



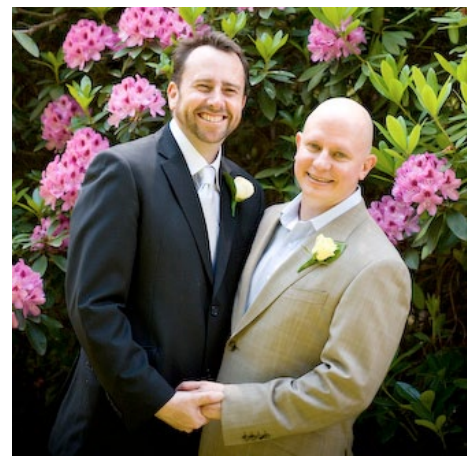
AUSTRALIAN  
MARRIAGE  
EQUALITY

**SUBMISSION TO**

# **The Senate Legal and Constitutional Affairs Committee Inquiry**

**INTO**

# **Marriage Equality Amendment Bill 2010**



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# 1. Introduction

## 1.1 Who are we?

Australian Marriage Equality (AME) is a community-based organisation dedicated to removing those discriminatory provisions of the Australian Marriage Act 1961 (Cth) (hereafter, “the Marriage Act”) which prevent same-sex partners entering legal marriages and which also prohibit the recognition of overseas same-sex marriages. AME’s work includes lobbying of decision-makers, public advocacy and community education. AME is governed by a nationally-representative, membership-elected board. Our funding comes from community fund raising.

For more on AME visit [www.australianmarriageequality.com](http://www.australianmarriageequality.com)

## 1.2 Acknowledgements

AME would like to thank its campaign co-ordinator, Rodney Croome AM, and Executive Officer, John Kloprogge for their co-authorship of this submission. We also thank Mr Jeremy Sear, Dr Sharon Dane and Dr Robert A. Battisti for their contributions.

## 1.3 What is marriage equality?

In a legal sense, marriage equality refers to the removal of legislative provisions which prevent same-sex partners from entering into marriages in Australia or from having their overseas marriages legally recognised in Australia.

More broadly, marriage equality is about treating marriage-like relationships with equal respect and dignity, regardless of the gender of the partners involved.

## 1.4 A note on terminology

In this submission we use the term “marriage equality” to describe the legislative reform necessary to ensure that same-sex couples have the right to marry under the Marriage Act 1961. We do not use the term “gay marriage” because this may suggest that the reform we seek is something special, lesser or different than marriage for different-sex

couples. The term “marriage equality” makes it clear that once reform has occurred the rights, responsibilities and status of marriage will be exactly the same for different and same-sex couples.

When it is necessary for us to distinguish between same-sex and different-sex couples or marriages, we use the term “same-sex” rather than “gay” because some same-sex partners may identify as bisexual or transgender.

Consistent with this terminology, we use the term “same-sex attracted people” to designate the broader group of people who may enter same-sex relationships.

At some points in the submission we use “solemnise” to describe entering into a marriage. We use this term because it is used in the Marriage Act, because it is suggestive of the seriousness and gravity of entering a marriage. We understand that for some people the word may have religious connotations. But clearly, like the word “marriage” itself, “solemnise” also has a legal meaning.

When we use the term “civil union” we refer to all schemes for the formal recognition of same-sex and other personal relationships, other than marriage. In common usage in Australia the term has come to mean a union formalised under a marriage-like civil union scheme (for example, Queensland’s Civil Partnerships Act 2011). But given our belief that no civil union scheme is an adequate substitute for marriage equality no matter what its marriage-like qualities (see section 6.2 for more), we conform with international usage that designates all formalising schemes “civil unions” including relationship and domestic partner registers, and civil partnership schemes.

## **1.5 A note on citing the personal views of others**

Throughout this submission we illustrate the points we make with personal views of ordinary Australians. These stories come from individuals who made submissions to this inquiry and to the 2009 Senate inquiry into the Marriage Equality Amendment Bill 2009. We have sought and received the permission of these individuals to publish their words in our submission. We have not included their names.

# 2. Executive summary and recommendations

## 2.1 Executive summary

### The issue

In a legal sense, marriage equality refers to the removal of legislative provisions which prevent same-sex partners from entering into civil marriages in Australia or from having their overseas marriages legally recognised in Australia. More broadly, marriage equality is about treating marriage-like relationships with equal respect and dignity, regardless of the gender of the partners involved.

### Growing support

The international experience shows that, while marriage equality is a relatively recent reform in other countries, the pace of reform is accelerating and its geographical spread is growing. Opinion polls show a majority of Australians support marriage and that the number is steadily increasing.

In line with increasing popular support for marriage equality, a rapidly increasing number of Australia's private corporations, unions and local governments are recognising the overseas same-sex marriages of their employees. From 2011, the Australian Bureau of Statistics has allowed same-sex partners to record if they were married in the National Census.

### Human rights

Same-sex partners are not equal under the law if they are excluded from the legal rights and responsibilities which flow from and are associated with marriage. In the same vein, the denial of marriage equality is a serious act of legal discrimination against same-sex relationships.

Allowing same-sex partners to marry ensures they enjoy the legal and social recognition and respect associated with the institution of marriage. By the same token, denying same-sex partners the right to marry sends out the message that these partners are not capable of the level of love and commitment that is associated with marriage. It also sends out the message that it is acceptable to exclude an entire group of citizens from important social institutions on the basis of their sexual orientation. The negative messages sent out by discrimination in marriage foster prejudice, discrimination and unequal treatment against same-sex relationships in the wider community.

Courts in other countries have highlighted a range of other rights, apart from equality, which are also breached by discrimination in marriage. These include the right to marry, the personal autonomy or “liberty” to choose one’s own marriage partner, and the right to privately pursue consensual family relationships without state interference. For those people denied the right to marry the person they love, marriage is synonymous with freedom from second-class legal and social status. The association between the equality in marriage and freedom from second-class status is well understood in the context of the struggle for the civil rights of people of colour, including indigenous Australians.

We ask the Committee to consider all the other groups in society, along with people of colour and same-sex attracted people, who at one time or another have been denied the right to marry the partner of their choice. The gradual acceptance that members of these groups are fully adult, fully citizens and fully human, has been accompanied by an acceptance of their right to marry whomever they wished.

## **Practical benefits**

Married partners have immediate access to all relationship rights, entitlements, protections and responsibilities. Another practical benefit of marriage is its portability. Another very obvious and immediate benefit of marriage equality would be the recognition of those same-sex marriages Australians have entered into overseas.

Marriage provides partners, families and the general community with a universal language for love, commitment and relationships. It is also one of the universal legal and social institutions through which we find connection and belonging, not only with our partner, but with our families and communities. Excluding same-sex couples from marriage excludes them from the universal language so fundamental to everyday interaction, and from the sense of belonging and connection to family and community



that marriage offers. Correspondingly, including them results in a large number of real social, cultural and economic benefits.

Marriage equality has a direct impact on mental health outcomes. A growing body of local and international scientific research shows that discrimination in marriage law has a direct adverse impact on the health and wellbeing of same-sex attracted people, especially young people. Peak professional health bodies in Australian and internationally have responded to this research by calling on governments to legislate urgently for marriage equality on public health grounds.

Allowing same-sex couples to marry will admit many couples who seek to uphold the core values of marriage and are enthusiastic for the institution. It will send out the message that marriage is defined by love and respect not prejudice and discrimination.

Marriage discrimination breaches the right of churches to officially solemnise same-sex marriages if that is their wish.

The conservative economic case for marriage equality is that the failure of the state to allow same-sex couples to marry limits financial self-reliance and heightens the risk of welfare dependence of these couples.

Some social conservatives make the case that allowing same-sex couples to marry will inculcate in these couples values like fidelity, commitment, self-discipline, and responsibility.

## **Objections to equality**

A common objection to marriage equality is that marriage is, by definition, a union of a man and a woman. However, the fact that a majority of Australians support same-sex marriage Australia indicates that a more inclusive definition is acceptable in this country.

Another argument is that marriage has remained unchanged since it was first instituted. But marriage has changed significantly under the influence of social and historical factors.

Another common argument against marriage equality is that, regardless of all the above-mentioned changes, marriage has traditionally been an exclusively heterosexual institution, and is exclusively heterosexual in other non-western cultures and/or non-Christian faiths. But we should not continue a discriminatory practice simply because

it was practised in the past and continues to be practised by others. Also, same-sex marriages have been legally recognised in the European tradition and in other cultures and faiths.

Some objections to marriage equality are overtly religious. However, in Australian law, and, before that, the British legal system Australia inherited, there has been a clear distinction between civil and religious marriage for several centuries. It is because of this clear distinction that our law a) allows divorce, even though this is expressly prohibited by Jesus, b) prohibits polygamy, arranged marriages, child betrothal and the subordination of married women, even though these are commonly found in the Old Testament, and c) allows marriage between people of different faiths or no faith. According to the Australian Bureau of Statistics 69.2% of marriages performed in 2010 were performed by a civil celebrant rather than a minister of religion.<sup>1</sup> This compares to 40.3% in 1987.<sup>2</sup>

An argument that derives from the above religious case against marriage equality is that allowing same-sex marriages will impinge on religious freedom; in particular, religious marriage celebrants and civil celebrants with a religious faith will be forced to marry same-sex partners against their beliefs. Australian Marriage Equality supports an exemption for religious marriage celebrants who do not wish to marry same-sex partners, provided it is consistent with current regulations pertaining to a religious minister's right to refuse to marry any particular couple

A very common argument against marriage equality is that marriage is for the bearing and raising of children, and that same-sex partners cannot, themselves, bear children, and/or should not raise them. However, there is no legal requirement for marrying different-sex partners to be able to have children or to intend to have children. The other side of the procreation argument is that an increasing number of same-sex couples are raising children and raising them well. We note that in a 2010 opinion poll on marriage equality that 72% of respondents with children supported same-sex marriage, a result 10% higher than the population as a whole.<sup>3</sup> Clearly, Australian parents do not feel that marriage equality threatens their families or children.

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1 Australian Bureau of Statistics. Marriages and Divorces, Australia, 2010, catalogue no 3310.0. <http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/1B42D16E581BD55FCA2579A3001C3D97?opendocument>

2 Australian Institute of Family Studies, Family Facts & Figures: Category of marriage celebrants. <http://www.aifs.gov.au/institute/info/charts/marriage/celebrants.html>

3 Galaxy Research poll. Same-sex marriage study: October 2010. Commissioned by Australian Marriage Equality and Parents & Friends of Lesbians and Gays (PFLAG). <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/12/Full-Galaxy-Poll-Results-2010.pdf>

In the Australian context the most common objection to marriage equality is that it will diminish and demean marriage. But the overseas experience clearly shows that marriage equality does not diminish the quality or duration of different-sex marriages.

Some opponents of marriage equality argue that it will “open the floodgates”, and/or lead society down a “slippery slope”, to the legitimisation of any number of unacceptable relationships. But the overseas experience shows otherwise.

To make the point that same-sex couples are incapable of the levels of commitment associated with marriage, opponents of marriage equality often cite studies purportedly showing same-sex relationships are shorter, less happy, stable and committed than different-sex relationships. However, in countries with marriage equality divorce rates among same-sex and different-sex couples are the same.

Some opponents of marriage equality argue that we should not redefine marriage for the sake of a sub-class of people within an already-small minority. But, given that 62% of Australians support marriage equality, the argument that a small minority should not define marriage is actually an argument for reform.

Some equality opponents argue that most same-sex couples do not want to marry. But studies in the gay, lesbian, bisexual and transgender community show that there is overwhelming support for the right to marry and that a majority would marry if they could. Many heterosexual couples do not want to marry, but this has never been seen as a reason to prevent marriages between different-sex couples being recognised by the law.

## Alternatives to full equality

There are significant drawbacks to being deemed to be in a legally-entitled relationship rather than nominating oneself for such recognition. This is why a recent Australian same-sex relationships survey showed that 55.4% of respondents who were currently in a same-sex de facto relationship would marry under Australian law if they had the choice.<sup>4</sup>

Some opponents of marriage equality pose civil unions as an alternative which solves the evidentiary problem associated with de facto relationships. However, an increasing body of jurisprudence and social research indicates that civil unions do not provide the

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<sup>4</sup> Dane, Sharon K., Masser, Barbara M., MacDonald, Geoff., & Duck, Julie M. (2010) Not So Private Lives: National findings on the relationships and well-being of same-sex attracted Australians (April 2010). [http://espace.library.uq.edu.au/eserv/UQ:205948/Not\\_So\\_Private\\_Lives\\_Report.pdf](http://espace.library.uq.edu.au/eserv/UQ:205948/Not_So_Private_Lives_Report.pdf)

same legal equality, protection or recognition for same-sex couples as marriage, and that these couples find civil unions much less desirable than marriage.

## Analysis of the three Bills before parliament

There are aspects of the Bill before the Senate, and the two Bills before the House of Representatives, which could be improved. In regard to the Bill before the Senate we suggest changes to the objects of the Bill as well as the inclusion of a provision guaranteeing the right of religious celebrants to refuse to solemnise marriages.

## Other issues

We welcome the Australian Government's new policy of granting Certificates of No-impediment to Marriage (CNIs) to Australians entering same-sex marriages overseas.

In the course of the marriage equality debate questions have arisen about the constitutional powers of the Commonwealth and the States to solemnise same-sex marriages. Our view is that failure to allow same-sex marriage is not due to legal and constitutional constraints, but to a lack of political will.

## 2.2 Recommendations

### Recommendation One

We recommend that section 88EA of the Marriage Act 1961 (Cth) be repealed so that same-sex marriage solemnised overseas shall be recognised in Australia as marriages.

### Recommendation Two

We recommend that section 5(1) of the Marriage Act 1961 (Cth) be amended so that the definition of "marriage" is gender neutral.

### Recommendation Three

We recommend that the Senate pass legislation that has

- a. a more inclusive set of objectives,

- b. an inclusive statement in regard to eligibility to marry, and
- c. a provision enshrining the right of religious celebrants to refuse to solemnise any marriage that does not single out same-sex couples

#### **Recommendation Four**

We recommend that the requirement for declaring that marriage is between a man and a woman be removed, that related restrictions on the conduct of civil celebrants and civil ceremonies be eased, and that these changes be communicated to all registered marriage celebrants.

# 3. The context

## 3.1 The context of this inquiry

In 2010 the Australian Greens' spokesperson on sexual and gender diversity, Senator Sarah Hanson-Young, reintroduced the Marriage Equality Amendment Bill 2010. That Bill, if passed, would allow same-sex marriages to be solemnised in Australia and overseas same-sex marriages to be recognised.

In 2012, that Bill was referred to an inquiry of the Senate Legal and Constitutional Affairs Committee to which this submission is made.

## 3.2 The broader Australian context

In 2004 the Federal Coalition Government, with the support of the Labor Opposition, amended the Marriage Act 1961 to define marriage as the union of one man and one woman and to preclude the recognition of overseas same-sex marriages. Prior to this, a gender requirement had not been clear.

The amendment was ostensibly in response to an appeal to the Family Court from two Australian same-sex couples who sought recognition of their Canadian marriages under Australian law. The amendment removed the court's discretion to grant such recognition. After the amendments were passed the appeals were not continued<sup>5</sup>.

From 2004 to its defeat in 2007, the Federal Coalition Government recognised same-sex partners as interdependent partners in areas such as some defence force benefits. But it refused to reconsider its opposition to marriage equality.

In 2008, the Federal Labor Government recognised same-sex de facto partners in 85 different federal laws. But it too refused to consider marriage equality.

At its National Conference in December 2011, the Australian Labor Party agreed to change the Party's platform to specifically endorse marriage equality. A motion was

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<sup>5</sup> For comments on the case from one of the couples involved in this unsuccessful appeal see <http://www.australianmarriageequality.com/news/20060108.htm>

also passed ensuring that federal Labor representatives would be given a conscience vote on the issue should a bill come to a vote in Parliament.<sup>6</sup>

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<sup>6</sup> "Labor decides on conscience vote for gay marriage", ABC News (online). 3 December 2011. <http://www.abc.net.au/news/2011-12-03/labor-votes-for-conscience-vote-on-same-sex-marriage/3710828>

# 4. The case for marriage equality

## 4.1 The onus rests on those who would deny equal rights

The starting position for any discussion about whether to extend equal rights and protections to a particular class of people within society should be the recognition that all human beings are equal in dignity and rights. This principle forms Article One of the Universal Declaration of Human Rights.<sup>7</sup>

Given this understanding, it follows that the onus lies not upon that particular class of people to establish why they should be granted equal rights, but rather upon opponents of equality to establish why they should not.

However, AME recognises that a fuller exposition of the arguments for legislative reform is required, and this is provided below.

## 4.2 The case from increasing recognition and support

### 4.2.1 Increasing recognition of marriage equality overseas

Ten other nations allow same-sex couples to marry. Together with the dates when marriage equality was achieved, they are:

- The Netherlands (2001)
- Belgium (2003)
- Canada (provincially beginning in 2003, nationally in 2005)
- Spain (2005)
- South Africa (2006)

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<sup>7</sup> United Nations. The Universal Declaration of Human Rights. <http://www.un.org/en/documents/udhr>



- Norway (2009)
- Sweden (2009)
- Portugal (2010)
- Iceland (2010)
- Argentina (2010)

In seven of these nations marriage equality was achieved through legislative change alone. In three, reform was prompted by successful appeals under the equality provisions of constitutionally-entrenched bills of rights.

Proposals for marriage equality are being actively considered (either legislatively or judicially) in the following countries;

- Australia
- Denmark
- United Kingdom
- Ireland
- Brazil
- Mexico
- Colombia
- Finland
- Nepal
- Slovenia
- France
- Paraguay

Nine American jurisdictions allow, or will soon allow, same-sex marriage. They are Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, District of

Colombia, Washington state and Maryland (in California same-sex marriages are not solemnised but out-of-state and existing same-sex marriages are recognised). In about two-thirds of these jurisdictions reform was achieved by legislative change alone. The Mexican state of Mexico City allows same-sex marriages. In Brazil same-sex civil unions can be converted into marriages by state judges.

The international experience shows that, while marriage equality is a relatively recent reform in other countries, the pace of reform is accelerating and its geographical spread is growing.

The international experience also shows that reform is achieved more often through legislative action than by judicial decisions. This is relevant because in Australia, in the absence of a constitutionally-entrenched charter of rights, reform must be achieved through Parliament.

#### 4.2.2 Growing popular support for same-sex marriage in Australia

Opinion polls show a majority of Australians support marriage and that the number is steadily increasing.

In 2004 a Newspoll commissioned by SBS Television found that 38% of those surveyed supported marriage equality while 44% opposed and 18% were undecided<sup>8</sup>.

In 2007 a Galaxy Poll commissioned by campaign organisation, Get Up!, found that 57% of those surveyed support marriage equality.<sup>9</sup>

A Galaxy Poll conducted in 2009 using an identical question to 2007, showed 60% of those surveyed were in favour of marriage equality.

This poll also showed that a majority of voters for all major parties support reform (Greens 82%, Labor 64% and Coalition 50%), and that younger Australians are more likely to support reform.

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<sup>8</sup> A copy of this poll can be found at [http://www.newspoll.com.au/image\\_uploads/cgi-lib.17497.1.0601\\_gay.pdf](http://www.newspoll.com.au/image_uploads/cgi-lib.17497.1.0601_gay.pdf)

<sup>9</sup> Schubert, M. "Public backs gay unions, equality". The Age. 21 June 2007. <http://www.theage.com.au/news/national/public-backs-gayunionsequality/2007/06/20/1182019204491.html>

In October 2010, a Galaxy poll found that 62% of Australians supported marriage equality.<sup>10</sup> This result was later repeated in an ACNielsen poll in 2011.<sup>11</sup>

A Roy Morgan poll in August 2011 found that 68% of Australians supported marriage equality.<sup>12</sup>

A Galaxy poll conducted in May 2011 found that 75% of Australians believe it is inevitable that marriage equality will become law.<sup>13</sup>

On the trends indicated by these polls we can expect support for marriage equality to keep on increasing, particularly given the high level of support among young voters.

A copy of the 2010 poll has been enclosed as attachment 1.

Studies in the LGBTI community show support for marriage equality to be extremely high. These are dealt with at greater length in section 5.2.3.

We note that there has been significant public discussion of a report about attitudes to same-sex marriage published by the Ambrose Centre on Religious Liberty, whose founder and chairperson, Mr Rocky Mimmo, has previously stated that marriage equality would “defy the law of nature” and would be “mandating” “an illusion and an untruth”<sup>14</sup>. The report concedes that when a neutral question on the issue of marriage equality is asked of respondents there is majority support (approximately 60% according to the Ambrose Centre). But the Centre also asks a variety of questions about what it perceives will be the negative outcomes of marriage equality such as a change in the definition of marriage or worse parenting outcomes for children. Not surprisingly it finds there is less support for marriage equality in these circumstances. We dismiss these findings of the Ambrose Centre because there is no evidence of these negative outcomes in other countries with marriage equality<sup>15</sup>.

The Ambrose Centre also found that marriage equality is a low priority for many voters and that Labor will lose a significant slice its current voting base if it supports marriage

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10 Galaxy poll. Same-sex marriage study (October 2010). <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/12/Full-Galaxy-Poll-Results-2010.pdf>

11 Coorey, P. “Voter opinion adds weight to shift in marriage policy”, Sydney Morning Herald. 15 November 2011. <http://www.smh.com.au/national/voter-opinion-adds-weight-to-shift-in-marriage-policy-20111114-1nfkj.html>

12 Roy Morgan poll, Can of Worms. <http://ten.com.au/CanOfWorms-poll-results-worm-11.htm>

13 Galaxy poll, Same-sex marriage inevitability (May 2011). <http://www.australianmarriageequality.com/wp/wp-content/uploads/2011/06/Samesex-marriage-inevitability-May-2011.pdf>

14 <http://ambrosecentre.org.au/images//same%20sex%20marriage%20-%20is%20marriage%20precious.pdf>

15 For more see: <http://www.australianmarriageequality.com/wp/2011/11/23/opponents-of-equality-release-pro-gay-marriage-polling/>

equality. We contest these findings. It makes no sense that marriage equality is both a low priority for voters and a politically-significant vote changer. It is our view that marriage equality does have an electoral impact but it is opposite to that forecast by the Ambrose Centre. Galaxy polling has found that Labor will benefit by a 7.3% swing from supporting majority equality, chiefly voters enticed back from the Greens<sup>16</sup>. Further evidence that party support for marriage equality is becoming a vote winner can be found in successive polls on marriage equality. The polls show that among voters who support marriage equality there has been a steady shift in strength of feeling from “support” to “strongly support”. Similarly, among those who oppose marriage equality there has been a steady shift from “strongly oppose” to “oppose”. Clearly, the passion in this debate, and the corresponding potential to impact on electoral outcomes, is shifting from those who oppose reform to those who support it.

#### 4.2.3 Growing recognition of overseas same-sex marriages in Australia

In line with increasing popular support for marriage equality, a rapidly increasing number of Australia’s private corporations, unions, local and state governments, and federal government agencies are recognising overseas same-sex marriages.

Australian corporations and local governments that recognise the overseas same-sex marriages of their employees include ANZ Bank, the City of Sydney, the Commonwealth Bank of Australia, David Jones, IBM Australia, ING Australia Ltd, Seek.org.au, the Kogarah Council (NSW), Hepburn Shire Council (Vic), Qantas, Telstra, St George Bank, and Westpac.<sup>17</sup>

Two state governments recognise overseas same-sex marriages as state civil unions. In 2010 the Tasmanian Government amended that state’s Relationships Act so that same-sex couples in overseas same-sex marriages and civil unions are automatically recognised as being in a state Deed of Relationship. In 2011 the Queensland Government passed a Civil Union Act which has the same effect.

The Australian Bureau of Statistics (ABS) allowed same-sex partners to record if they were married in the 2011 National Census. This year the ABS will publish the resulting figures as a standard statistical output<sup>18</sup>.

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16 For more see: <http://www.australianmarriageequality.com/wp/2011/10/21/new-galaxy-poll-swing-to-labor-if-it-backs-gay-marriage/>

17 For the full list see <http://www.australianmarriageequality.com/employers.htm>

18 For more see <http://www.australianmarriageequality.com/news/20090507.htm>

## 4.3 The case from first principles

### 4.3.1 Equality: removing inequality and discrimination from the law

Same-sex partners are not equal under the law if they are excluded from the legal rights and responsibilities which flow from and are associated with marriage.

This view has been upheld by a number of appellate courts, particularly in Canada where the national Charter of Rights and Freedoms includes an equality provision.

For example, in *Barbeau v British Columbia* the British Columbia Court of Appeal found that,

“...Redefinition of marriage to include same-sex couples...is the only road to true equality for same-sex couples.”<sup>19</sup>

In the same vein, the denial of marriage equality is a serious act of legal discrimination against same-sex relationships.

According to the California Supreme Court In *Re Marriage Cases*,

“...in contrast to earlier times, our state now recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual’s sexual orientation, and, more generally, that an individual’s sexual orientation — like a person’s race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights. We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.”<sup>20</sup>

Following the passage of Proposition 8 in California which overturned same-sex marriage laws in that state, the Ninth District Appeals Court held that the denial of marriage rights constituted a breach of equal protection provisions in the United States Constitution, saying:

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19 *Barbeau v British Columbia (Attorney General)*, 2003 BCCA 251 at 156, also Ontario Court of Appeal, *Halpern v. Canada*, [2003] O.J. No. 2268.

20 *In re Marriage Cases* (2008) 43 C4th 757

“[The ban on same-sex marriage] serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”<sup>21</sup>

It is incontestable that the same principles generally apply in Australian public policy. Australia accepts it has an obligation under the International Covenant on Civil and Political Rights to remove laws which discriminate on the grounds of sexual orientation.<sup>22</sup> This obligation has been acted upon through the recognition of same-sex de facto relationships at a state and federal level. There is no justification for not extending the principle of anti-discrimination to marriage (for more on Australia’s international human rights obligations see section 8.4 below).

Given the reform of all federal laws to recognise same-sex partners except the Marriage Act, marriage equality will have the effect of finally removing all legal inequality and discrimination from Australian federal law.

#### **4.3.2 The broader implications of equality: reducing prejudice and discrimination**

Allowing same-sex partners to marry ensures they enjoy the legal and social recognition and respect associated with the institution of marriage.

By the same token, denying same-sex partners the right to marry sends out the message that these partners are not capable of the level of love and commitment that is associated with marriage.

It also sends out the message that it is acceptable to exclude an entire group of citizens from important social institutions on the basis of their sexual orientation.

These negative messages are magnified by the fact that marriage is the only federal law which still discriminates, and because marriage is such an important social institution (for more see sections 4.4.3 and 4.4.4 below).

The negative messages sent out by discrimination in marriage foster prejudice, discrimination and unequal treatment against same-sex relationships in the wider community.

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<sup>21</sup> Perry v Brown, no. 10-16696, slip op. at 5 (9th Cir. Feb. 7, 2012)

<sup>22</sup> see Toonen v Australia [1994] PLPR 33. And, Young v Australia (2003). UN Doc CCPR/C/78/D/941/2000 (12 August 2003)

There is a substantial body of Australian social research which shows the vulnerability of same-sex attracted people to prejudice, discrimination and unequal treatment.

Surveys within the lesbian, gay, bisexual, transgender and intersex (LGBTI) community consistently find that LGBTI people experience unacceptably high levels discrimination in the workplace, discrimination in other aspects of their lives including at school and in their families, and hate-motivated assault<sup>23</sup>.

#### **4.3.3 Conditions on equality and non-discrimination: acknowledging that same-sex relationships and marriage are compatible**

A critical condition applies to the principles of equality and non-discrimination. They can not apply to things which are inherently unequal or incompatible.

With regard to marriage equality, it is important to acknowledge that marriage is an institution with a particular form, purpose and set of criteria of participation, and that same-sex relationships can take this form, meet this purpose and satisfy the criteria for participation to the same extent as relationships which are already accepted for participation.

We firmly believe that a) the purpose of civil marriage is to legally solemnise, entitle and protect a loving, committed, enduring, conjugal or “romantic” relationship, and b) same-sex partners are as capable of forming such relationships and therefore meeting the requirements of marriage as the partners who currently qualify to marry.

Analogies to equality struggles from the past help explain why it is fundamentally important to acknowledge that same and different-sex relationships can share the same general characteristics in regard to marriage. Women achieved the vote because they share with men an equal capacity to exercise this right, and an equal interest in the outcome of political processes. People of colour achieved civil rights because they share with whites personal autonomy, freedom of conscience and a common humanity. So same-sex couples deserve the right to marry because they share with different-sex couples an equal capacity for love and commitment, and they share an interest in having that love and commitment recognised and protected by society and the state.

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<sup>23</sup> For workplace discrimination see, “The Pink Ceiling is Too Low: workplace experiences of lesbians, gay men and transgender people”, NSW Gay and Lesbian Rights Lobby, 1999, [http://glrl.org.au/images/stories/the\\_pink\\_ceiling\\_is\\_too\\_low.pdf](http://glrl.org.au/images/stories/the_pink_ceiling_is_too_low.pdf). For hate crime see Mason, G., “Violence against lesbians and gay men”, Australian Institute for Criminology, 1993, <http://www.aic.gov.au/documents/D/2/2/{D22F8857-A477-4BA0-BAB8-5C04C2B1E7E9}vpt2.pdf>

We believe both the purpose of marriage and the equal marriage-like characteristics of same-sex relationships have been established as principles of public policy in Australia. For example, neither a particular religious adherence nor the intention to procreate are requirements on marrying partners. In all states and federally, same-sex couples are permitted to qualify as conjugal and cohabiting partners in de facto marriages. In section 5 below, we explore and dismiss alternate views on what marriage is for, as well as myths about same-sex relationships that seek to disqualify them from the right to marriage.

#### 4.3.4 Choice and freedom: the right to marry, personal autonomy and privacy

Courts in other countries have highlighted a range of other rights, apart from equality, which are also breached by discrimination in marriage. These include the right to marry, the personal autonomy or “liberty” to choose one’s own marriage partner, and the right to privately pursue consensual family relationships without state interference. We can refer generally to these rights as freedom to marry without state intervention.

According to the Massachusetts Supreme Court in *Goodridge v Mass. Department of Public Health*:

“Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.”<sup>24</sup>

These views were expanded by the California Supreme Court, *In Re Marriage Cases*,

“the constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right

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<sup>24</sup> *Goodridge v Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).



of two adults who share a loving relationship to join together to establish an officially recognized family of their own — and, if the couple chooses, to raise children within that family — constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.”<sup>25</sup>

In regard to marriage and privacy the California Court found

“the state constitutional right to marry, while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual’s interest in personal autonomy by California’s explicit state constitutional privacy clause. (See, e.g., *Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th at p. 34 [the interest in personal autonomy protected by the state constitutional privacy clause includes “the freedom to pursue consensual familial relationships”]; *Valerie N.*, supra, 40 Cal.3d 143, 161.)”<sup>26</sup>

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25 *In re Marriage Cases* (2008) 43 C4th 757. Page 8, [http://www.aclu.org/images/asset\\_upload\\_file713\\_35332.pdf](http://www.aclu.org/images/asset_upload_file713_35332.pdf)

26 *op cit*, p50

### Personal views: democratic values and citizenship

We pride ourselves on a free society here in Australia, but we will not be truly free if so many citizens are oppressed in this way. Please support this bill to legalise gay marriage in the interests of freedom and equality (and love).

Leave religious-based morality arguments to the various churches. Civil marriages, however, are something completely different. The secular social contract requires gay and lesbian citizens to observe the laws of the state and fulfil their responsibilities - ie pay taxes. In return, the state is required to protect these citizens and afford them the rights they are entitled to ie, all civil rights including the right to marry and have a family. Any less - any withholding of rights based on arbitrary personal characteristics - is an a shame on all of us in a democratic, secular society.

It breaks my heart that my own country doesn't accept or acknowledge that we should have the same rights as other Australians. My wife and I work hard, we pay the same amount of tax as everyone else, we are saving as best we can to buy our first home, we love our families and our families love us, we are planning for our first child, neither of us has ever broken the law, we contribute as citizens every day to this country, and yet still we are not given equal rights.

#### 4.3.5 The broader implications of freedom and choice: the link between freedom to marry and full citizenship

For those people denied the right to marry the person they love, marriage is synonymous with freedom from second-class legal and social status.

The association between the equality in marriage and freedom from second-class status is well understood in the context of the struggle for the civil rights of people of colour.

In 1958, in the midst of the struggle for black civil rights in America, Martin Luther King Jr declared,

“When any society says that I cannot marry a certain person, that society has cut off a segment of my freedom.”<sup>27</sup>

In 1959, the German-American philosopher and political theorist Hannah Arendt made the same point in greater detail,

“The right to marry whoever one wishes is an elementary human right compared to which ‘the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one’s skin color or race’ are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to ‘life, liberty and the pursuit of happiness’ proclaimed in the Declaration of Independence, and to this category the right to home and marriage unquestionably belongs”.<sup>28</sup>

Inspired by this idea, a black woman from Virginia, Mildred Loving, and her white husband, Richard, took state laws barring their interracial union all the way to the US Supreme Court and in 1967 succeeded in having them struck down<sup>29</sup>.

What many Australians don’t know is that laws with a similar effect to those against which Mrs Loving fought, existed here for a century, and were central to the struggle for Aboriginal rights<sup>30</sup>. Beginning in Victoria in the 1860s and reaching their apogee in Western Australia and Queensland in the 1930s, Aboriginal Protection Acts included provisions allowing state officials to determine who Aborigines could or could not marry. These laws were used for different purposes at different times. Queensland’s policy was generally one of preventing black/white unions. WA’s evolved in the opposite direction, preventing “half-castes” from marrying other Aborigines in order to “breed out the colour”. But no matter what the racist purpose of these policies, the effect was the same: personal tragedy and political disenfranchisement.

The Sydney and Melbourne-based Aboriginal activists who emerged from the labour movement in the 1920s to fight for better wages and conditions for black workers, were slow to pick up on the link between the freedom to marry and full citizenship. Not so

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27 King (Jr), M. L., Carson, C., Luker, R., and Russell, P. A., (2000) *The Papers of Martin Luther King, Jr: Symbol of the movement*, January 1957, University of California Press, Berkeley. Page 436.

28 Arendt, H. and Baeher, P. R. (ed), (2000) *The portable Hannah Arendt*, Penguin Group, New York. Page 236.

29 *Loving v Virginia* (1967) 388 U.S. 1

30 Croome, R. “True and good citizens: The history of freedom to marry in Australia”. *Overland* 203-winter 2011, p. 15–25. <http://overland.org.au/previous-issues/issue-203/feature-rodney-croome/>

those directly disadvantaged by the laws, including the “half-caste” women of Broome, who declared in a petition in 1935,

“Sometimes we have the chance to marry a man of our own choice. We ask for our Freedom so that when the chance comes along we can rule our lives and make ourselves true and good citizens.”<sup>31</sup>

Thanks to voices like these, freedom to marry rose to the top of the Australian Aboriginal rights agenda, second only to the right to vote, and stayed there until the states repealed their Protection Acts, and the national referendum of 1967 confirmed full Aboriginal citizenship.<sup>32</sup>

There is an obvious parallel between the historic struggle of blacks for marriage choice, and today’s struggle by same-sex partners for the same choice. It’s not simply that the former was told which race to marry, while the latter is told which sex. It’s about freedom from prejudice and freedom to fully share the joys of family life. Mildred Loving saw these links when, on the 40th anniversary of the court decision that bears her name, she declared:

“I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. I am proud that Richard’s and my name are on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight, seek in life.”<sup>33</sup>

But as the Broome petition suggests, the link between freedom to marry and citizenship runs deeper than legal equity and full social participation. We ask the Committee to consider all the other groups in society, along with people of colour and same-sex attracted people, who at one time or another have been denied the right to marry the partner of their choice: women, people from differing faiths, people with disabilities, paupers and prisoners, servants and slaves, people from different countries or races. What they all have in common is that they have been regarded as too immature or irresponsible to make what is arguably the most important decision any individual can ever make, the choice of a life-long partner. Instead they were told that their hearts were untrustworthy and they should marry as society dictates, or not at all. In the same vein, the gradual acceptance that members of these groups are fully adult, fully citizens and

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31 Attwood, B. and Markus, A. (1999) *The Struggle for Aboriginal Rights: A Documentary History*, Allen & Unwin, Sydney, p. 130.

32 ‘Our ten points: Deputation to the prime minister’, *Australian Abo Call*, no. 1, 1938, in Attwood, B. and Markus, A. (1999) *The Struggle for Aboriginal Rights: A Documentary History*, Allen & Unwin, Sydney, pp. 89–94.

33 Loving, M (2007), “Loving for All”, June 12, 2007. [http://www.freedomtomarry.org/pdfs/mildred\\_loving-statement.pdf](http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf)

fully human, has been accompanied by an acceptance of their right to marry whomever they wished.<sup>34</sup>

It is the acceptance of same-sex attracted Australians as fully equal members of the Australian nation and the human family which lies behind many people's support for marriage equality. Our hope is for the day when, like Mildred Loving and the "half-caste" woman of Broome, we too will be free to make our own choice and rule our own lives.

#### **4.3.6 The limits of freedom and personal autonomy: establishing that marriage equality causes no harm**

Of course, no rights are absolute. The right to personal autonomy, freedom of choice and privacy are often limited to prevent harm to others or society, or to prevent the infringement of other rights.

This means it is necessary for supporters of marriage equality to show that the reform they support has benefits, does not cause harm and does not infringe other rights. Above we have outlined some of the general benefits of equality and freedom of choice. Below we consider further benefits of marriage equality. After that we consider and dismiss the case that marriage equality causes harm and/or infringes other fundamental rights.

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<sup>34</sup> Croome, R. "True and good citizens: The history of freedom to marry in Australia". *Overland* 203-winter 2011, p. 15–25. <http://overland.org.au/previous-issues/issue-203/feature-rodney-croome>

## Personal views: the racial parallel

Basic history may remind you of the fact that in the past marriages between people of different coloured skin was also thought to be 'wrong'. The fact that homosexual people cannot marry is of equal discrimination as the bias on coloured skin is now seen.

There is credible research supporting the fact that homosexuality is a matter of biology and not a matter of choice and I feel that the Australian government continuing to discriminate against homosexuals is a breach of my rights as a citizen of a first world country. I was born this way, I cannot change it and to deny me equal rights because of that fact is outdated and disgusting, and not that far removed from when it was illegal for indigenous to marry whites or inter-marriage between the castes in India.

I currently work as a teacher at a school for predominately Australian Aboriginal students, and several of my classes have been learning about the African-American struggle for Civil Rights. When examining the case of Loving V. Virginia, one student pointed out the similarities between interracial marriage and same-sex marriage. She turned to me and said, "What's the big deal? Why does it matter who you love, or what you do at home? Why do they even care? When will they ever learn???" She was visibly upset and frustrated that her elders - the government, religious leaders, community members, those who she looked to for guidance - could not see the simple truth that she could.

## 4.4 The case from practical benefits

### 4.4.1 The practical legal benefits of marriage equality

Married partners have immediate access to all relationship rights, entitlements, protections and responsibilities. This contrasts to de facto couples who must cohabit for a certain period before they are deemed to have relationship rights and protections.

A marriage certificate also allows married partners to prove their relationship status if challenged. This contrasts with de facto couples who must prove they fit a range of criteria before their legal rights are secure. This is particularly important in emergency situations. The capacity to quickly and easily prove one's relationship status is particularly important for same-sex partners because continued prejudice against same-sex relationships can lead to denial of rights.

Civil union schemes offer an alternative way to immediately access and guarantee relationship entitlements. But as shown in section 6.2 below, these schemes do not provide the same access to, or guarantees of, legal entitlements that marriage does.

Another practical benefit of marriage is its portability. The criteria for establishing de facto status, and the rights ascribed to de facto partners, are different between the Australian states and between Australia and other nations. Indeed, some other nations do not deem unmarried partners to have legal rights at all, or limit these rights substantially. The same problems exist for partners in civil unions. In contrast, marriage is a universally-understood form of relationship recognition with a relatively standard set of relationship rights ascribed to it. This means that married partners traveling between jurisdictions will have much less trouble than unmarried partners asserting and obtaining their relationship rights. Of course, this is not yet the case for same-sex partners, because of the limited number of jurisdictions that recognise same-sex marriages. However, this list is growing rapidly.

Personal views: many practical problems arise from marriage discrimination

As a man in a relationship with another man from another country I currently feel forced out of Australia because of the difficulty involved in him even visiting Australia. Moreover, his nationality (Egyptian) means that it is difficult for him to acquire an Australian visa, in fact we have already had difficulties. We planned for him to visit my family in Australia and his visa application was denied. To this date he has not met them. the 'inter-dependency' visa (a step in the right direction) is not a good enough way of our recognizing our committed and deeply loving relationship. If we ever move to Australia I see no reason why our rights as a couple should not be equal to male-female partnerships and am consequently in FULL SUPPORT of same-sex marriage in our wonderful and open-minded country.

I am an Australian citizen living in the United Kingdom who married an English person who is of the same sex in 2006. We had a wonderful notion that we could one day live in Australia and enjoy the lifestyle and raise a family and me also being close to my family so we came home for a 'trial run' in 2007. (But) the moment I stepped on to Australia soil (my home country!) my marriage was not recognised which I found nothing short of disrespectful. My partner was hospitalised in 2007 at St Vincent's and I was informed I had no more rights than a friend and could not be listed as her spouse on the paperwork hence was only allowed in during visiting hours.

It might be hard to comprehend if you are not in a same-sex relationship, but we are often not even sure what our rights are a lot of the time, especially in different states. It can be very confusing, and it can be very hard to find information, and it is very sad, that in this day and age in Australia, the land of the 'fair go', there is still a group of citizens like us, who have to regularly log on to Google and devote significant chunks of time to working out what our rights are in different parts of Australia, whenever we embark on a normal

#### 4.4.2 Recognition of existing overseas marriages

Another very obvious and immediate benefit of marriage equality would be the recognition of those same-sex marriages Australians have entered into overseas.



We estimate that between 3000 and 4000 Australian couples have married overseas. This estimate is based on the numbers of couples who have contacted us for advice, and the numbers who have entered into British civil partnerships in UK consulates in Australia. Mostly these couples have married in countries without residency requirements for marriage, such as Canada (we estimate the number of Australian couples who have entered into Canadian same-sex marriages to be about 2000). But we have been contacted by couples who have married in all the nations which allow same-sex marriage.

The failure of the law to allow same-sex marriages adversely affects these couples in two ways.

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). We understand the Committee has received submissions from couples married overseas which outline some of these problems.

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, as well as creating the above-mentioned legal disadvantages.

Another group affected by the failure to recognise existing overseas same-sex marriages are those same-sex partners who move to Australia from jurisdictions where marriage equality exists. The disrespect shown to their solemn vows by their adopted country is also deeply hurtful.

Of course, it is not just married same-sex partners who are hurt and disadvantaged by the failure of Australian law to recognise existing overseas same-sex marriages. The national economy also suffers because a) Australian same-sex couples spend money on their weddings overseas and b) some married partners considering Australia as a destination for travel or immigration, will opt instead for those countries which respect their legal status. The economic impact of discrimination is dealt with in the next section.

## Recommendation One

Section 88EA of the Marriage Act 1961 (Cth) should be repealed so that same-sex marriage solemnised overseas shall be recognised in Australia as marriages.

Personal views: the law fails to recognise and honour overseas same-sex marriage

My partner and I were recently married in Canada, but upon flying home to Australia, our marriage is not recognised and this has brought significant sadness to not only our lives, but to both of our families who were unable to travel to Vancouver to be with us on our special day.

We spent a small fortune to be legally married, because this was very important to us, and this was money we had been saving to put towards our first home deposit, but we made the decision to dip in to these funds to be married in a country where it was legally recognised and neither of us regret this for an instant.

My wife and I are now in the bizarre predicament, that we are married in a large (and growing) number of countries in the world, and not married here in our own country. Some people find this funny, saying we have the 'best of both worlds' we can get on a plane and be married one day, and get off a plane and be free of the 'ball and chain' the next, but this situation is far from funny, it is heartbreaking for those of us that it affects.

I invite you all to think about how you would feel, if you were married overseas, but not so in your own country of residence because your Government refused to accept this as a marriage, but was happy to acknowledge that yes, your relationship does exist for tax purposes? It really is extremely offensive and upsetting to experience this discrimination on a daily basis.

### 4.4.3 Other benefits for same-sex partners, their children, families and communities

Marriage provides partners, families and the general community with a universal language for love, commitment and relationships. It is also one of the universal legal and social institutions through which we find connection and belonging, not only with our partner, but with our families and communities.

Symbolic of this social aspect of marriage is the fact that marriage conventionally creates kinship between families as well as partners, hence terms such as “mother-in-law” and “brother-in-law”. Also, marriages are conventionally solemnised by a representative of the state, not only between the marrying partners, but in the presence, and with the explicit assent of, family members and friends.

Excluding same-sex couples from marriage excludes them from the universal language so fundamental to everyday interaction, and from the sense of belonging and connection marriage offers. Correspondingly, including them results in a large number of real social, cultural and economic benefits.

For example, two landmark studies led by MV Lee Badgett, Professor of Economics at the University of Massachusetts, describe and quantify some of these benefits in two separate jurisdictions, the Netherlands and Massachusetts. What follows is a summary of her findings. Another summary is included as attachment 2.

#### 4.4.3.1 The positive impact on same-sex couples

Marriage strengthens same-sex relationships. Seventy-two percent of individuals in married Dutch couples reported feeling more responsible and committed to their spouse as a result of marriage. These effects translate into healthier, longer-lasting relationships.

#### 4.4.3.2 The positive impact on families

Access to a social institution that is widely recognized— marriage—enhances same- sex couples interactions with their families and communities. Seven out of ten of those same-sex partners surveyed reported feeling more accepted in their own community as a result of being married. Sixty-two percent of same-sex couples agreed that their families have become more accepting of their partner as a result of being married.

#### 4.4.3.3 The positive impact on children

The children of same-sex couples families gain when their parents can marry. More than one-quarter of same-sex couples indicate that they have children in their home and that they and/or their spouse serves as a parent to those children. Of these households, nearly all (93%) agreed that their children are happier and better off as a result of their marriage. Many parents reported that their children felt more secure and protected. Others noted that their children gained a sense of stability. A third common response was that marriage allowed children to see their families as being validated or legitimated by society or the government.

Professor Badgett and her researchers also found that lesbian and gay people see alternative ways of granting legal status, such as civil unions, civil partnerships, domestic partnerships or registered partnerships, as inferior social and legal statuses. This finding will be discussed at greater length in section 6.2.

Professor Badgett's research has also shown the immense economic benefit of marriage equality. This research includes an analysis of the economic benefit for the US state of Massachusetts through spending on weddings by local and interstate couples<sup>35</sup>. On the basis of this analysis Professor Badgett has also predicted the economic benefit for other US states as they move towards marriage equality.

Most recently, Professor Badgett has applied her formula for calculating the economic benefit of marriage equality to Australia through the estimated wedding spend by same-sex couples.<sup>36</sup> Based on a conservative estimate that there are 33,000 same-sex couples in Australia (Labour Force Survey), of which about 54.7% would marry if given the option (Not So Private Lives report), and a wedding spend one quarter of the average wedding spend, same-sex marriage would bring at least \$161 million over the first three years – mostly spent on small businesses in the wedding industry.<sup>37</sup>

In her economic analyses, Prof Badgett also notes related research which shows the additional economic benefits which accrues from greater levels of immigration to places with marriage equality by members of the creative class. We have enclosed Professor Badgett's economic study as attachment 3.

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35 Badgett, et al, "The Business Boost from Marriage Equality: Evidence from the Health and Marriage Equality in Massachusetts Survey", Williams Institute, May 2009. <http://www.law.ucla.edu/WilliamsInstitute/pdf/BusinessBoost.pdf>

36 Badgett, M V L. & Smith, J. (2012) "The Economic impact of extending marriage to same-sex couples in Australia". The Williams Institute. <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Smith-Econ-Impact-Marriage-Feb-2012.pdf>

37 Badgett, M V L. & Smith, J. (2012) "The Economic impact of extending marriage to same-sex couples in Australia". The Williams Institute. <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Smith-Econ-Impact-Marriage-Feb-2012.pdf>

Prof Badgett's conclusion is that,

“Overall, the experiences of same-sex couples in two countries, the United States and the Netherlands, suggests that same-sex couples and their families are strengthened by a policy of marriage equality for same-sex couples. States also gain from the economic and budgetary advantages of marriage equality.”

Clearly, Australia also has much to gain from allowing marriage equality.

Personal views: the concerns of family, friends and fellow-citizens

I hope by the time my grandson (who is 9) is an adult he will know that this great country truly respects all of its residents.

As the mother of a young gay man, I fully support Marriage Equality for same sex couples. Same sex couples are a reality, and not an abhorration. (sic)

I am straight, but have several gay friends who are in long term relationships. My partner and I have the freedom to marry if we choose to do so, and it breaks my heart that the rights of people that I love are restricted because they are gay. Marriage is a commitment two people choose to make to each other based on love, trust, and fidelity, and it is immoral to continue to allow the Australian legal system to communicate that these values exist only in straight relationships.

I have a son who has come out 5 years ago, It was a shock as it is for most families, however our love for our children is unconditional, now I have a gay son, I have always loved him and always will, regardless of his sexual orientation. I feel that for him not have the fruits of marriage, like I have for the last 30 years, simply goes against all democratic and basic fundamentals (sic) of life. I feel very deeply regarding this unfair practice and hope this contribution may help to put and end to this very sad discrimination against a sector of society, that already has a lot more that most of us to cope with.

I lived with my mum and her same sex partner from the age of 10. I could not have had a better set of parents. They are my role models when it comes to how a long term relationship should look, and I hope my husband and I are as happy as they when we have been together for 20 years. Yet these women, who I love dearly, are denied the opportunity to legally marry. They came to my wedding and celebrated with me - yet I cannot celebrate the same happy

#### 4.4.4 How marriage equality will improve public health outcomes

An increasing body of research suggests that LGBTI Australians are significantly more likely to experience poorer health outcomes, including a greater incidence of psychiatric disorders, due to the negative impact of prejudice and discrimination.

The statistics are particularly alarming for younger and newly-identifying LGBTI people who have consistently higher rates of drug and alcohol abuse, homelessness, early school leaving, conflict with peers and parents and suicidal ideation, all directly related to the discrimination and prejudice they experience.<sup>38</sup>

There is also research linking these unacceptable levels of discrimination and poor-health outcomes directly to the exclusion of same-sex couples from marriage.

The American Psychological Association – the world’s largest association of professional psychologists – reviewed evidence of health outcomes following the passage of state same-sex marriage bans in the United States. It concluded that “campaigns to deny same-sex couples legal access to civil marriage are a significant source of stress to the lesbian, gay, and bisexual residents of those states and may have negative effects on their psychological well-being”.<sup>39</sup> The Australian Psychological Association has subsequently issued a statement endorsing the statement of its American counterpart.<sup>40</sup>

##### 4.4.4.1 Overseas research

A landmark study led by Dr Mark Hatzenbuehler of the Harvard School of Public Health examined the relation between living in states that instituted bans on same-sex marriage during the 2004 and 2005 elections and the prevalence of psychiatric morbidity among lesbian, gay, and bisexual (LGB) populations. It compared health indicators among LGB people before and after these bans were introduced, and measured them against those of heterosexual people.<sup>41</sup>

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38 For more on health risk in young people see “Writing Themselves in Again, the 2<sup>nd</sup> national report on the sexual health and wellbeing of same-sex attracted young people”, Australian Centre for Sex, Health and Society, [http://www.glhv.org.au/files/writing\\_themselves\\_in\\_again.pdf](http://www.glhv.org.au/files/writing_themselves_in_again.pdf)

39 American Psychological Association (2011), Resolution on Marriage Equality for Same-Sex Couples. <http://www.apa.org/about/governance/council/policy/same-sex.aspx>

40 APS endorses APA marriage equality statement, 22.12.11, <http://www.psychology.org.au/Newsandupdates/22Dec2011/>

41 Hatzenbuehler, M. L., McLaughlin, K. A., Keyes, K. M., & Hasin, D. S. (2010). “The impact of institutional discrimination on psychiatric disorders in lesbian, gay, and bisexual populations: A prospective study”. *American Journal of Public Health*, 100(3), 452-459. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820062>

The study showed that psychiatric disorders – defined by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – increased significantly among LGB respondents living in states that banned same-sex marriage. The disorders included:

- any mood disorder (36.6% increase),
- generalized anxiety disorder (248.2% increase),
- any alcohol use disorder (41.9% increase), and
- psychiatric comorbidity (36.3% increase).

By contrast, health indicators of LGB people living in states that had not introduced same-sex marriage bans, and of heterosexual people, did not show sudden increases in psychiatric disorders.<sup>42</sup>

A copy of this study has been enclosed as attachment 4.

Another study, led by Professor Gilbert Herdt of San Francisco State University, found that laws preventing same-sex couples from marrying cause the couples to devalue their relationships, feel discriminated against, and experience higher levels of stress and other mental health problems.<sup>43</sup>

The study attributes this to the negative effects of discrimination in a central social institution. It also highlighted the substantial body of research which shows that married heterosexual couples experience higher levels of physical and mental health, a benefit of marriage from which same-sex couples are excluded.

#### 4.4.4.2 Australian research

Two relevant Australian studies have been conducted through the University of Queensland. Here we include a summary of both studies. They are also included as attachments 5 and 6 to this submission.

The ‘Not So Private Lives’ was a national survey on the relationships and well-being of same-sex attracted Australians. The 2,032 same-sex attracted participants were 18-

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42 Hatzenbuehler, M. L., McLaughlin, K. A., Keyes, K. M., & Hasin, D. S. (2010). "The impact of institutional discrimination on psychiatric disorders in lesbian, gay, and bisexual populations: A prospective study". *American Journal of Public Health*, 100(3), 452-459. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820062/>

43 Herdt, G. & Kertzner, R. "I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States"; *Sexuality Research and Social Policy: Journal of NSRC*, Vol. 3, Issue 1, pp. 33-49.



82 years of age and from all states and territories. At other points in this submission we touch on the findings of “Not So Private Lives” in regard to the level of support for marriage equality among same-sex attracted Australians and the attitudes of these Australians to civil unions. At this point what is relevant are the findings in regard to psychological well-being.

Participants with a same-sex partner were asked about the extent to which they felt others (heterosexual friends, parents, siblings and contact from the broader community) placed equivalent value on their same-sex relationship when compared with heterosexual relationships (de facto and marriage). The majority of participants perceived that others placed equal value on their same-sex relationship when the comparison was with heterosexual de facto relationships. By contrast, and in all cases, the majority felt that others perceived their same-sex relationship to be of significantly less value when the comparison was with heterosexual marriages. For example, only 33.6% felt that their parents and only 45.6% felt that their heterosexual friends saw their same-sex relationship as being equivalent in value relative to heterosexual marriages. This shows that in most cases people did sense that their relationships were devalued relative to heterosexual relationships in general. The perception of inferior status was significantly more likely to be the case when the comparison was with (heterosexual) marriages. Further, the more same-sex attracted people perceived others devalued their relationship, relative to heterosexual relationship, the lower their reported psychological well-being.<sup>44</sup>

The second Australian study is “The Psychology of Same-Sex Marriage Opposition”. This study looked at the concrete impact that opposing same-sex marriage has on everyday Australians (both same-sex attracted and heterosexual). A team of psychologists from the School of Psychology at the University of Queensland conducted a study to examine these issues. Dr Fiona Kate Barlow, Dr Sharon Dane, Pete Techakesari and Kat Stork-Brett recruited 810 Australians (whose ages ranged from 18-77; 514 same-sex attracted, 296 heterosexual) and randomly assigned each of them to one of three conditions. One third of participants read articles opposing same-sex marriage, 1/3 read articles supporting same-sex marriage, and 1/3 read articles unrelated to same-sex marriage. Participants then also reported on how often they had contact with people who actively opposed same-sex marriage.

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44 Dane, S.K., Masser, B.M., MacDonald, G., & Duck, J.M. (2010). Not so private lives: National findings on the relationships and well-being of same-sex attracted Australians. School of Psychology Publications. The University of Queensland. Retrieved from: [www.notsoprivatelives.com](http://www.notsoprivatelives.com)

The results indicated that same-sex attracted participants who were experimentally exposed to articles opposing (as opposed to supporting) same-sex marriage were statistically significantly:

- More likely to report feeling negative and depressed (e.g., they were more likely to agree that they felt distressed, upset, guilty, scared, afraid, ashamed and nervous).
- More likely to report that they felt lonely
- More likely to report that they felt weak and powerless
- And less likely to report that they were feeling happy or positive (e.g., they were less likely to report that they felt strong, enthusiastic, proud, active, inspired and excited)

Likewise, heterosexual Australian participants who read opposing news articles felt more distressed and less positive than did those who read supportive news articles.

Further to these results, same-sex attracted Australians who reported having frequent contact with people who actively opposed same-sex marriage were statistically significantly more likely to:

- Report self-hatred (e.g., agree to statements such as "Sometimes I feel that I might be better off dead than have same-sex attractions")
- Feel that having a happy, healthy relationship was not a possibility for them (e.g., agree to statements such as "A long-term, loving, committed relationship cannot happen between same-sex attracted people")
- Expect to be physically or verbally assaulted on the basis of their sexual orientation (i.e., they were more likely to expect to be beaten, kicked, punched, spat on, sexually harassed and insulted)
- Feel unsatisfied with their life and hopeless about the future (i.e., they were more likely to agree with statements such as "I feel that my life has been a failure")

By sharp contrast, same-sex attracted participants who had frequent contact with people who actively supported same-sex marriage had greater satisfaction with their lives, more hope about their romantic relationships, and less self-hatred.

The preliminary results presented in this report speak directly to the same-sex marriage debate. The experimental and correlational findings show that opposition to same-sex

marriage has a direct, immediate, and negative effect on the health and wellbeing of the people to whom marriage is denied. If we extrapolate from our current results, it is possible that the Parliament's current stance on same-sex marriage may have a marked and harmful effect on the health and happiness of sexual minority individuals in general.<sup>45</sup>

Some opponents of marriage equality claim that the physical and mental health problems experienced by LGBTI people are an inherent part of being homosexual, which they consider a "lifestyle choice", and not the result of discrimination. The implication is that same-sex attracted people are ultimately responsible for their poorer health outcomes. However, the research we have cited clearly show that the poorer outcomes are directly proportional to the level of discrimination experienced as opposed to homosexuality per se. This is consistent with the scientific consensus that same-sex attraction is not a lifestyle choice but an inherent aspect of an individual in the same way as different-sex attraction.

Professor Ilan H Meyer of Columbia University has explained the higher prevalence of mental disorders among same-sex attracted people using the conceptual framework of "minority stress"— that stigma, prejudice, and discrimination create a hostile and stressful social environment that cause mental health problems.<sup>46</sup> The model describes stress processes, including the experience of prejudice events, expectations of rejection, hiding and concealing, internalized homophobia, and ameliorative coping processes.<sup>47</sup>

The denial of marriage equality has an obvious role in contributing to minority stress and its associated health problems, by reinforcing notions in same-sex attracted people that they are "different", "defective", or simply not deserving or worthy of marriage.

The impact of minority stress is greatest for young same-sex attracted people who receive clear signals about their social marginalisation, due to institutional discrimination like the denial of marriage while going through critical stages of identity formation. These young people then internalise negative attitudes about homosexuality and begin to form a low self-esteem as an entrenched part of their identity. This is why marriage equality has the support of Australia's youth mental health foundation, Headspace. In a statement issued last year Headspace said,

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45 Barlow, F.K., Dane, S.K., Techakesari, P., & Stork-Brett, K. (2012). The psychology of same-sex marriage opposition. A preliminary findings report. School of Psychology, The University of Queensland.

46 Meyer, I. H. "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence". *Psychological Bulletin*. 2003 September; 129(5): 674–697. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/>

47 Meyer, I. H. "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence". *Psychological Bulletin*. 2003 September; 129(5): 674–697.

“Marriage equality is primarily about ending social exclusion and giving all Australians the same basic rights. Lack of equality has strong links to mental health issues among same sex attracted young people. We want to see an end to the unnecessary stigma and isolation another generation of young Australians could face because of this inequality.”

An issue related to mental health is substance abuse, with evidence showing that same-sex attracted people have an elevated risk of developing a drug or alcohol problem as a direct result of prejudice and discrimination. A report produced by Australia’s National Drug and Alcohol Research Centre (NDARC) presented findings stating that many same-sex attracted people will develop drug dependencies in their youth as a coping strategy in response to a stressful environment and/or mental illness. Consequently, NDARC recently called on the federal government to legislate for marriage equality in order to address some of the underlying factors contributing to substance abuse.<sup>48</sup>

As explained by Ritter et al in the NDARC report:

“The best public-policy interventions are those which target a significant problem, have a clear rationale, are supported by research evidence, are least costly to implement and have strong community support. Legalising gay marriage as an alcohol and drug policy response meets these criteria.”<sup>49</sup>

We assume the Committee has received numerous submissions outlining how the failure of the law to allow same-sex marriage has lowered the self-esteem of young same-sex attracted people, and heightened levels of prejudice and discrimination in families and the workplace.

While marriage equality will not remove all prejudice, discrimination and unequal treatment against same-sex attracted people, it will be an important step towards this goal. We urge the Committee to consider this a compelling reason for marriage equality and reduce the burden of suffering within the community.

For more information about the impact of marriage discrimination on the mental health of same-sex attracted people we have attached a copy of the submission made by Psychologists for Marriage Equality to the Senate Legal and Constitutional Affairs Committee inquiry into marriage equality. It is attachment 7.

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48 Ritter, A., Matthew-Simmons, F., & Carragher, N. “Why the alcohol and other drug community should support gay marriage”. *Drug and Alcohol Review*, Volume 31, Issue 1, pages 1–3, January 2012. <http://onlinelibrary.wiley.com/doi/10.1111/j.1465-3362.2011.00410.x/full>

49 Ritter, A., Matthew-Simmons, F., & Carragher, N. “Why the alcohol and other drug community should support gay marriage”. *Drug and Alcohol Review*, Volume 31, Issue 1, pages 1–3, January 2012. <http://onlinelibrary.wiley.com/doi/10.1111/j.1465-3362.2011.00410.x/full>

Personal views: inequality in marriage results in stigma and discrimination

Being officially and publicly denied the choice of whether or not I want to get married to the person I love has definitely had a negative impact on my life. I am unable to walk down the street as myself for fear of being discriminated against and heaven forbid I show public affection even if it were to just hold my partners hand. This kind of oppression permeates throughout every aspect of my life and affects how I work in my place of employment and even how I interact with my neighbours. You may not be able to eradicate the hate and ignorance of every single person but by allowing such an obvious form of discrimination such as marriage apartheid to occur, you justify its existence and propagate the belief that differences between individuals are to be feared and discouraged.

Imagine if it were you who could not realise your dreams because of something that you did not ask for, nor can you change.... I am proud to be gay but getting to this point I have had to battle to be accepted for who I am and because of these current laws must continue to battle for acceptance.... Knowing that the government is willing to back our community would give so many marginalised GLBT people more confidence and bolster their self-esteem.

If same-sex couples are allowed the same basic human rights as heterosexual couples...students would see that there is nothing wrong with being homosexual and this will help many students as they face their own sexual realisations. The validity of same-sex marriages would also assist students who have two mothers, or two fathers as their parents. By negating these relationships, many children are the object of schoolyard bullying and abuse.

Isn't time to empower our young so that they don't have to be burdened with inequality under the law. It's about giving them some extra breathing space

#### 4.4.5 The benefits of marriage equality for marriage

The public debate on marriage equality often pits the benefits of equality for same-sex partners against the disadvantages for the institution of marriage.

This polarity ignores the many benefits of marriage equality for marriage.

Allowing same-sex couples to marry will admit many couples who seek to uphold the core values of marriage and are enthusiastic for the institution. It will send out the message that marriage is defined by love and respect not prejudice and discrimination. Marriage equality will prompt different-sex couples to re-think and re-value wedlock as a site of love, devotion, and, not least, social inclusion. It will show that marriage is relevant and resilient enough to embrace changing social attitudes in the same way it did last century when married women were given legal equality and interracial marriages were allowed.

Evidence that marriage equality may uplift rather than demean marriage can be found in those places where the formal recognition of same-sex relationships has a relatively long history. The example of formally-recognised same-sex partners seems to have helped inspire an increasing number of young heterosexual couples to marry. For example, in recent years in Denmark, Norway and Sweden marriage rates have increased by as much as 30% and divorces are steadily decreasing in number. At the same time, these nations have led the world on the recognition of same-sex relationships. Denmark was the first nation in the world to allow same-sex unions to be formally recognised, followed closely by Norway and Sweden. In turn, Norway and Sweden have recently moved to full marriage equality. The Wall Street Journal agrees this is not a coincidence. In an October 2006 opinion article on same-sex marriage its assessment of the Scandinavian experience was simple,

“there is no evidence that allowing same-sex couples to marry weakens the institution. If anything, the numbers indicate the opposite”.<sup>50</sup>

We understand the Committee has received submissions from heterosexual partners who either refuse to marry while their gay and lesbian friends can't, or who feel their marriage is diminished by discrimination against same-sex relationships in the Marriage Act.

The number of heterosexual Australians in this category will only grow while marriage discrimination persists. In the ears of more and more Australian, the phrase “to the exclusion of all others” risks becoming a statement of prejudice rather than a commitment to fidelity. The future of marriage in Australia, far from being threatened by marriage equality, may actually depend on it.

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<sup>50</sup> Spedale, D. R., and William N. Eskridge Jr, W. N., “The Hitch”, Wall Street Journal, October 27, 2006. Reprinted at <http://www.law.yale.edu/news/3708.htm>

#### 4.4.6 The benefits for religious institutions: enhancing religious freedom

Freedom of religion is often cited as a right which marriage equality would violate. The argument seems to be that marriage equality would mean religious institutions and their adherents would no longer be able to restrict their solemnisation of marriages, or their teaching about marriage, to different-sex couples.

In reality marriage equality does not infringe religious freedoms. The demand at the core of marriage equality is for civil marriage. If religious bodies wish to retain an exclusive definition of religious marriage they have that right. What they do not have a right to do is impose that religious definition on a secular legal system and a secular society (for more see sections 5.1.4 and 7.3 below).

If freedom of religion plays a legitimate role in the current debate it is because marriage discrimination breaches the right of churches to officially solemnise same-sex marriages if that is their wish.

The following extract from the US Lambda Legal Defence Fund, a litigant in a court appeal for marriage equality in New Jersey, succinctly makes the case<sup>51</sup>.

“Increasingly, clergy use their religious freedom to affirm gay couples’ lifelong commitments because religious values often govern the commitments people make in life, and marriage is one of the most profound commitments. For instance, Maureen Kilian, a church administrator and devout Episcopalian who was a plaintiff in Lambda Legal’s New Jersey case seeking access to marriage for gay couples, gave the following testimony: “For me, being married also tells people about your values and your faith, because it is an incredibly important commitment that has a spiritual side. . . . Straight couples whose belief systems place a priority on commitment can, by getting married, show that their actions match the words of their beliefs.” Allowing Kilian to marry her partner of over 30 years actually would respect her religious freedom to have her actions match the words of her beliefs. At the same time, it would not interfere with the important religious freedom of faith groups that do not wish to marry gay couples, divorced individuals, persons of a different faith, or anyone else.”

We understand the Committee has received a number of submissions from religious organisations and officials in Australia that currently allow and/or conduct same-sex

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51 See [http://data.lambdalegal.org/publications/downloads/fs\\_freedom-of-religion-and-from-discrimination.pdf](http://data.lambdalegal.org/publications/downloads/fs_freedom-of-religion-and-from-discrimination.pdf)

union ceremonies and wish to conduct same-sex marriages, but are denied the right by current marriage law to legally solemnise same-sex marriages.

We urge the Committee to seriously consider these submissions as a compelling argument for marriage equality.

## 4.5 The conservative case for marriage equality

### 4.5.1 Economic conservative case: fostering financial self-reliance

“Marriage remains an economic bulwark. Single people...are economically vulnerable, and much more likely to fall into the arms of the welfare state. Furthermore, they call sooner upon public support when they need care—and, indeed, are likelier to fall ill (married people, the numbers show, are not only happier but considerably healthier). Not least important, marriage is a great social stabiliser of men.”

The Economist, on the need for gay marriage, January 1996<sup>52</sup>

There are three arguments for marriage equality which can broadly be categorized as “conservative”. AME cites these arguments to make it clear that support for marriage equality ranges across the political spectrum.

The economic case, highlighted in the above quote from The Economist, is that the failure of the state to allow same-sex couples to marry limits financial self-reliance and heightens the risk of welfare dependence of these couples.

Backing this up is substantial empirical evidence to suggest that legal discrimination can have disastrous economic consequences for the individuals and couples involved. A number of US and UK studies analysing same-sex couple household incomes support the claim that the absence of legal rights and protections for same-sex relationships heightens the risk of financial jeopardy. In her paper, “Sexual Orientation Discrimination in the UK Labour Market”, British researcher, Michele Calandrino, sums up the conclusions of this body of research for the recognition of same-sex relationships.

“Since same-sex partnerships are not legally recognised, homosexual people do not have the possibility to form their own legally protected family. (Legally

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52 “Let them wed”, The Economist, January 4, 1996. Available at [http://www.economist.com/PrinterFriendly.cfm?Story\\_ID=2515389](http://www.economist.com/PrinterFriendly.cfm?Story_ID=2515389)



recognized) families ... represent strong safety nets for individual workers and this possibility of 'income-insurance' is not open to homosexuals."<sup>53</sup>

In the Australian context, this problem has been lessened by the recognition of same-sex de facto partners, particularly with regard to financial and workplace entitlements. However, insofar as married partners are more financially interdependent and more likely to stay together longer, including at times of personal crisis, the economic safety net which marriage provides different-sex partners is missing for same-sex partners. Calandrino and others have identified the economic consequences of this absence – for both same-sex partners and society. They include a) a disincentive to maximize earning, savings and investments, to plan or take any of the financial risks necessary to increase personal capital, b) a heightened risk of falling into the welfare net, and c) a reduced capacity to engage in wealth creation.

Amanda Vanstone, a former minister in the Howard Government, also acknowledges the importance of marriage equality for promoting financial reliance between partners and lessening reliance on the state.

"The next point I would make to conservatives – if you believe as I do you should try and look after yourself, be independent and be an individual, then you are going to have to do that with others. You're going to have to have relationships and admit dependence on other people. That's what people do when they get married. They say 'We are going to be dependent on each other'. I think conservatives should welcome more people openly saying 'I'm going to have a life relationship with this person, we will be dependent on each other, we are going to ask things of each other instead of asking from the State'. I think conservatives should welcome more recognition of interdependence."<sup>54</sup>

#### 4.5.2 Morally conservative case: inculcating traditional values

Social conservatism is considered synonymous with opposition to marriage equality. However, some social conservatives make the case that allowing same-sex couples to marry will inculcate in these couples values like fidelity, commitment, self-discipline, and responsibility. According to conservative US columnist, David Brooks<sup>55</sup>,

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53 Calandrino, M. (1999) Sexual Orientation Discrimination in the UK Labour Market, St Anthony's College, University of Oxford.

54 'Q&A: Amanda Vanstone on why conservatives should support marriage equality', 7 March 2012, Australian Marriage Equality. <http://www.australianmarriageequality.com/wp/2012/03/07/qa-amanda-vanstone-on-why-conservatives-should-support-marriage-equality/>

55 Brooks, D., New York Times, 22.11.03

“We shouldn’t just allow gay marriage. We should insist on gay marriage. We should regard it as scandalous that two people could claim to love each other and not want to sanctify their love with marriage and fidelity.”

Gay conservatives or “homocons” like Jonathan Rauch and Andrew Sullivan take the argument a step further. They argue that giving equal rights and status to same-sex relationships will “civilise” homosexuals, in particular men. Rauch claims that reform is less about civil rights than responsibility. He calls same-sex marriage a form of “soft-coercion” away from “a Peter Pan culture of libertinism and liberation” towards “a social compact forged of responsibility”<sup>56</sup>.

Social conservatives such as Rauch may be overstating their case. Most gay men take on the same levels of interpersonal and social responsibility as everyone else, and those who don’t won’t change just because the law does. But their case has highlighted the hypocrisy of other social conservatives who cite the health and wellbeing benefits of marriage but then deny these to homosexuals, who believe marriage is preferable to de facto cohabitation (or “living in sin” as they might say) but are happy for same-sex couples to cohabit as de facto partners rather than marry, who talk of the importance of protecting children but deny the children of same-sex couples equal legal protection and social opportunities, and who denounce homosexuals for being promiscuous and then denounce them for wanting to commit to each other.

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56 Rauch, J., *Gay Marriage: why it is good for gays, good for straights, and good for America*, Henry Holt and Company, New York, 2004

Personal views: other benefits of equality and costs of inequality

I am yet to hear a single, coherent argument in favour of excluding same sex couples from an institution which for many is a rite of passage; a social and legal recognition of a commitment which should enjoy the support of the state. Encouraging people to commit to each other is in the best interests of the state, socially and economically. Allowing same sex couples an equal right to marry does not impact on any group other than same sex couples, who - like all other Australians - may or may not choose to take this step. What is important, however, is the possibility of choice.

Australia should get with the times and make Same Sex Marriage legal. It has had no detrimental effect in other countries. In fact, I have opted to live in another country where I know my relationship with my boyfriend will be recognised.

Until the laws do change then I for one will be staying away from a country that would treat its citizens so poorly. I hope for the sake of everyone, and myself as I would love to return home one day that same sex marriage is legalised.

As a transgender person living fulltime in my recognized and realized gender, but not yet in a position to legally change my gender it would great to be able to, if the opportunity arises to marry legally, and be recognized as a couple in a legal state and the rights that the union of marriage carries with it.

#### 4.5.3 Socially conservative case: reforming institutions in order to preserve them

A third conservative case for marriage equality has been brought into focus by the growing debate about marriage equality in the United Kingdom. Its focus is on incremental institutional and social reform rather than financial autonomy and personal morality.

British journalist Matthew d'Ancona argues that conservatives should support marriage equality in order to preserve the institution of marriage.

“The case for gay marriage is essentially conservative. I am grateful to Ian Ker’s magisterial new biography of G K Chesterton for the following observation by its subject: ‘All conservatism goes upon the assumption that if you leave a thing alone, you’ll leave a thing as it is. But you do not. If you leave a thing to itself, you are leaving it to wild and violent changes.’ ... Chesterton was scarcely a moderniser. But his point applies well to the institution of marriage. In an age of impatience, lives based on tactics not strategy, and instant gratification, matrimony is in dire need of renewal and restoration. ... If marriage is indeed the cornerstone of a stable society, as conservatives plausibly argue, then its extension to same-sex couples will be a stabilising force. Gay couples who marry will not only be exercising a new right; they will be recruited to, and reinforcing, an ancient institution.”<sup>57</sup>

The London Times makes a similar point, in its editorial, “Allowing same-sex couples to marry would enrich the institution and expand the sum of human happiness”:

“Far from damaging marriage, expanding it to same-sex couples shores it up. Stable gay relationships are a part of national life. If marital law cannot accommodate them, the purpose of marriage will eventually be brought into question. Gay marriage will be a notable but still evolutionary social reform. And the marriage contract has changed historically to take account of shifting mores ... [Allowing gay couples to marry] will enrich the society and culture that their fellow citizens share.”<sup>58</sup>

The conservative case for marriage equality was given perhaps its strongest exposition recently by the Conservative Prime Minister of Great Britain, when he said,

“Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don’t support gay marriage despite being a Conservative. I support gay marriage because I’m a Conservative.”<sup>59</sup>

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57 d’Ancona, Matthew. “The case for gay marriage is fundamentally conservative - it will strengthen Britain’s social fabric”, The Telegraph (UK), 10 March 2012. <http://www.telegraph.co.uk/news/politics/david-cameron/9135181/The-case-for-gay-marriage-is-fundamentally-conservative-it-will-strengthen-Britains-social-fabric.html>

58 “For Gay Marriage: Allowing same-sex couples to marry would enrich the institution and expand the sum of human happiness”, The Times, 5 March 2012. <http://www.thetimes.co.uk/tto/opinion/leaders/article3339948.ece> (subscription required)

59 “Gay marriage is ‘a step too far’, says defence minister as Cameron proposes full marriage rights for same-sex couples”, Daily Mail (UK), 7 October 2011. <http://www.dailymail.co.uk/news/article-2046445/Gay-marriage-David-Cameron-proposes-marriage-rights-sex-couples.html>

#### 4.5.4 A final word in favour of equality

As we have shown, there are many reasons for marriage equality. But there is one which strikes us as more important than any other. It is often unstated in debates about same-sex marriage, but it runs through almost everything else that is said on the matter.

We are talking, of course, about the quality of love, intimacy, happiness, care and commitment in same-sex relationships. At its best, the love between two men or the love between two women can endure all, sustain all, uplift all and conquer all. At its best this love is as good and true as any love. There are no studies which prove this and no legal decisions which uphold it. There is simply the experience of many tens of thousands of Australians lived quietly, joyfully and, in the face of discrimination, derision and ignorance, bravely.

For those of us who have known and lived this love, the justice of marriage equality is self-evident. For those of us who endure the injustice of marriage discrimination there is no possibility of rest until reform is finally achieved.

#### Recommendation Two

On the basis of all the points made in our submission thus far, we recommend that section 5(1) of the Marriage Act 1961 (Cth) be amended so that the definition of “marriage” is gender neutral.

# 5. The case against reform

## 5.1 Objections regarding the perceived characteristics of marriage

### 5.1.1 The definition of marriage

A common objection to marriage equality is that marriage is, by definition, a union of a man and a woman. This definition can be legal, lingual and/or cultural.

In the case of legal definition, it is clear from the experience overseas that marriage can include same-sex partners. The fact that a majority of Australians<sup>60</sup> support the same legal definition in Australia indicates that such a definition is acceptable in this country too.

The same case can be made about the linguistic/cultural definition of marriage. For many years, prior even to the current debate on marriage equality, some long-term same-sex partners have referred to themselves, and been referred to by others, as “husbands” or “wives”.

This usage appears to go back to colonial times. In the reports of colonial administrators, incidents abound of male and female convicts in same-sex relationships who considered themselves married.<sup>61</sup>

Again, opinion polls showing majority support for same-sex marriage would appear to confirm that most Australians are comfortable with an inclusive cultural definition of “marriage”.

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60 “Public Opinion: Nationally”, Australian Marriage Equality, <http://www.australianmarriageequality.com/wp/who-supports-equality/a-majority-of-australians-support-marriage-equality/>

61 Croome, R. “True and good citizens: The history of freedom to marry in Australia”. *Overland* 203-winter 2011, p. 15–25. <http://overland.org.au/previous-issues/issue-203/feature-rodney-croome/>

## 5.1.2 Marriage is an unchanging institution

This argument is that marriage has remained unchanged since it was first instituted. Often, this case is made together with the religious case below, i.e. marriage has remained unchanged since it was first ordained by God.

Clearly, this is not the case. Marriage has changed significantly under the influence of social and historical factors. For example, at various times in the past child betrothal was permitted, women lost all their legal rights upon marriage and became their husbands' property, interracial unions were barred and inter-faith unions frowned upon.

Since it was first introduced in 1961 the Marriage Act has undergone amendments no less than twenty times (in 1966, 1973 (twice), 1976, 1982, 1985, 1988, 1990, 1991, 1992, 1994, 1995, 1996, 1999, 2000, 2001, 2002, 2004, 2010, 2011).<sup>62</sup>

Citing these examples reminds us, not only that change occurs, but that change is good for marriage. Imagine if marriage was the same institution today that it was when any of the above-mentioned conditions prevailed: it would no longer be considered relevant and few couples would wish to marry. The same consideration applies to same-sex marriage. As society becomes more accepting of same-sex relationships, the current prohibition on same-sex marriages will come to be seen as anachronistic and the institution of marriage as a whole will be increasingly seen as an instrument of prejudice rather than a symbol of love (for more see section 4.4.5 above)

## 5.1.3 Historical tradition and the cross-cultural experience

Another common argument against marriage equality is that, regardless of all the above-mentioned changes, marriage has traditionally been an exclusively heterosexual institution, and is exclusively heterosexual in other non-western cultures and/or non-Christian faiths.

The first point to make here is that we should not continue a discriminatory practice simply because it was practised in the past and continues to be practised by others. Slavery would never have been abolished, nor women enfranchised, if we had looked to the past or to other peoples to show us the way forward.

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<sup>62</sup> Marriage Act 1961 (Cth) – Notes, Australasian Legal Information Institute, [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma196185/notes.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/notes.html)

The second point is that same-sex marriages have been legally recognised in the European tradition and in other cultures and faiths.

The historian, John Boswell, has published extensively on the solemnisation of same-sex unions in pre-modern Europe<sup>63</sup>. His research includes Catholic liturgies written specifically for such ceremonies. This research is summarized by William Eskridge in *The case for same-sex marriage*, and placed in the broader context of the recognition of same-sex marriages from ancient times through to the industrial revolution<sup>64</sup>. Eskridge also reviews the extensive evidence for legally-recognised same-sex marriages in other cultures and religions from pre-modern China and Japan, through pre-modern Africa to indigenous cultures around the world.

The third point is that marriage equality is being seriously considered and enacted in an ever-increasing number of culturally-diverse nations including Spain, Portugal, South Africa, Slovenia and Nepal. Claims that excluding same-sex couples from marriage is a universal cultural norm and that allowing same-sex marriages is a cultural anomaly are simply not true.<sup>65</sup>

#### 5.1.4 Religion

Some objections to marriage equality are overtly religious. Examples include, “the Bible prohibits same-sex relationships”, “marriage is a holy sacrament between the marriage partners and God”, “marriage is a God-ordained institution” and “Australia is a Judeo-Christian nation with Bible-based laws”. Generally, these points are made by Biblical literalists who do not represent all Christians or all people of faith.

There is ample evidence that religious objections to marriage equality are not held by the majority of Australian Christians. A Galaxy poll in 2011 found that 53 percent of Australian Christians agreed that same-sex couples should be allowed to marry.<sup>66</sup> Polls from the United States suggest that Catholics, out of all major Christian denominations, are the most supportive of same-sex marriage – with support as high as 71 percent

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63 Boswell, J., *Same-sex unions in pre-modern Europe*, Random House, New York, 1994

64 Eskridge, WN, *The case for same-sex marriage*, Free press, New York, 1996

65 “Marriage as a universal norm”, Speech by Bill Muehlenberg to the National Marriage Forum (2004). [http://www.marriage.org.au/index.php?option=com\\_content&view=article&id=22&Itemid=24](http://www.marriage.org.au/index.php?option=com_content&view=article&id=22&Itemid=24)

66 “Report: Same-sex marriage and religion”, Galaxy Research (August 2011), <http://www.australianmarriageequality.com/wp/wp-content/uploads/2011/08/marriagereligion.pdf>



among regular Mass-goers.<sup>67</sup> It is reasonable to assume that support among Catholics in Australia is similarly high.

In response to vocal opposition to marriage equality from the Australian Christian Lobby (ACL), a number of Christian groups have been anxious to make it clear that the ACL is not representative of mainstream Christian views. In December 2011, the Victorian Council of Churches – which includes representatives of thirty Christian denominations – released a statement saying,

“There are well-organised and well-financed lobby groups who routinely present their views as “the” Christian position ... The community needs to know that there is a range of views held on many topics in the Christian tradition, just as there are numerous views in all areas of human endeavour. It is important that no one view captures the attention of the community, of the media and of government ... (T) here is a growing concern amongst member churches that their voices are not heard or considered because of the media’s reliance on groups like ACL.”<sup>68</sup>

Amongst many Biblical non-literalists, there is the belief that the Bible does not prohibit same-sex relationships as we understand them today, or that whatever prohibitions do exist in the Bible are no longer relevant.<sup>69</sup> It is on the basis of this belief that some Christian denominations, leaders and congregations support same-sex marriages and assert that their freedom of religion is impaired by the failure of the law to allow these marriages to be solemnised. In this regard, we draw the Committee’s attention to a list of mainstream Australian clergy who support marriage equality (attachment 8).

We understand the Committee has received numerous submissions from Christian clergy who support marriage equality so it is not necessary for us to explore the debate on same-sex marriage among Christians. Instead, we will focus on the secular response to those people of faith who oppose marriage equality. The key point in this response is that legally, and increasingly culturally, marriage is not a religious institution.

Some religious opponents of marriage equality argue that marriage is at its core a religious institution. Picking up on this case, Liberal Senator Gary Humphries has argued that the church has “a measure of ownership” over marriage.

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67 “Report: Catholic Attitudes on Gay and Lesbian Issues: A Comprehensive Portrait from Recent Research”, Public Religion Research Institute, 22 March 2011, <http://publicreligion.org/research/2011/03/for-catholics-open-attitudes-on-gay-issues/>

68 “Media release: Australian Christian Lobby does not represent all Australian Christians, nor all Christian viewpoints”, 8.11.2011, Victorian Council of Churches. <http://vcc.org.au/Media%20Release%20ACL.pdf>

69 See, for instance, Helminiak, Daniel A. (2000) *What the Bible Really Says about Homosexuality*, Alamo Square Press.

“Marriage ... was originally a religious sacrament conferred by the church. Over many centuries, certain legal rights became attached to marriages which were not available outside this institution. In recent centuries lawmakers began to realise that it was unfair to exclude people not in a religiously-sanctioned relationship from the entitlements which the law attached to marriage, and accordingly a form of civil marriage was developed to confer many of those rights ... Marriage isn’t a term the government invented, and to change that definition is false logic – it’s something we neither have nor want the authority to change”.<sup>70</sup>

However, marriage pre-exists all modern religions, including Christianity. According to Professor Boswell, early Christians married under Roman civil law and did not observe marriage as a sacrament. Only in the later Middle Ages and the Renaissance did marriage as a legal and civil institution and marriage as a religious sacrament or covenant converge. Even then the degree of convergence differed between jurisdictions and between Christian denominations.<sup>71</sup> In modern times religious and civil marriage have again diverged. In Australian law, and, before that, in the British legal system Australia inherited, there has been a clear distinction between civil and religious for several centuries.

It is because of this clear distinction that our law a) allows divorce, even though this is expressly prohibited by Jesus (Matt 5:32), b) prohibits polygamy, arranged marriages, child betrothal and the subordination of married women, even though these are commonly found in the Old Testament (for instance, Gen 4:19; Gen 24:1-4), and c) allows marriage between people of different faiths or no faith.

The distinction between civil and religious marriage is increasingly pronounced in contemporary Australia with the majority of different-sex couples now choosing to marry outside a church setting by a civil celebrant. According to the Australian Bureau of Statistics 69.2% of marriages performed in 2010 were performed by a civil celebrant rather than a minister of religion. This compares to 40.3% in 1987.<sup>72</sup> Clearly, for the overwhelming majority of Australians getting married today, marriage is a civil, and not a religious, institution.

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70 Senator Gary Humphries, Letter to constituents, 13 September 2011. <http://www.australianmarriageequality.com/wp/wp-content/uploads/2012/03/Gary-Humphries-letter.pdf>

71 Boswell, J., Same-sex unions in pre-modern Europe, Random House, New York, 1994

72 Australian Bureau of Statistics. Marriages and Divorces, Australia, 2010, catalogue no 3310.0. <http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/1B42D16E581BD55FCA2579A3001C3D97?opendocument>

In an attempt to reflect the legal and cultural reality of marriage today, the UK's Equalities Minister, Lynne Featherstone, has expressly denied that the church "owns" the civil institution of marriage.

"(Marriage) is owned by neither the state nor the Church ... It is owned by the people. (And) it is the government's fundamental job to reflect society."<sup>73</sup>

British journalist Dominic Lawson makes a similar point in his article, "Let church and state agree to differ on gay marriage".

"The truth is that in the Catholic Church, at least, marriage has for centuries been something quite distinct from that understood by the civil law. For example, it does not recognise divorce, whatever the law says: someone married in a Catholic church can get a legal divorce, but if he or she later tries to get another Catholic marriage, it will not be granted – on the grounds that this would be nothing less than bigamy. In other words, the Church will be free to consider that same-sex couples are not married, whatever is the case in the eyes of the law."<sup>74</sup>

Lawson's goes on to point out that in countries with a separation of church and state, there are, in fact, (at least) two institutions called "marriage":

"If we are supporters of the idea of a separation between church and state, and on the whole that seems rather better than the alternatives, then it should be perfectly possible to operate a dual system, in which same-sex couples have unions recognised as marriage by the civil authorities, but not necessarily by the churches, which have their own special notions of what constitutes sacred union – the rite of marriage, as opposed to the secular "right"."<sup>75</sup>

Australian Marriage Equality has repeatedly pointed out that what we are seeking is not a change to any religious conception of marriage. Those churches who oppose marriage equality will remain free to celebrate marriage according to their own traditions. But in terms of the civil institution of marriage, it is incumbent upon governments to ensure that all citizens are treated equally before the law – and this means having equal opportunity to marry the person of one's choice.

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73 "Church 'does not own marriage'", BBC News UK, 25 February 2012. <http://www.bbc.co.uk/news/uk-17162442>

74 Lawson, D. "Let church and state agree to differ on gay marriage", The Independent (UK), 6 March 2012. <http://www.independent.co.uk/opinion/commentators/dominic-lawson/dominic-lawson-let-church-and-state-agree-to-differ-on-gay-marriage-7537783.html>

75 Lawson, D. "Let church and state agree to differ on gay marriage", The Independent (UK), 6 March 2012. <http://www.independent.co.uk/opinion/commentators/dominic-lawson/dominic-lawson-let-church-and-state-agree-to-differ-on-gay-marriage-7537783.html>

### 5.1.5 The freedom of religious officials and institutions will be violated

An argument that derives from the above religious case against marriage equality is that allowing same-sex marriages will impinge on religious freedom; in particular, religious marriage celebrants and civil celebrants with a religious faith will be forced to marry same-sex partners against their beliefs, religious welfare and child agencies will be forced to acknowledge same-sex married partners against their beliefs, and religious schools will be forced to teach that same-sex marriages are acceptable against their beliefs.

We note that under Section 47 of the Marriage Act 1961 (Cth) (“Ministers of religion not bound to solemnise marriage”), religious ministers already have an express exemption from any obligation to solemnize “any” marriage:

“Nothing in this Part:

- b) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or
- c) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:
  - (i) longer notice of intention to marry than that required by this Act is given; or
  - (ii) requirements additional to those provided by this Act are observed.”

As stated above, Australian Marriage Equality supports a further, explicit exemption for religious marriage celebrants who do not wish to marry same-sex partners, consistent with section 47 above, although we believe religious marriage celebrants should be able to marry same-sex partners if they wish (see section 4.4.6 above).

In March 2012, a coalition of sixteen clergy from various faiths and denominations wrote to all members of the House of Representatives calling on them to support a motion from Andrew Wilkie MP regarding same-sex marriage and religious freedoms. The motion – which is before the House of Representatives but yet to be voted upon – highlights the fact that religious ministers should be under no obligation to perform same-sex marriages should the law change to make marriage equality a reality.

Rev Roger Munson, a minister at St James Uniting Church in Curtin (ACT), wrote:

“Some clergy support same-sex marriage, some don’t. The law should give churches permission to celebrate marriage according to their particular faith. Mr Wilkie’s motion underlines this principle, and should satisfy both sides of the issue.”<sup>76</sup>

The letter from the sixteen clergy is attachment 9.

While we support an exemption for religious ministers’ allowing them to refusing to solemnize same-sex marriages, we do not support exemptions in the Marriage Act for the other situations we have described. Each state and territory has its own detailed and well-considered legislation regarding discrimination on the grounds of sex, sexual orientation and gender identity. Each provides greater or fewer exemptions for religious conscience and practice religion. If these are sufficient to protect religious freedoms generally, they should be sufficient to protect religious freedoms in regard to how civil celebrants, as well as faith-based welfare agencies and schools, deal with marriage between same-sex couples. Similarly, faith-based welfare agencies and schools will have their own policies on how they treat unmarried or divorced different-sex partners. These can easily be expanded to include same-sex married partners.

### 5.1.6 Procreation and children

A very common argument against marriage equality is that marriage is for the bearing and raising of children, and that same-sex because same-sex partners cannot, themselves, bear children, they should not be able to marry.

In the Australian context the most famous expression of this argument was by former Prime Minister, John Howard. When explaining marriage must remain between a man and a woman, he declared “You’re talking here about the survival of the species”<sup>77</sup>.

As noted above, there is no legal requirement for marrying different-sex partners to intend to have children. This is why it is legally possible for partners to marry if they are infertile, passed child bearing age, or have no intention to procreate. It is also why Australian law provides the same legal rights, protections and responsibilities to parents in non-married relationships and their children.

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<sup>76</sup> ‘Clergy & Equality Advocates find common ground on gay marriage’, 15 March 2012, Australian Marriage Equality. <http://www.australianmarriageequality.com/wp/2012/03/15/clergy-equality-advocates-find-common-ground-on-gay-marriage/>

<sup>77</sup> “Howard hits out at gay marriage”, The Age, 5 August 2003.

<http://www.theage.com.au/articles/2003/08/05/1059849376651.html>

This legal regime reflects new social norms. There is no longer an expectation in large parts of Australian society that married different-sex couples will marry before they have children, marry to have children, or necessarily have children at all.

The other side of the procreation argument is that an increasing number of same-sex couples are raising children.

Studies from Australia and overseas show there is a significant number of children being raised by two parents of the same sex. The best summary of the research in regards to points a) and b) has been put together by Assistant Professor Jenni Millbank in 2002<sup>78</sup>.

Regarding numbers, Prof Millbank concluded,

“Of the lesbian and gay population, there are many studies that have attempted to quantify how many are parents or live with children. 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 next 5 years as many lesbians also indicate that they are planning to have children in the future.”

Clearly, there is a large number of Australian children being parented by same-sex couples.

The benefits to these couples and their children of both marriage and the right to marry have been noted in the Herdt and Badgett studies cited above. They include the removal of harmful discrimination, and a greater sense of stability and connection.

Studies such as these have prompted authoritative statements from relevant professional organizations. For example, a joint statement by four peak public health organisations in the United States – the American Psychological Association, the California Psychological Association, the American Psychiatric Association, and the American Association for Marriage and Family Therapy – concluded that marriage equality will only benefit children.<sup>79</sup>

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78 Millbank, J., “Meet the Parents”, 2002, [http://girl.org.au/images/stories/meet\\_the\\_parents.pdf](http://girl.org.au/images/stories/meet_the_parents.pdf)

79 “Brief of the American Psychological Association, The California Psychological Association, the American Psychiatric Association, and the American Association for Marriage and Family Therapy as amici curiae in support of plaintiff-appellees”, Appeal from United States District Court for the Northern District of California Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker).

Far from being an argument against marriage equality, whatever association exists between marriage and child-rearing is actually an argument for it.

However, this has not stopped opponents of marriage equality from claiming marriage equality will harm families and children.

They commonly argue that it preferable for all children to have a father and a mother they are biologically related to and that marriage equality would harm children by officially sanctioning a sub-optimal environment for raising them.

To quote from Jim Wallace of the Australian Christian Lobby,

“Children benefit most from having two biological parents of the opposite sex. They need the love and role models of the different genders that a mother and a father can provide, and they need this ideal of marriage to aspire to.

“Any redefinition of marriage risks deliberately placing children in relational constraints which deny them a mother or a father.”<sup>80</sup>

Our response is that there is no evidence whatsoever children fair worse when raised by two parents of the same sex. In fact there is a “rare degree of consensus” among scholars and researchers that children raised in such families are just as well-adjusted as their peers.<sup>81</sup>

After reviewing the extensive research on the outcomes for children of same-sex couples, the American Academy of Pediatrics concluded that:

“(A) considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual.”<sup>82</sup>

A report commissioned by the Australian Psychological Society found that:

“(P)arenting practices and children’s outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of

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80 Wallace, op cit

81 Biblarz, T.J. & Stacey, J. (2010). “How does the gender of parents matter?”, *Journal of Marriage and Family*, 72 (February 2010): 3–22.

82 American Academy of Pediatrics, “Policy Statement: Co-parent or Second-Parent Adoption by Same-Sex Parents,” *Pediatrics*. 109(2002): 339-340. (Reaffirmed 1 February 2010).

heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families.”

Another research review published in the peer-reviewed *Journal of Developmental and Behavioral Pediatrics* concluded that:

“Findings from research suggest that children with lesbian or gay parents are comparable with children with heterosexual parents on key psychosocial developmental outcomes.”<sup>83</sup>

The above-mentioned joint statement co-signed by the American Psychological Association, the California Psychological Association, the American Psychiatric Association, and the American Association for Marriage and Family Therapy said that:

“There is no scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted.”

Inevitably, studies have been deployed by opponents of marriage equality to argue that same-sex parenting do not provide a healthy environment in which to raise children. But without exception, these reports are either deeply flawed methodologically, or they never purported to make the sort of claims that anti-marriage equality activists have attributed to them.

An example is the report by Professor Patrick Parkinson of Sydney Law School – entitled *For Kids’ Sake* launched in September 2011 by the Australian Christian Lobby.<sup>84</sup> The report investigated whether certain family structures are linked to poorer outcomes for children, such as abuse, mental disorders, mistreatment and neglect. Its conclusion was that children benefit from stable, secure “continuous” home environments of the kind that can be provided by married biological parents. This conclusion has been seized upon by opponents of marriage equality to argue the reform is a “recipe for social collapse” and a “crazy [attempt] at social engineering and thought control” .<sup>85</sup>

However this interpretation is not backed up by the research Prof Parkinson cites. Parkinson’s sources are very careful to use terms like “two continuously married

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83 Tasker, F. (2005) “Lesbian mothers, gay fathers, and their children: A review.” *Journal of Developmental and Behavioral Pediatrics*, 26(3), 224-240.

84 Parkinson, P. (2011) “For Kids’ Sake: Repairing the social environment for Australian children and young people”. The University of Sydney. [http://sydney.edu.au/law/news/docs\\_pdfs\\_images/2011/Sep/FKS-ResearchReport.pdf](http://sydney.edu.au/law/news/docs_pdfs_images/2011/Sep/FKS-ResearchReport.pdf)

85 Shanahan, A. “Children suffer under political correctness”, *The Australian*, 3 September 2011. <http://www.theaustralian.com.au/news/opinion/children-suffer-under-political-correctness/story-e6frg6zo-1226127876896>



parents” to define their ideal, and terms like “step-parents”, “new dads” and “non-resident parents” for what they believe is less than ideal. It’s true that one of Parkinson’s researchers, US Professor Susan Brown, refers to “married biological parents”, but she is careful to define this term as excluding only “married step, cohabiting, and single-parent families”. It’s also true Parkinson cites research showing “father-absence” as a problem, but in his own words this is about “fathers (who) drop out of children’s lives when the parents are not living together”.

The point is that the research Parkinson cites looks at the effect on children of disruption or instability in family life. That disruption can take the form of divorce, the stress on a single parent, a step-parent moving in, or an irresponsible, absent dad. What the researchers are not looking at is same-sex parenting because an increasing number of children born to same-sex partners know both partners as their parents from birth until adulthood, and experience none of the instability and disruption identified as the cause of poor child-rearing outcomes.

It is true that some same-sex partners with children have unhappy relationships, split up, meet new partners, or are raising children from previous relationships. But the rate of disruption and instability in two-mum and two-dad households is no greater than it is in the general population, and could possibly be lower according to the latest research in this area.

Several commentators have noted that Prof Parkinson himself does not draw from his work the extreme conclusions others have drawn.

As Sydney journalist Erik Jensen points out,

“The problem is that nowhere in its 117 pages does the report pass judgment on gay marriage. If anything, it recommends parent and marriage counselling be extended to gay couples.”<sup>86</sup>

As Rodney Croome, campaign director of Australian Marriage Equality, observed, many of Professor Parkinson’s arguments about the benefits of marriage can be directly applied to the children of same-sex couples.

“The obvious extrapolation is that if marriage is good for the kids of opposite-sex couples, it will also be good for the children being raised by same-sex couples ... (And) when we look more closely at the Parkinson Report we can see it is actually

a sustained case for respecting and strengthening the bonds between same-sex partners and their children by allowing these partners to marry."<sup>87</sup>

In summary, if marriage is good for kids, it is because it provides them with stability and security, not because it may provide them with parents who happen to be of different genders or who happen to share their genes.

We believe Australian parents understand that the case put forward by groups like the ACL is not true. We note that in the 2010 Galaxy opinion poll on marriage equality 72% of respondents with children supported same-sex marriage, a result 10% higher than the population as a whole.<sup>88</sup> Clearly, Australian parents do not feel that marriage equality threatens their families or children.

### 5.1.7 Sexual complementarity

An argument often associated with the procreational case against marriage equality, is the argument that marriage is essentially about the complementarity of the sexes. This argument is based on the view that men and women are essentially different in way that makes their union somehow more meaningful.

The prominent columnist Piers Akerman, has said,

"Among humans, marriage is the joining of a man and a woman, different sexes, one whole....At the simplest, a marriage is reflected in the relationship between a nut and bolt. A single nut is not much use. Neither is a bolt, but the two used in tandem as they are designed to be used, form an effective fastener. Two nuts don't make it, nor two bolts. Try to put them together and they don't marry."<sup>89</sup>

Such views suggest that biological sex is a more important feature of an individual than his or her character, capacities and morality. They suggest that biological sex is what determines how well we build our primary personal relationship rather than our capacity for love, commitment, patience and sacrifice.

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87 Croome, R. "Parkinson report an argument for same-sex marriage", ABC The Drum Unleashed. 14 September 2011. <http://www.abc.net.au/unleashed/2897380.html>

88 Galaxy Research poll. Same-sex marriage study: October 2010. Commissioned by Australian Marriage Equality and Parents & Friends of Lesbians and Gays (PFLAG). <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/12/Full-Galaxy-Poll-Results-2010.pdf>

89 Akerman, P., "When convenience and distraction unite", Daily Telegraph, 3.8.09, [http://blogs.news.com.au/dailytelegraph/piersakerman/index.php/dailytelegraph/comments/when\\_convenience\\_and\\_distraction\\_unite/](http://blogs.news.com.au/dailytelegraph/piersakerman/index.php/dailytelegraph/comments/when_convenience_and_distraction_unite/)

We believe it is self-evident that true complementarity between partners is determined not by their anatomical features, but by the strength of the love and commitment they share. To put it more bluntly, a successful relationship is based on what is in one's heart, not what is between one's legs. There is a substantial body of peer-reviewed research which indicates that many same-sex attracted people form committed relationships that are long term, and that these couples have the same level of relationship quality as opposite-sex couples.<sup>90</sup> (For a visual representation of Australian same-sex couples who have been together for longer than the average marriage (ie. 8.7 years), visit the Commitment Project website, [www.thecommitmentproject.net](http://www.thecommitmentproject.net).)

What makes two people complementary has exercised the human mind for thousands of years. But serious thinkers long ago dismissed biological sex as the key. In Plato's Symposium, Aristophanes makes it clear that biological sex is the very last personal characteristic which determines complementarity in romantic, marriage-like relationships.

“And so, when a person meets the half that is his very own, whatever his orientation, whether it's two men or not, something wonderful happens: the two are struck from their senses by love, by a sense of belonging to one another, and by desire, and they don't want to be separated from one another, not even for a moment.”<sup>91</sup>

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90 For example,

\_\_\_ Bradford, J., C. Ryan, and E. Rothblum, “National lesbian healthcare survey: Implications for mental health”, *Journal of Consulting and Clinical Psychology*, Vol 62 No 2, 1994 pp. 228-242.

\_\_\_ Falkner, A., and J. Garber, “2001 gay/lesbian consumer online census”, Syracuse, Syracuse University, New York, OpusComm, and GSociety. 2002

\_\_\_ Morris, J., K. Balsam, K., and E. Rothblum, (2002). “Lesbian and bisexual mothers and nonmothers: Demographics and the coming-out process”, *Developmental Psychology*, 16, 144156.

\_\_\_ Blumstein, P., and P. Schwartz, *American couples: Money, work, sex*. William Morrow, New York, 1983

\_\_\_ Bryant, A. S., “Relationship characteristics of gay and lesbian couples: Findings from a national survey”, *Journal of Gay and Lesbian Social Services*, 1, 1994, pp. 101-117.

\_\_\_ Kurdek, L. A., “Differences between gay and lesbian cohabiting couples”, *Journal of Social Personal Relationships*, 20, 2003, pp. 411-436.

\_\_\_ Peplau, L. A., and K. P. Beals, “The family lives of lesbians and gay men”, in A. L. Vangelisti (Ed.), *Handbook of family communication*, pp. 233-248, 2004

\_\_\_ Peplau, L. and L. Spalding, “The close relationships of lesbians, gay men and bisexuals”, in C. Hendrick and S. Hendrick (Eds.). *Close relationships: A sourcebook*. Thousand Oaks, California Sage, 2000, pp. 449-474.

91 Plato, Symposium. <http://www.laphamsquarterly.org/voices-in-time/platos-other-half.php?page=all>

For our purposes, it is enough to remind the Committee that complementarity, however it is defined and on whatever it is based, is not a condition for entering a legal marriage.

### 5.1.8 Marriage will be diminished, demeaned, degraded or destroyed

In the Australian context this is probably the most common objection to marriage equality. It is also one of the most frustrating because rarely, if ever, do those who make this claim explain why marriage will be diminished by equality.

One possibility is that those who make this claim believe same-sex relationships are immoral, sinful or flawed, indeed so deeply immoral, sinful or flawed that they will inevitably drag marriage down rather than be “redeemed” by it.

In other sections of this submission we have questioned the legitimacy and relevance of claims that same-sex relationships are against Biblical teaching and are more likely to be unstable.

The other response is again to refer to the impact of marriage equality on different-sex marriages in those places where marriage equality has been achieved. In section 4.4.5 we looked at evidence that the formal recognition of same-sex relationships may encourage different-sex marriages by effectively “rejuvenating” marriage. There is also evidence that marriage equality does not have a direct relationship with different-sex divorce rates. For example, the US state of Massachusetts has that nation’s lowest divorce rate, and was also the first to allow same-sex marriages<sup>92</sup>.

Other US states which came early to either marriage equality or civil union schemes also have relatively low divorce rates. This should not be surprising. It is very difficult to imagine a situation where a different-sex couple would feel their marriage is worth less and/or not worth continuing, because same-sex partners can marry.

Because the overseas experience so clearly shows that marriage equality does not diminish the quality or duration of different-sex marriages, we must seek ask if there are other ways marriage may be diminished by equality.

Sometimes opponents of equality suggest that marriage is such an important but fragile institution that any change poses a risk too great to take, regardless of what that change might be.

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92 See <http://www.cdc.gov/nchs/data/nvss/Divorce%20Rates%2090%2095%20and%2099-07.pdf>

In an opinion piece against same-sex marriage in the *Launceston Examiner*, the managing director of the Australian Christian Lobby, Jim Wallace, wrote,

“A large number of the current problems encountered by society are caused by family breakdown. As a society we need to be doing all we can to promote stable marriages and family life, not changing what marriage means”.<sup>93</sup>

The obvious response is that the definition of marriage has changed many times without the institution falling apart. For example, divorce law has been reformed to allow partners to escape abusive or unhappy marriages, marital rights and responsibilities have been extended to unmarried de facto partners, rape law has been reformed to remove marriage as a defence, children’s law has been reformed to recognise the rights of children born out of wedlock, and marriage law itself has been reformed to provide legal equality for wives and, as already mentioned, to remove barriers to interracial marriages.

When each of these reforms was proposed, opponents of change claimed that the institution of marriage would be diminished, demeaned, degraded or destroyed. But clearly this was not the case. Instead marriage was reformed, renovated and rejuvenated so that it remained relevant to an ever more tolerant and egalitarian age.

We believe marriage equality is part of the same tradition of reform and renovation, and that opposition to marriage equality is as misguided as opposition to past reforms.

There are some people who oppose marriage equality because they oppose all change. There is probably little we can say to assuage their concerns. But for those who oppose marriage equality because they value the institution so highly and fear its decline, we say: have more faith in the resilience and adaptability of marriage, history shows reform is not the enemy of matrimony some fear it to be.

### 5.1.9 The slippery slope

Some opponents of marriage equality argue that it will open the floodgates, and/or lead society down a slippery slope, to the legitimisation of any number of illegitimate, unacceptable and non-marriage-like relationships.

Some argue that marriage equality for same-sex partners will lead other people to demand the right to marry their dogs, cars, plasma screens, or other animals or

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93 Wallace, J., “Should we legalise gay marriage?”, *Examiner*, 4.9.09, p23

inanimate objects they hold dear. This case is probably made facetiously, but it is still deeply offensive to same-sex partners to have their relationships compared to the relationship between a car owner and his or her car. It is also absurd. Marriage is a legal contract between consenting adults and as far as we know there is no proposal to give pets or household items legal standing to sign contracts.

These are classic examples of the “slippery slope fallacy”, that is, when someone “asserts that some event must inevitably follow from another without any argument for the inevitability of the event in question”.<sup>94</sup> Alarmist predictions about dire consequences to follow from a particular social change should not be taken seriously unless substantiated by evidence or at least some logical argumentation.

### 5.1.9.1 Polygamy and polyamory

A more serious argument is that allowing same-sex marriage will lead to polygamy. Prominent columnist and marriage equality opponent, Andrew Bolt, makes this argument in terms of the principle of freedom of choice referred to in section 4.3.4 above.

“...how can a society that’s moving to give a man the right to marry another man then refuse a man the right to marry two women? Give way on gay marriage, you must give way on polygamy. In both cases it’s about consenting adults, right?”<sup>95</sup>

As we have indicated above, marriage equality is about the principle of freedom of choice, but not only about that principle. There are also important legal, social and cultural limits on this freedom. When these are taken into account we can see that the above argument makes no sense.

Polygamy raises practical legal considerations about group consent and legal regulation of relationships that simply do not arise in the case of monogamous (same-sex or different-sex) relationships. For example, the recognition of polygamous marriages would have to address how the state would regulate the addition and removal of partners to a union where some may consent and some may not; or how the state would administer the division of property when varying numbers of partners joined or left such a union. It would add considerable complexity to government regulation of tax and welfare arrangements, care of children, and data collection. We have not seen

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94 “Fallacy: Slippery Slope”, The Nizkor Project. <http://www.nizkor.org/features/fallacies/slippery-slope.html>

95 Bolt, A., “Polygamy - the right to put down women”, Herald Sun, 28.6.08, <http://www.news.com.au/heraldsun/story/0,21985,23928410-25717,00.html>

solutions we think resolve the legal problems with polygamy. And of course no such proposal is before the Parliament to be evaluated on its merits. In contrast, there are three specific bills before the Parliament to remove sex discrimination in the Marriage Act 1961. They can be analysed directly, and concerns comprehensively addressed as they have been above.

On top of the legal barriers to the recognition of polygamous marriages there are cultural barriers.

We note that none of the countries which allow same-sex marriage are polygamous marriages officially solemnised, even though some of them, like Spain and the Netherlands, have large religious minorities that traditionally allow it. There is an even wider gulf between the two issues in countries which allow polygamy. In places like Saudi Arabia, Afghanistan and Nigeria, homosexuals are not only unable to marry, there are put to death. This is not a coincidence.

Polygamy is generally about a man controlling the lives of several women. It is an arrangement that comes from a time when women were considered less valuable than men, restricted to the house and to childrearing, and made their husband's property. This is reflected in the legal status of the wives in polygamous relationships. Generally they lose their rights and autonomy when they marry, are punished much more harshly for adultery, and can be the divorcee but not the divorcer.

Wherever values like this prevail same-sex marriage is inconceivable. Where all husbands are legally dominant and all wives mere submissive extensions of their husband, it is absurd and profoundly threatening for there to be an official union between two husbands or two wives. Where marriage is the union of a bread winner who must always be male and a child-carer who must always be female, it is economically unsustainable for people of the same-sex to marry.

Same-sex marriage only begins to make sense in a society where there is a degree of social and economic equity between men and women and legal equality between marriage partners. It only becomes possible for two men or two women to marry if men and women are already free to choose how they lead their lives regardless of their gender.

A further point about polygamy is that there is no guarantee that maintaining the ban on same-sex marriage will stop polygamous relationships from being legalised someday anyway, because allowing same-sex marriage is not a pre-condition for legalising them. For example, all the countries that currently recognise polygamy arrived there not via

same-sex marriage, but via different-sex marriage. Using the flawed logic of the slippery slope, one could argue that different-sex marriage should be banned because it has sometimes led to polygamous marriages and could do so again. Clearly this is absurd. The argument that same-sex marriage will lead to the recognition of polygamy is no less absurd.

Another form of multiple marriage that opponents of marriage equality believe lies at the end of the same-sex marriage slippery slope is “polyamorous marriage”. Polyamory is distinguished from polygamy by being a mutual conjugal relationship between three or more people based on equality between these people. Clearly, the gender inequality that is characteristic of polygamous relationships does not apply in this case. This leads opponents of same-sex marriage to ask, if marriage today is about equality between partners, as well as freedom of choice, then how can we say “yes” to same-sex couples and “no” to polyamorists?

There are several possible answers to this question.

The first is legal. As with polygamous marriages, the recognition of polyamorous relationships raises practical legal concerns regarding issues like consent to new partners, division of property and custody of children. Given that, to our knowledge, there is no body of law anywhere in the world that provides a precedent for recognising polyamorous relationships, legal concerns raised by the recognition of these relationships are even greater than those raised by polygamous marriages.

The second response to the question “why not polyamory next?” is that virtually no-one seems to want it. Australia is a parliamentary democracy where proposals can only become law if they gain the support of the majority of representatives in each House of Parliament. Unlike in the United States, there is very limited scope for judicial reform in the area of human rights because Australia does not have a bill or charter of rights. Therefore, polyamory can only be legally recognised if a significant proportion of Australians and their representatives supported it. We are not aware of any polling on the subject, but it would be reasonable to assume that public support for the idea is very low, and certainly nothing approaching the 62 percent that support same-sex marriage. There certainly has been no visible campaign for the issue, unlike the strong national movement that is calling for same-sex marriage.

If there was a genuine movement in Australia for the legal recognition of polyamorous relationships we can expect it would first seek the recognition of these relationships as de facto unions or as civil unions before it then moved on to marriage. However, no case has been made at a state or federal level for the extension of de facto or civil union



status to polyamorous relationships. As long as this remains so, the idea that there is a movement for the recognition of polyamorous relationships is baseless.

Certainly, those calling for same-sex marriage are not proponents of polyamory. A large part of same-sex couples' desire to marry is being able to experience the traditions, rights and responsibilities that come with marriage as it is currently understood. Like others, same-sex partners grow up in a world where there is a strong and widespread aspiration to enter two-person marriages. They share that aspiration. They do not grow up with an aspiration to enter several-person marriages. This is why there is no movement from same-sex partners for the recognition of polyamorous relationships.

The next set of responses is to do with culture expectations of marriage. Marriage in European Australian culture has always been about couples. Marriage as the bond of two people has endured all the other reforms which have occurred to marriage over the last hundred years, including the development of civil marriage. This makes us confident it will endure further reforms, including allowing same-sex marriages. Why is there such a deep cultural expectation that marriage is a two-person union? Marriage is about fostering stable and durable relationships. In our law and culture marriage is ideally a lifelong and exclusive union. Relationships between two people, either of different sex or of the same sex, can be sufficiently stable and enduring to fulfill these criteria. It is hard to see how a lifelong and exclusive union can exist as we add more people – each with their own distinct needs, aspirations, fears, insecurities and jealousies – to a particular relationship. There are doubtless examples of faithful and committed multiple partners. But in general, stability and durability are far easier to achieve between two partners. Another consideration about the nature of marriage is that marriage is also about uniting two families as well as two partners. We see this in the use of terms like “sister in law” and “father in law”. It is hard to imagine how polyamorous relationships would unite families and create kinship in the same way as same or different-sex marriages.

Finally, there is the argument that same-sex marriage is “a natural stopping point” because same-sex attracted people remain the last class of people excluded from marriage on the basis of an immutable characteristic. Currently, same-sex couples don't have the option to marry, and there is nothing they can do to earn that right. But when same-sex marriage is eventually legalised, there will be no class of citizens left who are expressly prohibited from marrying because of something about themselves they cannot change (aside from children, who do not have the maturity or capacity to consent). This, argues Jonathan Rauch, will be the natural stopping place:

“Same-sex marriage is not, as so often alleged, a slippery slope to polygamy or anything else. Just the opposite: it is a natural stopping place. In fact, it is the natural stopping place. It is the bottom of the slope. When everybody can marry one other person, there will be no one left to take in.”<sup>96</sup>

American writers, Andrew Sullivan, provides further rationale for this point when he says,

“I believe that someone’s sexual orientation is a deeper issue than the number of people they want to express that orientation with. Polyamory is a choice while same-sex attraction is not.”

Aside from the legal, political and cultural barriers to the legal recognition of polygamy and polyamory there is the overseas experience.

When it comes to polygamy and polyamory, and the slippery slope generally, none of the dire outcomes from same-sex marriage predicted by its opponents have come to pass in any of the overseas jurisdictions that have marriage equality. In our view this is the most important and compelling argument against the slippery slope because it is an empirical fact, not theory, postulation or prediction. Some opponents of marriage equality will argue that marriage equality has not been in place long enough to know what the results will be. Our response is that it has been long enough to know the sky does not fall in.

#### 5.1.10 Equality is opposed by key constituencies

There is a commonly-held misconception about marriage equality is that it is opposed by either a majority of Australians or by sections of the population who hold their views strongly and/or have significant social and electoral influence.

As noted in section 4.2.2 above, it is clear that a majority of Australians support marriage equality.

The question then becomes, who opposes reform and how strongly?

The most recent Galaxy poll (February 2012) on marriage equality shows that, while support is lower among blue collar, lower income, less-well-educated, older, male respondents, marriage equality still has the support of the greatest number of

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<sup>96</sup> Rauch, J. (2004) *Gay Marriage: Why it is good for gays, good for straights, and good for America*. Henry Holt & Co., New York: p 137.

respondents in each of these categories.<sup>97</sup> Clearly, none of these demographic groups strongly oppose reform. Some of the key demographics, and their level of support for marriage equality, are presented below:

	Support	Oppose
Blue collar	55%	35%
White collar	66%	27%

	Support	Oppose
Married	58%	33%
Not married	69%	24%

	Support	Oppose
Capital city	66%	28%
Rural/regional	57%	33%

	Support	Oppose
18-24 years	81%	15%
25-34 years	64%	28%
35-49 years	62%	31%
50-64 years	51%	38%

The statements of some Australian religious leaders, particularly those affiliated with Islam, orthodox Judaism, the Catholic Church, or with various Protestant fundamentalist and evangelical denominations, would suggest that strong and unswerving opposition to marriage equality is to be found in their congregations.

We believe this assertion should not be taken for granted. As we have already noted, 53% of Australian Christians support marriage equality. A diversity of views on marriage equality is as likely to exist in the above-mentioned religious denominations as it is in others.

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97 Galaxy poll, Religion and same-sex marriage, February 2012. <http://www.australianmarriageequality.com/wp/wp-content/uploads/2012/03/REPORT-Religion-And-Same-Sex-Marriage-Feb-2012.pdf>

But even if some of the congregations in question strongly oppose marriage equality, is this a legitimate reason not to reform the Marriage Act?

As a pluralistic society, we must be tolerant of differing views. But as we have noted several times already, as a secular society in which law is not based on religious doctrine, we must not allow this doctrine to determine our laws. Furthermore, as a democracy, we must also not allow minority views, including the views of the minority of Australians who oppose marriage equality, to entirely determine government policy.

Of course, elected governments will always be sensitive to the views of key constituencies. In this regard, we understand that successive Federal Governments and Oppositions have assumed some fundamentalists and evangelical congregations that oppose same-sex marriage have a disproportionate influence on which political party takes government because these congregations are located in key marginal seats and because they hold some sway over less-religious constituents who depend on their welfare and educational services.

We believe the electoral influence of these congregations has been grossly over-estimated, often by their leaders to inflate these leaders' political influence. We ask that the Committee seek out whatever information the Federal Government and Opposition have been given in the course of the debate about marriage equality about the size and sway of fundamentalist and evangelical congregations in key marginal seats, so the veracity of this information can be checked against reality.

## **5.2 Objections regarding perceived characteristics of same-sex relationships**

### **5.2.1 Same-sex relationships are shorter, less happy, less stable and less committed**

To make the point that same-sex couples are incapable of the levels of commitments associated with marriage, opponents of marriage equality often cite studies purportedly showing same-sex relationships are shorter, less happy, stable and committed than different-sex relationships.

One common example is a Dutch study which opponents of equality claim found that gay men in Amsterdam have an average of eight partners a year<sup>98</sup>.

What those who cite this study often do not mention is that it was designed specifically to look at high-risk behaviour for HIV infection, and hence focused on young gay men living in the inner-city, explicitly excluding men in monogamous relationships and, on occasion, men who were HIV negative. Obviously this is not representative of all same-sex attracted people.

The same point can be made about those studies which compare generally unmarried same-sex couples to married different-sex couples<sup>99</sup>.

In contrast to these isolated and mis-construed studies, there is a substantial body of research which indicates that many same-sex attracted people,

- have committed relationships. For example, in the US survey data indicate that between 40% and 60% of gay men and between 45% and 80% of lesbians are currently involved in a romantic relationship<sup>100</sup>
- have the same level of relationship quality and commitment as different-sex couples<sup>101</sup>, and
- often form durable relationships. For example, US survey data indicate that between 18% and 28% of gay couples and between 8% and 21% of lesbian couples have

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98 Xiridou et al, "The contribution of steady and casual partnerships to the incidence of HIV infection among homosexual men in Amsterdam", *AIDS*, Issue 7, Vol 17, May, 2003, pp 1029-1038, <http://journals.lww.com/aidsonline/pages/articleviewer.aspx?year=2003&issue=05020&article=00012&type=fulltext>

99 For example, Weedon-Fekjr, H., "The demographics of same-sex marriages in Norway and Sweden", *Demography*, Feb, 2006.

100 For example, Bradford, J., Ryan, C., & Rothblum, E. (1994). "National lesbian healthcare survey: Implications for mental health", *Journal of Consulting and Clinical Psychology*, 62. 228-242.

Falkner, A., & Garber, J. (2002). 2001 gay/lesbian consumer online census, Syracuse, NY: Syracuse University, OpusComm Group, and GSociety.

Morris, J., Balsam, K., & Rothblum, E. (2002). "Lesbian and bisexual mothers and nonmothers: Demographics and the coming-out process," *Developmental Psychology*, 16, 144156.

101 Peplau, L. A., & Beals, K. P. (2004). "The family lives of lesbians and gay men", in A. L. Vangelisti (Ed.), *Handbook of family communication* (pp. 233-248). Mahwah, NJ: Erlbaum

Peplau, L. & Spalding, L. (2000). "The close relationships of lesbians, gay men and bisexuals", in C. Hendrick & S. Hendrick (Eds.). *Close relationships: A sourcebook* (pp. 449-474). Thousand Oaks, CA: Sage.

lived together 10 or more years<sup>102</sup>

In order to remove demographic biases that bring into the question the relevance of some studies, the best way to determine if same-sex relationships can have the same marriage-like characteristics as different-sex relationships, it is necessary to look at comparative divorce rates in those jurisdictions where same-sex marriage is allowed.

The Netherlands is the obvious jurisdiction to turn to first because marriage equality has been in place for almost a decade. What we find in that country is that divorce rates among same-sex and different-sex couples married in the same year is exactly the same<sup>103</sup>. Interestingly, the latest statistics from the United Kingdom indicate that same-sex couples in civil partnerships are less likely to divorce than different-sex couples in marriages<sup>104</sup>.

This would suggest that, for those same-sex couples who are likely to marry, levels of commitment are the same as for their different-sex counterparts, and may even be greater.

Some researchers have also speculated that the stability of same-sex couples would be enhanced if partners from same-sex couples enjoyed the same levels of social support and public recognition of their relationships as partners from heterosexual couples do<sup>105</sup>.

There also are studies which suggest a correlation between the legal recognition of same-sex relationships and the duration of these relationships<sup>106</sup>.

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102 Blumstein, P., & Schwartz, P. (1983). *American couples: Money, work, sex*. New York: William Morrow and Company, Inc.

Bryant, A. S., & Demian. (1994). Relationship characteristics of gay and lesbian couples: Findings from a national survey. *Journal of Gay and Lesbian Social Services*, 1, 101-117.

Falkner, A., & Garber, J. (2002). 2001 gay/lesbian consumer online census, Syracuse, NY: Syracuse University, OpusComm Group, and GSociety.

Kurdek, L. A. (2003). Differences between gay and lesbian cohabiting couples. *Journal of Social Personal Relationships*, 20, 411-436.

103 Gottlieb, S. (2006) "Five years of gay marriage", Radio Nederland Wereldomroep. <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/gay060403-redirected>

104 <http://www.pinknews.co.uk/2011/09/23/gay-civil-partners-less-likely-to-split-up-than-straight-married-couples/>

105 Kurdek, L. A. (2004). "Are gay and lesbian cohabiting couples really different from heterosexual married couples?" *Journal of Marriage and Family*, 66, 880-901.

106 For example, Oswald et al, "Structural and Moral Commitment Among Same-Sex Couples:

Relationship Duration, Religiosity, and Parental Status", *Journal of Family Psychology*, No3, Vol 22, 2008, pp411-419, <http://www.clarku.edu/faculty/goldberg/OSWALD%20GOLDBERG%20ET%20AL.%20JFP%202008.pdf>

Ultimately, however, the debate about how long and stable same-sex relationships are is irrelevant to the issue of marriage equality.

Allowing the class of same-sex partners to marry does not mean all these partners will marry. Generally, only those partners for whom the institution is appropriate and whose relationships uphold its values, will seek to marry. Put simply, marriage is for people who want to marry and are in marriage-like relationships. The characteristics of the relationships of those same-sex partners who do not wish to marry is irrelevant to the question of whether same-sex marriage should be permitted.

### 5.2.2 We should not radically redefine marriage for a small minority of people

The final point in the previous section often leads some opponents of marriage equality to argue that we should not redefine marriage for the sake of a sub-class of people within an already-small minority.

There are two general responses to this point. The first is about the number of same-sex attracted people and/or same-sex couples in Australia. The second is about whether equality will radically redefine marriage.

It is impossible to be sure how many same-sex attracted people and/or couples there are in Australia.

In regard to same-sex attracted people, various surveys have returned percentages ranging from 1 to 10%, depending on the sample surveyed.

In regard to same-sex couples, the Australian Bureau of Statistics produces counts based on those Census questions which allows same-sex de facto partners to indicate their relationship. But the ABS admits this is probably an undercount of how many same-sex couples there actually are.

Here is the ABS statement on the issue from its 2009 social trends paper on couples.

“The number of people living in a same-sex couple relationship has also increased over the past decade. In 1996, 0.2% of all adults said they were living with a same-sex partner. By 2006, this had increased to 0.4% (to around 50,000 people). However, 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."<sup>107</sup>

At the very least, then, we can say that 50,000 partners and another 50,000 same-sex attracted people are affected by marriage discrimination. With some certainty we can say that this number is much higher, higher indeed by several factors.

100,000 is not an insignificant number of citizens to be disadvantaged by legal discrimination. Arguably the number of Aborigines who were adversely affected by limitation on their choice of marriage partner was not much greater than this. To remove discrimination against this racial minority, the definition of marriage was changed to remove racial restrictions. Why then, can't the definition of marriage be changed to remove gender restrictions?

The final point to be made about same-sex partners as a minority is this: according to the most recent national polling, the percentage of Australians who support marriage equality is a large majority of 62%. Only 30% oppose it.<sup>108</sup> The argument that a small minority should not define marriage is an argument for marriage equality.

The second point raised in this section is about radically redefining marriage.

Permitting same-sex partners to marry does not significantly change the definition of marriage. Marriage will remain the union of two people for life. Indeed, the core values of marriage, love and commitment, will be enhanced by the institution's embrace of loving committed same-sex couples in the same it was enhanced by the embrace of interracial couples.

As explained in section 5.1.8 above, opponents of past marriage reforms, including divorce reform and the recognition of de facto relationships, also argued these changes would radically redefine marriage. History has shown this was not the case. Marriage in law, and the associations marriage has in popular understanding, remain largely unchanged. Where there has been change in marriage through the elimination of discrimination, that change has never been for the worse.

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107 The full paper can be found at,

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009>

108 Galaxy poll, Religion and same-sex marriage. February 2012. <http://www.australianmarriageequality.com/wp/wp-content/uploads/2012/03/REPORT-Religion-And-Same-Sex-Marriage-Feb-2012.pdf>



### 5.2.3 Most same-sex couples do not want to marry and are happy as they are

This is a commonly-made point, often to magnify the argument about “tiny numbers”.

The first response is to point out that the number of opposite-sex couples who “do not want to marry and are happy as they are” has never been seen as an argument for prohibiting them from marrying.

The second response is to note the importance of distinguishing between same-sex partners who want to marry, and those who want the right to marry, either because they may wish to marry in the future or because, in and of itself, the right signifies equal legal status and social acceptance (see section 4 above).

Studies in the gay, lesbian, bisexual and transgender community show that there is overwhelming support for the right to marry.

For example the Victorian Gay and Lesbian Rights Lobby's, “Not Yet Equal” report (2005) found that 79.8% of the LGBTI people surveyed wanted marriage to be available to same-sex partners<sup>109</sup>. This figure was higher than for any other form of relationship recognition including domestic partnership or partnership registration.

An even higher figure of 86.3% was returned in the NSW Gay and Lesbian Rights Lobby's “All Love is Equal, Isn't It?” report (2007)<sup>110</sup>.

When it comes to same-sex partners who would marry if the choice was available, the percentages are lower, but steadily rising.

In the 2005 Victorian report, 45% of those surveyed would marry if they had the choice. This was up from 23% in a similar survey conducted in 2000. The 2007 NSW report gave a similar figure of 42%.

The most recent study on this issue, by Dr Sharon Dane et al at the University of Queensland, called “Not So Private Lives, the Ins and Outs of Same-Sex Relationships”, found that 80% of same-sex partners support the right to marry and 55.4% would marry if they had the option (“Not So Private Lives” has been included as attachment 5).

“Not So Private Lives” is the only national study on same-sex relationship recognition yet conducted. This may be the cause of the higher level of interest in marrying compared

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109 “Not Yet Equal”, <http://www.vglrl.org.au/files/publications/NotYetEqualFullReport.pdf>, p38

110 “All Love is Equal, Isn't It?”, [http://glrl.org.au/images/stories/all\\_love\\_is\\_equal\\_isnt\\_it.pdf](http://glrl.org.au/images/stories/all_love_is_equal_isnt_it.pdf), p17

to previous studies. But more likely, the higher figure reflects an overall upwards trend in interest in marriage among same-sex partners over time. Many same-sex attracted people alive today grew up when legally-solemnised same-sex marriage was either inconceivable or highly improbable. Remember, it has only been less than a decade since the first same-sex marriages in the world took place in the Netherlands. Rising interest in marriage is probably due to the growing hope that the option will, at some stage, become available. If this is true, we will continue to see a rise in the percentage of LGBTI people who will marry if they have the option.

As discussed further below in section 6, the “Not So Private Lives” study also found that many same-sex partners who are currently either de facto partners, in a state formalised relationship, in an overseas formalised relationship or in an overseas same-sex marriage are not satisfied with their current legal status and would marry under Australian marriage law if they had the choice (55.6%, 78.3%, 60% and 91.3% respectively). This dispels the myth that same-sex partners are happy as they are and do not wish to marry.

## Personal views: refuting the case against reform

During our time spent in Canada, the country seemed to be functioning well, and there was no evidence that having same-sex marriage has destroyed family values or broken down social functions in anyway. The religious institution of marriage is alive and well there and has not been destroyed, and life goes on as usual, and Canadians can truly say that they have equality in their country.

If there is no longer any objection to inter-racial, inter-denominational or non-procreative marriages, as well as the greatly increased rate of divorce, then surely same-sex marriage can not be objectionable. As we live in a nation that is based on the separation of church and state, no religious objection to the marriage of same-sex couples should be entered into. If a church does not wish to marry two people based on religious grounds, they are within their rights. However, as the majority of heterosexual couples are choosing a civil rather than religious wedding ceremony, nothing would have to be altered to allow for the union of a same-sex couple.

Freedom is accepting the rights of others to live their life the best way they know how. To tell two humans that they cannot marry, that their love is not worthy of legal recognition is hypocritical, small minded, out of touch, inconsiderate, dictatorial and without community.

I was raised to believe that Australia was a country which supported the separation of church and state, and yet my partner and I are systematically denied the same rights as others simply because Christianity does not deem us "holy."

I pray that our Government will see how the love of God knows no bounds, and that all His creation are equal in His sight.

# 6. The alternatives to reform

## 6.1 De facto partnerships

Some opponents of marriage equality believe existing laws deeming cohabiting same-sex partners as de facto partners are sufficient to protect their legal rights and satisfy their desire for legal recognition.

However, as indicated in section 4.4.1 above, there are significant drawbacks to being deemed to be in a legally-entitled relationship rather than nominating oneself for such recognition.

De facto partners are required to fulfill certain criteria including a period of cohabitation before they are deemed to have legal entitlements and protections. These entitlements and protections can be more easily challenged in the absence of the evidence of a legal relationship a marriage certificate provides. Certification is a particular issue for same-sex partners because their legal entitlements is relatively recent and is not widely recognised, understood or accepted in some sections of society. As indicated above, this problem can be particularly acute in emergency situations.

As well as practical difficulties, de facto relationships still carry less and/or different social recognition and respect than marriages in Australian society. Many same-sex partners resent the fact that they do not have the choice to opt for the recognition and respect associated with marriage.

These practical and cultural issues are reflected in the results of the recent Australian same-sex relationships survey cited in section 5.2.3 above (Dane et al). It shows that 55.4% of respondents who were currently in a same-sex de facto relationship would marry under Australian law if they had the choice.

Australian Marriage Equality supports cohabiting same-sex partners being deemed to be in a de facto relationship. De facto recognition provides important legal entitlements and protections for couples who choose not to marry.

But we do not endorse de facto recognition for same-sex couples as a substitute for equality in marriage. Like their different-sex counterparts, same-sex partners should have the choice.

Personal views: de facto recognition is not enough

Recent law changes that see same-sex relationships placed on an equal footing for tax purposes when one or more partners receives Centrelink benefits, (so same sex couples are accepted in a legally existing relationship in this regard) but we are still not afforded many of the basic citizenship rights that our heterosexual peers enjoy, marriage and adoption rights being two ways in which same-sex couples are still legally discriminated against in Australia.

The Australian government has shown that they are only willing to introduce measures which will raise revenue, like being able to tax us equally and being able to cut centrelink payments, leaves me wondering why I should have to pay all this tax if I can't receive the same entitlements as almost every other Australian.

Please do not misunderstand me, I applaud the recent changes made to many federal laws to acknowledge same sex entitlements, these are long over due and are a great step forward. I believe it is fair that same sex couples are treated equally to everyone else and that we should all be taxed the same way. But this is only fair if same sex couples are treated equally in every way, not in a watered down "partial equality" that suits the government, but still separates us from our heterosexual friends and creates a confusing mess of different rules and entitlements.

I live with my partner, who is also female. According to the new laws, she is my 'DeFacto'. But I really don't think that that term even begins to describe what we have together. Our relationship has survived us living in different states. It has survived everything that has tried to pull us together. We survived when I moved to a new state, with no money or work. She pulled me through the depression, anxiety, self-hatred, and lack of self-esteem...In turn,

## 6.2 Civil unions

### 6.2.1 Research showing the inadequacy of civil unions

Some opponents of marriage equality pose civil unions as an alternative which solves the evidentiary problem associated with de facto relationships.

However, an increasing body of jurisprudence and social research indicates that civil unions do not provide the same legal equality, protection or recognition for same-sex couples as marriage, and that these couples find civil unions much less desirable than marriage.

To this submission we have attached a pamphlet published by AME which summarises this jurisprudence and research (attachment 10).

The judicial decisions and social research cited in this pamphlet show that civil union schemes

- fail to meet the requirement of full legal equality
- fail to provide equal relationship benefits even when the law says they should
- create practical day-to-day problems and fail to provide the same level of recognition and respect as marriage, in both cases because they are not as widely recognised or understood
- do not have significantly more support in the general community than marriage equality
- have much less support in the LGBTI community than marriage equality

As a result of this evidence civil unions have been dubbed by overseas legal advocates “a failed experiment” that “entrench discrimination” rather than removing it.

To the evidence cited in our pamphlet we add two further studies which show that same-sex partners have a much stronger preference for marriage over civil unions.

The research of Professor Lee Badgett and others that has already been cited, addressed the issue of civil unions. Her research found that when given an option of marriage or

registered partnership, Dutch same-sex (and, for that matter, different-sex) couples were much more likely to formalize their unions with marriage.

Dutch couples understood the political point of registered partnerships as making a statement about the inferiority of gay people generally.

Likewise, in the United States, there is strong evidence that same-sex couples prefer marriage to civil unions, even though civil unions come with very similar legal rights and benefits. In the first year after marriage equality in Iowa, Vermont and Massachusetts, 30% of same-sex couples had married. After one year of civil unions in six different states, only 18% of same-sex couples had entered such unions.<sup>111</sup>.

This is consistent with the Australian study by Dr Sharon Dane et al cited above. Of those respondents currently in a same-sex state formalised relationship, overseas formalised relationship or overseas same-sex marriage 78.3%, 60% and 91.3% respectively would prefer to be married under Australian law.

## 6.2.2 A national civil union scheme?

In principle, Australian Marriage Equality supports civil union schemes for those couples who do not wish to marry but who seek certification of their relationship status. However, as with de facto laws, we oppose civil unions as a substitute for equality in marriage. Again, a choice should be available as to which form of relationship most suits the couple in question.

In practice, this means that we support state civil union schemes because, in the absence of state marriage laws, such schemes cannot be considered a substitute for marriage equality. But we oppose a national civil union scheme, at least until marriage equality has been achieved in national marriage law, because of the likelihood such a scheme would be proposed and accepted as a substitute for full equality.

In this regard we draw the Committee's attention to the legal and constitutional questions raised by a national civil unions scheme. As there is no explicit head of power for civil unions in section 51 of the Constitution, it seems unlikely the federal parliament could enact a national civil union scheme unless it had referrals of power from various states and territories. That would be a potentially costly and time-consuming exercise, for something that most same-sex couples do not want. Moreover, it is by no means

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<sup>111</sup> "Marriage, registration and dissolution by same-sex couples in the U.S.", The Williams Institute, July 2008, <http://www.law.ucla.edu/WilliamsInstitute/publications/Couples%20Marr%20Regis%20Diss.pdf>

certain that a majority of state governments would refer their powers to the federal parliament for this purpose.

Personal views: civil unions are not a substitute

Separate but equal recognition of same sex relationships rings of Jim Crow

The so-called alternatives to marriage - civil union, registered partnership, domestic partnership, and cohabitation - even if they provide the same rights and benefits as marriage, are inherently unequal.

Civil unions do not offer the kind of legal equity that comes with marriage, do not offer the same practical benefits as equality in marriage, do not offer the same social acceptance or status as equality in marriage

People have told us we can “register” our relationship here in Tasmania, but this is also something people can do who are in a significant relationship with someone else, such as a carer, which is a far cry from the nature of our relationship. Sadly too, in my understanding of this scheme, it seems that a relationship registration is only eligible for couples if they are not already married, meaning that if my wife and I were to apply for this, we would have to sign a statutory declaration stating that we are not married. I have to say that this is something that we will refuse to sign. Primarily because it is a lie, as we are married, and also because we will never belittle our marriage by ticking a box saying we are not married just because currently the Australian government chooses to refuse to accept our status as a married couple.



# 7. A comparative analysis of the three marriage equality bills currently before federal parliament

There are three marriage equality Bills now before the parliament. The subject of this inquiry is the Marriage Equality Amendment Bill 2010, introduced by Senator Hanson-Young of the Australian Greens. In the House of Representatives there are two Bills subject to a different inquiry. They are the Marriage Amendment Bill 2012, proposed by Mr Jones of the ALP, and the Marriage Equality Amendment Bill 2012, proposed by Mr Bandt, of the Australian Greens and Mr Wilkie, independent.

## 7.1 Objects of the Bills

The Hanson-Young Bill, like the Bandt/Wilkie Bill, has the following objects:

- (a) to remove from the Marriage Act 1961 discrimination against people on the basis of their sex, sexual orientation or gender identity; and
- (b) to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and
- (c) to promote acceptance and the celebration of diversity.

The Jones Bill has the following object:

to amend the Marriage Act 1961 to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life.

Australian Marriage Equality has concerns about both objects.

The Hanson-Young objects speak exclusively about the rights and freedoms of same-sex attracted and gender diverse people. These are important but they are only one aspect of this debate. The objects of the Bill should also refer to the benefits of marriage

equality for the families of same-sex partners and for society, the responsibilities inherent in marriage for same-sex partners, and the religious freedoms allowed and protected by marriage equality.

The Jones' object speaks to the core issue of access to the institution of marriage, but adds the caveat that access depends on "a mutual commitment to shared life". AME believes such a commitment is central to the meaning of marriage. However, it is not a caveat that is currently applied to different-sex marriages, meaning the admission of same-sex couples to marriage is being associated with a different type of commitment than that traditionally associated with the institution. Neither is "a mutual commitment to shared life" consistent with the more rigorous legal definition of marriage as a lifelong union to the exclusion of all others. Indeed, the term "a mutual commitment to shared life" is generally associated with establishing the existence in law of a de facto relationship in state and federal law. By suggesting the admission of same-sex couples to marriage means the institution is now associated with less commitment than was previously the case the Jones' object may perpetuate a perception that there is precisely the kind of distinction between same and different-sex relationships that the Bill is generally seeking to eliminate.

Our preferred set of objects are as follows:

The object of this Act is

- (a) to amend the Marriage Act 1961 to ensure equal access to marriage for all adult couples irrespective of sex, sexual orientation or gender identity; and
- (b) to recognise that freedom from discrimination on the above grounds is a fundamental human right; and
- (c) to build stronger relationships, families and communities through the provision of equal access for same-sex partners to the protections, responsibilities, rights, obligations and benefits of marriage; and
- (d) to enhance and protect religious freedoms by allowing religious celebrants the choice to legally marry same-sex partners, or not to marry them

## 7.2 The grounds of marital eligibility

All three Bills amend the s5(1) “definition of marriage” clause previously amended by the Howard government in 2004 to add, after “the union of two people”, “regardless of their sex”. The Hanson-Young Bill and the Bandt/Wilkie Bill add to “sex”, “sexual orientation or gender identity”. Both definitions of marital eligibility achieve the same end of allowing same-sex couples to marry. The longer definition makes it clear that discrimination on the additional grounds of sexual orientation and gender identity are as unacceptable as discrimination on the grounds of sex. This is relevant if the Commonwealth seeks to base its power to legislate for same-sex marriage on its human rights treaty obligations. The longer definition may also remove any confusion about whether intersex people including people of indeterminate biological sex can marry. We support a definition that is clear and inclusive. But we also acknowledge that both definitions achieve our objective.

## 7.3 Obligations of religious celebrants

The Hanson-Young Bill has no provision related to obligations of authorised celebrants who are ministers of religion. In contrast, the two House of Representative Bills amend s47 to make it quite clear that there is no obligation for ministers of religion to solemnise a same-sex marriage if they do not wish to. Section 47 already makes it clear that there is no obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage, and there is nothing within the Bills that would change this. But both Bills still seek to allay outstanding concerns about the freedom of religious celebrants not to marry same-sex couples should either Bill become law.

Australian Marriage Equality supports provisions which make it clear that religious celebrants will be under no obligation to marry same-sex couples, should it be against their doctrine, values or wishes (our submission to the inquiry into the Hanson-Young Bill asks for this Bill to include such a provision). Our preference is for the relevant provision in the Bandt/Wilkie Bill. It reinforces the religious freedom inherent in s47 without singling out same-sex marriages. The relevant provision of the Jones Bill does single out same-sex marriages. This suggests that same-sex marriages are somehow different to, or less acceptable than, other marriages which religious celebrants may be disinclined to solemnise, such as marriages between divorcees or marriages between people of different faiths or no faith. It also suggests there is special repugnance to same-sex marriages among people of faith which is not the case for most Australian Christians, as polls we have cited show. One solution would be to list all the types of

marriages religious celebrants may not wish to solemnise, but this would be impractical. It should be enough for a Bill allowing same-sex marriages to re-iterate the freedom of religious celebrants not to solemnise a marriage against their will. It is not necessary to make the added point that they will not be obliged to solemnise same-sex marriages.

All three bills repeal s88EA, added in 2004 by the Howard Government to prevent the recognition of marriages between people of the same-sex performed overseas. AME strongly supports the removal of this discriminatory provision.

### **Recommendation Three**

We recommend that the Senate pass legislation that has

- a. a more inclusive set of objectives,
- b. an inclusive statement in regard to eligibility to marry, and
- c. a provision enshrining the right of religious celebrants to refuse to solemnise any marriage, that does not single out same-sex marriages

# 8. Associated issues

## 8.1 Certificates of No-impediment to Marriage

In February this year the Australian Government began issuing Certificates of No-impediment to Marriage (CNIs) to Australians entering same-sex marriages overseas.

Previously, CNIs had been refused to Australians entering overseas same-sex marriages on the basis that such marriages are not recognised in Australia.

Australian Marriage Equality and other organizations advocated and lobbied against this policy on the basis that CNIs are properly 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.

We also argued that same-sex couples were significantly inconvenienced and legally disadvantaged by not being able to marry overseas. For example, in some countries that allow same-sex marriages and require CNIs, cohabiting partners have fewer legal rights and protections than married partners.

We congratulate the Legal and Constitutional Affairs Committee for recommending in favour of issuing CNIs to same-sex couples in its 2009 inquiry into marriage equality. We congratulate the Australian Labor Party for adopting a similar policy at its 2011 National Conference. We applaud the Federal Government for acting on the views of the Committee and the ALP.

The new policy will benefit many same-sex partners intending to enter overseas same-sex marriages. It also sends a strong message that reforms to marriage policy can occur through the parliamentary process without deleterious consequences.

But, of course, removing barriers to overseas same-sex marriages does not change the fact that same-sex couples are still compelled to travel overseas to marry or the fact their overseas marriages are not recognised as marriages in Australia.

## 8.2 Regulations and policies governing marriage ceremonies

Under the previous Howard Government a set of new policies were issued governing marriage ceremonies.

Correspondence to federally-registered marriage celebrants made it clear they were required to declare during marriage ceremonies that marriage in Australia is the union of one man and one woman voluntarily entered into for life, even if the marrying partners requested that the reference to man and woman not be included. Also, celebrants were asked not to a) conduct same-sex commitment ceremonies, including those associated with state civil union schemes, b) acknowledge marriage discrimination in the marriage ceremonies they perform, c) speak publicly in favour of marriage equality, and d) allow different-sex partners to refer to each other, during marriage ceremonies, with terms other than “husband” and “wife”?

We believe these regulations put unnecessary restraints on the freedom of speech of marriage celebrants and limit the ceremonial choices that were once, and should again, be available to marrying partners.

### Recommendation Four

We recommend that the requirement for declaring that marriage is between a man and a woman be removed, that related restrictions on the conduct of civil celebrants and civil ceremonies be eased, and that these changes be communicated to all registered marriage celebrants.

## 8.3 Constitutional issues: the respective powers of federal and state governments

In the course of the marriage equality debate questions have arisen about the respective powers of the Commonwealth and the States to solemnise same-sex marriages.

Clearly, section 51(xxi) of the Constitution gives the federal Parliament the power to make laws for “marriage”, which is not elsewhere defined in the Constitution.

As the Committee will be aware, the High Court has not defined marriage in its constitutional context. Indeed, as a report on the matter from the Parliamentary Library concludes, the Court has not clearly indicated whether the term used in the Constitution

should be defined by its contemporary usage, or by what was intended by the framers of the Constitution.

“...were the Commonwealth to legislate for the recognition of same sex marriage a question arises regarding its constitutional underpinning. As noted, the High Court’s consideration of s. 51(xxi) leaves open whether Parliament can determine the meaning of marriage or whether the term has a fixed intrinsic meaning.”<sup>112</sup>

Clearly the Commonwealth powers in the Constitution have long been interpreted in such a way as to encompass modern developments not envisaged in 1901. The closest indication to the view the High Court might take was given by Justice McHugh in 1999 in *Re Wakim ex parte McNally*<sup>113</sup>:

“...in 1901 “marriage” was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably “marriage” now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.”

The preceding paragraph by Justice McHugh further explains that the level of abstraction required to deny the Parliament the power to regulate marriages between persons of the same sex is not consistent with how the Constitution is generally interpreted:

“Indeed, many words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered. Examples can be found in the powers conferred on the Parliament of the Commonwealth to make laws with respect to “trade and commerce with other countries, and among the States”, “trading or financial corporations formed within the limits of the Commonwealth”, “external affairs” and “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”. In these and other cases, the test is simply: what do these words mean to us as late 20th century Australians? Such an approach accords with the recognition of Isaacs J in *The Commonwealth v Kreglinger & Fernau Ltd* and

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112 Ireland, I “The High Court and the Meaning of ‘Marriage’ in Section 51 (xxi) of the Constitution”, Law and Bills Digest Group, 12 February 2002. <http://www.aph.gov.au/library/Pubs/RN/2001-02/02rn17.htm>

113 *Re Wakim* (1999) 198 CLR 511 at paragraph 45 and 44

Bardsley that our Constitution was “made, not for a single occasion, but for the continued life and progress of the community”.

Associate Professor Kristen Walker has analysed the approach that may be taken by a Constitutional “originalist”:<sup>114</sup>

“For an originalist, it would appear that the connotation ought to include the element of heterosexuality, given that the framers understood marriage in this way at 1900 and did not contemplate same-sex marriage. However, several points may be noted. The first is that the question of same-sex marriage is not one to which the framers actually turned their minds and decided to reject. Rather, same-sex marriage simply was not in their minds as a matter that needed addressing. In this sense, same-sex marriage may be analogized to a technological advance – and the High Court has had little difficulty in accepting that the Constitution may be interpreted so as to encompass technological advances. Alternatively, an analogy may be drawn with the majority’s approach to the interpretation of ‘foreign power’ in *Sue v Hill*. Although the connotation of foreign power in 1900 was, arguably, ‘any sovereign state other than the United Kingdom’, that was not the formulation adopted by the High Court. Rather, the majority interpreted foreign power as meaning ‘any sovereign state other than the state for whose purposes the question of the other’s status is raised’ and concluded that, although the United Kingdom did not previously answer that description, it did today. The connotation adopted by the majority is one that clearly could describe the framers’ understanding of the term ‘foreign power’ at a relatively high level of abstraction. It does not misrepresent the concept of foreign power. Similarly, in the marriage context, the framers can be said to have understood marriage as ‘the intimate union of two people’ – this would not misrepresent the notion of marriage; it simply states it at a higher level of abstraction – but they had a different understanding of who were included in the term ‘people’ as we do today.”

Walker, writing in 2007, suggested that a non-originalist approach might involve the High Court “consult[ing] a dictionary, a habit of Australian judges”, although she conceded that even at that stage the Macquarie dictionary included “the intimate union of two people” as a definition. In light of subsequent polling, her view that “if a court were to commission a survey... the likelihood is, I suggest, that most Australians would say that marriage is the union of a man and a woman” is no longer sustainable. Clearly a majority of Australians now accept that marriage can include couples of the same sex. And of course in the context of a High Court challenge to any of the marriage equality bills

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114 Walker, K., “The same-sex marriage debate in Australia”, *The International Journal of Human Rights*, Vol 11, No 1, pp109-130



currently being considered by the Parliament, which would obviously only occur after they'd passed, Parliament itself would have confirmed such a definition of marriage.

Some opponents of marriage equality have argued that uncertainty about how the High Court may define marriage means the Federal Parliament cannot or should not amend the Marriage Act to allow for same-sex marriages.

We would dispute this. There are many examples of where the Federal Parliament has legislated in areas where its constitutional powers were disputed. These include the World Heritage Properties Conservation Act 1983 (Cth) (which prompted the famous Tasmanian dams case before the High Court) and the Workplace Relations Act 1996 (Cth) (which also prompted a High Court challenge to Commonwealth powers). In regard to the issue of equal rights for same-sex partners, the constitutionality of the Human Rights (Sexual Conduct) Act 1994 (Cth) was also questioned.

Further, section 51 (xxi) of the Constitution is only one head of power the Federal Parliament can draw on. It can also base marriage equality on the treaty obligations we address in sections 4.3.1 and 8.3 of this submission.

Given the above-cited precedents and options available to the Federal Parliament, our conclusion is that failure to allow same-sex marriage is not due to legal and constitutional constraints, but to a lack of political will.

Questions have also arisen regarding the constitutional powers of the States to legislate for same-sex marriages. Professor George Williams and Associate Professor Walker have made the point that the constitutional marriage power is a concurrent power<sup>115</sup>. This means the States have the power to legislate for whatever marriages the Commonwealth does not legislate for. In effect, when the Commonwealth Marriage Act was amended in 2004 to make it clear that same-sex marriages cannot be solemnised, the power to legislate for these marriages fell to the States. This view has seen legislation for same-sex marriage introduced in Tasmania and South Australia. It has also drawn criticism, much of it informed by a misunderstanding of the nature of our federal arrangement. Although it was less than sixty years ago, many Australians seem to have forgotten that all marriages were solemnised under State law until the Federal Parliament acted on its constitutional power and enacted the current Marriage Act in 1961.

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115 [http://tjlr.org/more/82\\_0\\_1\\_0\\_M3/](http://tjlr.org/more/82_0_1_0_M3/)

The detailed views of Professors Williams and Walker are publicly available<sup>116</sup>. As a matter of principle, AME supports the right of the states to recognise same-sex relationships in whatever way they see fit. However, our primary goal remains amendment of the Commonwealth Marriage Act.

## 8.4 Australia's international obligations: the ICCPR and the right to marry

In section 4.3.1 above we state our belief that communications to the UN Human Rights Committee from Australia have established Australia's obligations to remove legally-entrenched discrimination on the grounds of sexual orientation.

Opponents of marriage equality may argue that this obligation is qualified by the case of *Joslin et al v New Zealand*, in which the UN Human Rights Committee (HRC) found that the right to marry enshrined in Article 23 of the International Covenant on Civil and Political Rights does not permit same-sex marriage. The HRC argued

“Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.”<sup>117</sup>

This finding has been widely criticised by human rights experts as an unduly literalist reading of Article 23 which is inconsistent with the general principles of treaty interpretation<sup>118</sup>. One such principle is that treaties should be read as a whole. Clearly, the Human Rights Committee read Article 23 without reference to the general anti-discrimination provisions of Article 2 (ensuring freedom from discrimination). Another such principle is that treaty interpretation should be guided by contemporary context not original intent. Again, the HRC clearly allowed itself to be guided by what was intended by the framers of the ICCPR in a way which, if applied to all the Covenant's provisions,

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116 [http://tjlg.org/index/CO\\_3\\_1/](http://tjlg.org/index/CO_3_1/)

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

118 for a general overview of the *Joslin* decision and its critics see Aleardo Zanghellini, “To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men” 9(1) *Melbourne Journal of International Law*, 2008

would render that document irrelevant very quickly. For these reasons many human rights experts believe that the HRC's interpretation of Article 23 is seriously flawed and will not stand.

We remind the Committee that Australia is free to interpret its obligations under the ICCPR independently of the HRC's decisions. The flaws to be found in the HRC's reasoning on marriage equality would suggest this is an example where Australia should feel free to more consistently apply the principles of equality and non-discrimination.

## 8.5 Recent international jurisprudence: our response to Gas and Dubois v France before the European Court of Human Rights.

Much has been said about a recent decision of the European Court of Human Rights, *Gas and Dubois v France*,<sup>119</sup> and its implications for whether same-sex marriage ought to be considered a "human right". The case has been referred to in a number of submissions to this inquiry opposing marriage equality, but these submissions have usually taken the decision out of context.

The UK Daily Mail first reported that the court concluded: "Gay marriage is not a 'human right'".<sup>120</sup> However, as Daniel Sokol from the Guardian Legal Network points out, this is a serious misreading of the case. The case was actually about the right of same-sex couples in civil partnerships to adopt children.<sup>121</sup>

Essentially the case involved a lesbian couple, Ms Gas and Ms Dubois, where one partner wanted to adopt the child of the other partner (this can be a useful way to minimise legal uncertainties regarding the guardianship of children in such family arrangements). French law did not allow adoption by couples who were not married, nor did it allow same-sex couples to marry. Gas and Dubois were in a French civil union, and argued that the law prohibiting "civil-unioned" couples from adopting children breached the European Convention on Human Rights' prohibitions on discrimination.

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119 (2012) (application no 25951/07). Available online (in French) at: <http://bit.ly/wDGRZI>

120 Doughty, S. "Gay marriage is not a 'human right': European ruling torpedoes Coalition stance", Daily Mail, 20 March 2012. <http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html>

121 Sokol, D. "Can a homosexual person adopt his or her partner's child?", The Guardian. 2 April 2012.

<http://www.guardian.co.uk/law/2012/apr/02/can-gay-person-adopt-partners-child?newsfeed=true>

However, the court held that Gas and Dubois were not being discriminated against under French law because the prohibition on civil partners from adopting children applied equally to heterosexual and same-sex couples. Clearly, this ignores the fact that heterosexual couples can circumvent this obstacle by getting married while same-sex couples cannot.

The question of whether it was discriminatory to deny Gas and Dubois the right to marry was, according to the court, already answered in a previous case, *Schalk and Kopf v Austria*.<sup>122</sup> In that case, the court concluded that signatory countries to the European Convention on Human Rights are not obliged to legalise same-sex marriage on human rights grounds because doing so may breach the “Margin of Appreciation” doctrine developed by the court.<sup>123</sup>

This principle holds that individual states within the European Union are free to determine for themselves when significant legislative change should occur, where such change involves cultural aspects that may vary across the various EU member states. Because of the “special status” of marriage in Austrian law and culture – as a heterosexual union geared towards procreation – the court concluded that the margin of appreciation doctrine prevented it from challenging Austria’s ban on same-sex marriage.

There are important responses to be made in response to the Court’s decision.

Firstly, the court’s margin of appreciation doctrine has been the subject of strong criticism for prioritising cultural considerations above universal human rights standards.<sup>124</sup>

Secondly, cultural considerations largely strengthen the case for marriage equality in Europe (and Australia), not weaken it: the growing public acceptance of homosexuality and the secularisation of marriage suggest same-sex marriage is already culturally acceptable.

Thirdly, the European Court of Human Rights has a vested interest in maintaining an especially conservative approach to issues like same-sex marriage, because it is interested in ensuring that countries that may disagree with the court’s rulings are not tempted to withdraw from the European Convention on Human Rights. In other

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122 (2010) (n. 30141/04). Available online (in French) at: [http://www.menschenrechte.ac.at/uploads/media/Schalk\\_und\\_Kopf\\_gg\\_OEsterreich\\_Urteil\\_01.pdf](http://www.menschenrechte.ac.at/uploads/media/Schalk_und_Kopf_gg_OEsterreich_Urteil_01.pdf)

123 Bamford, N. (2011). ‘Families but not (yet) marriages? Same-sex partners and the developing European Convention “margin of appreciation”’. *Child and Family Law Quarterly* 23: 128.

124 Bamford, N. (2011). ‘Families but not (yet) marriages? Same-sex partners and the developing European Convention “margin of appreciation”’. *Child and Family Law Quarterly* 23: 128.

words, there are political considerations that the court must take into account which may impact on its capacity to give a clear-sighted appraisal of human rights questions.

Fourthly, the decision in this case is inconsistent with court decisions in Canada, the United States, South Africa and elsewhere, that hold that bans on same-sex marriage breach legal and constitutional provisions on equal rights.

In summary, we do not believe that Gas and Dubois v France can be relied upon to make a definitive judgment about whether marriage equality comes within the ambit of human rights. Instead we must look to other sources, many of which are included in this submission.

# 9. A historic opportunity

Historians will look back on marriage equality as a historic reform. It will be seen not only as a turning point for LGBTI Australians in their struggle for acceptance and equality, but as turning point for the Australian people as we strive to realise our shared aspiration of creating an ever fairer and more egalitarian society. In the words of Australian actor and comedian, Magda Szubanski,

“The law as it stands is unfair and it needs to be changed to reflect the wonderful, tolerant, live-and-let-live society Australians have created.”

The Senate Legal and Constitutional Affairs Committee has an opportunity before it to be a key part of achieving this historical reform. We call on the Committee to seize this opportunity by endorsing marriage equality.

Personal views: the last word

All I ask is please have the foresight to debate this with empathy, impartiality and wisdom, not out of fear, and ask again what sort of country you want to leave for your children bearing in mind that any one of you could have children or may have children who might want to marry another person of the same sex. You may decide to leave the Marriage Act the same, maybe for not wanting to rock the boat or change the status quo, and justifying it on the grounds that it is fair but in my eyes and the eyes of many others I know it will be plain unjust! This is unjust for me, my family, and friends and for our nation.