

2 April 2012

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Senate Legal and Constitutional Committee
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Inquiry into Marriage Equality Amendment Bill 2010

The authors of this submission, eleven lawyers and academics from the Deakin University School of Law, welcome the opportunity to comment on the *Marriage Equality Amendment Bill 2010* (the **Senate Bill**) currently subject to inquiry by the Senate Legal and Constitutional Committee (**Committee**).

The Bill is one of three Bills currently before the Commonwealth Parliament which propose to amend the *Marriage Act 1961* (Cth) (**Marriage Act**) to permit two people to marry regardless of their sex.¹

The authors believe that the realisation of the rights to non-discrimination and equality are fundamental to a free and democratic society. Conversely, discrimination and inequality result in social exclusion, poor health outcomes,² entrenched poverty and disadvantage, violence and other negative outcomes.³

The authors support marriage equality, and reject those arguments that seek to deny equality and non-discrimination to same-sex couples. We support the Senate Bill's commitment to eliminating discrimination and inequality on the grounds of sex, sexual orientation and gender identity.

1. About us

The authors of this submission are lawyers and academics at the Deakin University School of Law. The School of Law at Deakin University seeks to provide innovative and distinctive legal education rather than replicating the courses and approaches of other law schools across the country.

¹ The other Bills are the *Marriage Equality Amendment Bill 2012* (the **Bandt/Wilkie Bill**) and the *Marriage Amendment Bill 2012* (the **Jones Bill**). A table summarising the provisions of the three Bills is **attached** at **Appendix A**.

² World Health Organisation, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) 6; 'Tackling Discrimination is Good for Health', *VicHealth Letter*, Winter 2007, 4-5.

³ Equalities Review Panel, *Fairness and Freedom, the Final Report of the Equalities Review* (2007) London.

The authors teach into the School's academic courses, but also research and publish in areas related to the law. A particular area of strength of the School's research output is in the area of human rights, civil rights and public law,⁴ which is clearly relevant to the issues being considered by the Committee.

The authors do not speak for Deakin University, the School of Law, or all of the lawyers or academics working at the School of Law.

2. We support marriage equality

Like a reported two-thirds of Australians,⁵ the authors support marriage equality.

We will leave it to other submissions to the Committee's inquiry to consider the stories of people affected by the current discriminatory laws, and provide further evidence demonstrating the overwhelming community support for changes to these laws.

This submission will consider the need to provide equality in the area of marriage.

Under international and domestic human rights law, Australia must respect, protect and fulfil the rights to non-discrimination on the grounds of sexual orientation and gender identity. We discuss these concepts in section 2.1 of this submission.

In order to give effect to these obligations, section 2.2 of this submission considers the need for marriage equality.

2.1(a) International and Comparative Human Rights Law

Under international human rights law, it is unlawful to discriminate against a person because of his or her sexual orientation⁶ and gender identity.⁷

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all

⁴ See eg Margaret Brock and Dan Meagher, 'The legal recognition of same-sex unions in Australia: A constitutional analysis' (2011) 22 *Public Law Review* 266; Mirko Bagaric, Theo Alexander and Marlene Ebejer, 'The illusion that is the right to a fair trial in Australia' (2011) 17(2) *Australian Journal of Human Rights* 59; Richard Coverdale, 'Postcode justice: rural and regional disadvantage in the administration of the law' (2011) 16(1) *Deakin Law Review* 155; Oscar Roos, Benjamin Hayward and John Morss, 'Beyond the Separation of Powers: Judicial Review and the Regulatory Proscription of Terrorist Organisations' (2010) 35 *University of Western Australia Law Review* 81; James Farrell 'Strange bedfellows? Tax administration and human rights brought together' (2010) 44(3) *Taxation in Australia* 147; Oscar Roos and Benjamin Hayward, 'Criminal Priors and the Right to be Elected' (2009) 34 *Alternative Law Journal* 36; James Farrell, 'Human rights developments since the release of the White Paper' Presentation to the 6th Australian Homelessness Conference, 3 September 2010, Brisbane, Australia; James Farrell, 'The road home: Australians' right to adequate housing' (2009) 34(4) *Alternative Law Journal* 227; John R Morss, 'Heteronomy as the Challenge to Nation: A Critique of Collective and of Individual Rights' (2004) 8 *Law, Text, Culture* 167; John R Morss, 'But for the Barriers: Significant Extensions of Children's Capacity Established in B & B' (2004) 11 *Psychiatry, Psychology and Law* 319; John R Morss, 'Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costas Douzinas' (2003) 27 *Melbourne University Law Review* 889.

⁵ See Galaxy Research, *Same Sex Marriage Report* (June 2009), available at <http://www.australianmarriageequality.com/Galaxy200906.pdf>; Galaxy Research, *Same Sex Marriage Study* (October 2010), available at <http://www.australianmarriageequality.com/Galaxy201010.pdf>. See also Gareth Parker, 'Majority in WA support gay marriage' *The West Australian*, 14 December 2010; 'Most Australians back same-sex marriage', *news.com.au*, <http://www.news.com.au/top-stories/most-australians-back-same-sex-marriage/story-e6frfkp9-111113794960>; 'Greens seize on marriage poll' *Star Observer*, 22 March 2011.

⁶ Sexual orientation has been defined as 'capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender': *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, preamble [Yogyakarta Principles].

⁷ Gender identity is defined as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms': *Yogyakarta Principles*, ibid.

persons equal and effective protection against discrimination on any ground such as ... sex ... or other status.⁸

The *Yogyakarta Principles* affirm the right of all persons to enjoy human rights without discrimination on the basis of sexual orientation or gender identity. They further provide that all persons are entitled to equality of and before the law without any discrimination on the basis of sexual orientation or gender identity.⁹ States must take all appropriate measures to ensure the right to the universal enjoyment of human rights and the right to recognition before the law.¹⁰

As well as being recognised in international law, sexual orientation is also a prohibited ground of discrimination in countries such as the United Kingdom,¹¹ New Zealand,¹² Canada,¹³ South Africa,¹⁴ and Fiji.¹⁵

2.1(b) Domestic Law

Legislation prohibits discrimination against a person because of his or her sexual orientation or gender identity in all Australian jurisdictions.¹⁶

Approximately 100 Commonwealth laws were recently reformed to end discrimination against same-sex attracted individuals in areas such as superannuation, social security, taxation, and workers' compensation.¹⁷ Whilst these reforms are commendable, they failed to address the legal recognition of same-sex marriage.

2.2 The need for marriage equality

The Final report of the UK Equalities Review, *Fairness and Freedom*, clearly articulates the economic and social case for legal protection from discrimination:

There are substantial benefits to be gained from living in a more equal society. Gaps in educational attainment, employment rates or other opportunities impoverish us all. Research shows that not only does absolute poverty in itself reduce our productivity; so does the size of the gap between those at the top of society and those at the bottom. On several measures, that gap

⁸ Although sexual orientation is not an explicit ground of discrimination in article 26, the UN Human Rights Committee has interpreted other prohibited grounds, namely 'sex' and 'other status', to include discrimination based on sexual orientation: see *Toonen v. Australia*, HRC, Communication No. 488/94, UN Doc. CCPR/C/50/D/488/92 (1994); *Young v. Australia*, HRC, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003). See generally also Sarah Joseph, 'Gay Rights Under the ICCPR – Commentary on *Toonen v. Australia*' (1994) 13 *University of Tasmania Law Review* 392.

⁹ See generally Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', (2008) 8(2) *Human Rights Law Review* 207, 214-215.

¹⁰ Yogyakarta Principles, principles 1, 3.

¹¹ See *Equality Act 2006* (UK), ss 81(1), 82; *Equality Act (Sexual Orientation) Regulations 2007* (UK); *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* (UK). Cited in Public Interest Law Clearing House (Vic) (PILCH), *Ensuring Respect, Recognising Diversity: Submission to the Senate Committee on Legal and Constitutional Affairs on its Inquiry into the Marriage Amendment Bill 2009* (Cth) (August 2009).

¹² See *Human Rights Act 1993* (NZ), s 21(1)(m); *Employment Relations Act 2000* (NZ), s 105(1)(m).

¹³ See *Charter of Rights and Freedoms* (Can.), s 15(1); *Egan v Canada*, [1995] 2 SCR 513 (Can., Supreme Court) (recognising sexual orientation as an analogous ground of discrimination). Cited in PILCH, above n 11.

¹⁴ See *Constitution of the Republic of South Africa*, 1996 (Sth. Afr.), s 9(3). See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] (12) BCLR 1517 (Sth. Afr., Constitutional Court); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [2000] (1) BCLR 39 (Sth. Afr., Constitutional Court). Cited in PILCH, *ibid*.

¹⁵ See *Constitution (Amendment) Act 1997* (Fiji), s 38(2)(a); *Human Rights Commission Act 1999* (Fiji), 17. See also *Nadan and McCoskar v State* [2005] FJHC 500 (Fiji, High Court). Cited in PILCH, *ibid*.

¹⁶ See *Discrimination Act 1991* (ACT), ss 7(1)(b), 7(1)(c); *Human Rights Act 2004* (ACT), s 8(3); *Anti-Discrimination Act 1977* (NSW), Parts 3A, 4C; *Anti-Discrimination Act 1992* (NT), s 19(c); *Anti-Discrimination Act 1991* (QLD), ss 7(m), 7(n); *Equal Opportunity Act 1984* (SA), s 29(1)(b); *Anti-Discrimination Act 1998* (Tas), ss 16(c), 16(e); *Equal Opportunity Act 1995* (VIC), ss 6(ac), 6(l); *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 3, 8; *Equal Opportunity Act 1984* (WA), Parts IIAA, IIB. Cited in PILCH, *ibid*.

¹⁷ See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) (together the **Equal Treatment Acts**).

*creates a drag on economic performance. This does not mean that the answer is to hold back those at the top or to sacrifice prosperity; but it does require focused effort on those who seem rooted at the bottom of the pile.*¹⁸

*The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies. In the poorest areas of unequal societies, the quality of social relations and the social fabric are stretched to breaking point...*¹⁹

While these conclusions are true of all forms of discrimination, it is particularly apposite for the institutionalised discrimination against same-sex couples in Australia.

As in other societies, marriage is an important institution in Australia. Eskridge suggests that “*marriage is an institution that is constructed, not discovered, by societies. The social construction of marriage in any given society is fluid and mobile...*”²⁰ Stadtler adds that the civil recognition of marriage evolved to support the economic and cultural benefits of the institution, rather than to protect cultural norms.²¹

Recognising that marriage is a social construct, it is important to recognise that marriage is an institution that ‘*represents a legal status in the nature of a partnership conferred and prescribed by the state. The state has reserved to itself the power to regulate that status*’.²² This includes the power ‘*to determine the requirements of a valid marriage, to control the capacity and qualifications of the parties to a marriage, to stipulate the formalities to be complied with before marrying, and to lay down the procedures necessary for the solemnisation of the marriage*’.²³

The absence of legal recognition of marriage has marked consequences for same-sex couples in Australia. Justice Albie Sachs of the Constitutional Court of South Africa has explained, for instance, that

the impact of the legal void in which same-sex couples are compelled to live is real, intense and extensive. To appreciate this it is necessary to look precisely at what it is that the law offers to heterosexual couples, and, conversely, at what it denies to same-sex couples. Such scrutiny establishes that the consequences of the total exclusion of same-sex couples from the solemnities and consequences of marriage are far from academic...

...

The exclusion of same-sex couples from the benefits and responsibilities of marriage ... is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or

¹⁸ Equalities Review Panel, above n 3, 23.

¹⁹ Ibid, 25. See generally, Richard Wilkison and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (2011), London.

²⁰ William N. Eskridge, Jr., ‘A History of Same-Sex Marriage’ (1993) 79 *Virginia Law Review* 1419, 1436. Cited in Castan Centre for Human Rights Law (**Castan Centre**), *Submission to the Senate Legal and Constitutional Committee Inquiry into the Marriage Equality Amendment Bill 2009* (September 2009), 4.

²¹ Edward H. Stadtler, ‘A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?’ (1999) 40 *Virginia Journal of International Law* 406, 406. Cited in Castan Centre, *ibid*.

²² *Quilter v Attorney-General* [1998] 1 NZLR 523, 534 (Thomas J.). See also *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others; Lesbian and Gay Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355, [64] (Sachs J.) (**Fourie**). Cited in PILCH, above n 11. See further Brock and Meagher, above n 4.

²³ *Quilter v Attorney-General* [1998] 1 NZLR 523, 534 (Thomas J.). Cited in PILCH, *ibid*.

*lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples. It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. ... It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.*²⁴

The authors agree with his Honour; the status quo ‘represents a harsh if oblique statement by the law that same-sex couples are outsiders’ that ‘negate[s] their right to self-definition in a most profound way’. Many international jurisdictions agree, and the Netherlands,²⁵ Belgium,²⁶ Canada,²⁷ Spain,²⁸ South Africa,²⁹ Norway,³⁰ Sweden,³¹ Portugal,³² Iceland,³³ Argentina³⁴ and several US states³⁵ have changed their laws to recognise marriage equality.

We believe equality delivers strong outcomes for communities, and this includes marriage equality.

3. We disagree with the arguments against marriage equality

Again, other submissions to the Committee's inquiry will debate the merits of the arguments against marriage equality. However, it is the authors' view that there is no reasonable justification for the differential treatment of same-sex and opposite-sex marriages.

3.1 Demeaning the institution of marriage

Opponents suggest that same-sex marriage may demean the institution of marriage.³⁶ However, there is no evidence that heterosexual marriages have suffered, or that marriage is held in lower esteem, in those countries where same-sex couples are allowed to marry.³⁷ Indeed, the opposite seems to be true.³⁸

Rarely do opponents of marriage equality explain how marriage is diminished by equality. We can only assume they mean that same-sex relationships are worth less than their opposite-sex counterparts and that to equate the two somehow symbolically degrades the latter. As the CEO of the Public Interest Advocacy Centre, Ed Santow, recently said:

²⁴ *Fourie*, above n 21, [62], [71]-[72] (Sachs J.) [citations omitted].

²⁵ See Netherlands Ministry of Justice, ‘Upper house approves bill allowing same-sex marriages’ (Press Release 19 December 2000).

²⁶ *Belgian Civil Code* – Book I, Title V, Chapter I, Article 143.

²⁷ *Civil Marriage Act*, SC 2005, c 33.

²⁸ *Civil Code of Spain* – Book One, Part IV, Chapter II, Article 44.

²⁹ *Civil Unions Act 2006* (SAf).

³⁰ ACT 1991-07-04 NO. 47: *The Marriage Act*, Norway.

³¹ *Gender-Neutral Marriage and Marriage Ceremonies* (Government Offices of Sweden Fact Sheet, May 2009).

³² *Portuguese Civil Code* – Article 161.

³³ *Law in respect of Marriage*. See <http://www.althingi.is/altext/138/s/0836.html>.

³⁴ *Argentine Civil Code* – Article 172.

³⁵ Six US states allow same-sex marriage: New York, Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire.

³⁶ See eg Cindy Wooden, ‘Affirming same-sex union demeans marriage: Vatican’ *Catholic Weekly*, 18 March 2012;

³⁷ See Chris Berg, ‘Conservatives court the same-sex marriage lobby’ *ABC Unleashed*, 29 June 2011;

³⁸ See Alan Brownstein, ‘Religious freedom and gay marriage can coexist’, *Los Angeles Times*, 11 May 2009.

*This argument seems to rest on the fallacy that my choice to do one thing somehow invalidates your choice to do something else. But the recognition of same-sex marriage detracts from the value of heterosexual marriage no more than the existence of left-handed people devalues those who write with their right hand.*³⁹

Some men felt the same way when legal equity was granted to women⁴⁰ as did some whites when legal equity was granted to other racial groups.⁴¹ But such fears proved to be groundless and in retrospect appear deeply prejudiced.

3.2 Marriage=parenting; children need a mum and a dad

Opponents of marriage equality argue that the purpose of marriage is procreation.⁴² However, many straight couples do not or cannot procreate; same-sex couples are equally capable as opposite-sex couples of childrearing;⁴³ childrearing is not the sole objective of marriage;⁴⁴ and the inability to procreate does not disqualify, and never has disqualified, a couple from getting married under Australian law, nor from getting married under the domestic marriage law of nearly all other jurisdictions around the world. For these reasons, marriage for the purpose of procreation is not a legitimate basis to justify discriminatory treatment.

3.3 Marriage equality will violate religious freedoms

Some people of faith are concerned that their religious freedoms will be violated by marriage equality.⁴⁵

They believe religious marriage celebrants will be forced, against their beliefs, to conduct marriage ceremonies for same-sex partners. In none of the countries that allow same-sex partners to marry have any churches been forced to marry same-sex couples.⁴⁶ Indeed, in Australia marriage celebrants are not forced to marry anyone against their will, and in section 4 of this submission, we suggest that the Senate Bill expressly recognise that Ministers of religion will not be obliged to solemnise marriages if the Bill is passed.

Some are also concerned that faith-based charities and welfare agencies will be forced to recognise same-sex married couples, and their own children will be taught about same-sex

³⁹ Edward Santow, 'Taking the politics out of same-sex marriage' *Sydney Morning-Herald*, 13 February 2012.

⁴⁰ See eg the comments attributed to Hilaire Belloc 'I am opposed to women voting as men vote. I call it immoral because I think the bringing of one's women, one's mother and sisters and wives, into the political arena disturbs the relations between sexes': Patrick Rooke, *Women's Rights* (London: Wayland, 1977), 11. See also Harry C.J. Phillips, *Electoral Law in the State of Western Australia: An Overview* (2008) 12-14; Anne Firor Scott and Andrew MacKay Scott, *One half the people: the fight for woman suffrage* (1982).

⁴¹ See eg the Minister for Native Welfare's comments to the Western Australian Parliament in 1962, while supporting electoral enfranchisement of Aboriginal Australians: 'I cannot, of course, say at the moment when I would be prepared to recommend full citizenship ... When I myself feel the time is right to grant full citizenship, I can assure members I will not hesitate to recommend to the Government that that step be taken ...': John Chesterman and Brian Galligan, *Citizens without rights: Aboriginals and Australian Citizenship* (1997) 169. See also Phillips, above n 39, 14-15; David A. J. Richards, *Identity and the case for gay rights: race, gender, religion as analogies* (1999) chapter 2; Jack M. Bloom, *Class, Race, and the Civil Rights Movement* (1999).

⁴² See eg Nicholas Tonti-Filippini, 'Marriage is about rights of the children' *The Age*, 6 September 2011; Bob Egelko, 'Prop 8 Backers: Marriage promotes procreation' *San Francisco Chronicle*, 17 June 2010; David van Gend, 'Same-sex marriage hurts kids' *Courier-Mail*, 16 November 2010. See also <http://www.australianmarriageequality.com/wp/answering-the-critics/>.

⁴³ See William Meezan and Jonathan Rauch, 'Gay Marriage, Same-Sex Parenting and America's Children' (2005) 15(2) *The Future of Children* 97; Maggie Gallagher and Joshua K. Baker, 'Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being' (2004) *Institute for Marriage and Public Policy* 2.

⁴⁴ See *Halpern v Canada (Attorney General)*, [2003] 65 OR (3d) 161 (Can., Ontario Court of Appeal), at [119], [137]; *EGALE, Canada Inc. v Canada* [2003] 225 DLR (4th) 472 (Can., British Columbia Court of Appeal), [120]-[24], 86-90.

⁴⁵ See eg Paul Kelly, 'Passion for same-sex marriage a problem for Labor' *The Australian*, 30 November 2011; Tom Jones, 'Gay marriage bill doesn't do enough to protect religious freedom' *Baltimore Sun*, 21 February 2012; Lane Williams, 'Gay marriage debate shows threat to religious freedom' *Deseret News*, 4 July 2011; Bobby Ross, 'Should the Marriage Battleground Shift to Religious Freedom?' *Christianity Today*, 7 January 2011; Robin Wilson, 'The flip-side of same-sex marriage' *Los Angeles Times*, 3 May 2009. See also <http://www.australianmarriageequality.com/wp/answering-the-critics/>.

⁴⁶ See Brownstein, above n 38.

marriages in school.⁴⁷ Most Australian schools and charities are already subject to anti-discrimination laws which prevent them from discriminating.⁴⁸ However, most of these laws provide that charities and schools may seek exemptions should the need arise, which balances the right to freedom of religion with the right to equality and non-discrimination.⁴⁹

4. Our comments on the Bill

The authors make the following comments about the Senate Bill:

- We support the definition of ‘marriage’ proposed by clause 1 of Schedule 1 of the Senate Bill and the Bandt/Wilkie Bill; unlike the Jones Bill, this definition will extend the right to marry to people regardless of their sexual orientation or gender identity, which more appropriately recognises people’s status and identity.
- We support the amendments proposed by clauses 2, 3 and 4 of Schedule 1 of the Senate Bill to remove discriminatory references to parties to a marriage, and suggest adding a new clause that omits “a husband and wife” from Part III of the Schedule (table item 1), and substitutes “two people” for similar reasons (both the Jones Bill (cl 5) and the Bandt/Wilkie Bill (cl 7) contain this clause).
- We suggest that the Committee consider inserting a new clause to amend section 47 to make it clear that Ministers of religion are not bound to solemnise marriage by the Marriage Act or any other law. We consider it inappropriate to compel any Minister of religion to solemnise marriage, and our suggested amendment will provide a safeguard that adequately balances the competing rights of freedom of religion with the right to equality and non-discrimination. Both the Bandt/Wilkie Bill (clauses 4 and 8) and the Jones Bill (cl 3) include model provisions. The authors prefer the model in the Bandt/Wilkie Bill, as the proposal in the Jones Bill continues to discriminate against people on the basis of their sexuality and sexual preference.
- We support the repeal of section 88EA of the Marriage Act, as proposed by clause 5 of Schedule 1 of the Senate Bill, and the Jones Bill (cl 4) and Bandt/Wilkie Bill (cl 6).
- The Equal Treatment Acts have significantly reduced same-sex discrimination in Commonwealth legislation, but some further consequential amendments may be required. The Bandt/Wilkie Bill inserts a regulation making power that allows Acts (other than the *Marriage Act*) to be amended consequentially, or that otherwise relate to, the enactment of that Bill (cl 9). Such a conferral of power diminishes the importance of the institution of the Parliament, and is inconsistent with the proper relationship between the Executive and the Parliament. It may also raise legal issues about the permissible and actual scope of the power under the proposed consequential amendments to make regulations amending other Acts of Parliament. We consider that, if any consequential requirements are needed, they should be considered as part of the Committee’s deliberations and brought before Parliament (perhaps as amendments to this Bill) rather than made by regulation.

⁴⁷ See *Stand4Marriage, Our Children at Risk*.

⁴⁸ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Australian Human Rights Commission Act 1986* (Cth); *Age Discrimination Act 2004* (Cth); *Discrimination Act 1991* (ACT); *Human Rights Act 2004* (ACT); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (VIC); *Charter of Human Rights and Responsibilities Act 2006* (VIC); *Equal Opportunity Act 1984* (WA).

⁴⁹ See eg *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1992* (NT) s 51; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Anti-Discrimination Act 1998* (Tas) ss 51, 52; *Equal Opportunity Act 2010* (Vic) ss 82, 83, 84; *Equal Opportunity Act 1984* (WA) s 72.

We note that no specific consequential amendments have been identified in the Bandt/Wilkie Bill or its explanatory materials.

We commend this Bill, and encourage the Committee to support its passage through the Commonwealth Parliament, to deliver fair, just and equal outcomes for same-sex couples and the broader Australian community.

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Appendix A: table summarising proposed legislation

	<i>Marriage Equality Amendment Bill 2010</i> Senate Bill	<i>Marriage Equality Amendment Bill 2012</i> Bandt/Wilkie Bill	<i>Marriage Amendment Bill 2012</i> Jones Bill
Definition of 'marriage' (sub-s 5(1))	Repeal the definition, substitute: marriage means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life. (cl 1)	Repeal the definition, substitute: marriage means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life. (cl 1)	Repeal the definition, substitute: marriage means the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life. (cl 1)
Subsection 45(2)	After "or husband", insert ", or partner". (cl 2)	After "or husband", insert ", or partner". (cl 2)	
Subsection 46(1)	Omit "a man and a woman", substitute "two people". (cl 3)	Omit "a man and a woman", substitute "two people". (cl 3)	Omit "a man and a woman", substitute "two people". (cl 2)
Section 47		After "Part", insert "or in any other law". (cl 4) To avoid doubt, the amendments made by this Schedule do not limit the effect of section 47 (ministers of religion not bound to solemnise marriage etc.) of the Marriage Act 1961. (cl 8)	After paragraph (a), insert: (aa) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex; or (cl 3)
Subsection 72(2)	After "or husband", insert ", or partner". (cl 4)	After "or husband", insert ", or partner". (cl 5)	
Section 88EA	Repeal the section. (cl 5)	Repeal the section (cl 6)	Repealed (cl 4)
Part III of the Schedule (table item 1)		Omit "a husband and wife", substitute "two people". (cl 7)	Omit "a husband and wife", substitute "two people". (cl 5)
Consequential amendments		(1) The Governor-General may make regulations amending Acts (other than the <i>Marriage Act 1961</i>) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act. (2) For the purposes of the <i>Amendments Incorporation Act 1905</i> , amendments made by regulations for the purposes of this item are to be treated as if they had been made by an Act. (cl 9)	