

Senate Legal and Constitutional Committee,

Thank you for the opportunity to make a submission on the Marriage Equality Amendment Bill 2010.

## **Introduction**

The short list of six items in the Schedule to the Marriage Equality Amendment Bill 2010, may seem a trivially brief amendment to legislation, but its importance cannot be overstated.

Those amendments concern fundamental principles regarding the way in which many Australian citizens are to be treated by their Government, and in turn, by their fellow citizens.

Those six items represent the difference between a continuing, unjustified discrimination, and recognition of existing, fundamental human rights. They represent the difference between irrational hatred, and reason; between bigotry and dignity; between injustice and equality under the rule of law.

To a gay or lesbian teenager, anxiously considering their future and what course their life may take - and how their families, friends, peers and communities, guided and governed by the law, will either value, or condemn their relationships - those few amendments may represent, quite literally, the difference between death and life.

## **Equality under the rule of law is about 'a fair go'**

Australia has a proud tradition of liberty and we enjoy a stable, secular and tolerant democracy. In a world where many countries must contend with entrenched conflicts along political, ethnic or religious divides, this is no small feat. And unlike other nations, we don't often trumpet our freedoms and liberties, perhaps because they are so entrenched within our institutions and within the fabric of our society. We extend, and we have come to expect in return, 'a fair go'; a quintessentially Australian term for the universal principle of equality.

Those three simple words encapsulate both a philosophy of life, and a guiding principle for a democratic society. They express the fundamental principle that all people are equal before the law. To be treated with fairness is to be treated justly and equally, and to have 'a fair go', means equality of opportunity. We expect fairness from one another, and most of all, we expect it from our Government and its institutions: we expect that the Government won't unfairly stand in the way, or unjustly deny us the liberty to pursue our own ambitions and strive to fulfil our potential in life.

When our Government intervenes through the prescription of law, particularly laws that discriminate, it should do so to *promote* fairness, to 'level the playing field', to extend liberty and equality, not diminish it.

John Stuart Mill said that in a liberal state, 'the à priori presumption is in favour of freedom and impartiality,'<sup>1</sup> and so 'the burden of proof is supposed to be with those who are against liberty.'<sup>2</sup> Advocates against same-sex marriage, who wish to restrict the liberty of their fellow citizens by perpetuating an unjustified discrimination, must present compelling reasons for why this discrimination should continue.

It is my submission that no such compelling arguments have been, nor indeed could be, advanced.

### **Unjustified discrimination**

The law discriminates all of the time, allowing the exercise or restriction of rights in certain circumstances. All manner of licenses, qualifications, entitlements, and so forth require the law to discriminate between people, allowing some to exercise rights that are not extended to others. (For example, to drive a vehicle, we must obtain a license; to vote, we must be at least 18 years old.)

When the law prescribes such discriminations, it must do so for a valid and justifiable purpose. An unlicensed driver is prohibited from driving because there is no assurance that he or she can operate the vehicle, abide by the road rules and maintain a standard of safety for other road users. The rights of others would be dangerously compromised if unlicensed drivers were allowed on the road.

Laws that enact government policy must be based upon reason and substantiated by evidence, or, at the very least, a logical consistency. The continuing discrimination against same-sex couples - denying them the right to marry - has no basis in reason, is not substantiated by any evidence, and is inconsistent with existing Federal laws which govern the treatment of same-sex couples.

### **Reasons to remove the continuing discrimination against same-sex marriage**

The onus to justify the continued prohibition against allowing same-sex couples to marry lies with those who would deny removal of that discrimination. However, I wish to address a number of points in response to unsubstantiated arguments that have been advanced seeking to maintain the current denial of the right of same-sex couples to marry.

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<sup>1</sup> John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education*, ed. John M. Robson, Introduction by Stefan Collini (Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1984) Chapter 1.

<sup>2</sup> Ibid.

- **Same-sex marriage will *strengthen*, not weaken the institution of marriage**

There is a public good in encouraging familial structures of care, support and interdependence. The Government has a legitimate interest in furthering the way in which family units are strengthened through the legal recognition of relationships and social bonds, and recognising the responsibilities to one another that this encompasses.

Even from a purely economic perspective, the care and support provided by one spouse to another (medical, financial, etc.) represents a cost that might otherwise be paid for by the state.

The social, medical, and economic benefits of marriage are widespread and well documented, including:

- Married people report higher levels of physical and psychological health;
- Married people are more likely to volunteer;
- Being married increases the likelihood of affluence;
- Married people tend to experience less depression and fewer problems with alcohol;
- Getting married increases the probability of moving out of a poor neighborhood;
- Married people are less likely to experience poverty; and
- Marriage is associated with a lower mortality risk.<sup>3</sup>

Removing the unjust discrimination against a group of citizens that wish to enter into this commitment will extend those individual and societal benefits, thereby *strengthening* the institution of marriage as a desirable status, not diminishing it in any way.

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<sup>3</sup> Peggy McDonough, Vivienne Walters, and Lisa Stroschein, 'Chronic Stress and the Social Patterning of Women's Health in Canada', *Social Science and Medicine*, Vol. 54 (2002), pp. 767–782; Corey L. M. Keyes, 'Social Civility in the United States', *Sociological Inquiry*, Vol. 72, No. 3 (2002), pp. 393–408; Thomas A. Hirschl, Joyce Altobelli, and Mark R. Rank, 'Does Marriage Increase the Odds of Affluence? Exploring the Life Course Probabilities', *Journal of Marriage and Family*, Vol. 65, No. 4 (November 2003), pp. 927–938; Allan V. Horwitz, Helene R. White, and Sandra Howell-White, 'Becoming Married and Mental Health: A Longitudinal Study of a Cohort of Young Adults', *Journal of Marriage and Family*, Vol. 58 (November 1996), pp. 895–907; Scott J. South and Kyle D. Crowder, 'Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences', *American Journal of Sociology*, Vol. 102, No. 4 (January 1997), pp. 1040–1084; Daniel T. Lichter, Deborah Roempeke, and Brian J. Brown, 'Is Marriage a Panacea? Union Formation Among Economically Disadvantaged Unwed Mothers', *Social Problems*, Vol. 50 (2003), pp. 60–86; Stephanie A. Bond Huie, Robert A. Hummer, and Richard G. Rogers, 'Individual and Contextual Risks of Death among Race and Ethnic Groups in the United States', *Journal of Health and Social Behavior*, Vol. 43 (2002), pp. 359–381.

- **Same-sex marriage will benefit the lives of gay and lesbian Australians without any detriment to other Australians**

Legal and social recognition of same-sex relationships is likely to reduce discrimination, increase the stability of same-sex relationships and lead to better physical and mental health for gay and lesbian people.<sup>4</sup> Marriage is likely to stabilise same-sex relationships, create a focus for celebration with families and friends and provide vital protection at time of dissolution.<sup>5</sup> Gay men and lesbians' vulnerability to prejudice-related mental health issues (such as depression) may diminish in societies that recognise their relationships as valuable and become more accepting of them as respected members of society.<sup>6</sup>

Further, these outcomes can be achieved without any detriment to other Australians, including (as is often claimed by opponents of same-sex marriage) heterosexual married couples. There is no evidence that the introduction of same-sex marriage in any other jurisdiction has resulted in any negative impact upon heterosexual marriage. In fact, evidence suggests the opposite:

In Massachusetts, which legalized gay marriage in 2004, the divorce rate has **declined** by 21% and is the lowest in the country by some margin. It is joined at the top of the list by Rhode Island and New Mexico, which do not perform same-sex marriages but idiosyncratically also have no statute or constitutional provision expressly forbidding them, as well as Maine, whose legislature approved same-sex marriage only to have it overturned (although not banned constitutionally) by its voters. On the other hand, the seven states [with the highest divorce rate] all had constitutional prohibitions on same-sex marriage in place throughout 2008. The state which experienced the highest increase in its divorce rate over the period (Alaska, at 17.2%) also happens to be the first one to have altered its constitution to prohibit same-sex marriage, in 1998.<sup>7</sup>

- **The welfare of children in same-sex couple families will be enhanced by same-sex marriage**

Children are presently being raised by gay and lesbian parents, and will continue to be so, irrespective of whether or not marriage discrimination is ended. No credible study has ever found that children are negatively impacted by being raised in a lesbian or gay household.<sup>8</sup>

There is absolutely no credible evidence that having gay parents causes children any direct harm or that the children are more likely to be homosexual themselves.

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<sup>4</sup> Royal College of Psychiatrists, UK:

<http://www.rcpsych.ac.uk/pdf/Submission%20to%20the%20Church%20of%20England.pdf>

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> <http://www.fivethirtyeight.com/2010/01/divorce-rates-appear-higher-in-states.html> (emphasis added)

<sup>8</sup> Perry v Schwarzenegger, 704 F. Supp. 2d 921 - Dist. Court, ND California, 2010

<https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>

On the contrary, research has concluded that children of homosexual parents are no worse off for it.<sup>9</sup>

The indirect harms that a same-sex family with children may encounter are a result of marriage discrimination. Uncertainty in legal status, conferring property, dealing with public institutions and so forth are a *consequence* of the continuing discrimination, not a cause.

- **The primary purpose of marriage is not sexual reproduction**

Heterosexual couples are not required to swear an oath to reproduce in order to receive a marriage certificate, or demonstrate their biological capacity to conceive children. Elderly people who are incapable of bearing children are not prohibited from marriage. Couples who simply don't want children can still marry, and marriages are not annulled by the state if a couple fails to produce children.

That children commonly follow after the marriage of a heterosexual couple does not alter the nature of the marriage relationship between that couple and the Government. The married couple who conceive children are treated no differently by the Government than the married couple who do not. Their marriage status is identical.

It has been said that there's a legitimate government interest in supporting the reproductive family unit, and that is absolutely true. This can be accomplished, however, without excluding non-reproductive families; there's no reason that same-sex couples must be excluded any more than there's a reason that sterile couples or couples who simply do not wish to have children should be excluded. While there is a rational basis for the Government to support heterosexual reproductive marriage, there is no rational basis for supporting it to the exclusion of others.

Even if the Government's belief was the primary purpose of marriage was 'procreative' (which I submit is not the case) then no explanation has been given as to how permitting same-sex marriage impairs or adversely affects that purpose.

- **Same-sex marriage will not affect the 'sanctity' of marriage**

'Marriage' is a civil relationship that holds no sanctity unto itself. Aside from the requirements prescribed in the *Marriage Act 1961* (Cth) there is no test for the form in which heterosexuals may be married or, if subsequently divorced, how many times they may re-marry. Further, there is no legal prescription as to how the married couple must behave to one another once married. Adultery, for example, is not illegal.

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<sup>9</sup> Judith Stacey and Timothy Biblarz, '(How) Does the Sexual Orientation of Parents Matter?' *American Sociological Review* (Volume 66, Number 2, April 2001).

The 'sanctity' that a heterosexual marriage or a same-sex marriage holds exists solely in the bond between the married couple and is not prescribed by Government.

- **The rights and dignity of heterosexual married couples will be unaffected by same-sex marriage**

Recognition of the right of marriage for same-sex couples will have absolutely no legal consequence on the status, rights and responsibilities of heterosexual married couples.

Some heterosexual citizens may feel perturbed by the legal recognition of the fundamental rights of same-sex couples to be married. So be it. No substantive, tangible detriment will be inflicted on those citizens as a result of same-sex marriage. It is abhorrent to the purpose of a free democracy that a Government would continue to deny fundamental rights to a minority group of citizens upon no other basis than that another group of citizens might not personally like it.

- **Religious objection to same-sex marriage is not a valid reason to discriminate**

The primary source of objection to same-sex marriage is religious in nature and the funding and advocacy against same-sex marriage is primarily a product of religious institutions. The objection to same-sex marriage from a religious perspective is an extension of homophobia and an irrational hatred of same-sex attracted people as 'immoral' based upon religious teachings.

Australian law is not based in theocracy, it is a product of secular democracy, and laws must have a secular purpose. The freedom to practice religion in Australia is inherent in our society. However, that freedom does not extend to the denial of fundamental rights to fellow citizens.

No person can be compelled to enter into a marriage, whether heterosexual, or same-sex. No person expressing an objection to same-sex marriage for religious or any other reason, could be legally forced to marry a person of the same sex, or even attend such a marriage. The laws of Australia will continue to protect the religious freedom of those who do not wish to marry someone of the same-sex.

- **The right of religious organisations and individuals to refuse to conduct a same-sex wedding ceremony will be unaffected**

The laws of Australia will also continue to protect the religious freedom of those who do not wish to conduct a marriage of a same-sex couple. The government has no right to force any church to marry anybody it doesn't want to marry. It doesn't have that power now: a Catholic church is under no obligation to marry someone who has been divorced nor to marry a Protestant couple, for example. An Imam cannot be compelled to marry a Jewish couple. A Priest may refuse to marry a couple who state that they are atheists.

This right will continue under the proposed amendments contained in the Marriage Equality Amendment Bill 2010. Specifically, section 47 of the *Marriage Act 1961* (Cth) provides that:

**47. Ministers of religion not bound to solemnise marriage etc.**

Nothing in this Part:

(a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or

(b) 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.

• **‘Traditions’ that unjustly discriminate are to be judged on their merits, not their longevity**

Often, the argument offered against same-sex marriage, is that heterosexual marriage is the ‘traditional’ form of marriage, and same-sex marriage will change the ‘definition’ of marriage. Proponents of this argument often do not specify what historical definition they are referring to. Marriage throughout human history has not been static.<sup>10</sup> And the rights and status conferred by marriage at law have changed and evolved over time – including very recent history.

At any given moment, different people already have different ideas of what ‘marriage’ means. In some cultures marriages are still arranged. In the past, marriages have been used to end wars or seal treaties. It was once expected that the father of a bride would be paid a dowry for the privilege of marrying her. In the early 20th century it was unheard of to have two working parents, but by the end of the 20th century it was common. Definitions and ideas change over time.

Further, the mere passage of time does not imbue a practice with legitimacy, when examined in light of current standards of justice. It seems absurd to us now that rape within a marriage was not criminalised until the state of New South Wales amended its legislation in 1981, followed by all of the other states from 1985 to as recent as 1992.<sup>11</sup> A rape within marriage was as equally unjust before 1992 as it was after: it was simply that the law had failed to recognise the crime and provide a remedy.

Similarly, the discrimination against recognising the right of same-sex couples to marry is a continuing unjust discrimination. We hold ourselves to higher standards of

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<sup>10</sup> [http://www.huffingtonpost.com/jane-minogue/the-ever-changing-definit\\_b\\_170638.html](http://www.huffingtonpost.com/jane-minogue/the-ever-changing-definit_b_170638.html)

<sup>11</sup> Jennifer Temkin, *Rape and the Legal Process*, p. 86.

liberty than previous generations, because we have learnt the consequence of injustice for society. We demand that a government policy be tested by evidence, and justified by reason. We know that discrimination based upon prejudice is wrong, however ingrained and long-lasting that prejudice has been.

- **Recognition of same-sex marriage does not justify recognition of polygamy, incest or bestiality**

It has been claimed that recognition of same-sex marriage would then lead to other circumstances being defined as 'marriage', including polygamy, incest or even bestiality.

These rhetorical questions aren't arguments; they're simply inflammatory remarks, which make the hidden assumption that heterosexual couples are worthy of marrying but homosexual couples, are not. (It's almost circular reasoning in some respects; because homosexuals are unworthy of marriage; ask a rhetorical question that's supposed to relate that unworthiness.) This hidden assumption can be challenged and invalidated simply by asking the same question a different way, inverting or removing the assumption. If heterosexuals can get married, why not a man and his sister? If heterosexuals can get married, why not homosexuals?

Neither those who oppose and those who support same-sex marriage propose changes to the law to allow polygamy or incest. Further, to suggest that somehow the love between two persons of the same-sex could be no more than that between a person and an animal is simply an insulting, inflammatory remark that assumes that homosexuals are less human than heterosexuals.

- **Same-sex marriage is not a 'special' right**

Our society ostensibly supports freedom, liberty, and equality under the law for everybody. It is this equality which same-sex couples seek to secure in their efforts to legalize same-sex marriages. Equality before the law is not a 'special' right – it is a fundamental consequence of the rule of law and a bedrock of a democratic society.

The case could be made that the only group that could be considered to have a 'special' right is heterosexuals. They can get married. Same-sex couples cannot. Advocates against same-sex marriage would be more honest to say they want their own right to remain 'special' by preventing same-sex couples from attaining equality.

- **Existing laws that remove Federal discrimination against same-sex couples do not provide the same rights as marriage**

The Federal Government has claimed that the removal of legal impediments in the recognition of same-sex couples as *de factos* diminishes the need for an amendment to the *Marriage Act 1961* (Cth), reserving marriage *in name-only*, for heterosexual couples.



However, this ignores all of the laws relating to same-sex couples as the State level, including inheritance laws. There are hundreds of state-provided services or benefits for heterosexual married couples that are not available through any means other than marriage.

Further, the argument that the same rights may be achieved through contractual arrangements, civil registrations, powers of attorney and so forth ignores the fact that the term 'marriage carries with it an instantly understandable social connotation.

Furthermore, if this argument was valid, and the law has or could provide all of the same benefits of marriage to same-sex couples save for the name, then it is surely also an argument against heterosexual marriage. Why should opposite-sex couples be permitted to wed if they can simply secure all of these benefits through contracts, and power of attorney? The fact that those making this argument chose only to apply it to same-sex couples reveals the bias in their reasoning.

- **Civil unions are not the same as marriage and will perpetuate inequality**

Calling a two-partner union a 'marriage' for heterosexuals but a 'civil union' for same-sex couples is similar to the failed doctrine that was argued in the United States of 'separate but equal' to justify the inferior treatment of African Americans compared to white Americans. It is not equality under the law.

In the recent case of *Perry v Brown*, the majority judgement commented on the substitution of 'civil union' for marriage in a social context, and stated:

We are excited to see someone ask, 'Will you marry me?', whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see 'Will you enter into a registered domestic partnership with me?' ... We see tropes like 'marrying for love' versus 'marrying for money' played out again and again in our films and literature because of the recognized importance and permanence of the marriage relationship ... The name 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships.<sup>12</sup>

Advocating for civil unions at the expense of marriage equality, is like saying: 'Yes, you can get on the bus, but you still have to sit at the back.'

- **Same-sex marriage promotes human dignity**

Ultimately, removing the unjustified discrimination against same-sex marriage promotes recognition of gay and lesbian Australians as equal under the law, entitled to the same rights and required to meet the same responsibilities as all other citizens.

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<sup>12</sup> *Perry v. Brown* 2012 WL 372713 Court of Appeals, 2012 (USA) - <http://www.ca9.uscourts.gov/datastore/opinions/2012/02/10/10-16696.pdf>

For a portion of Australian society, same-sex attraction is an inherent part of their identity. It is not the sum total of who they are, but it is fundamental component of their character. For a great many same-sex attracted Australians, their sexual identity is not considered a 'choice',<sup>13</sup> but an essential fact of their life, guiding their desire to form loving relationships with a partner.<sup>14</sup>

## **Conclusion**

Ending marriage discrimination will remove an archaic, unjustified prejudice against a minority within Australian society that has faced a long history of oppression, hatred and treatment as second-class citizens. What is more, removing this unjustified discrimination can be achieved without any consequential reduction to, or abrogation of, the rights of anyone else.

More importantly, ending marriage discrimination will recognise same-sex couples as equal before the law, with the same rights and responsibilities; it will provide gay and lesbian Australians with 'a fair go' - the same chance at pursuing happiness in their lives and in their relationships, as all other Australians.

I urge you to recommend that the Parliament of Australia pass the Marriage Equality Amendment Bill 2010.

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<sup>13</sup> 'It would appear that sexual orientation is biological in nature, determined by a complex interplay of genetic factors and the early uterine environment. Sexual orientation is therefore not a choice': Royal College of Psychiatrists, UK:

<http://www.rcpsych.ac.uk/pdf/Submission%20to%20the%20Church%20of%20England.pdf>

<sup>14</sup> If sexual orientation were a 'choice', as many opponents to same-sex marriage claim, then it follows that heterosexuality would be a choice too.