



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2216/2012\*, \*\*, \*\*\*, \*\*\*\*

<i>Communication submitted by:</i>	C (represented by counsels, Michelle Hannon, Ghassan Kassisieh and Clancy King)
<i>Alleged victims:</i>	The author and her minor daughter
<i>State party:</i>	Australia
<i>Date of communication:</i>	27 April 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 November 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	28 March 2017
<i>Subject matter:</i>	Prohibition of access to divorce proceedings for same-sex couples married abroad
<i>Procedural issues:</i>	Inadmissibility <i>ratione loci</i> ; lack of victim status
<i>Substantive issues:</i>	Equal access to courts and tribunals; discrimination on the basis of sexual orientation
<i>Articles of the Covenant:</i>	14 (1), read in conjunction with 2 (1), and 26
<i>Article of the Optional Protocol:</i>	1

1.1 The author of the communication is C, a citizen of Australia and the United Kingdom of Great Britain and Northern Ireland, born on 12 April 1963. She submits the communication on behalf of herself and her minor daughter, R. She claims to be victim of a violation by Australia of her rights under articles 14 (1), read together with 2 (1), and 26 of the Covenant. The author is represented by counsel.

\* Adopted by the Committee at its 119th session (6-29 March 2017).

\*\* The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamarian Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

\*\*\* Individual opinions by Committee members Yadh Ben Achour; Sarah Cleveland; and Anja Seibert-Fohr, joined by Photini Pazartzis, are annexed to the present Views.

\*\*\*\* Annex IV is circulated in the language of submission only.



**The facts as submitted by the author**

2.1 Ms. C lives in the State of Queensland, Australia. For about 10 years she lived with Ms. A as a couple, first in the State of Victoria and then in Queensland. At some point both women committed to undertake fertility treatment and chose a sperm donor. They agreed that C would be the birth mother. Their daughter was born in 2001. They intended at all times to be equal parents to their child. The laws in Queensland at the time did not allow the naming of a second parent of the same sex on a birth certificate. However, under subsequently reformed Queensland and Commonwealth laws both women are now recognized as the legal parents of their daughter. C and A's relationship was at all times financially interdependent and committed. C was the primary income earner and A worked part-time and was the primary homemaker. Their finances were intertwined, with the family home, mortgage, car loans and bank accounts in both their names.

2.2 In 2004, as a result of the newly reformed marriage laws in Canada, they travelled to Canada and married pursuant to Canadian law. However, shortly thereafter tensions arose in their relationship and A left the marital home on 22 December 2004. They have been separated since that time and C has been the sole caregiver for the couple's daughter.

2.3 Following the separation, C contacted a solicitor to have a financial separation agreement drawn up under the Queensland property division laws for unmarried ("de facto") couples, which had been revised to include same-sex de facto couples. She was advised that there was no access to child support payments through the normal mechanisms. After legal reforms introduced in 2008, C did not attempt to claim child support. On 3 March 2005, C and A entered a binding separation deed under the Queensland de facto property division regime. All contact between them ceased in 2006. No formal custody proceedings have been initiated and the author has been the child's sole parent since 22 December 2004. A has made no contact with her daughter since early 2005 and provides no financial support. She also stopped making payments to the mortgage, which was in both women's names. C no longer knows A's whereabouts.

2.4 The author wishes to formally dissolve her Canadian legal marriage for significant personal as well as practical reasons, including having the option to remarry or enter a civil partnership in the future. Under the Queensland Civil Partnerships Act, partnership cannot be entered into and is rendered void if either party is already married or in another civil partnership. Also, C was left encumbered by debt collectors with questions concerning A's debts, some of which she was unaware of. Furthermore, C regularly travels overseas as part of her work and is concerned that her status as married will deem A to be her legal spouse when travelling to countries (including Canada, the United Kingdom, Denmark and some parts of the United States) which recognize her as married under their domestic laws. This has consequences for issues such as next of kin, should there be an emergency while she is abroad. A divorce order would provide the author with conclusive proof that her relationship with A has formally ended.

2.5 Proceedings for divorce orders in Queensland are regulated by the Australian Family Law Act 1975. A divorce order formally and finally dissolves a matrimonial relationship. An inherent requirement in filing a valid application for divorce, and being granted a divorce order by the court, is for a party's marital relationship to be recognized as a "marriage" for the purposes of the Act. The Act does not specifically define what constitutes a "marriage". However, the legal recognition of certain unions such as marriages for the purposes of the Act depends on: (a) The definition of "marriage" and the rules governing the recognition of overseas marriages in the Marriage Act 1961; (b) the common law rules of private international law (when there is an inconsistency, the provisions of the Marriage Act always prevail over those of private international law); and (c) specific provisions in the Family Law Act which deem certain unions to be marriages for purposes of proceedings under that Act.

2.6 Section 5 (1) of the Marriage Act defines marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". This definition applies across the whole Act, regardless of whether a marriage has been solemnized in Australia or overseas, and reflects the underlying common law definition of marriage in Australia. The Act also provides for recognition of foreign marriages in Australia.

Generally, marriages which have been solemnized overseas in accordance with local laws are recognized as valid in Australia, except where specific legislative exceptions apply. In this respect, section 88EA of the Act provides that “a union solemnized in a foreign country between: (a) a man and another man, or (b) a woman and another woman, must not be recognized as a marriage in Australia”.

2.7 The Marriage Amendment Act 2004 added sections 5 (1) and 88EA to the Marriage Act. The explanatory memorandum indicated that the purpose of the (then) bill was “to give effect to the Government’s commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage”. The bill also confirmed that unions solemnized overseas between same-sex couples would not be recognized as marriages in Australia.

2.8 The author concedes that she has not applied for divorce in Australia. However, any such application (or challenging the likely refusal of any court to hear such an application) would be entirely futile, given the express legislative provisions which deny her eligibility. Furthermore, Australia does not have a federal bill of rights that would allow her to challenge discrimination on the basis of sexual orientation in Commonwealth laws such as the Marriage Act or the Family Law Act. Accordingly, there is no effective judicial or administrative action available in Australia for challenging legislative provisions that discriminate on the basis of sexual orientation. Because her complaint stems from statutory provisions, any finding by the Australian Human Rights Commission that the laws breached her human rights also could result only in a recommendation which would have no binding effects. Only legislative reform passed by Parliament can provide an effective domestic remedy to the author.

2.9 The author contends that she has no right to apply for a divorce in any other country with a connection to the subject matter of the communication, namely Canada (where her marriage was solemnized) or the United Kingdom (where she is also a citizen). She cannot get a divorce in Canada because under section 3 (1) of the Canadian Divorce Act 1985 the applicant must be ordinarily resident for a least one year. In the United Kingdom, her Canadian marriage, although not recognized as a marriage, is recognized as a civil partnership. However, sections 221 (1) and 219 of the Civil Partnership Act 2004 provide that domestic courts have jurisdiction over dissolution or annulment of a civil partnership not registered there if at least one of the partners is habitually resident or domiciled in the United Kingdom, in some cases for at least six months immediately preceding the presentation of the petition. Further, it is not clear that any dissolution order granted by the United Kingdom would be recognized by other States. In view of her personal circumstances, the author is unable to relocate to Canada or the United Kingdom. Being required to reside there for six months to one year in order to be able to apply for a divorce would be a manifestly unreasonable, prejudicial and ineffective remedy.

### **The complaint**

3.1 The author claims that the denial under Australian law of access to divorce proceedings for same-sex couples who have validly married abroad and the consequential denial of court-based relief in the form of a divorce order amounts to discrimination on the basis of sexual orientation, contrary to article 14 (1), read together with article 2 (1) (equal access to courts and tribunals), and article 26 (equality before the law) of the Covenant. If she were in an opposite-sex marriage, recognized for the purposes of the Family Law Act, she would be entitled to file an application for divorce and have an Australian court vested with family law jurisdiction hear the application. As she meets all other requirements for such an application to succeed, she would obtain a divorce order. The only distinction made by the law is that her former partner is of the same sex as she. The same-sex nature of her marriage is a characteristic pertaining to her sexual orientation as a lesbian.

3.2 Australian laws which deny the author access to court-based divorce mechanisms solely on the basis of her sexual orientation cannot be justified on any objective or reasonable grounds for the following reasons.

3.3 Australia generally recognizes foreign marriages for the purposes of divorce, even where these marriages are not recognized in other laws or otherwise allowed to take place

in Australia. Same-sex marriages (which cannot be entered into in Australia) are singled out by the Family Law Act and Marriage Act for less favourable treatment than opposite-sex marriages, which also cannot be entered into in Australia. For example, Australia does not allow polygamous marriages to take place in its jurisdiction and bigamy is a criminal offence. Yet, polygamous opposite-sex marriages formed overseas are deemed to be marriages for the purposes of the Family Law Act. Accordingly, a man who marries a second wife overseas would be entitled to seek a divorce order under Australian law, as would his second wife, notwithstanding that the marriage could not be entered into in Australia and would not be recognized generally. The differential treatment between these two forms of non-recognized marriages in the access to divorce suggests that non-objective and discriminatory reasons are behind the less-favourable treatment given to same-sex couples who marry overseas. Further, because of the general recognition of foreign opposite-sex marriages in Australia, other types of marriage which could not be entered into in Australia are also recognized. For instance, marriages between a man and a woman who are both over the age of 16 are recognized in Australia if local laws in the foreign place of marriage allowed the union, despite the fact that the marriageable age in Australia is 18 years. Accordingly, divorce proceedings would be available regarding such marriages.

3.4 The denial of access to divorce mechanisms for same-sex couples does not further the objectives of divorce laws in Australia, and may even prevent their realization. These objectives are to facilitate an inexpensive and civil resolution to marital breakdowns in a manner which encourages minimal conflict and protects the welfare of children. Divorce in Australia today involves a nationalized, simplified do-it-yourself process which requires establishing 12 months of continuous separation as the sole ground for divorce. Parties and their legal representatives do not have to attend court hearings if the divorce application is uncontested and there are no minor children, and do not have to establish causes for the breakdown of the marriage. Where there are children of the marriage under 18 years, a court must also be satisfied that proper arrangements have been made for their care, welfare and development, or establish that the divorce order should take effect notwithstanding the absence of such arrangements. Denial of access to divorce proceedings and a divorce order prolongs conflict and prevents separating spouses from formally dissolving their marriage and putting an end to their separation. This places spouses and children at greater risk of psychological and physical health problems and financial and economic stress.

3.5 Further, the author is uncertain of her legal position regarding the current relationship recognition scheme in Queensland. She is unable to enter into a civil partnership with her current same-sex partner because she is already “married or in a civil partnership”, yet her marriage is not recognized under federal law for the purposes of dissolving it. Furthermore, Queensland may, as Tasmania has already done, deem her Canadian marriage to be a civil partnership, effectively enlivening retrospective recognition of her defunct marriage at some point in the future. It is difficult to predict what rights (for instance, succession and intestacy) this would enliven for A or her dependents for which C might then be responsible. The author has no legal avenue for correcting her legal marital status and removing this legal uncertainty.

3.6 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.

3.7 There is great public support in Australia for the equal treatment of same-sex couples, another reason why discrimination cannot be considered objectively or reasonably justified. Several politicians, judges, union leaders, religious leaders and notable Australians have expressed support for treating same-sex couples equally in Australia’s marriage law.

3.8 Between 1999 and 2004, all states and territories in Australia introduced comprehensive reform to recognize same-sex cohabiting (de facto) couples equally with opposite-sex de facto couples in almost all areas of law, and both opposite-sex and same-sex de facto couples are granted equal entitlements with married couples in almost all areas of law. This included equal recognition for same-sex partners in areas such as inheritance, victim compensation, next of kin and medical decision-making, stamp duties and property

division upon the breakdown of a relationship. In 2008, Parliament adopted reforms to recognize same-sex de facto couples equally with heterosexual de facto partners across all areas of federal law, and equalized treatment of de facto and married couples in all remaining areas of discrimination in federal law. These reforms resulted in equal recognition for same-sex couples and their children in such areas as workers' entitlements, superannuation, government pensions and benefits, access to health entitlements, tax benefits, migration, child support, alimony and property division on the breakdown of a de facto relationship. The right to marry (and divorce) and the recognition of foreign same-sex marriages are the only significant exceptions, an anomaly which suggests that discrimination in this area alone cannot be considered objectively or reasonably justified. The author's daughter has experienced the additional and significant detriment of being denied a court-based inquiry into whether her care, welfare and development have been secured following her parents' separation; such inquiry is made in all divorce proceedings.

3.9 In addition to the recognition of same-sex partners, all Australian jurisdictions recognize most types of same-sex families (i.e., couples with children) as a legal family. Thus, all jurisdictions now automatically ascribe parental status to the lesbian partner (the co-mother) of a birth mother who has a child through assisted reproductive technology. The co-mother appears with her partner on the child's birth certificate and has full parental rights. This recognition now applies to C's family, notwithstanding her separation from A, due to the retrospective nature of the reforms. A is recognized as a legal parent of her and C's daughter, notwithstanding that their marriage cannot be recognized.

3.10 The author cites 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. She distinguishes the decision of the European Court of Human Rights in *Schalk and Kopf v. Austria*, in which the Court dismissed a claim of discrimination based on denial of access to marriage by a same-sex couple, and contends that Australia should be required to recognize foreign same-sex marriages for purposes of seeking relief under the Family Law Act on the same basis on which Australia already treats opposite-sex married couples in marriages which are not otherwise permitted in Australia. That is, the recognition required by Australia would be on the same incidental basis which enables access to the courts and dissolution of a foreign opposite-sex marriage. The author's claim is therefore a relatively modest one and squarely within the ambit of articles 14 and 26. She seeks only equal treatment in accessing the family courts in order to dissolve her foreign marriage in the same way that Australia currently affords all other residents who enter into foreign opposite-sex marriages, regardless of whether those marriages are recognized more generally or otherwise permitted to be entered into in Australia.

3.11 The Committee should either distinguish its Views in *Joslin et al. v. New Zealand*<sup>1</sup> on its facts or otherwise find that its reasoning cannot be sustained in the light of the significant social, legal and cultural developments which have taken place since it was adopted.

3.12 Should the Committee find a violation of her rights under articles 14 and 26 of the Covenant, the author seeks the following remedies:

(a) Part VI of the Family Law Act 1975, concerning divorce and nullity of marriage, should be amended to enable persons who have entered into a same-sex marriage to seek relief under the Act on the same terms as persons in opposite-sex marriages;

(b) Sections 88B (4)<sup>2</sup> and 88EA of the Marriage Act 1961 should be repealed and the definition of "marriage" in section 5 amended to recognize, for the purposes of Australian law, same-sex marriages validly entered into overseas on the same terms as opposite-sex marriages entered into overseas;

<sup>1</sup> Communication No. 902/1999, Views adopted on 17 July 2002.

<sup>2</sup> This provision stipulates that "marriage has the meaning given by subsection 5 (1)", i.e. "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

(c) Federal anti-discrimination legislation should be introduced which would allow domestic courts to provide an effective remedy for discrimination based on sexual orientation, including discrimination caused by Commonwealth, state or territory laws.

#### **State party's observations on admissibility and author's comments thereon**

4. The State party's observations on admissibility and the author's response are summarized in annex IV to the present document.

#### **State party's observations on the merits**

5.1 In its submission dated 27 November 2013, the State party argues that although the fact that Australian law does not recognize same-sex marriage is not the subject of the communication, the author makes a number of statements relevant to the recognition of such marriages rather than to Australian divorce laws. These statements are not relevant as same-sex marriage is not protected by the Covenant, as the Committee held in *Joslin et al. v. New Zealand*. The claims concerning the recognition of same-sex marriage should therefore be disregarded.

5.2 According to the Committee's jurisprudence, in order to establish a breach of article 26 the author must show that: (a) she was subjected to a distinction, exclusion, restriction or preference (differential treatment) on a prohibited ground; and (b) the differential treatment was not legitimate, i.e., not directed towards a legitimate aim, based on reasonable and objective criteria and proportionate to the aim to be achieved.

5.3 Equality and non-discrimination do not require identical treatment of all persons in all circumstances. Under Australian law, every couple in Australia, regardless of whether it is a same-sex or opposite-sex relationship, has access to the same mechanisms for resolving disputes, distributing property and determining care arrangements for children under the Family Law Act 1975. Same-sex and opposite-sex couples are treated in the same way and are afforded the same protections and services to resolve disputes upon the breakdown of a relationship. Based on *Joslin* and individual opinions attached to the Views, the refusal to provide a divorce order to same-sex couples will not, in and of itself, violate the author's rights under article 26. Rather, to establish a violation of this article the author must first show that she has been denied certain rights or benefits (other than the fact that she was unable to obtain a divorce order). The State party maintains that the author has not been subjected to differential treatment for the following reasons.

5.4 Because the author is not considered married under Australian law no question arises with respect to getting a divorce in Australia. For the same reason, she is not precluded from entering into a registered relationship under Australian law.<sup>3</sup> Under the Relationships Act 2011, individuals are prevented from entering into a new registered relationship if they are married or already in a registered relationship. However, for the purposes of that Act, a marriage does not include a foreign same-sex marriage, and therefore the author's marriage is not a registered relationship. Hence, the author is able to enter a registered relationship in Queensland. Furthermore, her inability to enter into such a relationship is currently speculative. Therefore, in the absence of any actual interference with the author's rights the Committee should disregard her claim.

5.5 The author has not been denied effective court-based relief because Australian legislation has mechanisms to resolve both property and children's matters upon the breakdown of a de facto relationship. According to section 4AA of the Family Law Act, a "de facto relationship" is a relationship between two people either of the same sex or of the opposite sex who are not married or related by family and are living together on a genuine domestic basis. Whether a relationship is a de facto relationship is a question of fact and is determined on a case-by-case basis with reference to factors including the length of the relationship, the nature and extent of the couple's common residence, the degree of financial interdependence and care and support of any children. At the time of the author's separation from A in 2006, the division of property following breakdown of a de facto

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<sup>3</sup> According to the Relationships Act 2011, a "registered relationship" is a legally recognized relationship that, subject to the Act, may be entered into by any two adults, regardless of their sex.

relationship was covered by state law. The author was thus able to enter a formal separation deed following amendments to the Property Law Act 1974 (Queensland) made by the Discrimination Law Amendment Act 2002 (Queensland). Property matters are now governed by the Family Law Act and allow de facto couples who separated after 1 March 2009 to obtain property settlements on the same principles as those that apply under the Family Law Act to married couples. Furthermore, the author is currently able to access the remedies available in family law courts under the parenting provisions of the Family Law Act. The Act allows parents and all other persons interested in the care and well-being of a child to apply for a parenting order. This would enable the courts to ensure that the care arrangements following the separation are in the daughter's best interest. These remedies were available to the author at the time of her separation. She is also now able to access the Australian Child Support Scheme to apply for child support payments, and has been able to do so since 2009.

5.6 Some other claimed potential harms, including the author's future treatment in overseas jurisdictions and the impact of discriminatory laws on her child and on homosexual couples in general, are inadmissible and, alternatively, irrelevant to the consideration of the merits, as they do not establish that the author has been personally subject to less favourable treatment.

5.7 The author's claim that she is discriminated against because foreign same-sex marriages do not have access to divorce proceedings in circumstances where foreign opposite-sex marriages are granted such access is unfounded. Access to divorce proceedings for foreign marriages is not based on whether the marriage is a same-sex or opposite-sex marriage but whether, in the particular circumstances of each category of foreign marriage, there is a need for access to divorce proceedings. As a general principle, foreign marriages which are not recognized in Australia do not need access to divorce proceedings. However, this is subject to certain exceptions, based on the particular circumstances of those marriages. There are several categories of foreign marriage, each of which is treated differently depending on the circumstances of that marriage.

5.8 Under the Marriage Act, a foreign marriage will be recognized in Australia if it was a valid marriage in the foreign country and would be recognized as valid under Australian law if it had taken place in Australia. Foreign marriages which are not recognized in Australia include marriages in which either of the parties was not of marriageable age; either of the parties was already validly married; the consent of either party was not real consent; the parties are in a prohibited relationship, for instance brother and sister; or the union was between two partners of the same sex. While some opposite-sex foreign marriages have access to divorce proceedings in Australia, others do not. For example, some foreign opposite-sex marriages where one party is not of marriageable age, where the consent of one of the parties was not real consent or where the parties are in a prohibited relationship do not have access to divorce proceedings in Australia. As foreign opposite-sex marriages and foreign same-sex marriages are treated in the same manner in access to divorce proceedings, the distinction the author makes between foreign same-sex and foreign opposite-sex marriages is incorrect.

5.9 If the Committee does not accept that Australian divorce laws do not amount to differential treatment, the State party submits, in the alternative, that any differential treatment in its divorce laws is permissible, as it amounts to legitimate differential treatment. As applied by the Committee,<sup>4</sup> the test for legitimate differential treatment must be aimed at achieving a purpose which is legitimate; based on reasonable and objective criteria; and proportionate to the aim to be achieved. Any differential treatment of the author satisfies this test. First, the Australian divorce law framework seeks to ensure that those whose foreign marriages are recognized as valid in Australia can divorce in Australia. This aim is legitimate.

5.10 Foreign marriages that are recognized in Australia can obtain divorce orders and marriages that are not recognized cannot. This proscription is laid down in legislation and is therefore objective. It is reasonable that Australia reflect its domestic policy and laws on

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<sup>4</sup> The State party cites paragraph 13 of general comment No. 18 (1989) on non-discrimination.

which parties may marry in its recognition of foreign marriages. The exceptions for polygamous marriages and foreign marriages where the parties are aged between 16 and 18 years are in place for justified reasons. The Matrimonial Causes Act 1959 first and the Family Law Act later deemed polygamous marriages validly entered into overseas as “marriages” for proceedings under that Act, thus allowing access to divorce. The reasonable purpose was to enable parties to foreign polygamous marriages access to the assistance, relief and help provided by the family law courts in relation to (but not limited to) children’s matters, property matters, maintenance matters or divorce. The exception is objective, as it applies equally to those in foreign polygamous marriages.

5.11 For foreign marriages of persons between 16 and 18 years, section 88D (3) of the Marriage Act provides that such a marriage will not be recognized in Australia while either party is under 16. Once both parties attain the age of 16, the marriage could be considered valid provided it meets all the other requirements contained in Australian law regarding consent, polygamy, prohibited relationships and same-sex marriage. This exception to the general rule is because once both parties have reached the age of 16 Australian law recognizes their marriage. On this basis, individuals in those marriages are granted access to divorce proceedings. This exception is reasonable and objective because there is a clear policy rationale and it is based on objective criteria, i.e., age.

5.12 The differential treatment is proportionate to the aim to be achieved. The provisions in Australian divorce law are a proportionate manner of ensuring that individuals in foreign marriages that are recognized in Australia have the ability to dissolve these marriages. There is no requirement for parties in either a de facto relationship or a marriage to be granted a divorce order as a prerequisite for accessing the family law courts for remedy. All individuals, irrespective of whether their foreign marriage is recognized in Australia, have access to effective systems for the resolution of any family law disputes. Although different legislative provisions may govern relief following the breakdown of a relationship, the same services and protections are accessible to all parties to foreign marriages. 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.

5.13 The State party argues that the author’s claim under article 14 (1), read together with article 2 (1), of the Covenant lacks merit. A right to access courts under article 14 (1) only arises for a criminal charge or a “suit at law”. Since domestic law does not grant an entitlement to a divorce order, there is no determination of rights or obligations or “suit at law” to be heard. Because the author is not considered married, she does not require a divorce order, and so she is seeking a remedy she does not require. There is no right to access the courts in these circumstances. However, the author has access to all other remedies that are accessible as a result of such an order, as the Australian system provides the same protections and entitlements to all individuals upon the breakdown of a relationship. Any practical relief the author would wish to pursue upon gaining a divorce order (such as property settlement) is already accessible to her. She is not being denied the right to settle her claims and therefore is not being denied access to courts under article 14 (1).

#### **Authors comments on the State party’s observations on the merits**

6.1 The author commented on the State party’s observations in her submission of 17 February 2014. She maintains that *Joslin* is not directly relevant to the present communication. She seeks equal treatment only in accessing the family courts in order to dissolve her foreign marriage in the same way that the State party currently affords most other residents who enter into opposite-sex foreign marriages. If the Committee considers that *Joslin* is relevant, the interpretation of article 23 should be reconsidered, as international jurisprudence has evolved since those Views were adopted. If the Committee accepts that *Joslin* remains an appropriate interpretation for a denial of rights or benefits to same-sex couples that are available to married couples, the author’s claim remains valid. The State party mischaracterizes what is offered to same-sex de facto and opposite-sex de facto couples on the breakdown of a relationship. The appropriate comparison to the author’s situation is not the breakdown of an opposite-sex relationship but the breakdown of a foreign marriage. Australia provides access to divorce to most opposite-sex foreign



married couples, including in some cases those in marriages not otherwise recognized or allowed to be entered into in Australia.

6.2 The de facto regime does not offer all the rights and benefits an opposite-sex couple would be entitled to, for example, a court may not grant a divorce order if the parties have not made suitable arrangements for the future care of their children. The failure to provide a divorce also means that in an increasing number of jurisdictions the author remains married, and there is a very significant difference between the author's wish to be treated as someone whose marriage has ended and the State party's wish to treat the author as if her marriage had never existed.

6.3 The Marriage Act implements the State party's ratification of the Convention on Celebration and Recognition of the Validity of Marriages. However, the Convention leaves open the possibility that if a same-sex marriage is valid under the law in which it is celebrated it is to be treated equally with any other marriage. The State party's exclusion of same-sex marriages in the Marriage Act significantly departs from private international law rules and demonstrates differential treatment on a prohibited ground. Had Australia legislated objectively and proportionately, it would not have excluded all same-sex foreign marriages from recognition, even if only for access to divorce, but may have limited its non-recognition to marriages it could justify as repugnant on legitimate and objective public policy considerations. Indeed, the State party's contention that the author does not need access to divorce mechanism is contradicted by the State party's own account of the legislative changes put in place to ensure that people in polygamous marriages are granted access to court-based relief, including divorce, notwithstanding that Australian law does not recognize multiple spouses or otherwise permit a person to marry more than one spouse at a time. The relative ease in which such a remedy has been provided to persons in foreign polygamous marriages highlights the disproportionate and discriminatory treatment of same-sex couples who have married overseas. Further, in recognizing certain foreign marriages between two persons who would be too young to marry in Australia, the State party offers more latitude to foreign law which sets lower marriageable ages than it is prepared to offer to foreign laws which allow same-sex marriages. In fact, nothing in the State party's submission actually states why it is reasonable or proportionate to exclude same-sex couples who have validly married overseas from accessing a mechanism for dissolving their marriage which is otherwise available to opposite-sex couples who marry overseas and whose marriages, like the author's, were monogamous, consensual, non-incestuous and between persons of legal age.

6.4 The author disagrees that divorce proceedings do not fall under the concept of "suit at law". Her suit at law relates to the termination of her marriage and associated rights and obligations. The author also reiterates that she does not have the access to the court she needs and that her daughter did not have access to an inquiry into her welfare. As a result, her daughter has potentially been denied an ability to maintain some form of relationship with A.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

7.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

7.3 With regard to the requirements of article 5 (2) (b) of the Optional Protocol, the Committee notes the author's claim that the filing of an application for divorce would be futile and that it would have no real prospect of success, given the express legislative provisions which deny her eligibility to bring such an application before any Australian court. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) have been met.

7.4 The Committee notes the State party's argument that the author's claims are inadmissible *ratione loci*, under article 1 of the Optional Protocol and article 2 (1) of the Covenant. The State party indicates that foreign same-sex marriages are not recognized under Australian law and, consequently, Australian law provides no mechanism to invalidate such marriages. While the State party accepts that the author is in its jurisdiction, her claim requires Australia to provide a remedy for an action that occurred outside its jurisdiction and has no legal effect within its jurisdiction. Furthermore, some of the author's claims concern hypothetical consequences of her Canadian marriage that may occur outside Australia. Finally, the State party argues that some of the author's claims are too general or speculative and that, with respect thereto, the author lacks victim status under article 1 of the Optional Protocol.

7.5 The Committee notes that the author claims that she is uncertain of her legal position in Australia and that she does not have a legal avenue for correcting her marital status and removing the legal uncertainty domestically. 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.

7.6 The Committee notes the author's claim regarding the harm faced by her daughter and her request that her daughter be considered as co-author of the communication (see annex IV). She argues that the denial of access to court-based divorce proceedings has prevented the author from harnessing procedural mechanisms which might have assisted her daughter in maintaining some form of relationship with her co-mother and improve the prospects for seeking child support from her estranged spouse. The Committee considers, however, that the author has failed to show that her daughter's legal situation is hampered by the author's lack of access to divorce proceedings. According to the State party's submission, under the Family Law Act the author is able to access the remedies available in family law courts, including an application for a parenting order. Nor has the author demonstrated that her daughter tried unsuccessfully to maintain some form of relationship with her co-mother or that the author was unable to seek child support from her estranged spouse. Accordingly, the Committee concludes that this part of the communication is inadmissible under article 1 of the Optional Protocol.

7.7 In view of the foregoing, the Committee considers the claims under articles 14 and 26 of the Covenant sufficiently substantiated, declares the communication admissible insofar as it appears to raise issues under these provisions with respect to the author and proceeds with its consideration of the merits.

#### *Consideration of the merits*

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 The Committee takes note of the author's claims that the denial under Australian law of access to divorce proceedings for same-sex couples validly married abroad amounts to discrimination on the basis of sexual orientation and that access to divorce proceedings for same-sex marriages, which cannot be entered into in Australia, is singled out in Australian law for less favourable treatment than for opposite-sex marriages which also cannot be entered into in Australia, such as polygamous and underage marriages. The Committee also takes note of the author's claims regarding the difficulties she experiences in her daily life as a result of not being able to access a court-based divorce mechanism and the anxiety and feelings of humiliation that she endures as a result of the uncertainty about her marital status, for instance when she has to make declarations concerning her marital status. The author states that she is not considered ever to have been married in Australia. She is however considered married in some countries where she travels for work, but "divorced" is the only status that accurately identifies her personal situation. For the author, there is a significant difference between being treated as someone whose marriage has ended versus someone whose marriage never existed. The Committee also notes that the State party contends that the author's discrimination claim is unfounded; that, as a general principle, foreign marriages which are not recognized in Australia do not need access to divorce

proceedings; that this principle has exceptions based on the particular circumstances of those marriages; and that there are several categories of foreign marriage, each of which is treated differently. For example, some foreign opposite-sex marriages where one party is not of marriageable age, where the consent of one of the parties was not real consent or where the parties are in a prohibited relationship do not have access to divorce proceedings in Australia. In the State party's view, as foreign opposite-sex marriages and foreign same-sex marriages are at times treated in the same manner in respect of access to divorce proceedings, the distinction the author makes between foreign same-sex and foreign opposite-sex marriages is incorrect.

8.3 The Committee notes that the author is precluded from accessing divorce proceedings in Australia because her same-sex foreign marriage is not recognized under sections 5 (1) and 88EA of the Marriage Act of Australia, whereas couples in some specific categories of opposite-sex foreign marriage which also would not be recognized if they had been entered into in Australia do have access to divorce proceedings. Within the latter category, the author refers to polygamous marriages and marriages where the parties are aged between 16 and 18 years, which are not deemed to be marriages for the purposes of the Marriage Act yet are subject to divorce proceedings in Australia under the Family Law Act, whereas same-sex marriages are not recognized and do not have access to such proceedings. The Committee considers that this situation constitutes differential treatment.

8.4 The Committee recalls its jurisprudence according to which article 26 not only entitles all persons to equality before the law as well as equal protection of the law, but also prohibits any discrimination under the law and guarantees 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.<sup>5</sup> The Committee also recalls its jurisprudence according to which the prohibition against discrimination under article 26 comprises discrimination based on sexual orientation,<sup>6</sup> and that not every differentiation of treatment will constitute 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 Covenant.<sup>7</sup> The test for the Committee is therefore whether it has been shown that the differential treatment in the author's access to divorce proceedings in Australia following her same-sex foreign marriage with respect to persons who entered opposite-sex foreign marriages meets the criteria of reasonableness, objectivity and legitimacy of aim.

8.5 The Committee notes the State party's contentions that the Australian divorce law framework is aimed at ensuring that those whose foreign marriages are recognized as valid in Australia have the ability to divorce in Australia and that this aim is legitimate; that the proscription of divorce for foreign marriages not recognized in Australia is laid down in legislation and is therefore objective; and that the exceptions to this rule are based on objective and reasonable criteria. According to the State party, it is reasonable that Australia reflect its domestic policy and laws on which parties may marry in its law on recognition of foreign marriages and divorce. The State party indicates that the purpose of the exception for foreign polygamous marriages is to enable parties to foreign polygamous marriages access to the assistance, relief and help provided by the family law courts in relation to (but not limited to) children's matters, property matters, maintenance matters or divorce. As to foreign marriages of persons between 16 and 18 years, the State party states that once the parties attain the age of 16 the marriage could be considered valid under Australian law.

8.6 The Committee considers that the State party's explanation as to the reasonableness, objectivity and legitimacy of the distinction for the differential treatment between the two above-mentioned categories of foreign marriage not recognized in Australia and foreign same-sex marriages is not persuasive, and that compliance with domestic law does not in

<sup>5</sup> See general comment No. 18, para. 1.

<sup>6</sup> See communications No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.7; No. 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 10.4; and No. 1361/2005, *X v. Colombia*, Views adopted on 30 March 2007, para. 7.2.

<sup>7</sup> See general comment No. 18, para. 13.

and of itself establish the reasonableness, objectiveness or legitimacy of a distinction. In particular, the Committee notes that the State party fails to provide a reasonable justification for why the reasons provided for recognizing the exceptions do not also apply to the author's foreign same-sex marriage. For example, the State party has failed to provide any explanation of why its stated reason for providing divorce proceedings for unrecognized foreign polygamous marriages does not apply equally to unrecognized foreign same-sex marriages. In the absence of more convincing explanations from the State party, the Committee considers that the differentiation of treatment based on the author's sexual orientation to which she is subjected regarding access to divorce proceedings is not based on reasonable and objective criteria and therefore constitutes discrimination under article 26 of the Covenant.

8.7 Having reached the above conclusion the Committee will not examine the author's claim under article 14 (1), read together with article 2 (1), of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it reveals a violation of article 26 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to provide the author with full reparation for the discrimination suffered through the lack of access to divorce proceedings. The State party is also under an obligation to take steps to prevent similar violations in the future and to review its laws in accordance with the present Views.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them widely distributed.

## Annex I

[Original: French]

### **Individual opinion of Committee Member Yadh Ben Achour (dissenting)**

1. In the present case, which forms the subject matter of communication No. 2216/2012, I would like, with all due respect, to express my disagreement with the Committee. The Committee chose to find Australia in violation of article 26 of the Covenant, reasoning that “the differentiation of treatment based on her sexual orientation to which the author is subjected regarding access to divorce proceedings is not based on reasonable and objective criteria and therefore constitutes discrimination under article 26 of the Covenant” (para. 8.6). I believe, on the contrary, that the position taken by Australia in this matter does not constitute discrimination and is based on reasonable and objective criteria, for the reasons set out below.

2. The chief claim considered by the Committee is that Australia afforded differentiated treatment to different categories of persons who are in comparable situations. These categories are: homosexuals, for whom marriage and divorce are not recognized 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 whom marriage in Australia is not possible, who have married abroad but who can, in their case as well, apply for divorce in Australia. Consequently, the Committee considers “that this situation constitutes differential treatment” (para. 8.3), adding that, “in the absence of more convincing explanations from the State party, the Committee considers that the differentiation of treatment based on the author’s sexual orientation to which she is subjected regarding access to divorce proceedings is not based on reasonable and objective criteria and therefore constitutes discrimination under article 26 of the Covenant” (para. 8.6) and according to the jurisprudence of the Committee concerning discrimination based on sexual orientation (para. 8.4). I do not endorse this conclusion for the reasons set out below.

3. In my opinion, the persons in the three categories mentioned above are not in comparable situations from the perspective of the Covenant, given that homosexuals, in contrast to the other two categories, do not meet one of the basic requirements laid down in the Covenant for the conclusion of a marriage. Affording them differential treatment does not, therefore, constitute discriminatory treatment amounting to a violation of article 26. Article 23 of the Covenant, in fact, stipulates the following: “1. The right of men and women of marriageable age to marry and to found a family shall be recognized. 2. No marriage shall be entered into without the free and full consent of the intending spouses.” It therefore establishes heterosexuality, along with free consent, 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. The same is true, for example, of a putative marriage.

4. Of the three categories of persons mentioned above, only the category of homosexuals fails to meet this requirement for a valid marriage, as set forth in article 23 of the Covenant and in Australian internal law. 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.

5. This may be regrettable for the rights of homosexuals from the general standpoint of respecting sexual orientation. I support, I respect and I defend the freedom of all persons to choose their sexual orientation. However, the Committee is responsible for ensuring the implementation of 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, or with the internal positive law of Australia. 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, as clearly indicated, for example, by article 38 of the Statute of the International Court of Justice. 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.

6. This law, as underscored in paragraph 13 of general comment No. 18 (1989) on non-discrimination, recognizes that not every differentiation of treatment will constitute 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 Covenant. Hence, in the present case, the 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. From this standpoint, Australia cannot be found to have violated article 26 of the Covenant.

## Annex II

### Individual opinion of Committee member Sarah Cleveland (concurring)

1. I agree with the finding of discrimination in violation of article 26. I write separately to explain that even if Australia had provided a reasonable, objective justification, based on a legitimate aim, for granting divorce to some prohibited foreign marriages but not foreign same-sex marriages, this would not have ended the inquiry. The Committee still would have had to address whether the author was discriminatorily denied access to divorce under the Marriage Act.
2. The author claims that by denying access to divorce for foreign same-sex marriages, Australia discriminates on the basis of sexual orientation. Australia defends its legal regime, first, on the grounds that it generally treats all foreign marriages equally: Australia gives access to divorce only to foreign marriages that would be legally recognized if entered into in Australia. Because the Marriage Act does not recognize domestic same-sex marriages, there is no recognition (and thus no access to divorce) for foreign same-sex marriages.
3. Second, Australia contends that the exceptions to the above rule, where divorce is allowed for certain foreign marriages (polygamous and underage marriages), are not discriminatory.
4. The Committee directs its finding of discrimination to the second grounds. But even if Australia had adequately justified its differential treatment of foreign polygamous and underage marriages, the Committee would have had to consider whether Australia discriminates in denying divorce to foreign same-sex couples based on the Marriage Act.
5. As amended in 2004, section 5 (1) of the Marriage Act defines “marriage” as “the union of a man and a woman”. Section 88EA, entitled “Certain unions are not marriages”, also provides that “[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”. The author indicates that these provisions were added to prevent domestic courts from applying common law and private international law principles to recognize same-sex marriages.
6. All other prohibited marriages are addressed in article 23B of the Marriage Act (entitled “Grounds on which marriages are void”), including marriages that are bigamous, incestuous, lacking consent and underage. Section 88D likewise prohibits recognition of foreign marriages that are bigamous, incestuous and lacking consent, and certain underage marriages. Significantly, the Marriage Act also makes entering certain void marriages a criminal offence, subject to imprisonment for five years (e.g., sects. 94-95, bigamous and underage marriages).
7. By contrast, the parties agree that in Australia today, same-sex unions are legally protected essentially equivalently to opposite-sex marriages except for access to divorce and marriage. Since 2008, federal law has granted de facto same-sex couples federal entitlements equal to those of married couples. According to the author, all Australian jurisdictions also legally recognize most same-sex families and automatically bestow full parental rights to the lesbian partner of a birth mother.
8. Under article 26 of the Covenant, Australia bears the heavy burden of demonstrating that the distinction drawn in its laws regarding access to divorce, based on the prohibited grounds of sex and sexual orientation, is not discriminatory.<sup>1</sup> In this regard, Australia

<sup>1</sup> See communication No. 919/2000, *Muller v. Namibia*, Views adopted on 26 March 2002, para. 6.7 (“different treatment based on one of the specific grounds enumerated in article 26, clause 2, ... places a heavy burden on the State party to explain the reason for the differentiation”); cf. European Court of Human Rights, Grand Chamber, *X and Others v. Austria* (application No. 19010/07), judgment of 19 February 2013, para. 99 (“differences based on sexual orientation require particularly serious reasons by way of justification”).

repeatedly points to the prohibition of same-sex marriage in the Marriage Act as the reason that foreign same-sex marriages are denied access to divorce. Setting aside the question whether access to divorce should necessarily be treated the same as marriage, the mere fact that domestic law draws a particular distinction does not make that distinction non-discriminatory, as the Committee notes (para. 8.6).

9. Australia does not otherwise explain why the distinction in the Marriage Act is reasonable, objective and serves a legitimate aim, as required by article 26. In particular, nothing in Australia's submission explains 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.

10. The only justification offered is that article 23 of the Covenant does not require protection of same-sex marriage.<sup>2</sup> 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, as the European Court of Human Rights has recognized regarding similar text.<sup>3</sup> Nor has the relationship between article 23 and the Covenant's non-discrimination prohibitions been addressed in the Australian context.<sup>4</sup>

11. In both the present communication and another recent case,<sup>5</sup> the authors have emphasized the absence of a federal bill of rights or other legal mechanism in Australia that would allow them to domestically challenge legislation as discriminating on the basis of sexual orientation or gender identity. It is unfortunate that the law affords these individuals no vehicle to challenge unequal treatment domestically, where such questions should optimally be considered in the first instance.

12. Nevertheless, compliance with the Covenant requires Australia to justify its continuing legal distinction between same-sex and other marriages on reasonable, objective and legitimate grounds. In my view, Australia bears a substantial burden of explaining what valid imperatives require it to treat unequally foreign same-sex and other couples who want to marry or divorce.

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<sup>2</sup> See communication No. 902/1999, *Joslin et al. v. New Zealand*, Views adopted on 17 July 2002, paras. 8.2-8.3.

<sup>3</sup> See European Court of Human Rights, *Schalk and Kopf v. Austria* (application No. 30141/04), judgment of 24 June 2010, para. 55 ("looked at in isolation, the wording of Article 12 [of the European Convention on Human Rights] might be interpreted so as not to exclude the marriage between two men or two women"); compare article 3 of the Covenant (acknowledging the right of "men and women" to enjoy all Covenant rights). See, generally, Malcolm Langford, "Revisiting *Joslin v. New Zealand*: same-sex marriage in polarized times", in E. Brems and E. Desmet, *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, University of Oslo Research Paper No. 2017-12 (Oslo, 2017); P. Gerber, K. Tay and A. Sifris, "Marriage: a human right for all?", *Sydney Law Review*, vol. 36 (2012), pp. 643-667.

<sup>4</sup> See Human Rights Committee, communication No. 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 10.4; communication No. 1361/2005, *X v. Colombia*, Views adopted on 30 March 2007, para. 7.2.

<sup>5</sup> Communication No. 2172/2012, *G v. Australia*, Views adopted on 17 March 2017.



## Annex III

### **Separate opinion of Committee member Anja Seibert-Fohr, joined by Committee member Photini Pazartzis (dissenting)**

1. We are unable to join the majority of the Committee in finding a violation of article 26 of the Covenant. The Committee criticizes the fact that adolescents between 16 and 18 years of age and persons in polygamous marriages formed overseas have access to divorce proceedings in Australia whereas same-sex partners who were married abroad do not have access to such proceedings. According to the Committee, the State party's explanation as to the reasonableness, objectivity and legitimacy of the distinction is not persuasive. We respectfully disagree.

2. The Committee, tasked to monitor the protection of human rights, fails, in our opinion, to take due consideration of the particularly vulnerable position that adolescents and persons in polygamous marriages formed overseas may find themselves in. 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 for them to leave a disparate relationship and to seek assistance, relief and help provided by the family law courts in relation to issues such as children's matters, property matters and maintenance matters. Apart from separation deeds regarding property matters and remedies regarding parenting, divorce 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 States parties have undertaken to ensure under article 3 of the Covenant.

3. The situation of same-sex couples in Australia who were married abroad is substantially different from that of polygamous marriages. 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, nor has she substantiated that she was denied rights in a manner amounting to discrimination under article 26. Her partner left the marital home in 2004 and they have been separated ever since. Upon separation, the author was able to enter a formal 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.

4. Their situation is also different from that of adolescents between 16 and 18 years of age who were married abroad. Such marriages are considered valid under Australian law once both parties attain the age of 16. In order to legally separate, they must have access to divorce proceedings, just like anyone else who is legally married in Australia. Denying them access to divorce when they are considered legally married could amount to a denial of protection in violation of article 24 of the Covenant.

5. The exception for polygamous and adolescent marriages does not render the legislative framework discriminatory. According to the established jurisprudence of the Committee, not every differentiation of treatment will constitute 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 Covenant.<sup>1</sup> In the present case, the legal distinctions referred to by the author in the access to divorce proceedings between same-sex couples and polygamous or adolescent marriages can be explained on reasonable and objective grounds. The 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. Their protection in such circumstances is not only legitimate, but required under the Covenant. Accordingly, we cannot conclude that there is a violation of article 26.

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<sup>1</sup> See general comment No. 18 (1989) on non-discrimination, para. 13.

6. Though we agree with the majority that the State party has not presented its arguments in a profound and well-argued way, that does bar the Committee from conducting its own legal analysis on the basis of the provisions of the Covenant. The Committee needs to evaluate whether persons who claim discrimination under article 26 are in a relevantly similar situation to others who are treated differently and whether the difference in treatment can be justified on the basis of a legitimate aim and reasonable and objective criteria. We cannot rely solely on burden of proof considerations when it comes to the protection of Covenant rights.

## Annex IV

### I. Observations by the State party on admissibility

1. In a submission dated 27 November 2013, the State party argues that the author's claims under articles 2 (1), 14 (1) and 26 of the Covenant are inadmissible *ratione loci*, under article 1 of the Optional Protocol and article 2 (1) of the Covenant, to the extent that they relate to alleged violations of the Covenant that occurred or may occur outside Australia's territory and jurisdiction. Foreign same-sex marriages are not recognized under Australian law and, consequently, Australian law provides no mechanism to invalidate such marriages. While Australia accepts that the author is in its jurisdiction, her claim requires Australia to provide a remedy for an action that occurred outside its jurisdiction which has no legal effect within Australia's jurisdiction.

2. Additionally, or in the alternative, the State party submits that, as the author was married in Canada, she should seek a divorce order 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.

3. Additionally, or in the alternative, the State party submits that a number of the author's claims of alleged harm are inadmissible *ratione loci*, as they concern hypothetical future consequences for her outside Australia's territory and jurisdiction (see para. 2.9). Australia is not liable for any acts outside its jurisdiction and has no influence over the domestic laws of the United Kingdom of Great Britain and Northern Ireland or Canada.

4. The State party also submits that aspects of the author's claims are inadmissible under article 1 of the Optional Protocol as 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. Also, the author appears to make a number of claims on behalf of her daughter, who is not an author of the communication (see para. 5 below). For instance, she argues that Australia's divorce laws render the federal family courts unable to inquire into her child's care, welfare and development following the parents' separation, and that discriminatory laws reinforce a prejudicial environment which fosters harassment, abuse and violence against lesbians and gay men. The author fails to specifically identify the victims of these allegations or demonstrate how these claims are relevant to the complaint. The State party therefore submits that this material is inadmissible under article 1 of the Optional Protocol.

### II. Author's comments on the State party's observations on admissibility

5. The author submitted comments on the State party's observations on 17 February 2014. She indicates that she wishes to join her daughter as co-author of the communication, highlighting the harm faced by the child as a result of the discrimination faced by the mother. She claims that Australian divorce laws cannot be considered proportionate because, if an objective aim of these laws is to promote the welfare of children, the exclusion of some children from that protection for no reason other than the same-sex nature of their parents' marriage runs contrary to the stated objective.

6. Had access to the court-based divorce mechanism been available to the author, the family courts would have been prevented by section 55A of the Family Law Act 1975 from granting a divorce order to the author and her spouse unless it was satisfied that suitable arrangements had been made for the future care of the child. Furthermore, the denial of access to such mechanism has also prevented the author from harnessing procedural mechanisms (such as the ability to subpoena information about the whereabouts of her estranged spouse) which would have benefited the child. These mechanisms might have assisted the author's daughter in maintaining some form of relationship with her co-mother.

They would also have improved the author's prospects for seeking child support from her estranged spouse, especially following law reforms in 2008 which opened the child-support scheme to same-sex couples.

7. The fact that the same-sex marriage took place outside Australia is irrelevant, as the matter complained of is the failure of the State party to provide a mechanism for divorce of same-sex relationships. That mechanism is currently provided within the State party's jurisdiction to persons in the same position as the author whose marriages involve persons of the opposite sex. Marital status is generally a portable and internationally recognized status which is carried with a person wherever he or she goes. Accordingly, although a divorce order may be granted domestically, it has international effect. To alter one's marital status necessitates access to a remedy for the dissolution of that marriage. Whether Canada or the United Kingdom should provide the author with a remedy cannot divert attention from the absence of a legitimate basis for Australia to withhold its own existing domestic remedies from the author. Australia is responsible for the breach, as it occurs solely within its territory and jurisdiction. Furthermore, regarding the State party's argument that some of the author's claims are hypothetical, the author responds that she has experienced and continues to experience harm domestically.

8. The author submits that there is nothing theoretical about her situation as the law has been applied to her and has suffered tangible harm as a result. Marital status is a legal and permanent state. The status itself is real, current and personal. It marks and defines her identity in the way that the formal recognition of her name, sex or nationality might. That Australia does not recognize her status as married does not affect the multiple nations which now do or the way in which the author herself identifies. By 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. In analogous cases the Committee has acknowledged, especially in relation to article 17 of the Covenant, that interference with a person's ability to self-determine markers of their identity, such as name, is a real and tangible harm.

9. Australia's refusal to 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 — for example, on government forms, to employers, to service providers — which expose her to vulnerability, humiliation and anxiety. In some cases, those declarations are reinforced by the risk of criminal sanction for knowingly making false declarations. Thus, the author faces constant dilemmas as, while in Australia she is not recognized as married, she is also neither properly "single" nor "divorced", and she remains married in those countries which recognize her status. In the circumstances, the State party's submission that she is not a victim or has not suffered harm are untenable.

10. The author's submissions on the effect of discriminatory laws on lesbians and gay men are directed towards the lack of any justification for the discrimination in Australia's divorce law. The State party has not disputed the fundamental tenet of this evidence, namely that discriminatory laws foster prejudicial environments and have been shown to contribute to negative mental effects among this population. The author, as a member of the group which has been targeted by this legal discrimination, therefore also suffers from the general harm perpetuated against lesbians and gay men from discriminatory laws.

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