

# marriage =

## Have you thought about... **equal protection of human rights?**

In conversations about "marriage equality", we are constantly told that marriage is a human right, and it is.

### *Marriage is a compound right*

Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR), a binding treaty signed and ratified by Australia, provides:

*The right of men and women of marriageable age to marry and to found a family shall be recognised.*

[Note: this language is almost identical to that found in Article 16(1) of the United Nations Declaration on Human Rights which, while influential, is not binding.]

The right is a compound one: it is a right to marry and to found a family. There is no way that Article 23(2) can be read as providing a right to marry but not the right to found a family. It follows that a person who has a right to marry also has a right to begin a family within that marriage.

If this right is interpreted as requiring the State to allow same-sex couples to marry, it must also be interpreted as allowing same-sex couples to raise children.

### *Does the "right to marry" include a right for persons of the same sex to marry each other?*

The only time this issue has been ruled on by the United Nations was a decision of its Human Rights Committee in the case of *Ms. Juliet Joslin et al. v New Zealand (2002)*. In Ms Joslin's case, two same-sex couples appealed to the Human Rights Committee arguing that the failure of the New Zealand Marriage Act to provide for homosexual marriage discriminated against them directly in violation of the "equal protection" provisions in Article 26 of the ICCPR.

Source: *Ms. Juliet Joslin et al. v New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002)*.

The UN Human Rights Committee has decided there is no human right to marriage between homosexual couples.

In speaking about the "right to marry" in Article 23(2), the UN Human Rights Committee decided:

*Use of the term "men and women", rather than the general terms used elsewhere... has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognise as marriage only the union between a man and a woman wishing to marry each other.*

The Committee continued:

*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 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.*

This means that the UN Human Rights Committee has decided there is no human right to marriage between homosexual couples.

### *Does whether or not it is a human right really matter?*

Some might argue that just because the UN Human Rights Committee has ruled that nothing in the ICCPR requires a State to permit same-sex marriage, the decision does not prevent its recognition. Additionally, some might think that the world has changed significantly since 2002, and that the Committee might not make the same decision today. This is the published position of the Australian Human Rights Commission.

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However, rights are not absolute, nor do they exist in isolation. They must be considered in light of other rights.

When considering whether “marriage equality” will affect equality of other human rights, there are two more rights to consider.

Firstly, the same Article 23 in the ICCPR requires protection of the family. Article 23(1) reads:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Secondly, Article 7(1) of the United Nations Convention on the Rights of the Child, also a binding treaty to which Australia is a signatory, reads:

*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*

There exists a **human right of a child**, as far as possible, to know and be cared for by his or her parents. Any suggestion that this reference to “parents” is broad enough to include adoptive or other non-biological parents or “social” parents is not a proper reading of this article. Extending the definition of “parent” to any person who loves and/or cares for the child it would negate the right altogether.

We all know cases where it is not possible or not in the best interests of the child to be raised by his or her biological parents, and these cannot be avoided. But marriage redefinition would result in the creation of an institution in which a child, from birth, is denied this fundamental human right.

## *What do we do when rights conflict?*

The United Nations Human Rights Commission has said there is no clear right for two people of the same sex to marry.

However, there is **a specific right for a child to know and be cared for by his or her parents.**

In the case of conflict between the two, we should always prefer an existing right to a speculative one. And Article 3(1) of the ICCPR requires that:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

When we are considering the actual and agreed upon rights of the child to disputed “rights” of adults, there should be no question. The rights of the child prevail.

## KEY POINTS

The “right to marry” does not exist on its own. It is a right to marry and found a family.

**The United Nations Human Rights Committee has said that the “right to marry” does not include a right for same sex couples to marry.**

Australia has signed UN treaties which say that a child has the right to know and be cared for by his or her parents, and that in all actions concerning children, the best interests of the child shall be a primary consideration.

**This means that in the case of a conflict of rights (even though no “right” to same-sex marriage exists), the rights of the child prevail.**