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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[*, **]

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

[*] 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 Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Christof Heyns, Yuji Iwasawa, Bamarian Koita, Marcia V.J. Kran, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Jose Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany, and Margo Waterval.

article 2(1); and 26

Articles of the Optional Protocol: Article 1

1.1 The author of the communication is Ms C., an Australian and British citizen, born on 12 April 1963. She submits the communication on her behalf and on behalf of her minor daughter R. She claims to be victim of a violation by Australia of her rights under articles 14 (1), read together with article 2(1); and 26, of the Covenant. The author is represented.

The facts as presented by the author

2.1 Ms C lives in the State of Queensland, Australia. For about ten 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 the process of undertaking fertility treatment and choosing a sperm donor. They agreed that Ms. C would be the birth mother. Their daughter was born in 2001.They intended at all time 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 relationship was at all times financially interdependent and committed. Ms. C was the primary income earner and Ms. 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 the Canadian marriage laws. However, shortly after the marriage tensions in their relationship arose and Ms. A left the marital home on 22 December 2004. Since that time, they have been separated and Ms C has been the sole care for the couple's daughter.

2.3 Following the separation the author 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 changed at the time to include same-sex de facto couples. She was advised at the time that there was no access to child support payments through the normal mechanisms. After the legal reforms introduced in 2008 the author did not attempt to claim child support. On 3 March 2005 the author and Ms. A entered into a binding separation deed under the Queensland de facto property division regime. All contact between them ceased in 2006. Regarding parenting arrangements there have been no formal custody proceedings initiated and the author has been the child's sole parent since 22 December 2004. Ms A has made no contact with her daughter since early 2005 and provides no financial support towards her care. Ms. A also stopped making payments to the mortgage which was in both women's names. Ms C no longer knows of Ms A's whereabouts.

2.4 The author wishes to formally dissolve her Canadian legal marriage due to 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, the author was left encumbered with questions concerning Ms. A's debts (some of which she was unaware) from debt collectors. Furthermore, the author regularly travels overseas as part of her work and is concerned that her status as married will deem Ms A to be her legal spouse when travelling to countries (including Canada, UK, Denmark and some parts or 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 whilst she is abroad. A divorce order would provide the author with conclusive proof that her relationship with Ms. A has formally ended.

2.5 Proceedings for divorce orders in Queensland are regulated by Australia's 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 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 take precedence over the rules of private international law; and (c) specific provisions in the Family Law Act which deem certain unions to be marriages for the purposes of proceedings brought under this 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 solemnised 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." In addition to the recognition of conventional marriages between one man and one woman, the Act also deems foreign polygamous marriages as a "marriage" for the purposes of providing relief under the Act.

2.7 Sections 5(1) and 88EA were inserted into the Marriage Act by the passage of the Marriage Amendment Act 2004. The Explanatory Memorandum to the (then) Bill indicated that the purpose of the 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 made an application for divorce in Australia. However, the making of any such application (or challenging the likely refusal of any court to hear such an application) would be entirely futile and have no real prospect of success, given the express, legislative provisions which deny her eligibility to bring such an application before any Australian court. 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 of the Family Law Act. Accordingly, there is no effective judicial or administrative action available in Australia for challenging or rendering void legislative provisions that discriminate on the basis of sexual orientation. Even if she filed a complaint to the Australian Human Rights Commission, as the source of her complaint stems from statutory provisions, any finding by the Commission that the laws breached her human rights could only result in the Commission making 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 further contends that she has no right to apply for a divorce in any other country which has a connection to the subject matter of the communication, namely Canada (as the country in which her marriage was solemnised) or the United Kingdom (the country in which she is also a citizen). She cannot get divorce in Canada, because under section 3(1) of the Canadian Divorce Act 1985 the applicant has to be ordinarily resident for a least one year. As for the U.K., her Canadian marriage, although not recognized as a marriage in the U.K. is recognised as a civil partnership. However, Sections 221(1) and 219 of the Civil Partnership Act 2004 provides that England's and Wales' courts have jurisdiction in relation to proceedings for the dissolution or annulment of civil partnership not registered there if at least one of the partners is habitually resident or domiciled in the UK, in some cases for at least six months immediately preceding the presentation of the petition. Further, even if a dissolution order granted by UK were an option, it is not clear whether this would be mutually recognized by other States. In view of her personal circumstances the author is unable to relocate to Canada or the UK. Being required to reside there for the period of six months to one year in order to be able to bring an application 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 basis of sexual orientation, in contravention of 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 which is 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 The author submits that Australian laws which deny her 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 reasons stated as follows.

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 suggest 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 marriages which could not be entered into in Australia are also recognized. For instance, marriages between a man and a woman who are over the ages 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 nothing to 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 spousal conflict and protects the welfare of children. Divorce in Australia today involves a nationalized, simplified do-it-yourself process which requires establishing 12 months continual 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 parties do not have to establish who is to blame 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 in all the circumstances have been made for the care, welfare and development of those children; or that the divorce order should take effect notwithstanding that such arrangements have not been made. Denial of access to an application for divorce and the relief provided by divorce order prolongs conflict and prevents separating spouses from formally dissolving their marriage and putting an end to their separation, a situation which places spouses and children at greater risk of psychological and physical health problems, as well as financial and economic stress.

3.5 Further, in respect to the relationship recognition scheme currently available in Queensland, the author is entirely uncertain of her legal position. On one hand, 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 enabling her to dissolve it. There is therefore the further future risk that 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 may enliven for Ms. A or her dependents in the future and for which the author may then be responsible. The author has no legal avenue for correcting her legal marital status and removing this legal uncertainty.

3.6 The author claims that the discriminatory laws directly and indirectly help foster the prejudicial environments which enable homophobic abuse, harassment and discrimination to take place, in addition to being a form of discrimination and harm in and of themselves. Studies have shown that such laws may in and of themselves contribute to negative mental health outcomes for non-heterosexual persons.

3.7 The author submits that there is great public support in Australia for the equal treatment of same sex couples and this should be another reason for 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's compensation, next of kin and medical decision-making, stamp duties and property division upon the breakdown of a relationship. In 2008, the

Australian Parliament passed reforms to recognize same-sex de facto couples equally with heterosexual de facto partners across all areas of federal law, and equalized all remaining discrimination between de facto and married couples under federal law. These reforms resulted in equal recognition for same-sex couples and their children in areas as extensive 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 being 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 has been secured following her parent's 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 the author's family, notwithstanding her separation from Ms. A, due to the retrospective nature of the reforms in this area. Ms. A is recognized as a legal parent of her and the author's daughter, alongside the author, notwithstanding that their marriage cannot be recognized.

3.10 The author cites jurisprudence from different countries finding that denying same-sex couples access to the institution of marriage and its corollary benefits under law, including the right to divorce, amounts to unlawful discrimination. With reference to the decision of the European Court of Human Rights in *Schalk and Kopf v. Austria* dismissing the applicants claim of discrimination because they were denied the possibility to enter a same-sex marriage, the author contends that whilst Australia should be required to recognize foreign same-sex marriages for the purposes of seeking relief under the Family Law Act, that recognition should only be extended on the same basis which Australia already treats opposite-sex married couples in marriages which are not otherwise permitted to take place in Australia. That is, the recognition required by Australia would be on the same interim and incidental basis which enables access to the courts and the dissolution of a foreign opposite-sex marriage. The author's claim is therefore a relatively modest one and squarely within the ambits of articles 14 and 26. She only seeks 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 that same relief, regardless of whether those marriages are recognized more generally or otherwise permitted to be entered into in Australia.

3.11 With respect to the Committee's Views in Joslin v. New Zealand, the author invites the Committee to either distinguish it on its facts or otherwise find that its reasoning cannot be sustained in light of the significant social, legal and cultural developments which have taken place since it was adopted

Remedies sought

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

(a) That Part VI of the Family Law Act 1975, concerning divorce and nullity of marriage, be amended to enable persons who have entered into a same-sex marriage

oversees the ability to seek relief under the Act on the same terms as persons in opposite-sex marriages;

(b) That sections 88B(4)[1] and 88EA of the Marriage Act 1961 be repealed, and the definition of "marriage" in section 5 be amended, so as to recognise, for the purposes of Australian law, same-sex marriages validly entered into overseas on the same terms as persons who have entered opposite-sex marriages overseas;

(c) That federal anti-discrimination legislation be introduced which allows domestic courts to provide an affective remedy for discrimination based on sexual orientation, including a remedy for discrimination caused by Commonwealth, state or territory laws.

Observations by the State party on admissibility

4.1 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 recognised 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.

4.2 Additionally, or in the alternative, the State party submits that, as the author was married in Canada she should seek a divorce order in this country. The fact that she is not entitled to access this order is a matter for her to pursue with the Canadian Government.

4.3 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 UK or Canada.

4.4 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 to be 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.[2] 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 her parent's separation; or 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.

[1] This provision indicates 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".

[2] See paragraph 5.1.

Author's comments on the State party's observations on admissibility

5.1 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 in 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 other reason than the same-sex nature of their parents' marriage runs contrary to the stated objective.

5.2 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 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 2008 law reforms which opened the child support scheme to same-sex couples.

5.3 The fact that the same-sex marriage itself 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 as Australian law does for opposite sex couples married overseas. That mechanism is currently provided within the State party's jurisdiction to persons in the same position as the author where those 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 UK should provide the author with a remedy cannot divert attention away 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 solely occurs 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.

5.4 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.

5.5 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 dilemma as, whilst 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.

5.6 The author's submissions on the effect of discriminatory laws on lesbians and gay men are directed to 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.

Observations of the State party on merits

6.1 In its submission dated 27 November 2013 the State party argues that though the fact that Australian law does not recognise same-sex marriages is not the subject of the communication, the author makes a number of statements that are relevant to the recognition of such marriages rather than Australia's divorce laws. The State party disputes the relevance of these statements and recalls that same-sex marriage is not protected by the Covenant, as the Committee held in *Joslin et al. v. New Zealand*.[3] The author's claims concerning the recognition of same-sex marriage should therefore be disregarded by the Committee.

6.2 On the basis of the Committee's jurisprudence the State party contends that 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, that is it was not directed towards a legitimate aim, based on reasonable and objective criteria and proportionate to the aim to be achieved.

6.3 Equality and non-discrimination should not be understood as requiring identical treatment of all persons in all circumstances. Under Australian law, every couple in Australia, irrespective of whether the couple is in 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. Both 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. Building on *Joslin v. New Zealand* and individual opinions attached to the Views, the State party holds that 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, in order 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.

6.4 Because the author is not considered married under Australian law no question arises about getting a divorce in Australia. For the same reason, she is not precluded

[3] Communication No. 902/1999, *Joslin et al. v. New Zealand*, Views adopted on 17 July 2002, paragraphs 8.2 and 8.3.

from entering into a registered relationship[4] under Australian law. Under the Relationships Act 2011, individuals are prevented from entering 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 does not meet the definition of a 'registered relationship'. Hence, the author is able to enter a 'registered relationship' in Queensland. Furthermore, the author's inability to enter such a relationship is currently speculative. Therefore, in the absence of any actual interference with the author's rights the Committee should disregard this claim.

6.5 There is no denial of effective court based relief for the author 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 various factors such as the length of the relationship, the nature and extent of the couple's common residence, degree of financial interdependence and care and support of any children. At the time of the author's separation from her partner in 2006, the division of property following a breakdown of a de facto 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 (Qld) made by the Discrimination Law Amendment Act 2002 (Qld). 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 wellbeing of a child to make an application for a parenting order. This would enable the courts to ensure the care arrangement for the author's daughter following the breakdown of the relationship are in her best interest. These remedies were available to the author at the time of her separation. The author is also now able to access Australia's Child Support Scheme to apply for child support payments, and has been able to since 2009.

6.6 With respect to a number of other types of potential harm, including her future treatment in overseas jurisdictions and the impact of discriminatory laws on the author's child and on homosexual couples in general, the State party reiterates that the claims 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.

6.7 The author's claim that she is discriminated 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 rather 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 recognised in Australia do not need access to divorce proceedings. However, this is subject to certain exceptions, based on the particular

[4] 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.

circumstances of those marriages. There are several categories of foreign marriage, each of which is treated differently, depending on the circumstances of that marriage.

6.8 Under the Marriage Act, a foreign marriage will be recognised 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 recognised 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 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.

6.9 In the event that the Committee does not accept that Australia's divorce laws do not amount to differential treatment, the State party submits, in the alternative, that any differential treatment in Australia's divorce laws is permissible, as it amounts to legitimate differential treatment. As applied by the Committee,[5] the test for legitimate differential treatment requires that the differential treatment is: 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, Australia's divorce law framework is aimed at ensuring that those whose foreign marriages are recognised as valid in Australia have the ability to divorce in Australia. This aim is legitimate.

6.10 Australia's policy on divorce orders is that 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 reflects its domestic policy and laws on which parties may marry in its law on 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 in Australian law 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 the purposes of proceedings under that Act, thus allowing access to divorce proceedings. 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.

6.11 As to 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 as valid in Australia at any time while either party is under 16. Once both parties attain the age of 16 such a 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. The exception to the general rule is due to the fact that once both parties have reached the age of 16 Australian law recognizes that

[5] The State party cites General Comment No. 18: Non-Discrimination (1993), paragraph 13.

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.

6.12 The State party submits that 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 pre-requisite for accessing the family law courts for remedy. All individuals, irrespective of whether their foreign marriage is recognised in Australia, have access to effective systems for the resolution of any family law disputes that arise. 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 Australia's domestic policy on the recognition of marriage is a proportionate way of achieving its aim.

6.13 Regarding the author's claim under article 14(1) read together with article 2(1) of the Covenant, the State party argues that it has no merit. A right to access courts under article 14(1) only arises in the circumstances of a criminal charge or a 'suit at law'. Since in the present case domestic law does not grant an entitlement to a divorce order there is no determination of any rights or obligations to be made. There is therefore no '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. No right to access the courts can be found in these circumstances. While the author cannot apply for a divorce order she has access to all 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 (provided the de facto requirements in the Family Law Act are met), irrespective of whether it was a same-sex or opposite sex relationship. Any practical relief the author would wish to pursue upon gaining a divorce order (such as property settlement) is already accessible to her, in the very same courts. Although her claims would be settled under a different scheme, she is not being denied the right to settle them and it therefore cannot be said that she is being denied access to courts under article 14(1).

Authors comments to the State party's observations on merits

7.1 The author commented on the State party's observations in her submission of 17 February 2014. The author maintains that the Committee's Views in *Joslin v. New Zealand* is not directly relevant to the matters in the present communication. The author 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 its Views in *Joslin v. New Zealand* are relevant to decide the present communication the author submits that the interpretation of article 23 made in those Views should be reconsidered, as international jurisprudence has evolved since those Views were issued. Should the Committee accept the State party's submission that those Views remain an appropriate interpretation of the requirement for a denial of rights or benefits to same-sex couples that are available to married couples, the author submits that her claim is still made out. The comparison provided by the State party of what is offered to same-sex de facto and opposite-sex de facto couples on the breakdown of a relationship is a mischaracterisation. 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 mechanism to most opposite-sex foreign married

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

7.2 The author reiterates her initial submissions, including her argument that the de facto regime does not offer all of the rights and benefits an opposite-sex couple would be entitled to, including that : a court may not grant a divorce order if the parties have not made suitable arrangements for the future care of the children of the parties; the failure to provide a divorce order means that in an increasing number of jurisdictions the author remains married; 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.

7.3 The Marriage Act makes operative Australia's ratification of the Convention of the Celebration and Recognition of the Validity of Marriages. However, the Marriage 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 on an equal footing with any other marriage. The State party's exclusion of same-sex marriages in the Marriage Act represents a significant departure from generally accepted private international law rules. That blanket exclusion demonstrates differential treatment on the basis of a prohibited ground. Had Australia legislated objectively and proportionately, then 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 those types of marriages which 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 recognise 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 by the State party 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 demonstrates that it is prepared to offer 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 the dissolution of 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.

7.4 The author disagrees with the State party's statement 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 access to the court that she needs and that her daughter did not have access to an inquiry into her welfare on the separation of her parents. As a result, her daughter has potentially been denied an ability to maintain some form of relationship with Ms. A.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

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

8.3 In regard of the requirements of article 5 (2) (b) of the Optional Protocol the Committee notes the author's claim that 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) of the Optional Protocol have been met.

8.4 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 recognised 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 and has no legal effect within Australia's 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 to them, the author lacks victim status under article 1 of the Optional Protocol.

8.5 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.

8.6. 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 in the communication. 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.

8.7 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 examination on the merits.

Consideration of the merits

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

9.2 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 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 under-age 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 on her marital status. The author states that she is not considered ever to have been married in Australia; she is considered married in some countries where she travels for work; but divorced is the only status that accurately identifies her personal situation. For her, there is a significant difference between being treated as someone whose marriage has ended versus as someone whose marriage never existed. The Commiittee 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 recognised 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.

9.3 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 marriages 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 a differential treatment.

9.4 The Committee recalls its jurisprudence that 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.[6] The Committee also recalls its jurisprudence that the prohibition against discrimination under article 26 comprises discrimination based on sexual orientation,[7] 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

[6] General Comment No. 18 : Non-discrimination, 1989, paragraph 1.

[7] See communications Nos. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.7; 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 10.4 ; 1361/2005, *X v. Colombia*, Views adopted on 30 March 2007, para.7.2.

the Covenant.[8] 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.

9.5 The Committee notes the State party's contention that Australia's 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; the proscription of divorce for foreign marriages not recognized in Australia is laid down in legislation and is therefore objective; and the exceptions to this rule are based on objective and reasonable criteria. According to the State party, it is reasonable that Australia reflects 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.

9.6 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 marriages not recognized in Australia and foreign same-sex marriages is not persuasive, and that compliance with domestic law does not in 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 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 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.

9.7 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.

10 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 26 of the Covenant.

11. 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.

12. 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 or not there has

[8] General Comment No. 18, paragraph 13.

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. 9.6). 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 a differential treatment" (para. 9.3), adding that, "in the absence of more convincing explanations from the State party, the Committee considers 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. 9.6) and according to the jurisprudence of the Committee concerning discrimination based on sexual orientation (para. 9.4). 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, 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 H. Cleveland (concurring)

1. I agree with the Committee's 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 then 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, lacking consent, and certain underage marriages. Significantly, the Marriage Act also makes entering certain void marriages *a criminal offense*, subject to imprisonment for five years. (E.g., Secs. 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 equal federal entitlements 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.[9] In this regard, Australia repeatedly points to the prohibition on 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. 9.6).

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, nonconsensual, 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.[10] Yet nothing in the text of article 23's affirmative protection of the right of "men and women" to marry grammatically excludes same-sex marriage, as the European Court of Human Rights has recognized regarding similar text.[11] Nor has the relationship between article 23 and the Covenant's non-discrimination prohibitions been addressed in the Australian context.[12]

11. In both this Communication and another recent case[13], 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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[9] Communication No. 919/2000, *Muller v Namibia* (Views adopted 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. *X and Others v. Austria*, [GC], no. 19010/07, ECHR 2013, sec. 99 ("differences based on sexual orientation require particularly serious reasons by way of justification").

[10] Communication No. 902/1999, *Joslin et al. v. New Zealand* (Views adopted 17 July 2002), paras. 8.2, 8.3.).

[11] *Schalk and Kopf v. Austria,* Application no. 30141/04 (2010), para. 54 ("looked at in isolation, the wording of Article 12 [ECHR] 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 Brems and Desmet, *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (2017); Gerber, Tay and Sifris, *Marriage: A Human Right for All?*, 36 Sydney Law Review (2012), 642-667.

[12] Cf. *Young v. Australia*, Communication No. 941/2000 (Views adopted 6 August 2003), para. 10.4; Communication No. 1361/2005, *X v. Colombia* (Views adopted 30 March 2007), para. 7.2.

[13] Communication No. 2172/2012, *G v. Australia* (Views adopted 17 March 2017).

Annex III

Individual opinion of Committee member Ms. Anja Seibert-Fohr, joined by Committee member Ms. Photini Pazartzis (dissenting)

1. We are unable to join the majority of the Committee in finding a violation of Art. 26 of the Covenant. The Committee criticizes that adolescents between 16 and 18 years and persons in polygamous marriages formed oversees have access to divorce proceedings in Australia whereas same-sex partners who got 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 oversees may find themselves in. Women, who got 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 our Covenant.

3. The situation of same-sex couples in Australia who got married abroad is substantially different from polygamous marriages. The author has not convincingly argued that she is or was in a situation comparable to women in polygamous marriages, which would require 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 adolescents between 16 and 18 years who got married abroad. This marriage is considered valid under Australian law once both parties attain the age of 16. In order to legally separate, they need to have access to divorce proceedings just like anyone else who is legally married in Australia. Denying them access to divorce while they are considered legally married could amount to a denial of protection in violation of Art. 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.[14] 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 also required under the Covenant. Accordingly, we cannot conclude that there is a violation of article 26 of the Covenant.

6. Though we agree with the majority that the State party has not presented its arguments in a profound and well-argued way, this does bar the Committee from conducting its own legal analysis on the basis of the provisions of our 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 based on a legitimate aim and reasonable and objective criteria. We cannot solely rely on burden of proof considerations when it comes to the protection of our own Covenant rights.

[14] General Comment No. 18, paragraph 13.