discrimination on purpose and in effect.<sup>185</sup> Moreover, the invocation of the article

181 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, [5.3]. See also [6.1]; annex II [10].

182 *Ibid* [5.12] (emphasis added). See also annex II [10].

183 Only the dissenting views of Committee Member Ben Achour argues similarly: see *ibid*, annex I [3], [6].

184 Paladini, above n 34, 548 n 68, citing Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (Åbo Akademi University Institute for Human Rights, 1<sup>st</sup> ed, 2003) 329. See also *General Comment No 18*, UN Doc HRI/GEN/1/Rev.1, [1], [3].

185 Paladini, above n 34, 548; Roos and Mackay, above n 13, 910–18.

26 right of non-discrimination on the grounds of sexual orientation to laws which determine whether same-sex couples can marry is consistent with (i) the autonomy of the free-standing article 26 right, which affirms substantive equality before the law;<sup>186</sup> (ii) its text, in that the right of non-discrimination belongs to ‘all persons’ (emphasis added); and (iii) developments in domestic and supranational jurisprudence that have applied rights of non-discrimination on the grounds of sexual orientation discrimination to laws regulating homosexual relationships, including, more recently in some jurisdictions, same-sex marriage.<sup>187</sup>

In harmony with these legal developments and prior to *G v Australia* and *C v Australia*, the HRC had already equated unmarried same-sex couples with married and unmarried opposite-sex couples and adopted a ‘liberal and forward-looking interpretation’<sup>188</sup> of article 26. The HRC found in *Young v Australia* in 2003<sup>189</sup> and *X v Colombia* in 2007<sup>190</sup> that the denial of pension benefits to a surviving partner of a same-sex couple, in circumstances where pension benefits were available to the surviving partners of married and unmarried opposite-sex couples, breached article 26 in jurisdictions where same-sex couples were not free to marry.<sup>191</sup> Thus, prior to *G v Australia* and *C v Australia*, the HRC had already recognised ‘that lesbians’ and gay men’s interest in founding and cultivating sexually intimate adult relationships is presumptively no less valuable, under the ICCPR, than heterosexual people’s interest in forming and maintaining such relationships’.<sup>192</sup> This confirmed ‘the potential of Art 26 as an autonomous right, which can be invoked independently of the other ICCPR provisions to sanction unreasonable, non-objective discrimination in the legislation adopted by States parties independently of the field of law’.<sup>193</sup>

*G v Australia* and *C v Australia* take that HRC jurisprudence a step further and apply article 26 to laws specifically relating to same-sex marriage. Just as the HRC’s jurisprudence on the right to freedom of thought, conscience and religion in article 18 of the ICCPR has evolved and reversed its earlier *generalia*

186 See Paladini, above n 34, 548–9; Langford, above n 11, 124 n 19.

187 This includes Canada. See *Halpern v Canada (Attorney General)* (2003) 65 OR (3<sup>rd</sup>) 161 (Ontario Court of Appeal) 183–90 [82]–[107] (The Court); *Knodel v British Columbia (Medical Services Commission)* (1991) 58 BCLR (2d) 356 (British Columbia Supreme Court); *Inter-American Court of Human Rights Advisory Opinion* (Inter-American Court of Human Rights, 0C-24/17, 24 November 2017). See also discussion in Macarena Saez, ‘Transforming Family Law through Same-Sex Marriage: Lessons from (and to) the Western World’ (2014) 25 *Duke Journal of Comparative and International Law* 125, 160. Cf Abrusci, above n 145.

188 Paladini, above n 34, 554.

189 Human Rights Committee, *Views: Communication No 941/2000*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/941/2000 (6 August 2003) (‘*Young v Australia*’).

190 *X v Colombia*, UN Doc CCPR/C/89/D/1361/2005.

191 Paladini, above n 34, 548–53.

192 Zanghellini, above n 149, 145. This point was also picked up and disputed by the dissenting members of the HRC in *X v Colombia*, UN Doc CCPR/C/89/D/1361/2005, [7.2], annex: Separate Opinion by Mr Abdelfattah Amor and Mr Ahmed Tawfik Khalil (Dissenting): ‘The line of argument adopted by the [HRC majority] ... starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits’. See also *Fedotova v Russian Federation*, UN Doc CCPR/C/106/D/1932/2010; Paladini, above n 34, 542–3.

193 Paladini, above n 34, 553.

*specialibus non derogant* interpretation (by reference to the specific right to freedom from forced or compulsory labour in article 8(3)(c)(ii), which excludes '[a]ny service of a military character') which foreclosed a claim that article 18 encompasses a right of conscientious objection to military service,<sup>194</sup> it is conceivable that the HRC's jurisprudence on article 26 will evolve and reverse the *Joslin v New Zealand* foreclosure of the claim that article 26 encompasses a right to marry a person of the same sex – even if the HRC is not prepared to depart from the *Joslin v New Zealand* interpretation of article 23.<sup>195</sup> Indeed, the analogy is pertinent because, in terms of the relationship between articles 8 and 18, the specific article 8 freedom from forced labour *expressly and unambiguously excludes* military service from its definition of 'forced or compulsory labour', whereas any purported exclusion of same-sex marriage from the specific article 23 right to marry is, at very least, less clear, and more ambiguous and contestable.<sup>196</sup>

Moreover, expressed in terms of the maxim, how does the *right* to marry a person of the same sex derogate from a *right* to marry a person of the opposite sex *unless* marriage is heteronormative and same-sex marriage is inferior to opposite-sex marriage and thus depreciates it? But those two related conditions are inconsistent with *G v Australia* and *C v Australia* because, as explained previously, in both communications the HRC recognised the actual and juridical significance of same-sex marriage, and in *C v Australia* the HRC equated same- and opposite-sex marriage – hence the HRC de-emphasised, rather than emphasised, the heteronormativity of marriage. And in the absence of those two conditions, recognising a right to marry a person of the same sex, derived from article 26, does not in any way diminish or lessen the article 23(2) right to marry a person of the opposite sex.

## 2 Why a Separate Article 26 Claim May Now Succeed

In *Joslin v New Zealand*, the HRC described the claimed article 26 violation as 'mere refusal to provide for marriage between homosexual couples'.<sup>197</sup> In any subsequent *Joslin v New Zealand* type communication however, based on *G v Australia* and *C v Australia* (and on the related assumption that the HRC does not apply the maxim *generalibus specialibus non derogant* to the relationship between articles 23(2) and 26), a separate article 26 claim may succeed. In both *G v Australia* and *C v Australia*, the HRC recognised (in contrast to its position in *Joslin v New Zealand*) that marital rights between same-sex couples are important, and that domestic laws relating to marriage can breach the article 26

194 Human Rights Committee, *Views: Communication No 185/1984*, 25<sup>th</sup> sess, UN Doc CCPR/C/OP/2 (1990, views adopted 9 July 1985) ('*LTk v Finland*') 61 [5.2]. See Joseph and Castan, above n 2, 26, 579–80 [17.41]–[17.43].

195 See Gerber, Tay and Sifris, above n 40, 648. Cf Langford, above n 11, 132–4, 142.

196 See Langford, above n 11, 128.

197 *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999, [8.3] (emphasis added). See also Paladini, above n 34, 546 n 62, citing Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Routledge, 2<sup>nd</sup> ed, 2009) 237.

right to non-discrimination. This includes on ‘other grounds’ relating to an author’s LGBT status, and ‘marital status’ where the author is married to a person of the same sex, even if those laws are intended to reinforce an exclusively heterosexual definition of marriage.

(a) *How G v Australia Supports a Separate Claim under Article 26*

*G v Australia* directly concerned same-sex marriage because G identified as a woman and was married to another woman, and G claimed discrimination on the grounds of marital status. G wanted to be able to change her sex on her birth certificate to make it consistent with her actual sex while remaining married to her same-sex partner: ‘The author indicates that she wants to *preserve her marriage* rather than have it converted to a civil union’.<sup>198</sup> G was prevented from doing so by domestic laws that were intended to recognise marriage as exclusively heterosexual.

To substantiate her article 17 and 26 claims, G submitted that she suffered harm and detriment as a consequence of first, her unaltered birth certificate (which recorded her sex as male); and secondly, the requirement that she divorce her same-sex partner before altering the sex on her birth certificate.<sup>199</sup> Both sets of submissions presumed that G’s same-sex marriage was important enough to engage the right to privacy and the right to non-discrimination. In the case of the former, G’s submissions presumed that she could not reasonably be expected to divorce her same-sex partner against her wishes (‘the author’s [sic] asserts that she is in a loving relationship with her spouse and does not intend to apply for a divorce’),<sup>200</sup> so that she could change the sex on her birth certificate, and hence remove the cause of harm and detriment (‘[s]he has a right to be recognised as female on her birth certificate *and* she also has a right to be free from arbitrary interference with her family’).<sup>201</sup> In the case of the latter, G’s submissions could only succeed if same-sex marriage was important, to the extent that the requirement to divorce a same-sex partner could substantiate an interference with privacy or family (in breach of article 17) or discrimination (in breach of article 26).

In response to G’s article 17 claim, Australia submitted that (i) ‘there is *no evidence* that it has interfered with the author’s privacy or family *in any way*’;<sup>202</sup> (ii) ‘the author has failed to provide clear examples of where she has experienced *any actual interference with her privacy*’;<sup>203</sup> (iii) ‘any *perceived interference with the author’s privacy* has not been sufficiently substantiated’;<sup>204</sup> and (iv) ‘no such interference has taken place. Australia has not compelled the author to change her family circumstances and there has not been any interference with her family

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198 *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, [5.5] n 22 (emphasis added).

199 See *ibid* [7.2], [7.11].

200 *Ibid* [7.2].

201 *Ibid* [5.10] (emphasis added).

202 *Ibid* [4.2] (emphasis added).

203 *Ibid* [4.6] (emphasis added).

204 *Ibid* [4.8] (emphasis added).

by reason of the [*Births, Deaths and Marriages Act*].<sup>205</sup> Similarly, in response to G's article 26 claim, Australia reiterated 'that the author has not provided any evidence of specific instances where she has suffered detriment or harm'.<sup>206</sup> While Australia's response was focused on denying, or minimising, any alleged harm or detriment suffered by G as a consequence of her unaltered birth certificate, it also tacitly presumed that G's same-sex marriage was not important enough to engage the right to non-discrimination and the right to privacy. Otherwise, the bare fact of having to choose between 'preserving' her same-sex marriage and altering her birth certificate would itself be *prima facie* an interference with G's privacy and family, and a 'specific instance' of 'detriment or harm' to G.

It can be inferred from the HRC's determination that both articles 17 and 26 had been breached, and particularly from its determination that article 26 had been breached on the grounds of marital status, that the HRC favoured the presumption of G's submissions and disfavoured the presumption of Australia's submissions. This militates in favour of the success of an article 26 claim (on the grounds of sexual orientation discrimination) in any subsequent *Joslin v New Zealand* type communication, even if the HRC does not depart from the *Joslin v New Zealand* interpretation of article 23(2).

### (b) How *C v Australia* Supports a Separate Claim under Article 26

#### (i) Admissibility

As detailed previously, in *C v Australia* Australia submitted that first, some of C's claims were inadmissible *rationes loci* under article 1 of the *Optional Protocol to the ICCPR* ('*Optional Protocol*') and article 2(1) of the *ICCPR* because 'they concern hypothetical future consequences for her outside Australia's territory and jurisdiction';<sup>207</sup> and secondly, some of C's claims were inadmissible under article 1 of the *Optional Protocol* because:

she has not demonstrated that she was a victim of the alleged violations under the Covenant. A number of the claims relate to alleged violations of the Covenant that have not actually occurred, and instead rely on conjecture and speculation as to events in the future. In the absence of any actual interference with the author's rights, the Committee should rule these aspects of the communication inadmissible.<sup>208</sup>

C responded to those arguments as follows:

there is nothing theoretical about her situation as the law has been applied to her and [she] has suffered tangible harm as a result. Marital status is ... real, current and personal. It marks and defines her identity ... [b]y denying the author the mechanism to change her status Australia has denied her a degree of self-determination over a marker of her personal identity. ... Australia's refusal to

205 Ibid [4.9].

206 Ibid [4.19].

207 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012, annex IV(I): Observations by the State Party on Admissibility [3].

208 Ibid annex IV [4]. See also [8.6] in relation to the HRC's rejection of the State Party's *ratione loci* argument.

allow the author to access a mechanism for finally resolving and adjusting her marital status leaves her in a position of vulnerability and anxiety. She is constantly forced to make declarations as to her marital status ... which expose her to vulnerability, humiliation and anxiety. ... In the circumstances, the State party's submission that she is not a victim or has not suffered harm are untenable'.<sup>209</sup>

The references in C's response to 'marital status' are, of course, references to her marriage to a woman, and do not differentiate between same- and opposite-sex marriage.

The HRC found, in relation to admissibility, that

[t]o the extent that the author claims *direct effects* in Australia as her country of residence by the lack of access *on an equal legal basis* to divorce proceedings, the Committee considers that her communication is not inadmissible *ratione loci* under article 1 of the Optional Protocol.<sup>210</sup>

This statement is significant because the HRC recognised, first, the validity of the assumption underlying C's discrimination claim that same- and opposite-sex foreign marriages are to be treated 'on an equal basis'; and secondly, the symbolic significance of a marriage between two persons of the same sex. The HRC also acknowledged the concomitant adverse emotional impact on C caused by the uncertainty surrounding her marital status,<sup>211</sup> which had ramifications beyond the formal ramifications of Australian laws.

The last proposition above merits further elaboration. Although two of the four alternative submissions of Australia in relation to inadmissibility were based on an unexpressed assumption that the adverse emotional impact on C caused by the uncertainty surrounding her marital status were irrelevant (how else can Australia's claims of mere 'hypothetical future consequences', 'conjecture and speculation as to events in the future' and 'absence of any actual interference with the author's rights' be understood?), it is conceded that just because the HRC rejected Australia's inadmissibility argument does not necessarily mean that it endorsed the entirety of the C's response extracted above. Moreover, the HRC's focus on the *legal* differences between Australia's treatment of foreign same-sex marriage and its treatment of some categories of unrecognised foreign opposite-sex marriage in finding differential treatment,<sup>212</sup> may suggest that the HRC disregarded, or at least discounted, the symbolic impact of Australia's laws and their adverse emotional impact on C. However, the second proposition is made out because the HRC repeatedly, and in considerable detail (as the contrast with the dissent of Members Seibert-Fohr and Pazartzis illustrates),<sup>213</sup> referred to the emotional effect of Australia's legal framework on C in its Views.

Specifically, the HRC in its Views (i) stated that: 'The author wishes to formally dissolve her Canadian legal marriage *for significant personal as well as practical reasons*';<sup>214</sup> (ii) noted C's argument that:

209 Ibid annex IV(II): Author's Comments on the State Party's Observations on Admissibility [8]–[9].

210 Ibid [7.5] (emphases altered).

211 Cf ibid annex III: Separate Opinion of Committee Member Anja Seibert-Fohr, Joined by Committee Member Photini Pazartzis (Dissenting) [3].

212 Ibid [8.3].

213 Ibid annex III.

214 Ibid [2.4] (emphasis added).

Denial of access to divorce proceedings and a divorce order ... prevents separating spouses from formally ... putting an end to their separation ... [which] *places spouses and children at greater risk of psychological and physical health problems*.<sup>215</sup>

and (iii) noted C's claim that:

Discriminatory laws directly and indirectly help foster the prejudicial environments which enable homophobic abuse, harassment and discrimination to occur, in addition to being a form of discrimination and harm in and of themselves. Studies have shown that such laws may contribute to negative mental health outcomes for non-heterosexual persons.<sup>216</sup>

Thus, the HRC repeatedly acknowledged, and attached weight to, C's *feelings* about her marital status, and did not dispute the 'fundamental tenet' of C's complaint 'that discriminatory laws foster prejudicial environments and have been shown to contribute to negative mental effects among this population'.<sup>217</sup> Hence, there was differential treatment in *substance* – consistently with the HRC's reference to 'direct effects' in its ruling on the *rationes loci* argument<sup>218</sup> – and not just in legal form.

### (ii) *Merits*

As detailed previously, in *C v Australia*, Australia's alternative argument on the merits was that the criteria for C's differential treatment were reasonable and objective, and that it had a legitimate aim. Although Australia did not explicitly refer to the purpose of the relevant domestic laws in framing that alternative argument (instead asserting that 'it is reasonable that Australia reflect its domestic policy and laws on which parties may marry in its recognition of foreign marriages';<sup>219</sup> and that the 'exceptions ... are in place for justified reasons')<sup>220</sup> it is clear that the purpose of those domestic laws was '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*'.<sup>221</sup> Hence, in rejecting Australia's alternative argument, the HRC found for the first time that domestic laws which are expressly intended to exclude same-sex couples from the institution of marriage may breach the article 26 right to non-discrimination on the grounds of sexual orientation.

It is also worth noting Professor Cleveland's observation, in her individual concurring opinion, that: 'Nor has the relationship between article 23 and the Covenant's non-discrimination prohibitions been addressed in the Australian context'.<sup>222</sup> This leaves ample opportunity for arguments about same-sex

215 Ibid [3.4] (emphasis added).

216 Ibid [3.6]. See also at [5.6].

217 Ibid annex IV(II) [10].

218 Ibid [7.5].

219 Ibid [5.10].

220 Ibid. See also at [5.11].

221 Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth), quoted in *ibid* [2.7] (emphasis added). 'It is reasonable that Australia reflect its domestic policy and laws on which parties may marry in its recognition of foreign marriages': *ibid* [5.10]. See also at annex I [5]–[6].

222 *C v Australia*, UN Doc CCPR/C/119/D/2216/2012 annex II [10].

marriage and the right to non-discrimination to be brought in future communications.

## VI CONCLUSION

Almost twenty years have elapsed since the HRC was required to express its views in *Joslin v New Zealand* about same-sex marriage and the ICCPR. In that period there have been obvious and significant changes in the protection of LGBT human rights at the United Nations and in state practice: several United Nations Committees have issued General Comments and Concluding Observations dealing with discrimination based on sexual orientation;<sup>223</sup> 26 countries have legalised same-sex marriage;<sup>224</sup> the HRC increasingly questions states over LGBT rights in the regular reporting process;<sup>225</sup> and the United Nations Human Rights Council has adopted three resolutions concerning human rights and sexual orientation discrimination,<sup>226</sup> and appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>227</sup> During that same period, when courts around the world (including, most recently in 2018 the Inter-American Court of Human Rights)<sup>228</sup> have had cause to determine whether legal prohibitions on same-sex

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223 These include: the Committee against Torture (deriving from the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)); the Committee on Economic, Social and Cultural Rights (deriving from the *International Covenant of Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 933 UNTS 3 (entered into force 3 January 1976)); and the Committee on the Elimination of Discrimination against Women (deriving from the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)). See also Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47<sup>th</sup> sess, UN Doc CEDAW/C/GC/28 (16 December 2010). For details, see Kirsten Sandberg, 'The Rights of LGBTI Children under the Convention on the Rights of the Child' (2015) 33(4) *Nordic Journal of Human Rights* 337, 337.

224 As noted above, only the Netherlands had legalised same-sex marriage when *Joslin v New Zealand* was decided and Australia was the 26<sup>th</sup> country to legalise same-sex marriage. All 26 countries are listed in above n 3.

225 Langford, above n 11, 140; Gerber and Gory, above n 10, 411–15.

226 These are: Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 32<sup>nd</sup> sess, Agenda Item 3, UN Doc A/HRC/RES/32/2 (30 June 2016); Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, 17<sup>th</sup> sess, Agenda Item 8, UN Doc A/HRC/RES/17/19 (17 June 2011); and Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, 27<sup>th</sup> sess, Agenda Item 8, UN Doc A/HRC/RES/27/32 (26 September 2014).

227 The Independent Expert was appointed by a resolution of the Human Rights Council: Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 32<sup>nd</sup> sess, Agenda Item 3, UN Doc A/HRC/RES/32/2 (30 June 2016). This resolution was passed by a narrow margin of 23 to 18 with six states abstaining. Some of the controversies surrounding this resolution are discussed in Joel Voss, 'Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council' (2018) 19 *Human Rights Review* 1.

228 *Inter-American Court of Human Rights Advisory Opinion* (Inter-American Court of Human Rights, 0C-24/17, 24 November 2017). See Nicolás Carrillo-Santarelli, 'Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples. State Obligations Concerning Change of Name, Gender Identity

marriage violate human rights standards, they have generally found that such prohibitions are discriminatory and unjustifiable on reasonable or objective grounds.<sup>229</sup> Reflecting on that jurisprudence, Langford has observed:

one can consider whether any national prohibition on same-sex marriage or failure to recognise it in law and practice can be justified on reasonable and objective criteria. After more than a decade of litigation on this question, it is difficult to see how heteronormative approaches of marriage could survive this test. ... This is because the various objectives or aims associated with opposite-sex marriage do not make logical or basic evidential sense.<sup>230</sup>

This article has only touched in passing on the abovementioned developments. Instead, it has focused narrowly and specifically on the HRC's own jurisprudence in two recent communications in 2017: *G v Australia* and *C v Australia*. The significance of these two communications should not, however, be underestimated, as the pace of the HRC's jurisprudence in this area is slow: there had only been four HRC Views protecting LGBT human rights preceding *G v Australia* and *C v Australia*, from *Toonen v Australia* in 1994 to *Fedotova v Russian Federation* in 2012.<sup>231</sup> *G v Australia* and *C v Australia* therefore represent significant progress in the protection of LGBT persons against discrimination under the ICCPR in a single year.

While the relevance of *G v Australia* and *C v Australia* for Australian domestic law has been superseded by the legalisation of same-sex marriage in Australia and consequential amendments to the *Marriage Act* and related legislation, the HRC's Views in those two communications cast doubt on the authority of *Joslin v New Zealand* should another individual communication be brought before the HRC concerning the right to same-sex marriage – particularly if it incorporates arguments based on the right to non-discrimination (as it almost inevitably would). Such a communication may lead to a re-interpretation of the right to marry that encompasses a right to marry a person of the same sex. In the alternative, in the event that the HRC continues to adhere to the *Joslin v New Zealand* interpretation of the right to marry, *G v Australia* and *C v Australia* support a determination that a State Party that fails to provide for marriage equality violates the right to non-discrimination. It may have once seemed unlikely that the HRC would depart from the position it adopted in *Joslin v New Zealand*, given the controversy that such a departure would inevitably generate, but the pace of change in the area of LGBT rights over the last 50 years has been so great that it would be unwise to dismiss the possibility as far-fetched or fanciful.

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and Rights Derived from a Relationship between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18, and 24, in Relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17. Series A, No. 24' (2018) 112 *American Journal of International Law* 479.

229 See generally Roos and Mackay, above n 13; Langford, above n 11, 120.

230 Langford, above n 11, 138.

231 The intervening views were *Young v Australia*, UN Doc CCPR/C/78/D/941/2000 (6 August 2003) and *X v Colombia*, UN Doc CCPR/C/89/D/1361/2005 (30 March 2007). For an overview of these HRC views, see Gerber and Gory, above n 10, 428–33.