

Committee Secretary,  
Senate Legal and Constitutional Committee,  
PO Box 6100, Parliament House, Canberra A.C.T. 2600.  
Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

From: Kendall Lovett and Mannie De Saxe,  
Lesbian & Gay Solidarity (Melbourne),

## SUBMISSION

To the Senate Inquiry for the  
MARRIAGE EQUALITY AMENDMENT BILL 2010.

### ***Introductory Statement***

In a recent marriage equality case in California, Judge Vaughn R. Walker ruled that “Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians, the state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose.” He also found that domestic partnerships, by their nature, “invidiously discriminate” by relegating gay and lesbian couples to a lower status than marriage.

We intend to show in this short submission how the discriminatory provisions in the amended Commonwealth Marriage Act, passed in the Senate on Friday 13 August 2004, had a knock-on effect against same-sex couples in later Commonwealth legislation. The ruling by the Californian judiciary quoted above pinpoints the very ways in which we see it happening here.

### ***Vindictive laws are bad legislation***

The exclusively heterosexual definition of marriage (Section 5) and Section 88Ea which stipulates that a same-sex marriage contracted in another country is not to be recognised in Australia as a marriage, are both vindictive sections in the amended Commonwealth Marriage Act. It is worth reminding the Standing Committee that the then Attorney-General Philip Ruddock admitted in Parliament that the 2004 amendment bill, which had been sent to Committee for Review and was withdrawn and re-presented, was to specifically thwart the Family Court applications of Jacqueline Tomlins and Sarah Nichols. They were one of two couples who had applied to have their same-sex marriages in another country recognised in law here in Australia. The other same-sex couple was male. The Howard Lib/Nat Government supported by the Latham ALP Opposition passed the bill in a rush on the extended final sitting before the current parliament of the time was prorogued. It was guillotined in the Senate and the following week went to the Governor-General for assent because the Tomlins/Nichols Canadian marriage application was set down for hearing that very week. As Tomlins said in a Melbourne Age interview following the bill’s assent: “*All( this) so they could knock us out before we got to court.*” And then she added: “*Gay marriage is, very simply, an issue of equal rights; it’s about some people having those rights and some people not. Sarah and I want the security that marriage provides for our son.*”

In December 2008 when the government amended a raft of Commonwealth laws that discriminated against same-sex relationships, one of those laws the Social Security Act gave

Australia's most powerful bureaucratic body Centrelink the authority to order same-sex couples to reveal their identity and automatically the identity of their partner because her/his income would affect age pension and disabled health payments. Same-sex couples had been recognised in the law change to be de facto relationships. Unlike the heterosexual de facto relationship who can marry without hindrance provided one or other is not still married to another person, the vindictive discriminatory provisions in the Marriage Act effectively ruled out marriage for same-sex de facto partners. So, apart from being forced out of the closet –an invasion of privacy- and shoved back into an environment that did not accept them in their new same-sex status, they had to be stripped of their current pension rate and forced on to the outmoded interdependency lower *married* rate. After a lifetime of having to hide their relationship and a history of persecution, this was punishment from Centrelink for LGBTI seniors advertised as equality with toothbrushes and hand towels all because the Government in 2004 preferred to be religiously moral rather than secular and fair.

### ***About discrimination***

We aren't saying that marriage between a man and a woman is discriminatory. It's by amending the Marriage Act in 2004 to specifically limit marriage to be between a man and a woman and to refuse legal recognition of a foreign same-sex marriage that is discriminatory on both counts in Australia. Other foreign marriages, in particular those which differ in action by restricting a woman's rights (such as those that had occurred while under age according to another country's religious tradition, and arranged marriages where a woman has no right of refusal) are all acceptable for immigrants who wish to live in Australia regardless of having been contracted outside Australia in countries where there is no emancipation for women.

When same-sex relationships are mentioned in regard to legislation and in particular marriage, the aspect of discrimination quite literally becomes the subject of outright hate in the minds of the fundamentalist religious. They obviously exert the balance of power when it comes to many of the decisions made in a secular commonwealth like Australia that believes in separation of church and state. Why then does Australia allow its religious lobbies to dictate policy on marriage when quite obviously the majority of the population is prepared to accept same-sex relationships as a fact of modern life and the right to the benefits and responsibilities of secular marriage?

It's a sad fact that religious beliefs deny normal secular marriage rights to same-sex partnerships even when there is no intent by the couple to marry within the sacred precincts of any religious faith. Yet these religious bodies benefit from tax concessions at all levels of government. It's a bit like biting the hand that feeds them –the individual income taxpayer. Furthermore, the annual cost of tax concessions to the religious bodies is hidden from the community. Leaving aside genuine charitable activities, there is no accountability by annual turnover required from them by government for their income. The only reason they employ accountants is to make sure they don't accidentally pay any tax and their enterprises remain tax-free. Yet our secular government excuses all these religious institutions from paying taxes like the rest of us and our business communities but changes its secular marriage law to restrict its benefits and responsibilities to the narrow view of a religious minority.

### ***Churches argument against same-sex relationships***

The Catholic bishops argue that the foundation of marriage is the sexual difference between men and women and the "potential for new life." That may be so and not just from the point of view of the bishops. Those same secular Australian governments have supported the 20<sup>th</sup> century introduction of in vitro fertilisation (IVF) which enables couples to reproduce

offspring and those couples could well be of the same-sex. It may also be of interest to the bishops to learn that during the last fifty years gay men have been assisting lesbians to reproduce without necessarily going to bed with them so really the “potential for new life” isn’t the prerogative of religious marriage. Secular marriages do quite well too. It is suggested that this Inquiry check with the Rainbow Families group in Melbourne to find out how well so many same-sex couples as parents are coping with bringing up their many healthy children.

As for “undermining family life and damaging society” and “diminishing protection for traditional marriage” by allowing same-sex couples the same right of different-sex couples to marry is smoke-screen to hide the increasing breakdown of the very marriages the churches perform. And since when has the institution of marriage for the average couple been traditional? Does a century of our current form make it traditional? Who will choose it for her doctorate in psychology?

### ***Drawbacks in de facto relationships***

With former de factos now able to litigate property claims under the Family Law Act, judges and magistrates are accepting as evidence, to prove that a de facto relationship existed, such things as endearments written in Valentine’s Day and birthday cards, racy texts and heartfelt emails. Without the irrefutable proof of a marriage certificate, proving a genuine de facto relationship existed, lawyers “have been given extraordinarily wide discretion” to make the factual decision, according to family law expert Professor Patrick Parkinson in an article on The Age front page, 26 March 2012. In contrast, lawyers say married people are just not subject to the same sort of scrutiny as de factos in property disputes because they can rely on a marriage certificate to prove their relationship existed. They rarely have to divulge in what can be an uncomfortable invasion of privacy of their personal habits or sexual proclivities.

The bishops mentioned earlier who were so concerned about the nurture of children should consider same-sex parents and agree to an all-inclusive secular marriage certificate like that in Mexico. This year, the federal districts lawmakers in Mexico City voted to amend its civil code so that the definition of marriage read: “the free uniting of two people” there-in allowing same-sex couples to marry. The change to the law also granted same-sex couples adoption rights.

### ***Getting in touch with public opinion***

Instead of continuing to listening to religious hierarchy’s opinion for fear of losing votes, the federal Government should check out public opinion through the states and territories because they seem to be in touch with the Australian public’s support for same-sex marriage.

Alex Greenwich this week in the Melbourne Community Voice (28.3.12) writes that according to constitutional expert George Williams the federal parliament’s state Coalition and Labor colleagues are likely to make marriage equality happen if the Commonwealth doesn’t.

Up until 1961 marriage laws were state laws and when the federal Marriage Act came in 1961, marriage became a federal power held concurrently with the states under Section 51 of the Constitution. As such, states can legislate for areas not covered by federal powers (similar to what happens with industrial relations legislation). Because of what happened in 2004, the federal amendment opened the field for states to legislate because the federal Act only deals with ‘man and woman’ marriage and not same-sex marriage.

Greenwich specifically mentions part of the study tour in Australia of US economist, Professor Lee Badgett, who looked at the potential economic impact it would have if one state was to move first on marriage equality. Accordingly, the result would be a boost to the small businesses, which look after the 'wedding' industry, to the tune of \$100 million.

However, what is far more important, would be the profound impact on the mental health outcomes for that state's same-sex attracted people, particularly the youth, who will be sent the powerful message that their relationships are just as valid and valued as their heterosexual counterparts.

Australia should show their dithering same-sex fearful ally, the U.S. of A, which is suffering from too many marriage laws, the fair and honest way to go by adopting the *free uniting of two people in marriage* like Mexico has done.

Signed: Kendall Lovett and Mannie De Saxe,  
Lesbian & Gay Solidarity (Melbourne).