

The Senate

Legal and Constitutional Affairs
Legislation Committee

Marriage Equality Amendment Bill 2009

November 2009

© Commonwealth of Australia

ISBN: 978-1-74229-155-0

This document was printed by the Senate Printing Unit, Department of the Senate,
Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Members

Senator Patricia Crossin, **Chair**, ALP, NT

Senator Guy Barnett, **Deputy Chair**, LP, TAS

Senator David Feeney, ALP, VIC

Senator Mary Jo Fisher, LP, SA

Senator Scott Ludlam, AG, WA

Senator Gavin Marshall, ALP, VIC

Substitute Members

Senator Sarah Hanson-Young, AG, SA replaced Senator Scott Ludlam for the committee's inquiry into the Marriage Equality Amendment Bill 2009

Participating Members

Senator Helen Polley, ALP, TAS

Secretariat

Mr Peter Hallahan	Secretary
Mr Tim Watling	Principal Research Officer
Mr Greg Lake	Principal Research Officer
Ms Toni Dawes	Principal Research Officer
Ms Monika Sheppard	Senior Research Officer
Ms Margaret Cahill	Research Officer
Ms Cassimah Mackay	Executive Assistant

Other administrative support provided by

Ms Nina Boughey	Senior Research Officer
Ms Clare Guest	Executive Assistant
Ms Sophia Fernandes	Executive Assistant

Suite S1. 61 Telephone: (02) 6277 3560
Parliament House Fax: (02) 6277 5794
CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

TABLE OF CONTENTS

MEMBERS OF THE COMMITTEE	iii
RECOMMENDATIONS.....	vii
CHAPTER 1	1
Introduction	1
Summary of key amendments	1
Conduct of the inquiry.....	1
Acknowledgement.....	2
Scope of the report.....	2
Note on references	2
CHAPTER 2	3
Background.....	3
The Marriage Equality Amendment Bill 2009 – A Summary	3
The Legislative Context	3
The International Context.....	6
The Social Context	9
CHAPTER 3	13
The case for legalising same-sex marriage	13
Equality.....	13
Marriage and family as dynamic institutions	14
Commitment.....	17
Same-sex couples' desire for marriage	18
Broader role and benefits of marriage	20
Human rights and responsibilities	21
Recognition of marriages conducted overseas	22
Certificate of non-impediment	24

CHAPTER 4	27
The case for preserving the status quo	27
The 'Origins' of 'Marriage'	27
State involvement	29
Discrimination	34
Religious/Christian Grounds	36
Conclusion	37
CHAPTER 5	39
Discussion and Conclusion.....	39
Consistency of recognition for same sex relationships	39
Certificates of Non-Impediment to Marriage	39
Conclusion	41
DISSENTING REPORT BY SENATOR BARNETT.....	43
DISSENTING REPORT BY AUSTRALIAN GREENS	47
Introduction	47
Need for the Bill	48
Marriage and religion	49
Conclusion	50
Recommendations	50
APPENDIX 1	53
SUBMISSIONS RECEIVED.....	53
APPENDIX 2	73
WITNESSES WHO APPEARED BEFORE THE COMMITTEE	73

RECOMMENDATIONS

Recommendation 1

5.4 The committee recommends that the Government review (by reference to the Australian Law Reform Commission, or some other appropriate mechanism) relationship recognition arrangements with the aim of developing a nationally consistent framework to provide official recognition for same sex couples and equal rights under federal and state laws.

Recommendation 2

5.10 The committee recommends that the Department of Foreign Affairs and Trade issue Certificates of Non-Impediment to couples of the same sex on the same basis as they are issued for couples of different sexes.

Recommendation 3

5.15 The committee recommends that the Bill not be passed.

CHAPTER 1

Introduction

1.1 On 25 June 2009, the Senate referred the Marriage Equality Amendment Bill 2009 (Bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 26 November 2009.¹

1.2 The Bill was introduced in the Senate on 24 June 2009 as a private senator's bill by Senator Sarah Hanson-Young, Australian Greens. It amends various provisions of the *Marriage Act 1961(Cth)* (the Act) with the objective of:

- removing from the Act discrimination against people on the basis of their sex, sexuality or gender identity;
- recognising that freedom of sexuality and gender identity are fundamental human rights; and
- promoting acceptance and the celebration of diversity.²

Summary of key amendments

1.3 The key amendments contained in Schedule 1 of the Bill are as follows:

- repeal of the definition of *marriage* in subsection 5(1) of the Act;
- repeal and substitution of subsection 45(2) of the Act;
- omission and substitution of the phrase 'a man and a woman' in subsection 46(1) of the Act;
- repeal and substitution of subsection 72(2) of the Act;
- repeal of section 88EA of the Act; and
- omission of the phrase 'a man and a woman' in Part III of the Schedule (table item 1).³

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on July 1 2009, and again on July 29 and August 12. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 72 organisations and individuals making them aware of the inquiry and notifying them of the 28 August 2009 due date for submissions.

1.5 The committee received in excess of 28,000 submissions to the inquiry, including 82 from organisations and individuals representing organisations, 4943 from individuals and variations on 12 different standard letters. Of these submissions,

1 Journals of the Senate No. 77, 25 June 2009, p. 2206.

2 Item 3.

3 Schedule 1, items 1-6.

approximately 11,000 were in favour of the Bill, and approximately 17,000 were opposed to the Bill. The submissions from organisations and individuals representing organisations are listed at Appendix 1.

1.6 Some, but not all, submissions were placed on the committee's website. This was due to the large number of submissions received for the inquiry, and the resources required to publish those submissions.

1.7 The committee held a public hearing in Melbourne on 9 November 2009. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the Hansard transcript are available through the internet at <http://www.aph.gov.au/hansard>.

Acknowledgement

1.8 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Scope of the report

1.9 Chapter 2 provides an overview of the Bill. Chapter 3 contains for the argument for legalising same-sex marriage, while chapter 4 gives the argument for retaining the status quo. Chapter 5 rounds out the report, discussing the issues and making the committee's recommendations.

Note on references

1.10 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

Background

2.1 According to the Australian Bureau of Statistics (ABS), in 1996, 0.2% of all adults said they were living with a same-sex partner. By 2006, this had increased to 0.4% (approximately 50,000 people). However, the ABS noted that:

These figures may be an undercount of the true number of people living in same-sex relationships. Some people may be reluctant to identify as being in a same-sex relationship, while others may not have identified because they didn't know that same-sex relationships would be counted in the census.¹

2.2 Understanding the legislative, social and international context of the Marriage Equality Amendment Bill 2009 (Bill) helps to identify and appreciate the key issues and concerns raised by submitters during the committee's inquiry.

The Marriage Equality Amendment Bill 2009 – A Summary

2.3 The Bill would amend the Marriage Act to, 'remove all discrimination from the Marriage Act on the basis of sexuality and gender identity [and] to permit marriage regardless of sex, sexuality and gender identity.'²

2.4 The Bill seeks to achieve this by amending the definition of 'marriage', contained in subsection 5(1) of the Act, so as to read 'the union of two people, regardless of sex, sexuality or gender identity, voluntarily entered into.' The Bill also makes consequential amendments to remove references to 'a man and a woman'. Further, where the marriage celebrant is not a minister of religion, the amendments would allow the marriage to be solemnised according to any form and ceremony, and in the words of the parties' own choosing that they be lawfully wed.

2.5 While the legislative mechanics of the Bill are relatively simple, the potential implications of enacting such an amendment have raised significant community discourse and debate. This report seeks to navigate the concerns raised by submitters to this inquiry by first establishing the context of these discussions and then discussing the arguments put in favour and against the passage of the Bill. Finally, this report draws certain conclusions about the debate and makes recommendations for how best to deal with this legislation.

The Legislative Context

2.6 While subsections 51(xxi) and 51(xxii) of the Constitution give the Commonwealth Parliament 'the power to make laws for the peace, order and good

1 Australian Bureau of Statistics, *Australian Social Trends: 4201.0*, March 2009, p.7. Available at: [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6F761FF864FAA448CA2575830015E923/\\$File/41020_couples.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6F761FF864FAA448CA2575830015E923/$File/41020_couples.pdf) (accessed 12 November 2009).

2 Senator Sarah Hanson-Young, *Senate Hansard*, 24 June 2009, p. 4176.

government of the Commonwealth with respect to Marriage, Divorce and matrimonial causes, and in relation to parenting rights and the custody and guardianship of infants',³ marriage law in Australia was state-based until the 1961 passage of the Act.

2.7 On its passage through Parliament, the Act did not include a definition of 'marriage'. Senator Gorton, who was responsible for the carriage of the Bill through the Senate, remarked:

... in our view it is best to leave to the common law the definition or the evolution of the meaning of 'marriage' as it relates to marriages in foreign countries and to use this bill to stipulate the conditions with which marriage in Australia has to comply if it is to be a valid marriage.⁴

2.8 However, the Act (at section 46) included a provision that a celebrant, in explaining the nature of a marriage relationship, must say the words:

...Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life...⁵

2.9 While the section 46 description was not a definition, the *Marriage Amendment Act 2004*, among other things, amended the Act to insert these words as the formal definition of 'marriage'. The *Marriage Amendment Act 2004* also inserted section 88EA which provides that same-sex marriages solemnised in a foreign country would expressly not be recognised as a marriage in Australia, a matter that hitherto had been uncertain.

2.10 The Senate Legal and Constitutional Affairs Committee conducted an inquiry into the Marriage Amendment Bill 2004. The committee was instructed by the Senate to specifically consider:

- the legal interpretation of the marriage power in the Constitution, and the extent of this power with regard to the creation of marriage law and the recognition of foreign marriages;
- whether the Bill raises international comity issues, or inconsistency with laws, policies and standards of domestic and overseas jurisdictions;
- whether the Bill breaches international instruments including the Hague Convention and human rights mechanisms prohibiting discrimination on the grounds of sexual orientation;
- whether the Treaties relied upon in Schedule [2] of the Bill provide the Commonwealth with the necessary power to act, and how this action interferes with state and territory responsibilities to legislate for and to run adoption processes;

3 Subsections 51(xxi) and 51(xxii), *The Commonwealth Constitution Act 1901*.

4 *Senate Hansard*, 18 April 1961, p. 554.

5 *Marriage Act 1961*, subsection 46(2).

- the consequences of the Bill becoming law, and those remaining avenues available to the Commonwealth for legally recognising inter-personal relationships including same-sex relationships; and
- the government's insistence that this Bill be introduced as a matter of urgency when there has been no demonstrated reason for its urgent introduction and no community consultation on the provisions of the Bill.⁶

2.11 However, on 31 August 2004, before the committee was due to report, the Governor-General prorogued the 40th Parliament and the committee decided not to proceed with the inquiry. During the course of that inquiry, the committee received over 16,000 submissions from interested stakeholders.

2.12 It should be noted that in Australia at the time of this report, three States/Territories have systems which allow same-sex couples to register their relationships. Tasmania, Victoria and the Australian Capital Territory currently allow civil unions. While these unions are recognised for the purposes of some Commonwealth Acts, these civil union schemes are only open to residents of the particular state or territory that provides them. The City of Melbourne, Yarra City Council and the City of Sydney provide a registration system allowing same-sex couples to formally declare a relationship.

Further Constitutional considerations

2.13 The committee notes that concerns about the constitutional validity of the Bill were raised during the inquiry. The Gilbert and Tobin Centre of Public Law reminded the committee that, while section 51(xxi) of the Australian Constitution gives the Commonwealth Parliament power to make laws with respect to 'marriage', that power is not further defined by the Constitution, and the power may or may not extend beyond its current terms as a 'union between a man and a woman to the exclusion of all others voluntarily entered into for life'.⁷

2.14 The Gilbert and Tobin Centre suggests that the High Court could adopt at least 2 different approaches to defining marriage for the purposes of the Constitution. If the Court were to look to the intentions of the framers of the Constitution, it may be persuaded that the Commonwealth's power is limited to marriages of two different sexes. However, drawing on comments by Justice McHugh in the *Singh*⁸ and *Wakim*⁹ cases, the Gilbert and Tobin Centre observe that:

...it might be argued that gender is not central to the constitutional definition of 'marriage', which is instead focussed upon the commitment of two people to a voluntary and permanent union. This would be an example of an evolving interpretation in which the Constitution retains its essential meaning while accommodating later understandings as to what may fall

6 Senate, *Journals of the Senate No. 153*, 23 June 2009, pp. 3652-3.

7 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 2.

8 *Singh v Commonwealth* (2004) 209 ALR 355 at 371.

9 *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 553.

within those concepts. The fact that a same-sex union was not within the intended meaning of 'marriage' 1901 need not preclude such an interpretation today.¹⁰

2.15 The Gilbert and Tobin Centre concludes that:

On balance, it cannot be said with any great confidence that the High Court at the present time is likely to find the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed the most likely conclusion is that the meaning which is currently employed by the Marriage Act represents the full extent of the Commonwealth's power.¹¹

2.16 The Centre goes on to a similar conclusion in respect of the external affairs power (section 51 xxix), but also find that the Commonwealth could safely enact laws for same-sex marriage were the states to refer their powers to the Commonwealth to do so, concluding that:

The Commonwealth can then use this referred power to make laws for same-sex marriage under section 51(xxxvii). If the Commonwealth and all States were in favour of providing for same-sex unions, this would be the simplest and most certain constitutional method of achieving this.¹²

The International Context

2.17 In developed jurisdictions around the world, the issue of same-sex marriage has only relatively recently become a matter for broader public discussion, accompanied by support for the removal of legislative discrimination on the basis of sex, sexuality or gender identity.

Legislative approaches around the world

2.18 In 2001, two years after Denmark became the first country to recognise same-sex civil unions, the Netherlands became the first country to pass legislation allowing same-sex couples to be married. Since that time, six other countries have passed similar laws that apply nationally. These are Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2007) and Sweden (2009). In a further 40 countries, there is either national or state/provincial legislation allowing for the legal recognition of same-sex relationships.

2.19 The Civil Union Bill in New Zealand was given Royal Assent on 13 December 2004¹³, allowing same-sex couples the same rights as married couples in child custody, taxation and welfare matters.

2.20 In 1996, both the United States Congress¹⁴ and Senate¹⁵ passed the 'Defence of Marriage Act'¹⁶ which provided that no State was required to recognise, as a

10 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 2.

11 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 3.

12 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 4.

13 Available at http://www.legislation.govt.nz/act/public/2004/0102/latest/DLM323385.html?search=ts_act_civil+union_rese&p=1&sr=1 (accessed 11 November 2009).

marriage, a relationship between persons of the same-sex, even if that relationship is recognised as a marriage in other States. The Defence of Marriage Act was signed into law by President Bill Clinton on 21 September 1996. Since the passage of the Defence of Marriage Act, five US States have passed legislation legalising same-sex marriages. These include Massachusetts, Connecticut, Iowa, and Vermont, each of which has legislation in effect, while New Hampshire's legislation will commence on 1 January 2010.

International agreements and obligations

2.21 One important feature of the discussion of same-sex marriage relates to Australia's obligations under international Human Rights treaties and agreements. Whether (or not) Australia is in compliance with these obligations was a matter raised by a number of witnesses. (Evidence received from submitters in relation to this matter, and a discussion of the committee's conclusions, are contained in chapters 3, 4 and 5 of this report.)

2.22 Article 16 of the United Nations Universal Declaration of Human Rights states that:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹⁷

2.23 Australia is also a signatory to the International Covenant on Economic, Social and Cultural Rights, which accords rights to the family, with reference to marriage being entered into with the free consent of the intending spouses.¹⁸ Article 23 of the International Covenant on Civil and Political Rights, to which Australia is also a signatory, also outlines that party countries 'recognise the right of *men and*

14 Available at <http://clerk.house.gov/evs/1996/roll316.xml> (accessed 10 November 2009).

15 Available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280 (accessed 10 November 2009).

16 Available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR3396> (accessed 10 November 2009).

17 Article 16, United Nations, *Universal Declaration of Human Rights*, 10 December 1948. Available at <http://www.un.org/en/documents/udhr/> (accessed 11 November 2009).

18 Article 10(1), United Nations High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. Available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed 11 November 2009).

women of marriageable age to marry and found a family' (emphasis added).¹⁹ This treaty also outlines that party countries should take appropriate steps to ensure the equality of rights of spouses as to marriage, during marriage and at its dissolution.²⁰

2.24 In a 2002 case, dealt with by the United Nations Human Rights Committee (UNHRC), members of the UNHRC found that the relevant party country (New Zealand) had not violated the human right to marry contained in Article 23 by refusing to allow same-sex marriage.²¹ The UNHRC noted that:

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.

The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.²²

2.25 Since this ruling, the discussion of same-sex marriage has turned on the interpretation of the phrase 'men and women' in Article 23. In the abovementioned case, the UNHRC understood the phrase to be one term, citing the use of other terms such as 'every human being', 'everyone' or 'all persons' elsewhere in the Covenant. The UNHRC therefore understood the explicit and specific reference to 'men and woman' to mean a union between a man and a woman. Others argue that, as public discussion of same-sex marriage intensifies, the UNHRC is increasingly likely to reinterpret the phrase to mean 'men as a group and woman as a group', noting that the reference is clearly less strict than 'the union of a man and a woman to the exclusion of all others'.²³

19 Article 23, United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, 16 December 1966. Available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 11 November 2009).

20 Article 23(4), United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, 16 December 1966. Available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 11 November 2009).

21 See *Joslin et al V New Zealand*, United Nations Human Rights Committee, UN. Available at <http://documents-dds-ny.un.org/doc/UNDOC/DER/G02/441/12/pdf/G0244112.pdf?OpenElement> (accessed 11 November 2009).

22 UNHRC, *Joslin et al V New Zealand*, Doc CCPR/C/75/D/902/1999, 17 July 2002, p. 11. Available at <http://documents-dds-ny.un.org/doc/UNDOC/DER/G02/441/12/pdf/G0244112.pdf?OpenElement> (accessed 11 November 2009).

23 See, for example, Castan Centre for Human Rights Law, *Submission m87*, p. 8.

Recognition of marriage from other jurisdictions (including polygamy)

2.26 One important aspect of marriage legislation in every jurisdiction is the mechanism for recognising (or otherwise) marriages that were celebrated or given legal standing in other jurisdictions. For example, a feature of the Defence of Marriage Act in the United States is that federal laws do not prevent State's from enacting legislation that legalises same-sex marriage, however the federal law also doesn't require other states to recognise that marriage as legitimate. Similar principles apply across country borders.

2.27 As noted above, the *Marriage Legislation Amendment Act 2004* in Australia provided that same-sex unions solemnised in a foreign country would not be recognised as a marriage in Australia. However, while Australian law doesn't generally recognise foreign polygamous relationships as marriage, the *Family Law Act 1975* deems foreign polygamous marriages to be marriage for children's matters or property alterations (for example).²⁴

The Social Context

2.28 Discussions of same-sex marriage invariably involve lengthy debate about what role marriage itself plays in society and the implications that legalising same-sex marriage might have on families and society in general. Nonetheless, people generally agree that the state should not unduly intervene in private relationships without strong policy justification. During the inquiry, the committee heard evidence on what impact passage of the Bill might have on children of same-sex parents within a marriage relationship and what rights the Commonwealth currently extends to unmarried heterosexual and same-sex couples.

Impact of Marriage on Children

2.29 The Australian Institute of Family Studies (AIFS), an Australian Government Statutory body established to conduct research into the effects of Government programs on family wellbeing, has published a number of research papers which touch on issues relating to same-sex parent families. One important feature of the AIFS research relates to the significant diversity in the make up of families with same-sex parents. In a research paper published in 2003, the AIFS found that more same-sex parent families:

...are choosing parenthood within the context of their same-sex relationship through a variety of means including donor insemination and other assisted reproduction procedures, adoption or fostering. Thus, the extent to which family members are related biologically can differ (that is, one parent may or may not be the child's biological parent). The large proportion of children in current gay and lesbian families are likely to have been born or

24 Parliamentary Library, *Bills Digest: Marriage Amendment Act 2004*, p. 3.

adopted in the context of a heterosexual couple relationship that later dissolved.²⁵

2.30 The AIFS, in that paper, also discussed concerns by some in the community about the potential negative effects of being raised in a gay- or lesbian-headed family, particularly in relation to children's gender identity, their personal and social development and the harm resulting from family disruption (on the assumption that gay and lesbian relationships are more short-lived than heterosexual relationships).

2.31 The AIFS found that most literature suggests that children raised by same-sex parents do not show poor adjustment when compared with other children. However:

...much of the available research has involved small, unrepresentative samples that are predominantly well educated, middle class and American. The degree to which results reflect sampling biases of the research, and their applicability in the Australian context, are thus difficult to evaluate.²⁶

2.32 The committee recognises that there may be insufficient data collected within the Australian context to draw definitive conclusions about any impact that same-sex parenting may or may not have on children. This lack of data may also make it difficult to determine what factors might contribute to any outcome differences observed in children in same-sex parent families and whether those factors are a direct result of the particular family structure.

Legal rights for unmarried couples

2.33 On 30 April 2008, the Hon. Robert McClelland MP, Attorney-General announced that legislation to remove same-sex discrimination from a wide range of Commonwealth laws would be introduced to give effect to the recommendation of the then Human Rights and Equal Opportunity Commission (HREOC) 'Same-Sex: Same Entitlements' report.²⁷

2.34 In 2008, the committee conducted separate inquiries into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, the Same-Sex Relationships (Equal Treatment in Commonwealth Law – General Law Reform) Bill 2008 and the Same-Sex Relationships (Equal Treatment in Commonwealth Legislation – Superannuation) Bill 2008.²⁸ These bills amended more than 90 Commonwealth Acts to provide greater recognition and equal treatment of opposite- and same-sex de facto couples.

25 The Australian Institute of Family Studies, *Research Paper no. 30: Family Structures, Child Outcomes and Environmental Mediators*, January 2003, p. 26. Available at: <http://www.aifs.gov.au/institute/pubs/RP30.pdf> (accessed 12 November 2009).

26 The Australian Institute of Family Studies, *Research Paper no. 30: Family Structures, Child Outcomes and Environmental Mediators*, January 2003, pp. 26-27. Available at: <http://www.aifs.gov.au/institute/pubs/RP30.pdf> (accessed 12 November 2009).

27 The Hon, Robert McClelland MP, Attorney-General, 'Rudd Government moves on same-sex discrimination', 30 April 2008.

28 For more information about these inquiries, including copies of the Final Report, see www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/.

2.35 The committee recommended that the bills be passed, subject to certain recommendations. Many of the committee's concerns were addressed and the bills passed and received Royal Assent in November and December 2008.²⁹

2.36 During this inquiry, the committee heard evidence relating to this recognition of same-sex de facto relationships in Commonwealth laws. There was broad agreement that these measures were appropriate, however there was some discussion as to whether the changes went far enough to genuinely remove discrimination against same-sex couples.

29 The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* was assented to on 21 November 2009. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* was assented to on 2 December 2008. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* was assented to on 9 December 2008.

CHAPTER 3

The case for legalising same-sex marriage

3.1 The case for allowing the recognition of same-sex marriage under the Marriage Act took a number of angles, some of which overlapped. This chapter aims to convey a flavour of the main arguments put to the committee, the majority of which are premised on the idea that two people who are willing and able to make a life-long commitment to each other in the eyes of society and the law, should not be stopped from doing so merely because they are the same-sex. It is to this primary argument of the need to ensure fundamental equality that the chapter now turns.

Equality

3.2 Perhaps the most prominent argument put by those in support of the Bill centred on the need to treat people as equals, regardless of their sexual preference, and to recognise and respect the equality of a commitment between people of the same-sex and people of different sexes.¹ A number of witnesses referred to the recent reforms by the Government aimed at redressing the inequities, and all were in support of them. However, witnesses in support of the Bill predictably went on to argue that the reforms did not go far enough.

3.3 Dr Paula Gerber from the Castan Centre for Human Rights Law, for example, submitted that:

There have recently been a suite of reforms that have removed discrimination against gays and lesbians in the areas of taxation, superannuation and social security—the last bastion is marriage. In accordance with international human rights law, principles of non discrimination and equality, this too must be addressed. Civil unions and domestic partner registries are not sufficient. They are the equivalent of the ‘separate but equal’ response in America in the era of segregation, and we know from that time that that does not result in uniform enjoyment of human rights by all.²

3.4 Mr Gardiner, Vice President of Liberty Victoria, agreed and discussed some of the possible consequences of inequality for same-sex attracted people, including fostering a climate of homophobia and inviting all the negative personal and societal consequences of inequality:

Of course, as has already been mentioned, the Australian parliament, the current government, introduced a huge raft of excellent moves towards equality in 2008, amending some 84 or 85 federal laws to introduce equal

1 Of the very large number of submitters who expressed this view, some included Amnesty International, *submission m15*, p. 1; Human Rights Law Resource Centre, *submission m33*, p. 2; NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 3; Victorian Women Lawyers, *submission m52*, p. 1; Law Council of Australia, *submission m53*, p. 1; NSW Council for Civil Liberties, *submission m67*, p. 1; Australian Human Rights Commission, *submission m89*, p. 1.

2 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 3.

treatment for same-sex couples, leaving only one glaring hole in the edifice of equality. That has real consequences. As our submission points out...the ban on same-sex marriage authorises discrimination...Young same-sex attracted people...are harmed by the environment that authorises discrimination. There are pressures on young gay people growing up in a society which is not merely largely heterosexual but heterosexist, which says, 'If you are not heterosexual then you are unworthy.' That is difficult. The existing marriage law, with its insistence on inequality, creates an environment, as we say in our submission, which authorises discrimination and which harms young people...Those young people are pushed in the direction of depression and, indeed, suicide, by the environment which is created by things like this marriage law.³

3.5 Dr Adiva Sifris, also representing the Castan Centre, agreed that marriage imbues a sense of legitimacy, and reduces discrimination against same-sex couples.⁴ Citing the raft of legislation passed by the Commonwealth in 2008 which eliminated discrimination against same-sex couples, Dr Sifris applauded the measures already undertaken by the Government but invited further action:

You can already see the flow-on effects of [the 2008 measures]. A recent Galaxy poll showed that the number of same-sex marriages had increased by three per cent from two years ago. As the law changes, it starts to pull society along with it.⁵

Marriage and family as dynamic institutions

3.6 Proponents of the Bill argue that marriage is an institution which has evolved markedly over time.⁶ The Law Council of Australia observed that:

Legal reform of this nature is not unique, it is the natural progression of rights development as it accords with changes in social practice.⁷

3.7 The Australian Coalition for Equality submitted that:

The institute[ion] of marriage has changed over [the] 200 year history of Australia. No longer is marriage allowed between men and a 12 year old girl. Consenting adults may now choose who their partner for life is, rather than being forced into an "arranged marriage". Women are no longer denied legal rights nor treated as property during a marriage transaction of business. Couples of mixed-race may now be married and recognised by the law. Marriages between people of Aboriginal heritage are no longer restricted as they were previously. People from differing religious backgrounds are no longer frowned upon by society if they enter into a

3 Mr Jamie Gardiner, *committee hansard*, 9 November 2009, p. 5.

4 See also, for example, AIDS Council of NSW, *submission m4*, pp 2–3.

5 Dr Adiva Sifris, *committee hansard*, 9 November 2009, p. 4.

6 See, for example, Victorian Women Lawyers, *submission m52*, p. 4; Australian Marriage Equality, *submission m90*, p. 33.

7 Law Council of Australia, *submission m53*, p. 8.

commitment for life. Society in Australia now recognises and accepts divorce.⁸

3.8 In its supplementary submission to the inquiry, Australian Marriage Equality submitted that:

In the past, defenders of absolute monarchy, established religion and the second-class status of women, sought to place these forms of oppression beyond change by claiming some divine, natural or historical mandate for them. However, in each case the progress of history revealed these institutions to be purely social arrangements. Discrimination in marriage is no different. The future will show that this discrimination is mandated neither by nature nor by history and that its removal is both inevitable and desirable.⁹

3.9 One example of that evolution, cited several times through the course of the committee's hearing, was the abolition of the prohibition on interracial marriage in the United States in 1967.¹⁰ Marriage between the races had been outlawed in some states until that time, a practice now widely accepted as a violation of fundamental human rights. Mr Rodney Croome, representing Australian Marriage Equality (AME), observed that:

Marriage, like every social institution, changes to keep pace with changing social attitudes, and it is clear from the evidence we have heard this morning that a majority of Australians believe marriage today can encompass same-sex relationships. As I said earlier, Australian public policy is heading in the same direction with the recognition of same-sex de facto marriages. Marriage can and should change to reflect what we understand committed, loving relationships to be. If it does not, it becomes irrelevant and fossilised. In my mind, what degrades and demeans marriage is the fact that we keep it petrified at a certain time rather than allowing it to change.¹¹

3.10 Reverend Nathan Nettleton was one of the significant number of witnesses who discussed the relationship between marriage and the raising of children, and its implications for the validity of same-sex marriages. Reverend Nettleton, a Baptist Pastor appearing in his private capacity, put his view this way:

I would support the view that many marriages involve procreation, but I am yet to hear from the groups who argue that that we should outlaw postmenopausal marriage. It seems to me to be inconsistent. There are many marriages that we know where there is no possibility of children and we still support those marriages...My view is that procreation is a part of

8 Australian Coalition for Equality, *submission m88*, p. 3.

9 Australian Marriage Equality, *supplementary submission*, p. 5.

10 Mr Jamie Gardiner, *committee hansard*, 9 November 2009, p. 5.

11 Mr Rodney Croome, *committee hansard*, 9 November 2009, p. 20.

some marriages, but is not one of the conditions that define a marriage as a marriage.¹²

3.11 Australian Marriage Equality agreed, submitting that:

There is no intrinsic association between marriage and the raising of children. There is no evidence that children fair worse when raised by two parents of the same-sex. Indeed, the children raised by same-sex partners benefit from marriage equality. Therefore, there is no basis upon which to assert that children will be harmed by same-sex marriage.¹³

3.12 Reverend Dorothy McRae-McMahon also appeared in a private capacity, but expressed her view on the relationship between marriage and children from a religious perspective as follows:

I suspect that, from church to church, very often the procreation issue is raised, and all of us have responded to that one, in that, although that is of course part of some marriages, it cannot be part of all marriages, even heterosexual marriages. So it cannot be sustained, I do not think.¹⁴

3.13 The committee heard that the constitution of families, too, has changed over time. Dr Sifris submitted that:

The first thing is that the family is and was regarded as the foundation of society. Historically the family was based on marriage, and it was for this reason that the state has furiously protected the institution of marriage. But we need to understand that, in 2009, families are not what they were even 20 or 30 years ago. Families come in diverse forms. I have some statistics here from the Australian Bureau of Statistics which basically set out the different kinds of family forms. One can see that one-parent families and couple families without children are on the increase, whereas couples with children are on the decrease. On the other hand, de facto couples—people who do not marry—have increased from less than six per cent of all couples in 1986 to nearly 15 per cent now. Our whole concept of family in 2009 is very different to what it was 20 years ago.¹⁵

3.14 Even if the presence of children is accepted as important in the definition of marriage, the committee notes evidence cited by Australian Marriage Equality that increasing numbers of same-sex couples are choosing to raise children. Research from Professor Jenni Millbank in 2002 found that:

Surveys of gay men in the USA have suggested that around 10% of gay men are parents. American and Australian surveys of lesbians and NZ census data suggest that between 15-20% of lesbians have children. Australian surveys suggest that this proportion is likely to increase in the

12 Rev. Nettleton, *committee hansard*, 9 November 2009, p. 55.

13 Australian Marriage Equality, *submission m90*, p. 40.

14 Rev. McRae-McMahon, *committee hansard*, 9 November 2009, p. 58.

15 Dr Adiva Sifris, *committee hansard*, 9 November 2009, p. 3

next 5 years as many lesbians also indicate that they are planning to have children in the future.¹⁶

Commitment

3.15 A number of opponents of the Bill referred to same-sex relationships not enjoying the same levels of monogamy as heterosexual marriages.¹⁷ It was argued that there is considerable difficulty in judging the comparative levels of commitment between heterosexual and same-sex relationships, primarily because the latter are unable to marry, putting their relationships in a different legal and societal category from married heterosexuals. This, in addition to the residual homophobia experienced by many gays and lesbians, renders a direct comparison of levels of commitment, often expressed by reference to the average length of relationships, inaccurate and unfair.

3.16 Mrs Shelley Argent, representing the Parents and Friends of Lesbians and Gays (PFLAG), was one witness who disputed the view that comparison between heterosexual and same-sex unions was fair or helpful. Mrs Argent observed that same-sex relationships:

... are often coming from a situation where they are already living under pressure. A lot of them do not have family support and their partners are not welcome in the family home, so of course that is going to put pressure on the relationship. If you have to go home alone and you cannot take your partner with you at Christmas time, of course that puts pressure on the relationship. Then you also have this societal expectation, even from some parents, that the relationship will not work because it is a same-sex one. I just think that is insulting...It is all about respecting them as individuals and respecting their relationship.¹⁸

3.17 Notwithstanding the difficulties in gauging relative levels of commitment, Ms Dane spoke to research from jurisdictions which allowed same-sex marriage which suggested that marriage enhanced the level of commitment felt by same-sex couples. Ms Dane reported that:

Not surprisingly, studies involving countries and US states that have extended the marriage right show marriage benefits same-sex couples in much the same way as it has been shown to benefit opposite-sex couples. For example, a recent study by Badgett et al involving 552 married same-sex couples in Massachusetts found that close to 75 per cent felt that marriage had increased their commitment to their spouses. Seventy-five per cent felt more accepted by their community as a result, including by their

16 Australian Marriage Equality, *submission m90*, p. 36, citing Millbank J., *Meet the Parents*, 2002, http://grrl.org.au/images/stories/meet_the_parents.pdf.

17 See, for example, Mr Robert Ward, *committee hansard*, 9 November 2009, p. 62; Dr David Phillips, *committee hansard*, 9 November 2009, p. 34.

18 Mrs Shelley Argent, *committee hansard*, 9 November 2009, p. 37.

siblings and parents. Of those living with children, over 90 per cent felt that their children were happier and better off as a result of their marriage.¹⁹

3.18 Rev. Nettleton submitted that the argument made by opponents of same-sex marriage about levels of commitment disclosed an element of internal inconsistency:

To criticise the homosexual community, as many do, for its alleged promiscuity while at the same time working to deny them access to the social structures that encourage and support fidelity for the rest of us is surely disingenuous.²⁰

Same-sex couples' desire for marriage

3.19 Opponents of the Bill argued that the call for marriage among same-sex attracted people is coming from only a vocal minority within the gay community.²¹ In response, Ms Dane observed that:

If 10 per cent or 20 per cent of same-sex couples wanted to be married, that should be enough because it is about having the choice. The same would apply if, all of a sudden in time to come, only 30 per cent or 40 per cent of heterosexual couples chose to marry. Would that be a reason to abolish marriage? People still need a choice. So I have not really gone down the path of the numbers for that argument; I have only stated this to try and dispel the myth out there that I frequently hear that same-sex couples are promiscuous and do not really want to marry, and that is not true.²²

3.20 Dr Sifris agreed with Ms Dane:

A recent study shows that a lot of same-sex couples want that option to marry. Once again it comes back to options and choices. If heterosexual couples have the option to marry, the option to register, the option to do nothing, same-sex couple should have that same choice. It is a question of discrimination. Options and choices.²³

3.21 The committee notes evidence from the NSW Gay and Lesbian Rights Lobby of a 2006 survey conducted among gay and lesbian people living in NSW which found 86.3 per cent of respondents were in favour of gay marriage.²⁴ A similar survey conducted by the Victorian Gay and Lesbian Rights Lobby in 2005 found that 79.8 per cent of lesbian, gay, bisexual, transgendered and intersex people surveyed wanted same-sex marriage to be available.²⁵

19 Ms Sharon Dane, *committee hansard*, 9 November 2009, p. 22. This study was discussed in more detail in Australian Marriage Equality's submission (m90) at p. 26.

20 Rev. Nathan Nettleton, *committee hansard*, 9 November 2009, p. 52.

21 See, for example, Mr Chris Meney, *committee hansard*, 9 November 2009, p. 45; Mr Robert Ward, *committee hansard*, 9 November 2009, pp 62–63.

22 Ms Sharon Dane, *committee hansard*, 9 November 2009, p. 27.

23 Dr Adiva Sifris, *committee hansard*, 9 November 2009, p. 9.

24 NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 3.

25 Australian Marriage Equality, *submission m90*, p. 46.

3.22 A 2009 Galaxy poll was also brought to the attention of the committee, which found that 60 per cent of Australians supported giving same-sex couples the right to marry.²⁶

3.23 Many same-sex couples submitted their personal views about marriage, emphasising that they saw themselves as being the same as any other couple intending to marry, including their desire for formal recognition of those relationships in front of their friends and family. For example, the Hon. Ian Hunter MLC submitted that:

I want to get married. I know that I could travel overseas and do it, but like most people, I want to celebrate my love and my life surrounded by my friends and family.²⁷

3.24 Mr Michael Burge was in a similar position, submitting that:

While our marriage ceremony was very special to us, it was very difficult to involve our wider circle of friends and family, since the closest geographical place for us to marry was an international flight away. The cost of travelling to New Zealand was prohibitive to most people, and we did not expect anyone to spend a lot of money to be at our wedding.²⁸

3.25 Family members of same-sex couples also took the view that same-sex couples were no different to those of opposite sex. These views are well highlighted by Ms Annette Naylor, who submitted that:

...Both of my daughters are in relationships and are engaged to their respective partners. As a mother, I am very fortunate that they have each found such wonderful partners, who love and respect them...I have always loved and treated both of my daughters equally. They have both grown into beautiful, strong and intelligent women, whom I am extremely proud of. However, the eyes of the law currently do not see one of my daughters as equal. Despite the fact that I attended each of my daughter's engagements last year, one of my daughters cannot get married. The reason why my eldest daughter cannot get married is because she is gay and in a same-sex relationship. She is no different and no less of a person than my youngest daughter. Her sexuality does not define who she is and when I look at her, I do not see "my gay daughter"... I see my daughter. Her relationship is no less loving, no less committed and no less equal to her sister's relationship. How will allowing my eldest daughter to marry undermine my youngest daughters' marriage? As a mother, I want to attend both of my daughter's weddings. I want to be there for both of my girls during one of the most significant moments in their lives. I want them both to be treated as equals in the eyes of the law, just as they should be...²⁹

26 NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 3.

27 Hon Ian Hunter, *submission ef2*, p. 1.

28 Mr Michael Burge, *submission if52*, p. 1.

29 Ms Annette Naylor, *submission ef23*, p. 1.

Broader role and benefits of marriage

3.26 Proponents of the Bill spoke of their desire to make available the benefits of marriage to themselves and their loved ones, and argued that the benefits extended further than the couple themselves.³⁰ Mrs Argent submitted that:

A marriage ceremony puts the same-sex relationship into a context everyone is familiar with and has the potential to transform what the couple means to each other in the eyes of the family, friends and society in general. For many parents it will also take the sting out of their son or daughter identifying as lesbian or gay, because one of the main concerns parents experience is the loss of the tradition of having the marriage option for their child. For many this is a huge source of disappointment. For others it can also help the family come out and come to terms with their sexual orientation in a positive setting. Supporting friends and family bearing witness to the ceremony certainly helps to strengthen the couple's bond and show the relationship as meaningful in society.³¹

3.27 Mr Croome added that:

[M]arriage is an institution through which partners find connection and belonging not only with each other but within their families and within their communities. That is why marriage traditionally and conventionally creates kinship. We have terms like brother-in-law and mother-in-law. It is why conventionally at wedding ceremonies those present are asked if they assent to the marriage. It is not simply about the partners, as important as their bond is. It is about a public recognition of that and the creation, like I said, of connection and belonging. Marriage provides us with a universal language of love and commitment.³²

3.28 Mr Tuazon-McCheyne agreed, and spoke from his experience as a marriage celebrant:

I...have married over 1,000 Australian couples. They all receive a blessing from their community and their family and friends when they have their wedding ceremony. The most important thing about a wedding day, and the reason I do it, is that the 80 to 150 people who are there are the key people in their lives. They want to give love and energy to that couple and give them a boost on their journey and they want to celebrate what they have. We do not get that many great days in our lives, and the wedding day, the marriage day, is one of those days. That is one of the reasons why people get married, and that is one of the reasons why we got married.³³

30 A very large number of submitters made a similar point, including for example, the AIDS Council of NSW, *submission m4*, p. 1; Victorian Women Lawyers, *submission m52*, p. 4; Australian Marriage Equality, *submission m90*, pp 25–27.

31 Mrs Shelley Argent, *committee hansard*, 9 November 2009, p. 32.

32 Mr Rodney Croome, *committee hansard*, 9 November 2009, p. 20.

33 Mr Jason Tuazon-McCheyne, *committee hansard*, 9 November 2009, pp 22–23.

3.29 In addition to the benefits felt by the couple, their family and friends, the committee heard that marriage as an institution stood to gain from same-sex marriage. Australian Marriage Equality submitted evidence that marriage equality may solidify the institution of marriage based on an examination of places where the formal recognition of same-sex relationships has a relatively long history. Citing Denmark, Norway and Sweden marriage rates have increased by as much as 30% and divorces are steadily decreasing in number, drawing Australian Marriage Equality to conclude that the example of formally-recognised same-sex partners seems to have helped inspire an increasing number of young heterosexual couples to marry. Australian Marriage Equality also cited the Wall Street Journal in an October 2006 opinion article on same-sex marriage, in which its assessment of the Scandinavian experience was that: 'there is no evidence that allowing same-sex couples to marry weakens the institution. If anything, the numbers indicate the opposite'.³⁴

3.30 In seeking to contrast the benefits of marriage over those associated with civil unions, Mr Croome concluded that:

The repeated complaints of partners is that their status as civil union partners is not recognised or understood by key agencies—health insurers, schools or even government agencies—and certainly not in social discourse by their families, friends and neighbours. So while civil unions might grant those partners equal entitlements as married partners in practice they are often denied those entitlements by authorities who are ignorant of what a civil union is or who are deliberately discriminatory... but many of the partners I have spoken to say that, even though they are guaranteed by that registry the same spousal rights as married couples in Tasmanian law, often that is not respected by state authorities, by health insurers, by schools or whomever it might be simply because there is not an understanding of what that means.³⁵

Human rights and responsibilities

3.31 One of the key arguments for legalising same-sex marriage was its protection under Australia's international human rights obligations. Australia is a party to numerous human rights treaties, one of which is the International Covenant on Civil and Political Rights (ICCPR). Whilst the ICCPR does not contain an express right for same-sex marriage, it does have a prohibition on discrimination. Article 26 expressly prohibits discrimination, which is any distinction, exclusion, restriction or preference on any ground which has the purpose or effect of nullifying or impairing the enjoyment or respect of human rights by all on an equal footing. Dr Gerber submitted that the Toonen case stands for the principle that discrimination includes discrimination on the grounds of sexual orientation, meaning that discrimination

34 Australian Marriage Equality, *submission m90*, p. 28, quoting Spedale and Eskridge Jr, *Wall Street Journal*, October 27 2006.

35 Mr Rodney Croome, *committee hansard*, 9 November 2009, p. 27.

through excluding people from the right to marry solely based on sexual orientation is a breach of article 26 of the ICCPR.³⁶

3.32 The Australian Human Rights Commission took the same view of international law, submitting that:

Equality is a fundamental principle of international law. The Commission believes that a human rights analysis based on the principle of equality supports the recognition of same sex marriage.³⁷

3.33 Dr Gerber went on to argue that, in respect of couples with children, Australia's international obligations compel the recognition of a relationship between a child's parents on the basis that to do so is in the child's best interests:

Same-sex couples are now having children. International human rights law recognises that the family is the fundamental group unit of society and deserves special support and protection. Article 2 of the Convention of the Rights of the Child protects children from discrimination on the grounds of their parents' status, and that status includes their sexual orientation. The UN Committee on the Rights of the Child has expressly stated that it is concerned that discrimination based on the sexual orientation of the parents impacts negatively on the children. The Convention on the Rights of the Child also requires that any decision that impacts or affects children must be made with the best interests of the child being a primary consideration. Prohibiting a child's parents from marrying is not in the best interests of the child. All children deserve the chance to grow up in a stable and loving home with parents in a relationship that is publicly recognised and respected. There is extensive empirical research...that says that children raised in same-sex families are not disadvantaged by the fact that their parents are of the same sex, but what will disadvantage them is when those parents are discriminated against purely on the basis of their sexual orientation.³⁸

Recognition of marriages conducted overseas

3.34 A related, though separate issue is the question of whether to recognise same-sex marriages validly solemnised overseas. Such marriages are not currently recognised by Australia, but the Bill would reverse this. Among those in support of the Bill, the proposal received strong support.³⁹ The Law Institute of Victoria

36 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 2. Other submitters making this or a similar point included the Australian Human Rights Commission, *submission m89*, pp 4–5; Amnesty International, *submission m15*, p. 3; Public Interest Advocacy Centre, *submission m24*, p. 3; Human Rights Law Resource Centre, *submission m33*, pp 4–5; Law Institute of Victoria, *submission m34*, pp 1–2; NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 4.

37 Australian Human Rights Commission, *submission m89*, p. 3.

38 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 2.

39 See, for example, the Sydney Gay and Lesbian Choir, *submission m31*, p. 1; Human Rights Law Resource Centre, *submission m33*, p. 11; Law Institute of Victoria, *submission m34*, p. 2; Law Council of Australia, *submission m53*, p. 7; Australian Human Rights Commission, *submission m89*, p. 3.

submitted that Australia was obliged under the Hague Convention to recognise same-sex marriages, on the basis that the Convention's purpose is to 'facilitate the celebration of marriages and the recognition of the validity of marriages' between Contracting States, and that it was generally accepted that a marriage 'validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States'.⁴⁰

3.35 While the Institute conceded that the Hague Convention does not define marriage, it informed the committee that marriage should be interpreted in its broadest, internationalist sense, as required by Article 5 which provides that the 'application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the State of celebration'. The LIV concluded that, given 'public opinion in Australia is in favour of recognising same sex marriages...in the LIV's view, [there is] no international legal basis upon which Australia can justify its non recognition of foreign same sex unions'.⁴¹

3.36 Mr Gardiner argued that Australia was under an obligation to recognise such unions, and that:

...[T]he Hague convention should be obeyed, not violated. There are couples from Canada, from the United States, from South Africa, from Belgium, from the Netherlands, from Sweden and Norway, and soon from Albania and others...who are validly married under their laws and who have a right under the Hague convention to expect that we will acknowledge their marriage if they come here, and that should be done, too. Repealing section 88EA of the Marriage Act is quite independent of the question of whether people can get married here.⁴²

3.37 Dr Gerber concurred that Australia was in breach of its obligations, adding:

We are clearly in breach of that treaty. We even recognise legally performed polygamist marriages from Saudi Arabia and other such countries out of respect for our international obligations under the Hague convention. Professor Hilary Charlesworth referred to Australia as being 'Janus faced'. We present one face to the international community as an upholder and respecter of international human rights law by ratifying all these treaties and saying we are a worthy, human rights respecting country, and we are seeking a seat on the UN Security Council. But domestically it is the opposite in many cases, with children in immigration detention centres and our treatment of Indigenous Australians, and you can now add to that our treatment of sexual minorities. Internationally we are saying: 'We are going to uphold these laws. They are good, just laws; we agree with them,' but domestically we are ignoring them.⁴³

40 Law Institute of Victoria, *submission m34*, p. 2.

41 Law Institute of Victoria, *submission m34*, p. 2.

42 Mr Jamie Gardiner, *committee hansard*, 9 November 2009, p. 5.

43 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 6.

3.38 Dr Gerber also pre-empted any argument that recognition of marriages conducted overseas would provide a loophole through which Australian same-sex couples could be married offshore and be recognised at home, pointing out that many countries require at least one party to a marriage to be a resident of that country before the marriage can take place.⁴⁴

3.39 The adverse affects of allowing same-sex marriages offshore, yet failing to recognise them within Australia, were set out by a number of witnesses, of which Australian Marriage Equality was one:

First, for most of these couples, travelling overseas to marry is not their preference. They would marry in Australia if it were allowed because a) they would be closer to family and friends, b) a marriage at home is cheaper and much easier to arrange, and c) they would not risk the legal and financial complications associated with marriage and/or divorce in other jurisdictions (for example, non-residents can marry in Canada but only residents can divorce, and unlike Australia, divorce in Canada is fault-based)...Secondly, after going to so much trouble to marry overseas, couples have no legal recognition of their legal status or solemn vows when they return to Australia. This is deeply offensive to these couples...⁴⁵

3.40 Australian Marriage Equality also points to the distress felt by foreigners moving to Australia from jurisdictions in which they have lived as part of a married couple in the eyes of society and the law, but whose marriages are not recognised under Australian law.⁴⁶

Certificate of non-impediment

3.41 In addition to Australia declining to recognise same-sex marriages conducted overseas, the committee's attention was drawn to an apparent policy of the Government to decline to issue a certificate of non-impediment to same-sex couples who wish to marry overseas. These certificates are usually required by foreign governments before a marriage can be solemnised. Australian Marriage Equality submitted that:

Since the end of 2005 we have received a steady stream of complaints from Australians seeking to marry their same-sex partners overseas for whom the Government's refusal to provide a CNI has caused immense frustration...We understand that the Dutch Government has responded by waiving the CNI requirement for Australians entering same-sex marriages. We have been told the only other nationality it does this for is Zimbabweans...our understanding is that CNIs are issued to establish that there is no impediment to an Australian marrying overseas, not to establish there is no impediment to the recognition in Australia of the marriage they intend entering. This is confirmed by the documentation publicly available. For example, the application form for an Australian CNI asks the applicant

44 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 8.

45 Australian Marriage Equality, *submission m90*, p. 24.

46 Australian Marriage Equality, *submission m90*, p. 24.

to confirm they are not already married to another person in Australia. It does not ask if they seek to enter a same-sex marriage... Our understanding of the role of CNIs is also supported by the international experience. Other governments request CNIs from Australia to ascertain whether there are impediments to them solemnising marriages involving Australian citizens. Chief amongst such impediments are whether the Australian citizens in question are already married in Australia and are of marriageable age. Foreign governments are aware of the discriminatory nature of Australian law, and are not seeking further information about such discrimination because it is not relevant to them.⁴⁷

47 Australian Marriage Equality, *submission m90*, p. 51.

CHAPTER 4

The case for preserving the status quo

Marriage: from 'maritus' and 'maritata'—'husband and wife' in Latin. 'Matrimonio'; 'matrimonium'—'matrimony'; 'making of a mother'. It already has the two sexes written in the whole etymology of the language.¹

The 'Origins' of 'Marriage'

4.1 In the 1866 UK Court of Probate and Divorce case of *Hyde v Hyde and Woodmansee*, Lord Penzance said, 'marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'² This definition was subsequently used as the common law definition in many jurisdictions around the world, including Australia. In 2004, the *Marriage Legislation Amendment Act 2004* inserted and codified this common law definition in the *Marriage Act 1961*.³

The unique nature of marriage itself

4.2 An important element of the evidence opposing the Bill centred on the current definition of 'marriage' as being the most appropriate. Recognising the historical context of the marriage relationship, the benefit to the State of endorsing this relationship in law and the implications of changing the legal definition, submitters who opposed the Bill pointed to the distinguishing and unique characteristics of marriage to defend against broadening the term to include other types of relationships:

When a man and a woman have that relationship of intimate love it is different [from other relationships] because it has a capacity built into it that same-sex relationships simply do not have. It is a fundamentally different kind of relationship.⁴

4.3 Both the Catholic Dioceses of Sydney and Melbourne, in evidence given to the Committee, emphasised how the proposed definition of 'marriage' was a fundamental departure from the acknowledged and agreed definition used by every other culture or society across time:

Marriage has always been understood—even in very ancient societies—to be between a man and a woman. Even though certain forms of sexual behaviour have been tolerated—and widespread in some cultures—it has never been seen as marriage.⁵

1 Most Reverend Peter Elliot, Auxiliary Bishop, Southern Region, Catholic Archdiocese of Melbourne, *Proof Committee Hansard*, 9 November 2009, p 39.

2 *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133.

3 Ms J Norberry, *Bills Digest No. 155 2003-2004*, 4 June 2004, p. 2.

4 Mr Matthew MacDonald, *Proof Committee Hansard*, 9 November 2009, p 41.

5 Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 39.

The kind of proposal that is embodied in this... legislation is unheard of in any society, because here we are, as it were, going for the jugular. This is... a new, completely novel idea of what marriage is—which is not found in any of the societies of the world.⁶

4.4 The Australian Christian Lobby, while voicing support for the removal of unfair discrimination in Commonwealth legislation, opposed any widening in definitional scope. The ACL argued that broadening the definition would dilute the meaning and value of the term beyond what is desirable:

One of the ways to ruin something is to change the meaning of the word... It will take it away from being something between a man and a woman... A homosexual relationship is not a marriage, it cannot be a marriage, it should never be described as a marriage.⁷

4.5 Bishop Elliot, speaking for the Catholic Diocese of Melbourne, also spoke of how broadening the definition might itself constitute discrimination:

You speak of encompassing, including, expanding everyone into marriage, but in fact this proposed legislation explodes marriage, because the word becomes meaningless...in this proposed legislation, there is discrimination in favour of perhaps two to three per cent of the community—a minority within a minority...

This legislation would therefore be an act of massive discrimination against those people in this country who value marriage...⁸

4.6 In its submission to the inquiry, Family Voice Australia noted that if any component of the current definition was altered, the implications would be so radical that the changed definition could no longer be said to be of the same thing:

Marriage has traditionally been given a highly respected and protected status in law precisely because it regulates the sexual relationship between a man and a woman – the only sexual relationship that can result in the conception and birth of children.

Changing the definition of marriage to encompass same-sex relationships would reduce the content of marriage to a purely sexual or affective relationship lacking the critical nexus with childbearing.⁹

4.7 The ACL, in its written submission, summed up the discussion of definitional change like this:

Reducing marriage to a simple contract of consent and love between two people is a revisionist approach that has neither context nor legitimacy. It is

6 Most Reverend Peter Elliot, Auxiliary Bishop, Southern Region, Catholic Archdiocese of Melbourne, *Proof Committee Hansard*, 9 November 2009, p. 39.

7 Mr Robert Paul Ward, Victorian Director, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 60.

8 Most Reverend Peter Elliot, Auxiliary Bishop, Southern Region, Catholic Archdiocese of Melbourne, *Proof Committee Hansard*, 9 November 2009, p. 43.

9 FamilyVoice Australia, *Submission m8*, p. 2.

a selfish, adult-centred approach that rejects the broader cultural significance of marriage and its centrality to children and society. It discards the significance of marriage as an important social good held by a shared community as a public commitment to family and the raising of children.¹⁰

State involvement

4.8 There are a variety of different relationships which the State chooses not to regulate. Submitters who opposed the Bill gave examples of common interpersonal relationships that are not endowed with any particular legal status, such as personal friendships. These submitters asserted that there must be a strong policy justification before the State should involve itself in what would otherwise be a personal or private relationship. They argued that marriage, as currently defined, is unique among relationships in that it does have particular benefits to society that warrant its recognition in law.

4.9 Generally, those who opposed the Bill cited the common, natural ability of heterosexual couples in a life-long relationship to provide a healthy environment for having and raising children as the strongest justification for State regulation of marriage. Submitters also pointed to the importance of the law as a symbol of what is important to and good for society:

What we are considering here is marriage as a public, legal institution as opposed to a private institution. Marriage could exist without the state's public intervention, but this is a circumstance where the state declares that there is a public institution. That is something we tend to take for granted, but I would suggest that we should not, especially when you consider that it is not normal for the state to intervene in private relationships.¹¹

Marriage and children

4.10 The Catholic Diocese of Sydney submitted that the State has always recognised the public institution of marriage because of the unique and essential contribution of the marital relationship to the common good:

The primary reason why nation states have been interested in marriage and why it has attracted public support is its procreative aspect, encompassing the generation and raising of children.¹²

...

It is a union that is publicly recognised and treated as special, distinguished from other types of relationships because of its unique capacity to generate

10 Australian Christian Lobby, *Submission m71*, p. 8.

11 Mr Timothy Cannon, Research Officer, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 10.

12 Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

children and to meet children's deepest needs for the love and attachment of both their father and mother.¹³

4.11 So important was this aspect of the discussion, according to the Catholic Archdiocese of Sydney, that:

...the state cannot grant the legal status of marriage to same-sex unions without failing in its duty to promote and defend marriage as an institution essential to the public good.¹⁴

4.12 Many other submitters agreed with this position. For example, the Non-Custodial Parents Party (Equal Parenting) said:

From society's point of view, the chief purpose of the lifelong marriage relationship is to create the best possible environment to progenerate and raise children...

Marriage is the first step in the establishment of the genetic bonds of family. Through marriage, society deems a family relationship to exist between a previously unrelated man and woman... This kind of relationship is fundamentally unique, and so we give it a unique name: marriage.¹⁵

4.13 When asked by the committee what implications this position would have in relation to couples who are not able to have children, Mr Meney, from the Catholic Diocese of Sydney, responded:

The definition of marriage as an inherently procreative community does not exclude heterosexual married couples who cannot have children for reasons of age or infertility. They are still married, because their sexual union is naturally designed to give life, even if it cannot give life at a particular point in time or ever. Marriage between a man and a woman always has an inherent capacity for and orientation towards the generation of children, whether that capacity is actualised or not.¹⁶

Children's rights and outcomes

4.14 Building on the 'naturally procreating' element of the traditional marriage relationship, submitters also emphasised the important, child-raising environment it creates. Three particular aspects of the discussion of children were put to the committee: the rights of children to be raised by their biological parents where possible, childhood outcome differences in different family structures and the importance of having both male and female role models during a child's formative years.

13 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 39.

14 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

15 Non-Custodial Parents Party (Equal Parenting), *Submission m14*, pp. 1-2.

16 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 36.

Child's right to be brought up by biological parents

4.15 The Australian Family Association (AFA) felt that some supporters of the Bill, in discussing the rights of children of same-sex parents, focussed too much on the rights of children to a stable family environment:

[S]tability is not the only thing that children are entitled to. Prior to being guaranteed stability, we are suggesting children have a basic entitlement to be raised by their own biological mother and father—at least wherever that is possible.¹⁷

4.16 The Catholic Diocese of Sydney agreed with this position and argued that the Bill undermined this right:

To know and experience having a mother and a father is the right of every child and should be secured as far as possible.¹⁸

4.17 The AFA continued by arguing that children have a right to be raised by their biological parents and, where this is not possible, by extended family. Where neither of these is possible, the AFA suggested that:

...children at least have the right to be raised by a mother and father, just like they would if they had had access to their natural parents—as close as possible to the natural situation.¹⁹

4.18 The ACL also emphasised that children have a right to be brought up in the best possible environment:

... I believe you ought to play the tape to the end—there was a time not that long ago when some people thought that providing a child with a warm bed, plenty of food and a safe place to be was all that was necessary for their healthy development. We have learnt, perhaps to our cost, that it is more than that. It is not just food and water and a nice warm bed that makes a home. It is certainly being loved. Certainly—and evidence is increasingly showing this—the presence of a mother and a father in a home is really important to the development of a child.²⁰

Childhood outcomes

4.19 In a similar vein to the ACL's evidence about the rights of children to the best possible upbringing, some submitters gave evidence about the impact of same-sex parenting on children. Following on from the evidence on the importance of being raised by a mother and father, the ACL said:

17 Mr T. Cannon, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 11.

18 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

19 Mr T. Cannon, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 11.

20 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 62.

...the question is what is best for the children. Again, common sense tells us that having a mother and a father in a relationship is key to the success and wellbeing of that child longer term. Better education outcomes, better socioeconomic outcomes and better emotional outcomes have been proven by the research.²¹

4.20 While the ACL recognised that some data relating to child development outcomes was not clear, they did cite some more general research. Referring to a statement by the US Department of Health and Human Services and research by Dr David Popenoe, a professor of sociology emeritus and co-director of the National Marriage Project at Rutgers University,²² the ACL said:

Children do better on a whole range of criteria if they are in a stable relationship with a mother and a father present. The evidence is clear on that. To suggest otherwise is to play with the facts.²³

4.21 Other organisations and individuals who submitted to the inquiry, such as Salt Shakers, a Christian ethics group, cited research supporting the argument that children benefit from being raised by their biological mother and father in a stable family environment. Salt Shakers assert that:

A happily married couple bringing up their biological children means less expense for the state – in the provision of social welfare benefits and policing, for a start.²⁴

4.22 While the committee received evidence from submitters citing a range of research, no clear and definitive research was presented which unequivocally supported the assertion that children raised by same-sex parents suffered any unique or particular adverse developmental disadvantage. However, the committee received compelling evidence relating to the importance of involving both male and female role models in a child's development.

Male and Female role-models for children

4.23 The committee did hear evidence that role models play an important part in a child's development and was therefore sufficient justification for state's involvement in endorsing the marriage relationship.

4.24 The Catholic Diocese of Sydney, and many other submitters, was concerned about how changes to the law might undermine the different influences that men and women have on children:

If you legislate to say that a same-sex couple is equivalent in every way to a heterosexual couple, what you are essentially saying is that fatherhood is an

21 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 58.

22 Australian Christian Lobby, *Submission m71*, p. 6.

23 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 58.

24 Salt Shakers, *Submission m14*, p. 2.

optional extra or motherhood is an optional extra because it does not really matter to an individual child that they have both a father and a mother.²⁵

4.25 While not all submitters felt that role models necessarily needed to take a particular 'parent'-like role, many submitters emphasised the important differences between male and female and the role they play in modelling sexuality and healthy gender identity to children:

Gender differences exist; they are a fundamental reality of our biology and impact our psychology. Our maleness and femaleness is a key aspect to our personhood...²⁶

It is certainly clear from the studies we have seen... that the availability of a male and female role model in a parental situation provides the best possible outcome for children.²⁷

The law as a symbol

4.26 A final aspect of the discussion of the State's involvement in regulating the marriage relationship related to the educative and symbolic role of the law. The Catholic Diocese of Sydney provided a useful summary:

The law sends social messages, and it sends them to the community writ large. It does not send a message to just an individual family there, an isolated individual there; it sends it out to all the community: 'This is what we as a society think family life is now about and marriage is about.'²⁸

4.27 The Catholic Diocese of Sydney went on to note that, by passing this Bill, the State would imply that it is unnecessary and superfluous for children to have both a mother and a father:

It is contrary to everything we intuitively and sociologically know about effective parenting to claim that mothers can father just as well as men and that fathers can mother just as well as women...

It does not follow that, because some parents courageously succeed in the difficult job of raising children without a spouse, marriage is no longer the best place for children to be nurtured and loved. The state has always given marriage special recognition and support above all other sexual and romantic relationships.²⁹

25 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 44.

26 Dads4Kids Fatherhood Foundation, *Submission m44*, p. 3.

27 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 58.

28 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 44.

29 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

I think [passage of the Bill would] send a message to the vast majority of heterosexual couples and families within the community that there is nothing particularly special about motherhood or fatherhood.³⁰

4.28 Cardinal Pell, Catholic Archbishop of Sydney, noted the importance of distinguishing between certain groups within society. The Cardinal submitted that it is essential for the maintenance of the validity of any institution. Citing the example of universities basing access on academic merit, rather than on a simple desire to attend university, he points out that such recognition of difference is critical.³¹ Cardinal Pell also touched on whether or not the law actually had the power to change an institution, but rather served as a symbol or affirmation of a 'pre-political' idea:

The state should not alter and supply different reasons for an institution which it has no authority to change; rather it can only respect the nature of marriage as a natural, human institution and consider the reasons why this institution has deserved – and still deserved – social recognition.³²

Discrimination

4.29 The Explanatory Memorandum to the Bill states that the bill seeks to:

...remove all discrimination from the *Marriage Act 1961* on the basis of sexuality and gender identity, to permit marriage regardless of sex, sexuality and gender identity... to ensure that freedom of sexuality and gender identity are recognised as fundamental human rights, and that acceptance and celebration of diversity are essential components for genuine social justice and equality to exist.³³

4.30 During the inquiry, the committee heard evidence that not all discrimination is bad. That is, while undue and unfair discrimination is clearly undesirable:

...there are prudent reasons why societies discriminate on the basis of good social policy.³⁴

'Discrimination' should not be taken as a synonym for 'unfair treatment' or 'injustice', but should be understood as a valid social concept, as discrimination simply means to 'distinguish' or to 'differentiate'.³⁵

4.31 While most submitters agreed that people are entitled to respect, dignity and the right to participate in society free from hatred and harassment, whether or not limiting marriage to a relationship between one man and one woman is undue discrimination was discussed.

30 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 45.

31 Cardinal George Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 2.

32 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 3.

33 *Explanatory Memorandum*, p. 1.

34 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 38.

35 Australian Christian Lobby, *Submission m71*, p. 10.

In Australian Law

4.32 The AFA began by agreeing that marriage does intentionally discriminate in favour of one kind of relationship:

...but that is partly the point: to deliberately and publicly recognise that out of all human relationships the union of a man and a woman is fundamental to our continued existence.³⁶

4.33 The ACL supported the 2008 legislation to remove discrimination in a whole range of Commonwealth Acts for people in same-sex relationships. When questioned about the reason the ACL was not supportive of extending those reforms to the *Marriage Act 1961*, the ACL responded:

You will also be aware that the Australian Christian Lobby did not oppose the introduction of relationship registers in Tasmania and here in Victoria, where I was personally involved. We do not want to see homosexuals treated badly. We do not want to see homosexuals discriminated against in the areas of finance and property. But marriage is not an issue that we would want to see changed.³⁷

4.34 Pointing again to the 2008 legislative reforms, the ACL noted that:

Homosexual couples now have legal rights almost identical to those of heterosexual de facto couples... The question of 'equality' has therefore already been largely answered and homosexuals are treated fairly under Australian law in the same way that heterosexual de facto couples are.³⁸

4.35 This was a view shared by many other submitters, including Family Voice Australia, who noted that every individual man and every individual woman has a right to marry:

So marriage is a defined entity and it has a whole variety of restrictions that give meaning to the notion of marriage. Within that meaning there is no discrimination. Anyone who satisfies [the criteria for marriage set out in the *Marriage Act*] is free to marry without discrimination.³⁹

4.36 Cardinal Pell appeared to agree with this approach and, after noting that positive differentiation is important, submitted that:

It is not unjust discrimination against homosexual couples to uphold marriage as being between a man and a woman. Marriage and same-sex

36 Mr T. Cannon, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 10.

37 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 60.

38 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 57.

39 Dr David Phillips, National President, FamilyVoice Australia, *Proof Committee Hansard*, p 31.

unions are essentially different realities. Justice, in fact, requires society to recognise and respect this difference.⁴⁰

Internationally

4.37 Whether or not Australia is in breach of any international laws also made up a significant part of the committee's investigation. Those in opposition to the Bill generally did not feel that the *Marriage Act 1961* was discriminatory under international law.

4.38 At the Committee's supplementary estimates hearings, when asked about whether Australia is in breach of its international obligations, the Hon. Catherine Branson QC, President and Human Rights Commissioner, indicated that it was unclear whether either passage or non-passage of the Bill would place Australia in breach of the law:

This is an area where international jurisprudence is still developing. I do not think it can be firmly said one way or another at the moment whether there is an international obligation to allow same-sex marriage. But as increasing numbers of jurisdictions do so, it may be that international law is moving.⁴¹

4.39 The ACL questioned exactly what 'right' the Bill was seeking to effectuate and highlighted that the Bill's supporting documentation indicated that the amendments were designed to recognise 'freedom of sexuality' as a fundamental human right:

It is not at all apparent where such a 'right' originates, as it is nowhere established in foundational international human rights instruments... As well as being seriously flawed in law, recognising freedom of sexuality as a fundamental human right is a potentially dangerous objective of this Bill.⁴²

Religious/Christian Grounds

4.40 More than 2,500 individuals who submitted to the inquiry cited religious and moral reasons for their opposition to the Bill. While not all religious submitters were opposed to the Bill, and not all opposition came from religious organisations or individuals, some organisations did cite religious grounds for their opposition to the Bill.

4.41 The Presbyterian Church of Australia noted that:

God, Himself, purposed that “a man should leave his father and mother and be joined to his wife, and the two shall become one flesh” [Genesis 2 v24]... Male and female [“man” as Created] have equality of status before God; complementarity of role/responsibility towards each other, and; a

40 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 2.

41 Legal and Constitutional Legislation Committee, Supplementary Budget Estimates, *Proof Committee Hansard*, 19 October 2009, pp. 14-15.

42 Australian Christian Lobby, *Submission m71*, p. 11.

unique, natural ability both to reproduce, biologically, and nurture children in a way for which they were designed.⁴³

4.42 Cardinal Pell also highlighted the Catholic belief in marriage in his submission to the inquiry:

Catholics hold strong beliefs about the dignity of the human person and the goodness and beauty of marriage as a natural institution between a man and a woman.⁴⁴

4.43 The Sydney Anglican Church was careful to emphasise more than just a biblical basis for its opposition:

The churches' deep interest in marriage should not be regarded as a case of religious special pleading. Christians do read the Bible as the authoritative interpreter of marriage: for example, biblical authors ultimately rejected polygamy, loveless male dominance, and sexless marriage, since all these reinventions fall well short of what is best for humanity. But these insights have persuaded others and... contributed to the good of society, and should not be sidelined simply because it is 'religious'.⁴⁵

4.44 Rev Nathan Nettleton, a Baptist pastor from Victoria and a supporter of the Bill, noted the importance of considering the doctrines of religious freedom and the separation of church and state:

These beliefs, for which some of my Baptist forebears endured violent persecution, teach us... that it is a Christian duty to defend the right of others to follow their own conscience before God...

It is of course these same doctrines that underpin the church's right to pursue their own distinctive beliefs and practices even if the state provides for things that they disagree with.⁴⁶

Conclusion

4.45 The committee heard a range of compelling evidence from those in opposition to the Bill. Submitters focussed on the origins of the word 'marriage' and the development of what has come to be a technical and common law definition. They argued in favour of preserving the narrower and common definition on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children:

Our commitment is to defend the value of marriage for the society at large. We think it is good for the society—for everybody. We acknowledge that some people within society do not choose to get married. Some choose to have relationships outside of marriage. But we think there is an enormous

43 Presbyterian Church of Australia, *Submission m22*, p. 2.

44 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 1.

45 Anglican Church Diocese of Sydney, *Submission m76*, p. 2.

46 Rev Nathan Nettleton, *Proof Committee Hansard*, p. 55.

value for the society in privileging marriage as a heterosexual union for all the reasons that we have put forward.⁴⁷

47 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 45.

CHAPTER 5

Discussion and Conclusion

5.1 This chapter discusses two issues raised through the inquiry: possible steps to more consistently recognise same sex relationships nationally, and the Government's policy of declining to issue certificates of non-impediment to same sex couples attempting to marry overseas. It concludes with the committee's recommendation in relation to the Bill.

Consistency of recognition for same sex relationships

5.2 One issue which was raised with the committee, particularly by proponents of the Bill, was the inconsistency in recognition of relationships between jurisdictions within Australia. This inconsistency extended not only to the official status of relationships, but also to the benefits which attached to them, such as a means of accessing relationship entitlements and of proving the existence of a relationship if challenged.

5.3 The committee sees merit in developing and implementing a nationally consistent framework so that same sex couples who so desire can expect their relationship to be recognised on an equal footing to other couples in different jurisdictions. To the maximum extent possible, recognised relationships between jurisdictions should enjoy not only the same official status, but also identical practical benefits and entitlements. Such a reform should synthesise and harmonise with the Government's 2008 amendment of 84 pieces of legislation to remove discrimination against same sex couples.

Recommendation 1

5.4 The committee recommends that the Government review (by reference to the Australian Law Reform Commission, or some other appropriate mechanism) relationship recognition arrangements with the aim of developing a nationally consistent framework to provide official recognition for same sex couples and equal rights under federal and state laws.

Certificates of Non-Impediment to Marriage

5.5 As discussed in chapter 3, Government policy apparently favours declining to issue a certificate of non-impediment (CNI) to same-sex couples seeking to marry overseas.¹

5.6 The Smartraveller website, administered by the Department of Foreign Affairs and Trade (the Department), in respect of marrying overseas, states that:

Certificates of No Impediment to Marriage are issued by the Department of Foreign Affairs and Trade through overseas missions and state and territory offices to Australian citizens seeking to marry overseas. Certificates of No

1 See, for example, evidence from Australian Marriage Equality, *submission m90*, p. 51.

Impediment to Marriage are not a requirement of Australian law. They are issued purely at the request of overseas countries seeking to ensure that a marriage involving one or two Australian citizens, celebrated in that overseas country, will also be recognised as a valid marriage by Australian authorities.²

5.7 However, Australian Marriage Equality submits that:

...our understanding is that CNIs are issued to establish that there is no impediment to an Australian marrying overseas, not to establish there is no impediment to the recognition in Australia of the marriage they intend entering. This is confirmed by the documentation publicly available. For example, the application form for an Australian CNI asks the applicant to confirm they are not already married to another person in Australia. It does not ask if they seek to enter a same-sex marriage. It asks if they are already in 'a prohibited relationship'. But this cannot be construed to include a same-sex marriage because (a) they are not yet in a married relationship, and (b) same-sex marriages are not prohibited in Australia, simply not recognised. Our understanding of the role of CNIs is also supported by the international experience. Other governments request CNIs from Australia to ascertain whether there are impediments to them solemnising marriages involving Australian citizens. Chief amongst such impediments are whether the Australian citizens in question are already married in Australia and are of marriageable age.³

5.8 Notwithstanding the Department's injunctions to the contrary, it remains far from settled for the committee that the usual purpose of a CNI is to establish recognition of an impending marriage in a person's home country. Indeed, it seems to the committee that a CNI is most likely to be used by a foreign country to establish that two people are not currently married to other people, are of marriageable age, and are not closely related. Furthermore, the committee can see no necessary connection between the issuance of a CNI and an implied undertaking by the Australian Government to recognise a marriage conducted overseas.

5.9 Put simply, absent circumstances such as those listed above, a decision by a sovereign nation to allow marriage between a couple of the same sex should be a matter for that nation, and not a matter against which Australia should throw up bureaucratic barriers.

Recommendation 2

5.10 The committee recommends that the Department of Foreign Affairs and Trade issue Certificates of Non-Impediment to couples of the same sex on the same basis as they are issued for couples of different sexes.

2 See: www.smartraveller.gov.au/marriage_os.html (accessed 26 November 2009)

3 Australian Marriage Equality, *submission m90*, p. 51.

Conclusion

5.11 The committee has been overwhelmed with public enquiries and submissions to this inquiry. The changes canvassed by the Bill are highly emotive, and extremely controversial. Both those in favour of the Bill and those who oppose it have argued their positions passionately and compellingly.

5.12 The committee has much sympathy with the views put by those in support of the Bill, and in particular the importance of supporting same sex attracted people, who have suffered considerable inequality over many years, to prosper on an equal footing with heterosexual Australians. The committee hopes that its recommendation to review relationship recognition arrangements, and implement a nationally consistent framework for relationships, will promote this outcome.

5.13 Furthermore, the committee considers the current policy in relation to Certificates of Non-Impediment to Marriage to be inappropriate in all the circumstances, and to warrant reversal. All other things being equal, same sex couples proposing to legally marry overseas should not face administrative hurdles imposed by Australia.

5.14 While the committee agrees that the current definition of ‘marriage’ in the *Marriage Act 1961* is appropriate, other types of relationships play an important part in Australian society and deserve recognition. For this reason, the committee’s recommendation not to alter the definition of marriage should not be taken as a lack of support for same-sex couples. However, the committee considers that the current definition is a clear and well-recognised legal term which should be preserved. The committee recommends that the Bill not be passed.

Recommendation 3

5.15 The committee recommends that the Bill not be passed.

Senator Trish Crossin

Chair

DISSENTING REPORT BY SENATOR BARNETT

1.1 I agree with recommendation 3 of the majority report, that the Bill not be passed. I also consider that Chapter 4 of the majority report provides a fair assessment of the benefits of maintaining the definition of marriage as currently contained within the Marriage Act.

1.2 However, I do not agree with recommendations 1 and 2, which, in my view, give succour to those groups within the community that seek to erode and re-define the institution of marriage. I also disassociate myself from the bulk of the discussion in Chapter 5, entitled 'Discussion and Conclusion' which supports recommendations 1 and 2.

1.3 Given the general tone of Chapter 5, which is clearly sympathetic to those who seek to allow same-sex marriage or a form of formal recognition of such relationships by the State that mimics marriage and thus undermines it by stealth, I am somewhat surprised at the inclusion of recommendation 3.

1.4 Recommendation 3 is supported in the conclusions chapter by a single sentence which reads that 'the committee considers that the current definition is a clear and well-recognised legal term which should be preserved'. In relying on this argument as the sole reason for not supporting the bill, the majority have ignored the bulk of the strong arguments put by the very large number of submitters and witnesses at the public hearing. In putting up such a half-hearted argument, the majority are essentially setting it up to be dismissed, thus leaving the way open to same-sex marriage in the future.

1.5 In so doing, the majority have chosen to ignore the very persuasive evidence presented that the only credible reason for the State to formally recognise what is essentially a private relationship between two individuals by privileging marriage is because marriage between a man and a woman has particular benefits to society that warrant recognition and protection. As adequately explained in the evidence, for example in the submission of the Catholic Archdiocese of Sydney, but also by a broad range of other submitters:

It is a union that is publicly recognised and treated as special, distinguished from other types of relationships because of its unique capacity to generate children and to meet children's deepest needs for the love and attachment of both their father and mother.¹

1.6 The majority have also apparently chosen to ignore the evidence put to the committee that the best outcomes for children are where there is a positive male and female role model guiding their development towards adulthood. As was put to the

1 Mr Christopher Meney, Catholic Archdiocese of Sydney, Proof Committee Hansard, 9 November 2009, p. 39.

committee in literally thousands of submissions, children need a Mum and a Dad. Every child should have a reasonable expectation, all things being equal, of a mother and a father.

1.7 Proponents of same-sex marriage have sought to underplay the importance of male and female role models in the upbringing of children, and to discount the importance of children in any consideration of whether same-sex marriage should be sanctioned. They have sought instead to argue that marriage is primarily about two people's commitment to each other, and ignore children's rights. While I recognise that commitment is essential in a marriage relationship, the raising of children in the best possible environment can never be taken out of the equation. Accordingly, I find myself in broad agreement with the view strongly put by the Australian Christian Lobby, which was that:

Reducing marriage to a simple contract of consent and love between two people is a revisionist approach that has neither context nor legitimacy. It is a selfish, adult-centred approach that rejects the broader cultural significance of marriage and its centrality to children and society. It discards the significance of marriage as an important social good held by a shared community as a public commitment to family and the raising of children.²

1.8 The majority report also apparently ignores the strongly put arguments that children have a right to know who their biological parents are, and to be raised by them, or by extended family. Roots are important, as the recent lessons of the 'Stolen Generations' and 'Forgotten Generations' have reminded us with painful clarity.

1.9 The importance of the law as a symbol, and the messages that changes to this law would send to society at large were also ignored by the majority report. By reducing marriage's significance to that of little more than a generic, non-gender specific relationship register, as this Bill would do if supported, would send a clear message that there is nothing special about the unique roles of motherhood and fatherhood, or families built round these concepts. This would further undermine a long-standing institution that is already being undermined by family breakdown and apathy. The consequences of this undermining are clear in the outcomes for the many of the casualties of this process, both adults and children: educational failure, poverty, serious personal debt, crime and welfare dependency.

1.10 There is a clear public good associated with the marriage status-quo. I am of the view that this public good should be recognised and strongly supported, and governments should do much more to uphold and sustain it, for example through education programs and counselling for people seeking to marry, and those already married, designed to help them build and maintain their relationships.

2 Australian Christian Lobby, *Submission m71*, p. 8.

1.11 However, it is clear that there are significant elements within governments and political parties who seek to advance the cause of same-sex marriage, thereby undermining the meaning of the institution. For example, in November 2009, the ALP Victoria's state conference passed a motion calling on the Rudd Government to amend the 'Marriage Act to allow for equal access to marriage', ie. in support of same-sex marriage, and called on the 'Commonwealth Government not to override the ACT' same-sex civil partnership ceremonies.³ The Tasmanian ALP Conference passed a similar motion in favour of same-sex marriage in July 2009. Finally, the Federal ALP's policy, while stating Labor's commitment to maintaining the definition of marriage as currently set out in the Marriage Act, is that:

Labor will take action to ensure the development of a nationally consistent framework that provides...the opportunity for all couples who have a mutual commitment to a shared life to have their relationship officially recognised.⁴

1.12 This clearly supports the idea of officially recognising same-sex unions, which is a further step towards same-sex marriage.

1.13 I now turn briefly to the issue that is apparently driving this Bill – the allegation that same sex couples suffer unjustified discrimination under the Marriage Act, as enacted. This issue is well covered in Chapter 4 of the majority report, but it is worth reaffirming a number of key points raised in evidence about this issue.

...there are prudent reasons why societies discriminate on the basis of good social policy.⁵

...

'Discrimination' should not be taken as a synonym for 'unfair treatment' or 'injustice', but should be understood as a valid social concept, as discrimination simply means to 'distinguish' or to 'differentiate'.⁶

...

Homosexual couples now have legal rights almost identical to those of heterosexual de facto couples... The question of 'equality' has therefore already been largely answered and homosexuals are treated fairly under Australian law in the same way that heterosexual de facto couples are.⁷

...

3 Australian Coalition for Equality Media Release, 21 November 2009.

4 ALP National Platform and Constitution, Paragraph 140, accessed at http://www.alp.org.au/platform/chapter_07.php#7removing_discrimination_against_same_sex_couples, as accessed on 25 November 2009.

5 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 38.

6 Australian Christian Lobby, *Submission m71*, p. 10.

7 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 57.

It is not unjust discrimination against homosexual couples to uphold marriage as being between a man and a woman. Marriage and same-sex unions are essentially different realities. Justice, in fact, requires society to recognise and respect this difference.⁸

1.14 As was the subject of numerous exchanges during the committee's public hearing, the law already fairly and rightly discriminates on the basis of age, polygamy and family relationship.

1.15 Therefore I do not agree that same-sex couples suffer unjustified discrimination under the Marriage Act as enacted, and consider that this argument is essentially invalid, particularly noting legislation passed in the Australian Parliament in 2008 to remove discrimination. For this and other reasons I particularly reject the need for a further review to remove discrimination as proposed by Recommendation 1 in the majority report. I also do not support the element of Recommendation 1 which calls for further relationship recognition, which can only be seen as an incremental step to equate same-sex partnerships with marriage.

1.16 I also do not support Recommendation 2 regarding certificates of non-impediment on the basis that it is inconsistent with Recommendation 3 to reject the Bill. If the definition of marriage as currently stated in the Marriage Act is maintained as the applicable law, the proposal to allow the Department of Foreign Affairs and Trade to issue certificates of non-impediment lacks integrity and would facilitate further challenge to the current law in Australia, despite Recommendation 3.

1.17 For these reasons I submit that Recommendations 1 and 2 should not be supported and the Bill rejected resoundingly. This sentiment was well summed up in a submission to the committee as follows:

...the state cannot grant the legal status of marriage to same-sex unions without failing in its duty to promote and defend marriage as an institution essential to the public good.⁹

Recommendation 1

1.18 That the Bill be rejected.

Senator Guy Barnett
Deputy Chair

8 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 2.

9 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

DISSENTING REPORT BY AUSTRALIAN GREENS

Introduction

1.1 The aim of the Marriage Equality Amendment Bill 2009 (to be referred to as 'the bill' from here on after) is to remove all discrimination from the Marriage Act 1961 on the basis of sexuality and gender identity, and to permit marriage regardless of sex, sexuality and gender identity.

1.2 On the recommendation of the Selection of Bills Committee, the bill was referred to the Legal and Constitutional Affairs Committee for further examination into the need to expand the current definition of marriage, as defined within the Marriage Act.

1.3 The sheer number of submissions received by the committee, in excess of 25 000, the most ever received by a Senate Committee, highlighted the need for acceptance and the celebration of sexual orientation and gender diversity, as an essential component for genuine social justice and equality.

1.4 This bill is about removing discrimination. It is not a religious issue, nor should it be viewed or debated as one.

1.5 In a recent survey, commissioned by the Australian Marriage Equality, three in five Australians identified support for the right of same-sex couples to marry, with 60 per cent arguing that Australian law should recognise same-sex marriages that are legal in other countries.¹

1.6 The question of marriage is one between two people who love one another, and it should not be left to the Government of the day to determine whether or not a relationship is 'worthy' of a legally binding commitment.

1.7 The Greens believe that discrimination such as that espoused by the current Marriage Act 1961 must be overturned to ensure that freedom of sexuality and gender identity are recognised as fundamental human rights, and that acceptance and celebration of diversity are essential components for genuine social justice and equality to exist.

1 Same-Sex Marriage Report – June 2009
<http://www.australianmarriageequality.com/Galaxy200906.pdf>

Need for the Bill

1.8 While in the past year there have been some historic leaps forward in terms of removing discrimination against same-sex couples in Australian law, there remains one glaring omission from those advances – marriage.

1.9 In June 2009 the Greens introduced the Marriage Equality Amendment Bill 2009 as a private member's bill to legislate for marriage rights for same-sex couples," to recognise that freedom of sexuality and gender identity are fundamental human rights..."²

1.10 In fact, under Article 26 of the International Covenant on Civil and Political Rights (to which Australia is a signatory) "all persons are to be considered equal before the law and entitled without any discrimination to the equal protection of the law."

1.11 This bill recognises the increasing support for same-sex marriage in Australia, with opinion polls over the years showing a steady rise in support for marriage equality.

1.12 In evidence provided to the Committee, Dr Gerber from the Castan Centre for Human Rights and Law stated "we know from the experience of other countries that the sky does not fall in when same-sex couples are allowed to marry. We only have to look at Spain. It legalised same-sex marriage in 2005. Since then, the average number of same-sex couples entering into the institution of marriage is less than two per cent. So 98 per cent of marriages are still heterosexual couples. Same-sex couples are only ever going to constitute a very small minority of marriages, but, in a democratic country that respects human rights, the majority cannot be allowed to trample on the rights of the minority. All people should be able to enter into the institution of marriage regardless of their sexual orientation."³

1.13 The Public Interest Law Clearing House, in their submission to the Inquiry, included cases studies of why the legalisation of same-sex marriage is important. M. Kerr, 35, from Melbourne said "Without the possibility of indicating, in equal measure with our friends, our commitment to each other, we continue to feel that our government and country fails to recognise or accord the same level of respect for ourselves as individuals and our relationship as that accorded our family and friends."⁴

2 Senator Sarah Hanson-Young, Second Reading Speech, Marriage Equality Amendment Bill 2009, *Senate Hansard*, 24 June 2009.

3 *Committee Hansard*, 9 November 2009, p. 2.

4 PILCH
http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/submissions/sublist1/Sub_m61.pdf

1.14 Under our international and domestic human rights law, Australia is obligated to respect, protect and fulfil the rights to non-discrimination on the grounds of sexual orientation and gender identity. Preventing a group of people from entering into a legally binding union, just because they may be in the minority, is discrimination, and it should be viewed as such.

1.15 We know that not all same-sex couples wish to marry, but this truth is also of heterosexual couples. The difference is, heterosexual couples actually have the opportunity to choose whether or not they wish to marry, this choice is not extended to same-sex couples, and this needs to change.

1.16 Forward-thinking countries including Canada, the Netherlands, Sweden, Belgium, Norway, Spain, South Africa, and many states in the United States have already legislated for same-sex marriage. Australia needs to catch up with this global movement by ensuring that marriage is available to all – regardless of one's sexuality.

1.17 While in the past year there have been some historic leaps forward in terms of removing discrimination against same-sex couples in Australian law, the fact that successive governments continue to deny the right of same-sex attracted people from entering into marriage, shows we still have a way to go before true equality is realised.

1.18 As I said in my second reading speech, "it is outrageous to think that someone who was legally married in Canada can step off the plane at Sydney International Airport and no longer be considered married under Australian law."

1.19 This was highlighted during the committee hearings in Melbourne, whereby one of the witnesses told of the absurdity of being able to marry legally overseas, only to find upon return to Australia that the marriage was no longer legal.

1.20 Mr J Tuazon-McCheyne told the Committee "We have been together for over 11 years. We met in 1998 and married non-legally here in Melbourne in 2000 in front of 90 of our family and friends, and then we were legally married in Toronto, Canada, in 2004. Shortly afterwards, in 2006, we had a son, through a surrogacy arrangement in California, who is almost four now. We also registered our relationship in December last year here in Victoria. We are still not sure what all of that means, but we are kind of hoping that we are getting to closer to feeling like we are married at the end of all of that. The reasons for us marrying are the same as anybody else. We wanted to provide a stable environment for our son in particular. Most people nowadays do get married before they have kids, even though they have bought houses and have lived together for a long time."⁵

Marriage and religion

1.21 It should be noted that while there is some opposition within the ranks of various religious organisations when it comes to same-sex marriage, many Christians,

5 *Committee Hansard*, 9 November 2009, p. 21.

some in same-sex relationships, some not, who respect the human rights of all Australians, see marriage equality as being fundamental to the Christian philosophy of human rights.

1.22 In fact the Committee received many submissions from individuals who identified themselves as Christian.

1.23 Rev. Nettleton, an ordained minister of the Baptist Church of Victoria told the committee, "Marriage equality is often portrayed as an agenda of those who oppose the Christian faith and who despise heterosexual marriage, so I am grateful for the opportunity to appear before you today as a married heterosexual evangelical Christian pastor and theologian who supports the legislative amendment to allow same-sex couples the right to formalise their commitments in the legally recognised covenant of marriage."⁶

1.24 It is clear that while there are diverse views within the community, when it comes to the issue of same-sex rights, pitting non-religious individuals against religious individuals is clearly no longer a valid argument.

1.25 This is not a religious issue. This is not a gay issue. This is a human rights issue and it is time for the Federal Government to take a stand, and show leadership, on what clearly has community support.

Conclusion

1.26 The Marriage Equality Amendment Bill 2009 is an important step in the fight for equality for same-sex couples. We have seen some great reforms implemented over past year that removed much of the discrimination that same-sex couples were faced with. It is now time for the Government to start sending the message that all Australians are to be treated fairly and equally, regardless of their sexual orientation.

1.27 The community are streets ahead of the legislature in recognising the rights of same-sex couples to marry, and it is time for the major parties to listen to the voters of Australia, and finally extend the legal right to marry to all.

Recommendations

Recommendation 1

1.28 The Greens recommend that the Marriage Equality Amendment Bill 2009 be debated and passed into law.

Recommendation 2

1.29 The Greens further recommend that both major parties allow their members a conscious vote on this matter.

Recommendation 3

1.30 The Greens fully endorse recommendation No.2 of the Committee's report "that the Department of Foreign Affairs and Trade issue Certificates of Non-Impediment to couples of the same-sex on the same basis as they are issues for couples of different sexes."

**Senator Sarah Hanson-Young
Greens' Spokesperson on LGBTI**

APPENDIX 1

SUBMISSIONS RECEIVED

A record number of submissions were received by the committee, and it was not physically possible to publish them all because of resource limitations. A broad selection of submissions were made available on the committee's webpage. The submissions listed in this appendix were those which were published on the webpage. However, it should be noted that this represents only a limited selection of the approximately 28,000 submissions received.

Submissions received from organisations and individuals representing organisations

Submission Number	Submitter
m1	Metropolitan Community Church Brisbane
m2	Parents and Friends of Lesbians and Gays (PFLAG)
m3	Freedom Centre (PDF 27KB)
m4	ACON (the AIDS Council of NSW)
m5	Coming Out Proud State Steering Committee
m6	Sydney Centre for International Law
m7	*this number has been intentionally left blank
m8	FamilyVoice Australia
m9	*this number has been intentionally left blank
m11	The Office of the Anti-Discrimination Commissioner Tasmania
m12	Presbyterian Church of Australia
m13	*this number has been intentionally left blank
m14	Non-Custodial Parents Party (Equal Parenting)
m15	Amnesty International
m16	*this number has been intentionally left blank
m17	Presbyterian Church of Victoria
m18	Lutheran Church of Australia Commission on Social & Bioethical Questions
m19	Good Shepherd Lutheran Church Para Vista Inc
m20	Australian Family Association (WA)
m21	The Presbyterian Church of Australia, QLD
m22	Quakers in the Religious Society of Friends, Canberra
m23	Presbyterian Church of South Australia

m24	Public Interest Advocacy Centre (PIAC)
m25	Hawkesbury Nepean Community Legal Centre Inc
m26	George Cardinal Pell, Catholic Archbishop of Sydney
m27	Catholic Women's League of Victoria & Wagga Wagga Inc. Social Questions Committee
m28	Australian Institute of Family Counselling
m29	The Australian Democrats
m30	Seventh-day Adventist Church
m31	Sydney Gay & Lesbian Choir
m32	Freedom to Marry
m33	Human Rights Law Resource Centre (HRLRC)
m34	Law Institute of Victoria
m35	GenR8 Schools Ministries
m36	The Caer-Awen Discretionary Trust & Fagmedia.com
m37	The Family Council of Victoria
m38	National Civic Council
m39	Case Management, The Gender Centre
m40	Salt Shakers
m41	Organisation Intersex International Australia
m42	*this number has been intentionally left blank
m43	Liberty Victoria
m44	Dads4Kids Fatherhood Foundation
m45	NSW Gay and Lesbian Rights Lobby
m46	Australian Catholic Bishops Conference
m47	Knights of the Southern Cross Victoria
m48	NSW Council of Churches
m49	Gilbert & Tobin Centre of Public Law
m50	Victorian Women's Trust
m51	Baptist Union of NSW
m52	Victorian Women Lawyers
m53	Law Council of Australia
m54	TransGender Victoria
m55	Inner City Legal Centre

m56	Creek Rd Presbyterian Church
m57	*this number has been intentionally left blank
m58	Queer Officer of the Sydney University Law Society
m59	Federation of Community Legal Centres Victoria
m60	Children's Rights Council of Australia
m61	Public Interest Law Clearing House (Vic) Inc
m62	Family Challenge
m63	CONFIDENTIAL
m64	National Association of Catholic Families
m65	National LGBT Health Alliance
m66	Democratic Labor Party Vic Branch
m67	New South Wales Council for Civil Liberties
m68	Family Council of Queensland
m69	Victorian Gay and Lesbian Rights Lobby & The {also} Foundation
m70	Australian Family Association
m71	Australian Christian Lobby
m72	The Australian Gay & Lesbian Christian Network
m73	LGBTI Network for the National Association of Community Legal Centres
m74	Australian Family Association (SA)
m75	Sydney University Postgraduate Representative Association (SUPRA)
m76	Anglican Church Diocese of Sydney
m77	Catholic Archdiocese of Melbourne
m78	Family Life International Australia Ltd
m79	*this number has been intentionally left blank
m80	Australian Family Association ACT
m81	Christian Democratic Party
m82	*this number has been intentionally left blank
m83	International Gay and Lesbian Association (ILGA)
m84	Tasmanian Gay and Lesbian Rights Group
m85	TasUnity
m86	ACT Human Rights and Discrimination Commissioner

m87	Castan Centre for Human Rights Law
m88	Australian Coalition for Equality
m89	Australian Human Rights Commission
m90	Australian Marriage Equality

Submissions supporting the bill from individuals via the Senate online submissions program

Submission Number	Submitter
if1	Wendy Brown
if2	Name Withheld
if3	Confidential
if4	Lauren Quaintance
if5	Michael Kennard
if6	Cathy Josling
if7	Joseph Phipps
if8	Name Withheld
if9	Pj Dwyer
if10	Henry Collier
if11	Confidential
if12	Robyn Whittaker
if13	Steven Kennedy
if14	Danielle Finlay
if15	Katherine Monaghan
if16	Name Withheld
if17	Jonathan James
if18	Name Withheld
if19	Confidential
if20	Name Withheld
if21	Name Withheld
if22	Peter Williams
if23	Bronte O'Brien
if24	Robyn Thomas
if25	James Fiander

if26	David Cox
if27	Ashleigh Rees
if28	Craig Amundsen
if29	Chris Membrey
if30	Name Withheld
if31	Adam Todd
if32	Elizabeth Merrilees
if33	Olivia Boyd
if34	Katherine Brandon
if35	Kristen Hornby
if36	Leanne Rootsey
if37	Jyonah Jericho
if38	Tane Dragwidge
if39	Name Withheld
if40	Gary Whitney
if41	Name Withheld
if42	Name Withheld
if43	Stephen Cahill
if44	Matt Jacques
if45	Alexia Lishmund
if46	Mary Burke
if47	Nadine Burton
if48	Ali Thompson
if49	Priya Subramaniam
if50	Scott Sims
if51	Name Withheld
if52	Michael Burge
if53	Confidential
if54	Richard Williams
if55	Craig Whiting
if56	Natasha Norton
if57	Caroline Kades
if58	Name Withheld

if59	Philip Kirk
if60	David Goh
if61	Geoffrey Pfitzner
if62	Wayne Bennett
if63	Amparo Landman
if64	Carly Reilly
if65	Angela Elson
if66	Brett Lambden
if67	Name Withheld
if68	Matthew Anderson
if69	Fiona Mackenzia
if70	David MacFayden
if71	Name Withheld
if72	Name Withheld
if73	Matthew Harris
if74	Peter Nettell
if75	Name Withheld
if76	Dale Garsed
if77	Evan Hancock
if78	Chris Maylea
if79	Name Withheld
if80	Robert Quinn
if81	Name Withheld
if82	Name Withheld
if83	Naomi Brick
if84	Anne Champness
if85	Kirstin Hanks
if86	Brett Smith
if87	Name Withheld
if88	Olivia Dunn Frost
if89	Felix MacNeill
if90	Daniel Maher
if91	Name Withheld

if92	Daniel Osborne
if93	Sarah Officer
if94	Galen-Marcus Marelic
if95	Peter Whitelaw
if96	Adam Butler
if97	Anthony Tortorici
if98	Chantelle Stratford
if99	Name Withheld
if100	Georgia Maw
if101	Katherine Eastaughffe
if102	Chris Gill
if103	Samantha Marriner
if104	Anne Robinson
if105	Name Withheld
if106	Sam Lee
if107	Name Withheld
if108	Josephine Hutton
if109	Name Withheld
if110	John Mikelsons
if111	Anthony Hickey
if112	Name Withheld
if113	Name Withheld
if114	Emily Wilson
if115	Confidential
if116	Name Withheld
if117	Name Withheld
if118	Confidential
if119	Robert McDonald
if120	Eilis Hughes
if121	Confidential
if122	Peter Whitfeld
if123	Name Withheld
if124	Morgan Carpenter

if125	Scott Fitzpatrick
if126	Maria Vnuk
if127	Stephen Hatch
if128	Name Withheld
if129	Michael Boswell
if130	Gaye Oliver
if131	Name Withheld
if132	Simon Crouch
if133	Nicholas Dooland
if134	Kenneth Cooke
if135	Confidential
if136	Michael Newham
if137	Julie Boxsell
if138	Alyena Mohummadally
if139	Name Withheld
if140	Jacqueline Davis
if141	Name Withheld
if142	Ben Ingamells
if143	Ruth Evans
if144	Daniel Lockwood
if145	Glen Rodden
if146	Linda Petrie
if147	Leeann Palm
if148	Justine Dalla Riva
if149	Jonathon Woodgate
if150	Natalie Dabarera
if151	Georgia McMullan
if152	Name Withheld
if153	Rana Ensor
if154	Cameron Anderson
if155	Jim Richardson
if156	Name Withheld
if157	Giovanni Campolo-Arcidiaco

if158	Kim Tien
if159	Confidential
if160	Name Withheld
if161	Dana McMullen
if162	Confidential
if163	Kanatcha Sakdiset
if164	Emily Gilhome
if165	Alexandra Pagliaro
if166	Ian Cameron
if167	Jacqueline Smith
if168	Confidential
if169	Name Withheld
if170	H J McMahan
if171	Daniel Toborek
if172	Christopher Macfarlane
if173	Elysia Herriot
if174	Name Withheld
if175	Timothy Dangerfield
if176	Anthony Cronin
if177	Georgia Heath
if178	Name Withheld
if179	Emma Hart
if180	Name Withheld
if181	David Tidy
if182	Mark Brown
if183	Graeme Moffatt
if184	Confidential
if185	Edward Crossland
if186	Denis Gibson
if187	Jeffrey Appleton

Submissions opposing the bill from individuals via the Senate online submissions program

Submission Number	Submitter
ia1	Michael Dasey
ia2	Orysia (Trisha) Ellis
ia3	Benno Zuiddam
ia4	Mark Thorn
ia5	Ann Solomon
ia6	Les Beresford
ia7	Gordon Yearsley
ia8	Troy Lynch
ia9	Jean-Aim Bernard
ia10	Lou d'Apluget
ia11	Name Withheld
ia12	Name Withheld
ia13	Tania Parkinson
ia14	Renee Sahin
ia15	Confidential
ia16	Judith Bond
ia17	Name Withheld
ia18	Cathryn Williams
ia19	Jamie Bowman
ia20	Ian McGrath
ia21	Michael Treacy
ia22	Name Withheld
ia23	Stephen Hatton
ia24	Name Withheld
ia25	Confidential
ia26	Name Withheld
ia27	Ronald Rapetti
ia28	Name Withheld
ia29	Name Withheld
ia30	Murray Cleff

ia31	Name Withheld
ia32	Neil Robinson
ia33	Confidential
ia34	Name Withheld
ia35	Kim Raymond
ia36	Moyra Kenrick
ia37	Name Withheld
ia38	Glen Kroon
ia39	Name Withheld
ia40	Name Withheld
ia41	Name Withheld
ia42	Simon Ingram
ia43	Stephen Burridge
ia44	Name Withheld
ia45	Catherine Skinner
ia46	Jinu Abraham Johns
ia47	Robert Bishop
ia48	Name Withheld
ia49	Name Withheld
ia50	Sandra Vella Bonavita
ia51	Michael Schultz
ia52	Brian Lucas
ia53	Ian Hore-Lacy
ia54	Chris Shaw
ia55	Les Aldridge
ia56	Robert Day
ia57	Troy Westblade
ia58	Matthew Lawler
ia59	Riaan van der Merwe
ia60	Geoffrey Earl
ia61	Helen Louden
ia62	Patrick O'Neill
ia63	Michael Foulds

ia64	Caleb McKee
ia65	Name Withheld
ia66	Carolyn Allen
ia67	Name Withheld
ia68	Name Withheld
ia69	Tim Young
ia70	Name Withheld
ia71	David Hopkins
ia72	Peter McInnes
ia73	Confidential
ia74	Steve Nicholson
ia75	Peter Owen
ia76	Walter Abetz
ia77	Peter Sharp
ia78	Timothy Mildenhall
ia79	Nathan Scowen
ia80	Jonathan Guyer
ia81	Name Withheld
ia82	Name Withheld
ia83	Peter Kilpatrick
ia84	Name Withheld
ia85	Confidential
ia86	Name Withheld
ia87	Bruce Wilkinson
ia88	Jessica Lubgans
ia89	Name Withheld
ia90	Name Withheld
ia91	Name Withheld
ia92	Graeme Groves
ia93	Name Withheld
ia94	Gordon Killow
ia95	William Pitt
ia96	Maureen Kapitola

ia97	Name Withheld
ia98	Name Withheld
ia99	Steven Nash
ia100	Name Withheld
ia101	Jonathan Waugh
ia102	Stephen Wardell-Johnson
ia103	Confidential
ia104	Craig Austin
ia105	Donna Close-Katahira
ia106	Name Withheld
ia107	Peter Whitney
ia108	Ravi Kancherla
ia109	Richard Chittleborough
ia110	Sean Taylor
ia111	Confidential
ia112	Name Withheld
ia113	Timothy Daniels
ia114	Maryann Wright
ia115	Charles Cheng
ia116	Daniel Millerick
ia117	Name Withheld
ia118	Lachlan Grierson
ia119	Name Withheld
ia120	Name Withheld
ia121	Name Withheld
ia122	Name Withheld
ia123	Michael and Janine Cranney
ia124	Matthew Breeze
ia125	Name Withheld
ia126	Name Withheld
ia127	Name Withheld
ia128	Name Withheld
ia129	Name Withheld

ia130	Name Withheld
ia131	David Piper
ia132	Name Withheld
ia133	Name Withheld
ia134	Gail Musch
ia135	Hope Musch
ia136	Paul Cluff
ia137	Lucas Pardo
ia138	Name Withheld
ia139	Daniel Dahdah
ia140	Bea Wilmot
ia141	Rebecca Gebbing
ia142	David Bosma
ia143	William Thorne
ia144	Kevin Hackenberg
ia145	Name Withheld
ia146	Name Withheld
ia147	Sylvia Griffiths
ia148	Name Withheld
ia149	Ewald Seidel
ia150	David Plath
ia151	Name Withheld
ia152	Name Withheld
ia153	Lynn-Marie Tuivasa
ia154	David Oates
ia155	Stephen Hitchings
ia156	Name Withheld
ia157	Anna Hitchings
ia158	Name Withheld
ia159	Samantha Brown
ia160	Name Withheld
ia161	Howard Savage
ia162	Chris Harwood

ia163	Michael Manson
ia164	Lawrence Dignon
ia165	Kenneth Comber
ia166	Confidential
ia167	Elsbeth Campbell
ia168	Cameron Harwood
ia169	Paul Evans
ia170	Chris Twinn
ia171	Name Withheld
ia172	Bernard Curran
ia173	Barry Collins
ia174	Confidential
ia175	Rita McKinnon
ia176	Name Withheld
ia177	Nicolette Frey
ia178	Hazel Morgan
ia179	Andrew Hawes
ia180	Mary Hawes
ia181	Michael Campbell
ia182	Name Withheld
ia183	Name Withheld
ia184	Name Withheld
ia185	Name Withheld
ia186	Dougal Pottie
ia187	Daniel Rudd
ia188	Name Withheld
ia189	David McKinnon
ia190	Samuel Boland
ia191	Miranda Pade
ia192	Gerald Leicester
ia193	Peter McKinnon
ia194	Alicia Tong
ia195	Name Withheld

ia196	Humphry Faas
ia197	Emily Martin
ia198	Melissa Raymond
ia199	Name Withheld
ia200	Chris Tanna

Submissions supporting the bill from individuals

Submission Number	Submitter
ef1	Miss Rebecca Keevers
ef2	The Hon Ian Hunter
ef3	Ms Clover Moore
ef4	Dr Helen and Mrs Clare Pomery
ef5	Mr Mitchell Stroicz
ef6	Ms Melissa Star
ef7	Ms Jessica Mills
ef8	Ms Leah Brown
ef9	Mr Tom Tanhchareun
ef10	Mr Reece Lavender
ef11	Ms Jemma Bates
ef12	Mr Dave Mildren
ef13	Mr Bradley Phillip Harvey
ef14	Name Withheld
ef15	Mr Paul McNiff
ef16	Mr Stephen Kress
ef17	Mr Jim Woulfe and Mr Andreas Ohm
ef18	Name Withheld
ef19	Ms Trish Kernahan
ef20	Ms Jessica Firouz-Abadi
ef21	Name Withheld
ef22	Mr and Mrs Glenda and George Rendell
ef23	Ms Annette Naylor
ef24	Ms Robyn Tassicker

ef25	Ms Ingrid Saskia Wys
ef26	Rev Ian Pearson
ef27	SD Kennedy
ef28	Mr Christopher McKimm
ef29	Mr Serhat Turut
ef30	Mr Larry Singer
ef31	Mr Haydyn Bromley
ef32	Name Withheld
ef33	Dr Stephen Bates
ef34	Mr Hugh Wilson
ef35	Ms Kathy Wright
ef36	Mr James Cumming
ef37	Name Withheld
ef38	Mr Damian Douglas-Meyer and Mr Graham Douglas-Meyer
ef39	Mr Bozena Lawonski
ef40	Mr Grant Goodwin
ef41	Mr Anthony J. Liddicoat and Mr Timothy Jowan Curnow
ef42	Mr Murray Head
ef43	Mr Mathew Burke
ef44	Rev Nathan Nettleton
ef44a	Rev Nathan Nettleton
ef45	Dr Kerry Phelp
ef46	Ms Jackie Stricker

Submissions opposing the bill from individuals

Submission

Number

Submitter

ea1	Ms Rita Joseph
ea2	Next Generation Search and Rescue
ea3	Rev Peter Abetz
ea4	Mr Greg Donnelly
ea5	Dr David van Gend
ea6	Ms Rachel Tosh

ea7 Rev Clinton Le Page
ea8 Mr David and Mrs Elizabeth Cronin
ea9 Mrs Gail Gifford
ea10 Mr Duane Proud
ea11 Rev John F Swann
ea12 Ms Karolina Fowler
ea13 Dr. Stephen Smith
ea14 Mr Stewart MacFarlane
ea15 Mr Jude Hennessy
ea16 Mrs Marianne Kuilenburg
ea17 Mr John Miller
ea18 Mr Dale Collins
ea19 Mr Jonathon Craddock
ea20 Mr S.T. Hardin
ea21 Mrs Lorraine Shelton
ea22 Mr Peter Findlay
ea23 Ms F. Ferlin
ea24 Mr Gerard S Madden
ea25 Mr Ralph Fairbairn
ea26 Mr Grant Rokobauer
ea27 Mr David Reynolds
ea28 Mr Mike Southon
ea29 Chris Schultink
ea30 Mr Michael Norman O'Brien and Mrs Leanne Kay O'Brien
ea31 Mr Neil Cross
ea32 Ms Julie Kennedy
ea33 Mr Carl Antuar
ea34 Mr Philip R. Boyle
ea35 Mr Roger and Mrs Leslie Palmer
ea36 Mr John Doecke
ea37 Rev Dr J.F. Martins
ea38 Mr Terry and Mrs Joanne Fallowfield
ea39 Ms Linda Lilburne

ea40	Mr Michael E Daniel
ea41	Ms Tasman Walker
ea42	Mr Geoff Roberts-Thomson
ea43	Ms Kathryn Woolley
ea44	Mr Tivoli Vaiotu
ea45	Rev. R.G. Adams
ea46	Mr John Kingsmill

Standard letters and Form letters supporting the bill

Submission

Number	Submitter
ff1	Standard letter received from 1283 individuals
ff2	Standard letter received from 708 individuals
ff3	Standard letter received from 292 individuals
ff4	Standard letter received from 29 individuals
ff5	Variations on a standard letter received from 3031 individuals
ff6	Variations on a standard letter received from 564 individuals:
ff7	Variations on a standard letter received from 524 individuals
ff8	Variations on a standard letter received from 470 individuals

Standard letters and Form letters opposing the bill

Submission

Number	Submitter
fa1	Standard letter received from 8 individuals
fa2	Standard letter received from 5 individuals
fa3	Standard letter received from 10 individuals
fa4	Variations on a standard letter received from 483 individuals
fa5	Variations on a standard letter received from 9016 individuals
fa6	Variations on a standard letter received from 78 individuals
fa7	Submissions opposing the Bill on the basis of religious values, received from 2881 individuals
fa8	Simple statement of opposition to the bill received from 178 individuals

fa9 Submissions opposing the Bill expressing the view that "marriage should be limited to a man and a woman" received from 3076 individuals

ADDITIONAL INFORMATION RECEIVED

1. Australian Bureau of Statistics - Marriage and Divorces, Australia, 2008 - Tabled by Liberty Victoria at public hearing on Monday, 9 November 2009
2. Cohabiting couples 1986-2006, Marriages 2001-2006 and Family Type graph - Tabled by the Castan Centre for Human Rights at public hearing on Monday, 9 November 2009
3. Answers to Questions on Notice - provided by the Australian Christian Lobby (ACL) on Friday 13 November 2009
4. Answers to Questions on Notice - provided by the Catholic Archdiocese of Sydney on Monday 16 November 2009
5. Answers to Questions on Notice - provided by the Castan Centre for Human Rights on Tuesday 17 November 2009
6. Answers to Questions on Notice - provided by FamilyVoice Australia on Wednesday 18 November 2009
7. Answers to Questions on Notice - provided by Australian Marriage Equality on Friday 20 November 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Melbourne, Monday 9 November

CANNON, Mr Timothy, Research Officer
Australian Family Association

CROOME, Mr Rodney, Campaign Coordinator
Australian Marriage Equality

DANE, Ms Sharon, Consultant
Australian Marriage Equality

ELLIOTT, Most Reverend Peter, Auxiliary Bishop, Southern Region
Catholic Archdiocese of Melbourne and Catholic Archdiocese of Sydney

GARDINER, Mr Jamie, Vice-President
Liberty Victoria (Victorian Council for Civil Liberties Inc)

GERBER, Dr Paula, Deputy Director
Castan Centre for Human Rights Law

IRLAM, Mr Corey, Spokesperson
Australian Coalition for Equality

JOSEPH, Miss Mary, Research and Project Officer, Life, Marriage and Family Centre
Catholic Archdiocese of Sydney

MacDONALD, Mr Matthew, Executive Officer, Life, Marriage and Family Office
Catholic Archdiocese of Melbourne

McRAE-McMAHON, Reverend Dorothy Margaret
Private Capacity

MENEY, Mr Christopher, Director, Life, Marriage and Family Centre
Catholic Archdiocese of Sydney

NETTLETON, Reverend Nathan
Private Capacity

O'ROURKE, Ms Anne, Vice-President
Liberty Victoria (Victorian Council for Civil Liberties Inc)

PHILLIPS, Dr David, National President
FamilyVoice Australia

SIFRIS, Dr Adiva, Member

Castan Centre for Human Rights Law and Senior Lecturer, Family Law, Monash University

TUAZON-McCHEYNE, Mr Adrian, Member

Australian Marriage Equality

TUAZON-McCHEYNE, Mr Jason, Member

Australian Marriage Equality

WARD, Mr Robert, Victorian Director

Australian Christian Lobby

WILLIAMS, Mr Benjamin, Research Officer

Australian Christian Lobby