

**Submission to the**

**Senate Legal Constitutional Affairs Committee**

**on the**

**Senate Inquiry into the Greens Marriage Equality Amendment bill 2010**

**from**

**Eric Jones**

**2 April 2012**

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ii)

### **Introduction and overview of the submission.**

Thank you for the opportunity for making this submission to the Inquiry. **I trust that submitters will receive a copy of the Committee's report in due course.**

The submission opens in **Section 1** with an examination of what Marriage is, its purpose and history and supports Traditional Marriage. It sets out some arguments for and rebuttals for same-sex marriage. It concludes with a summary that states that "My opposition to same-sex marriage is a mainstream position that is based on the respect for the traditional marriage institution which is based upon a union of a man and a woman, the true welfare of children and society and a desire to protect the position of families and caution about change in society.

**Section 2.** Deals with Human Rights and notes the various United Nation Declarations that we have ratified and comments upon some overseas judicial adjudication on the status and position of Same-Sex Marriage.

**Section 3** deals with in 3.1 Discrimination, 3.2 Equality and Rights, 3.3 Cultural aspects and 3.4 Choice and Gender aspects.

Under discrimination the point is made that there is nothing unjustly discriminatory in marriage laws relying (reliance) on genuinely relevant distinctions. That relevant distinction is that a man and a woman, complementarily enter into a relationship that has a view to life creation because of their union. It is the nature of the heterosexual relationship and not the relationship which is the reason for marriage legislation focusing on heterosexual couples. Reasons, authorities and comments are set out for this position. The other issues outlined in the heading are addressed to various degree.

**Section 4** sets out some comments on the Australian Constitutional position on this issue.

**Section 5** sets out some comments on Overseas Jurisdictions and asks the question is it inevitable that same-sex marriage will be legalized everywhere. No conclusion is drawn but the situation is outlined particularly in the United States of America. The conservative case for same-sex marriage is considered in the light of the Netherlands experience over the last 10 years.

iii)

**Section 6** sets out some support and opposition to same-sex marriage. It also makes some reference to the tenor of the debate over this issue.

**Section 7** sets out something of Church and State Relations in Australia, Freedom of Conscience and Religion and Freedom of Speech in regards to the issue.

**Qualification.**

I do not claim that this submission is exhaustive because it has been hastily put together. Perhaps I have covered more than your remit but comment is made to show something of the wider commentary and debate on this issue.

iv)

**Recommendation.**

**That the Senate Legal and Constitutional Affairs Committee recommend to the Senate that the Bill not be passed.**

## 1)

### Section 1. MARRIAGE.

For thousands of years and in all cultures marriage has been between a man and a woman for the:-

- 1) procreation of children;
- 2) mutual love and care between the man and woman; and
- 3) good order and the social benefit of society.

This traditional marriage view has been the natural order of society. Whilst the institution of marriage has taken various forms for its solemnisation – tribal rights, mutual commitment, church or state provision- it has always been acknowledged that it is between a man and a woman.

Currently marriage creates legal responsibilities between the parties with the view of permanence in their relationship for the benefits of the children, parents and society. Marriage is a unique kind of sexually complementary union with a natural orientation to life.

Children then have the basic human right to know and be raised by their biological father and mother. Children need a mother and father as they bring complementary aspects to their children's development. A daughter learns from her father as a son learns from his mother. By definition two lesbian women can be mothers but they cannot be a mother and a father. Conversely two homosexual men can be fathers but they cannot be a mother and a father. Complementary aspects apply to men and women.

When a man and a woman have a marriage relationship it is different from other relationships because it has a capacity that same-sex relationships simply do not have. It is a different kind of a relationship.

For the true welfare of society governments should support traditional families for these have proven over the years that they are the best form of families. Generally social stability and cohesion flow from them. Whilst it is true that marriages do break down and other forms of associations have developed more strongly in the last 50 years or so, this does not dilute the position of the majority of marriages that contribute strong and healthy members to our society. Of course, married couples unable to have children are still married because their sexual relationship is naturally designed to create life.

2)

**It should also be noted that marriage between a man and a woman is not a religious but a natural institution.**

**Some arguments for and rebuttal are set out for same-sex marriages.**

**Argument.** Same sex couples can be good parents just like opposite sex parents.

**Answer.** As mentioned previously two homosexual men can be fathers but they cannot be a child's biological mother and father. Similarly two lesbians can be mothers but cannot be biological father and mother. Children need a mother and a father to function best in a society.

**Argument.** Research shows that children will not be disadvantaged in comparison to children of opposite-sex couples. Children need only one model; therefore, two same-sex parents can adequately raise a child.

**Answer.** Australia's stolen generation of children have demonstrated the damage done to children who are denied the right to know and be raised by their biological parents.

**Argument.** There are deficiencies in traditional marriage and natural families and what have you got to say on the topic given such failures.

**Answer.** The issue is not, however, whether opposite-sex couples attain the ideals of marriage in relation to fulfilling the needs of their offspring. Nor is the issue whether marriage is a perfect institution: it is not. Rather, the issue is whether children, in general, and society are better off if marriage remains between a man and a woman. After all, we are not all perfect.

**Argument.** Legalising same-sex marriage will not harm anyone. It will not damage traditional marriage.

**Answer.** Overseas experience has shown that it creates new forms of discrimination and limits civil and religious freedoms. E.g.s. Massachusetts. USA. Schools were forced to teach children about same-sex marriages whether they liked it or not.

Depending upon associated legislation it will discriminate against children conceived by donor-conception. Such children can be denied the right to know both their biological parents.

### 3)

The legalization of same-sex marriage -in Canada in 2005 resulted, I have been told, in restrictions on freedom of conscience and religion and freedom of speech. - marriage is no longer about children but only about “love”. Some examples here -Civil marriage celebrants have been targeted for refusal to conduct same-sex marriages. The same applied to the author of a letter to the editor questioning the morality of homosexuality.

**Argument using analogies.** E.g. Using the issue of past race-laws in other countries, i.e. Anti-miscegenation laws which prevented people of different races from marrying. - Such laws have been renounced so we should end the restriction on same-sex marriage.

**Answer.** It should be recognised that neither Australian nor English law has ever prohibited inter-racial marriage. Australia and Britain have long histories of inter-ethnic and inter-racial marriage.

Black activists in the USA also rejected such a false analogy. (See for example:

<http://www.villagevoice.com/2004-05-18/news/whose-dream/1>)

Jesse Jackson told a group of Harvard Law School students in 2004 that “gays were never called three-fifths human in the Constitution, and they did not require the voting Rights Act to have the right to vote”. (Cheryl Wetzstein. “Blacks angered by gay’s metaphors.” The Washington Times, 2 March 2004. Page A3.)

Laws banning interracial marriage were unjust. Overturning them did not mean a redefinition of marriage but an affirmation of it. Men and women should be allowed to marry regardless of skin colour. This does nothing to alter the one man, one woman aspect of marriage. Same-sex marriage is completely different – it is a redefinition of marriage.

**Princeton University Law Professor Robert George argues. “Because every law makes distinctions, there is nothing unjustly discriminatory in marriage law’s reliance on genuinely relevant distinctions.”**(Girgis.Sherif, et al., “What is Marriage?,” Harvard Journal of Law and Public Policy. Vol 34, No.1, Winter 2010,pp245-287,p249.)

**Some other points on the legalization of same-sex marriages.**

- 1) Redefining marriage would mean abandoning the most important legal and social safeguard of a child’s connection to his or her heritage and identity.
- 2) Legislation will flow onto the teaching of such life styles in our schools as normal. Service agencies could be forced to provide services against their consciences.



4)

3) Following and depending on the nature of any legalization will the state bend to pressure from other groups for their associations to be legalised? E.g. Polyamory.

**Re the Proposal.**

The Proposal in the Marriage Equality Amendment Bill 2010 to redefine marriage in the Marriage Act 1961 into “persons” or more specifically in Subsection 5 (1) (definition of marriage) –

“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.”

Is a fundamental departure from the agreed definition used by ours and other cultures and societies over time.

**Summary.**

My opposition to same-sex marriage is a mainstream position that is based on the respect for the traditional marriage institution which is based upon a union of a man and a woman, the true welfare of children and society and a desire to protect the position of families and caution about change in society.

References and sources and acknowledgements (RSA), if not quoted above, used in the above are listed in the RSA section at the back of this submission. The same applies for the other sections of this submission.

## **Section 2. HUMAN RIGHTS.**

### **Relevant United Nations Declarations.**

#### **1948 UN Declaration of Human Rights – Article 16.**

“Men and Women ... have the right to marry and to found a family, which is “the natural and fundamental group unit of society and is entitled to protection by society and the State”.

The inalienable, biological rights of children were confirmed in the UN Convention of the Child (12 December 1989);

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents **(Article 7)**.

### **International Covenant on Civil and Political Rights (ICCPR) covenant.**

#### **The International Covenants on human Rights and Optional Protocol. Print date 1976.**

Article 23. (1)The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. (2) **The right of men and women of marriageable age to marry and to found a family shall be recognized.**

I understand that Australia has ratified the above instruments and that we should be guided by them.

**General comment.** I assert that children have the fundamental Human Right to be raised by their biological Father and a Mother.

### **Some Overseas Constitutions, Judicial adjudication on the status and rights of Same –Sex Marriage.**

\* The French Constitutional Court ruled against Homosexual Marriage. 3 February 2011.

\* The recently enacted Hungarian Constitution defines marriage as between a Man and a Woman.

**European Court of Human Rights in Strasbourg, France.**

**Probably the leading Human Rights Court, specifically created to deal with Human Rights, in the world determined in a case recently -**

- \* where a Lesbian couple had tried to establish marriage rights under anti-discrimination laws the judges said that there had been no discrimination;
- \* that the European Convention on Human rights does not require member states governments to grant same-sex couples access to marriage; and
- \* “with regard to married couples, the court considers that in view of the social, personal and legal consequences of marriage, the applicants legal situation could not be said to be comparable to that of married couples”.

The **UK Telegraph** 21 March 2012 reported that “**Gay marriage is not a human right, according to European ruling** (Refer <http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-rig...>)

**The Daily Mail** UK 20 March 2012 reported “**Gay marriage is not a human right: European ruling torpedoes Coalition stance**”. They also comment that the ruling also says that if gay couples are allowed to marry, any church that offers weddings will be guilty of discrimination if it declines to marry same-sex couples. (Refer <http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-Europe...>)

The **GNN SX Express Yourself gay newsnetwork** on the 22 March 2012 reported with the heading “**marriage not a human right, rules Euro Court**. (Refer <http://gaynewsnetwork.com.au/news/northern-territory/5518-marriage-not-a-human-ri...> )

Fr **Frank Brennan**, one of Australia’s most prominent human rights lawyers and former chairman of the Australian Governments National Human Rights Consultation in 2009, **opposes same-sex marriage** and compared the issue of same-sex parenting to the Stolen Generations and victims of forced adoptions. (Refer <http://www.starobserver.com.au/news/2012/03/20/brennan-attacks-same-sex-parents/...>)

### Section 3. 1. DISCRIMINATION.

**A. All individuals, regardless of their sexuality, are equal before the law.** We are talking about relationships here and their importance to society. Marriage laws are accorded a special status to reflect the intimate union of a man and a woman. Basically the union of a man and a woman is special.

**B. Denying Same-sex couples the status of marriage is not discriminatory in the sense that “every law makes distinctions.** There is nothing unjustly discriminatory in marriage laws reliance on genuinely relevant distinctions (Professor Georges view previously quoted.) That relevant distinction is that a man and a woman, complementarily enter into a relationship that has a view to life creation because of their union. It is the nature of the heterosexual relationship and not the relationship which is the reason for marriage legislation focusing on heterosexual couples.

It should also be pointed out that male-female marriages have many restrictions on them. E.g.s – You cannot marry 1) under a certain age, 2) a close relative, 3) a married person or 4) more than one person at a time. Is this discriminatory? No it is not as it has been recognised that for health reasons and the good order of individuals and society in general these restrictions apply.

After all, if heterosexual marriage discriminates against same-sex couples, then in turn, same-sex marriage discriminates against polygamists and those in polyamorous relationships, or against people who are just friends.

**Professor Margaret Somerville, Professor of Law and Professor in the Faculty of Medicine and founding Director of the Centre for Medicine, Ethics and Law at McGill University, Montreal, Canada,**

Also comments, in part,-

- a. In essence same-sex relationships discriminate against marriage as between a man and a woman.
- b. It is argued that excluding same-sex couples from marriage is the same act of discrimination as prohibiting interracial marriage, which has been recognised as a breach of human rights. But this is not correct. Because an interracial marriage between a man and a woman does symbolise the procreative relationship, its prohibition is based on racial discrimination. In contrast, not extending the definition of marriage to include same-sex couples is not based on the sexual orientation of the couple, but the absence of a feature of their relationship which is an essential feature of marriage.

8)

**C. It is not unjust to recognise that marriage is different from all other kinds of sexual and romantic relationships.** Justice requires us to recognise the unique nature of marriage being an exclusive relationship of a man and a woman. Same-sex couples are already recognised and provided for by laws on domestic partnerships.

**D. In a sense some “discrimination” makes sense.** Refer Janet Albrechtsen article entitled “No hatred in keeping marriage laws sacred” Australian 12 May 2004. Our marriage laws are premised on discrimination because society has always placed a value on linking parenthood and marriage.

Of course, this discrimination I would add means discrimination that is not bad, hateful, undue and unfair and is clearly undesirable but has a positive public purpose. After all society discriminates on the basis of good social policy in other areas. I suppose discrimination should not be taken as “unfair treatment” or injustice but should be understood as a valid social concept, as discrimination would simply mean to “distinguish” or to “differentiate” which is largely the position with traditional marriage.

**E. Paul Kelly, the distinguished Editor-at-Large, of the Australian on the 30 November 30, 2011 said the following-**

“Gay activists say gay marriage is needed to remove discrimination in marriage. This polemic conceals rather than reveals what is happening. **Discrimination is not the real issue.** In a civilised polity there is no place for discrimination based on age, race, gender or sexual preference. The Gillard government has removed discrimination affecting gays and gay couples. Seen in this context, changing the Marriage Act is about changing the concept of marriage. This affects the entire society, not just gays.

What is the new ideology of marriage? It is overwhelmingly about rights and expanding the rights agenda. It says consenting adults bound by love have equal rights to marry.” Summarising -He then quotes Greens MP Adam Bandt about love having no boundaries and says that it raised problems because the public is wary of more rights without matching responsibility. The erection of a libertarian construct on marriage. Opens a variety of postmodern and cross-cultural constructs where marriage can be a range of options.

“In this situation legal recognition of fatherhood and motherhood comes under assault because they constitute an obsolete view of marriage. This is now happening in a number of same-sex marriage nations.”

### Section 3. 2. EQUALITY AND RIGHTS.

#### Equality and Rights.

For the issue of equality **same-sex couples enjoy equitable treatment in all aspects relevant** to de facto couple status. NSW,VIC,TAS,ACT regulate same-sex partnerships on a relationship register. This gives them public recognition of their relationships. The push for same-sex marriage is largely ideological because same-sex couples are not disadvantaged without it (Southern Cross March 2011) Albeit not all of the states are covered. As mentioned above the commonwealth has also legislated so that no one suffers.

To the point that same-sex couples have” a right to a child”. No doubt processes will follow and presently exist, I believe, for same-sex couples to have children. However this treats children as commodities to satisfy adult desires and demands. Nobody has a “right to a child”, anymore than a man has a “right” to a woman. Children need a mother and a father to function best in a society made up of both sexes.

Marriage between a man and a woman **protects the child’s right to know** and be cared for by his or her own mum and dad. The convention on the rights of the child recognises that all children deserve to have this right protected, wherever that is possible. Marriage reflects just how important it is for mums and dads and their biological children to stay together. Same-sex marriages and same-sex parenting do the opposite: they can separate children from their biological parents. Where are Children’s rights there?

**Dr Ray Campbell**, Catholic Ethicist, in the Catholic Leader of the 11 December 2011 said the debate needed to be moved on from **the rhetoric of equality** to the nature of marriage and the role of the state. (Refer to <http://www.catholicleader.com.au/news.php/top.stories/human-rights-not-the-issue-77>)

### **3.3. CULTURAL ASPECTS.**

Comments are made that marriage is a cultural construct, to suit conservative values of the past. Our culture has changed, values have changed, and therefore marriage can be redefined to include same-sex marriage.

In answering this one simply has to acknowledge “that marriage is a cultural institution built around a very real biological fact: that the sexual union of a man and a woman is an inherently procreative relationship.”

Various cultures around the world through their states define natural marriage as being between one man and one woman only, to provide for a framework that strengthens families, provides stability and protects children’s identities and have the right to know and to be raised by their biological father and mother.

Traditional natural marriage is enshrined in the UN Declaration of Human Rights (as listed before).

All 199 Nations have adopted this declaration. Even the 10 who have allowed same-sex marriage.

One wonders how they can support the UN Convention with their actions.

### **3.4. CHOICE. GENDER.**

The argument here does not seem to take into account the true and unique nature of marriage and the public good of society in the raising of balanced children that thrive best in complementary male-female marriage relationships. Also refer Paul Kelly’s article above in relation to some of this point.

Gender differences exist and the acknowledgement of same is the only intellectually honest response. I appreciate that this is not a comprehensive coverage of this area.

#### **Section 4. CONSTITUTIONAL POSITION.**

I am not a Lawyer but it seems to me that any attempt by the Parliament to change by legislation the definition to change the nature of marriage as currently set out by allowing same-sex marriage would, more than likely, be unconstitutional.

The Marriage Act of 1961 was amended in 2004 to define marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. I understand that the whole Federal Parliament supported this except for the far left in the Senate. However, I stand to be corrected if this is not so!

Prior to 2004 the Common Law definition of marriage was anchored in the Hyde V Hyde and Woodmansee case where Lord Penzance defined marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others”.

The Australian High Court, as far as I know, has never been called upon to define marriage under the Constitution, though I suspect some reference could have been made about it. In any determinative case I guess it would come down to consideration of a conservative plain traditional meaning of the word “ marriage” that applied in 1901 and still applies today or an interpretive approach that redefines the word to accommodate an “evolving” definition.

I tend to think that the status quo approach would apply but it would basically depend upon the views of the High Court Justices as to how they see the constitution should be interpreted.

I acknowledge that the marriage law was by reference from the States. I also understand that when the Family court was given powers to deal with defacto relationships, it was by way of referral of state powers. It seemed that the marriage power in the constitution was deemed not to cover heterosexual defacto relationships. If the marriage power cannot deal with heterosexual defacto relationships, how can it deal with same-sex relationships?

Same-sex marriage advocates might advance a case on discrimination grounds under the Foreign Affairs powers of the constitution in relation to the International Covenant on Civil and Political Rights. Who knows how that would go!



**Section 5. OVERSEAS JURSDICTIONS. It is inevitable that Same-Sex Marriage will be legalized everywhere type argument.**

As I understand it only ten countries out of 199 have legalized same-sex marriage.

The Hungarian constitution which was only enacted last year defines marriage between a man and a woman and rejects same-sex marriage.

In the United States of America only six/eight states and Washington DC have passed it. In Connecticut, Iowa and Massachusetts same-sex marriage have been imposed by activist judges. (I might add that in Iowa three Judges, including the Chief Justice, were dismissed by the people in a statewide referendum- style retention vote. Never before had this happened in the history of Iowa. Why? because the three were part of seven judges in a case declared that the State's Constitution invalidated the legislatures marriage law. A law that confirmed marriage was only for heterosexuals. (Professor James Allan. Professor of Law. University of Queensland. (Australian paper item)) In Vermont, New Hampshire, New York and Washington DC same-sex marriages have been passed in state and district legislatures. Maryland and Washington have also passed it???

Two states, so far, have reversed attempts to legalise same-sex marriage. Maine voters exercised their "citizen's veto" to prevent legislation to be passed into law. In California, "Activist judges" it appears, have denied the popular will of the people as expressed by them in a ballot initiative to reverse same-sex marriage. It looks like the matter will go to the Supreme Court for determination.

New Jersey and Rhode Island have refused to legalize same-sex marriage. In liberal Minnesota a marriage amendment (for Traditional marriage) will be on the 2012 ballot for the people's determination.

In New York the bill to legalize was only carried by 33 to 29 votes. It seems that there is strong opposition to overturn the bill as happened elsewhere. Further the New York legislature refused to let the people of New York directly vote on the definition of marriage, as it seems was their right.

13)

**In the 31 states where the definition of marriage has been voted on by the people, constitutional amendments have been passed in all of them to define marriage as only between a man and a woman.**

**France.**

The French Parliament rejected a same-sex marriage bill in June 2011.

France's highest court (The Constitutional Court) ruled that laws banning same-sex marriage did not violate the constitution.

**Netherlands. The conservative case for Same-Sex Marriages**

In an item in the "National Review Online", dated the 17 May 2011 entitled "Marriage in the Netherlands: A decade after Same-Sex Marriage," the author reported some of the following – "A research brief from the Institute for Marriage and Public Policy relying primarily on information from Statistics Netherlands provides a snapshot of the institutional strength of marriage a decade after same-sex marriages were legalized. (The article does not address causation factors.) Its modest findings are that gay marriages are relatively rare.

The brief concludes: "At a minimum the data from the Netherlands does suggest that the hopes of those making a conservative case for gay marriage – that it will strengthen marriage generally and dramatically increase the stability and fidelity among same-sex couples are likely to be disappointed.

## **Section 6. SOME SUPPORT AND OPPOSITION TO SAME-SEX MARRIAGE.**

### **Some Polls, Petitions, Parliamentary Survey Statements and previous votes in the Commonwealth Parliament.**

**Polls.** Sexton Group of the Ambrose Centre for Religious Liberty found a 49 to 40% majority for changing the Marriage Act. However, only 14% strongly wanted the change.

Galaxy Polls. Those in favour –June 2007 57%, October 2010 62%.

### **Petitions to Commonwealth Parliament and ALP National Conference.**

In favour. Get-up petition. Number of signatures???

Against. Senator Boswell (National Party) and Senator Helen Polley (ALP) 52000 paper signatures to the Senate supporting traditional marriage. 24 August 2011.

ALP National Conference.

100000 Australians against urging the ALP Conference to keep its election promise of keeping traditional marriage as the basis of their Federal Policy. 1 December 2012.

### **Previous Votes in the Parliament on this issue.**

February 2010. Senate. Defeated 44 to 5 (Previous Parliament).

5 July 2011. Senate. Defeated 31 to 9.

### **Commonwealth Parliamentary members survey of electorates report.**

Following Mr Bandts (Green MP) successful motion – which only passed by one vote- for local members to gauge the opinion of their constituents re same-sex marriage only 6 out of the 30 MP's reported that their electorates were in favour of change. Basically the push for recognition failed to win support in the parliamentary debate.

### **Some opponents of Same-Sex Marriage.**

\* Julia Gillard. Prime Minister of Australia.

\*Loree Rudd, sister of former Prime Minister Rudd.

\* Barry Cohen. Former ALP Member for Robertson. Indeed in an article in the Australian on the 12 December 2012 he warns against a backlash on same-sex marriage. (Or at least disagrees with it!)

\* Margaret Court. Women Tennis Great and Pastor.

**Disagrees with Same-Sex Marriage.**

\*Warren Entsch. MP. Founder of the Parliamentary Friends of Lesbian, Gay, Bisexual, Transgender and Homosexual men and women. (Brisbane Times 5 December 2011.)

(Refer to <http://www.brisbanetimes.com.au/queensland/marriage-no-fixall-for-gay-community-e>)

**“Progressive” Left support.**

It is interesting to note that when Getup surveyed its members for issues for 2012 Same-Sex Marriage did not feature in the top 10 items. (Refer to <http://blog.getup.org.au>)

**Media.**

The Australian’s Editorial of the 24 November 2011 reported that same-sex marriage was an issue low in priority for people. 60% - including many supporters of changing the Marriage Act believe that debating the question is a distraction. The Editorial also noted the sharp community division over this low order issue.

**Moral objections.**

For those who have moral objections to same-sex marriages will our supposedly tolerant society have room for those who do not support same-sex marriages and support traditional marriage? Look at what happened to Margaret Court! (See below.)

Overseas. Courts in Massachusetts in the USA have told parents that they cannot object to their children being taught about same-sex marriage in primary school. (Source -Messages for National Marriage Day 15 August 2011.)

**The tenor of the debate.**

I suspect that Same-sex marriage advocates have been abused for their views a position which I do not agree with. However the treatment of Margaret Court was appalling when she made her views known in support of traditional marriage. Margaret is possibly the highest achieving Australian sportswoman ever. She was the World Tennis Champion on three occasions.

As a Christian Pastor she expressed the views of many Australians. The calls for her name to be taken down from the Centre Court and other comments made about her because of her views were over the top. (Refer to “Hatred stuns tennis great Margaret Court.” Herald Sun 24 January 2012.

<http://www.heraldsun.com.au/news/more-news/hatred-stuns-tennis-great-court/story-f...>) and (“Priority to protect marriage” <http://www.heraldsun.com.au/opinion/priority-is-to-protect-marriage/story-ebfrfhqf-1..>.)

In the Australian Editorial, of 14 March 2012, entitled “Marriage debate must be allowed to speak its name”, talking about unfashionable positions (did they mean traditional marriage???) that they can be intelligently formed and rationally justified. Yet the response they received from the entrenched political class is often dismissive, antagonistic or patronising. People who hold a traditionalist view about marriage are best placed to know their own hearts and whether or not they oppose gay marriage without wishing ill upon, or inciting hate against gays. (I certainly do not!)

## Section 7. **CHURCH AND STATE RELATIONS IN AUSTRALIA.**

### **Freedom of Conscience and Religion and Freedom of Speech.**

#### **7A.**

Church and State relations in Australia have developed along the lines of 1) “Freedom of” rather than along the lines of 2) “Freedom from” stance that has developed in the United States of America since the 1950s. In Australia you have a series of interactions between the two areas. Indeed, in the Commonwealth Constitution Section 116, does not guarantee an absolute full “Freedom of Religion” but has parts in it relating to the establishment of religion or prohibition about imposing any religious observance, the free exercise and no test for any office or trust under the Commonwealth.

I query the point of view that says “recognising same-sex marriage would better reflect Australia’s approach to balancing respect for religious freedom with the separation of Church and state.” (Refer Canberra Times. 20 March 2012. Article entitled “Same –sex marriage arguments released.”

<http://www.canberratimes.com.au/national/samesex-marriage-arguments-released-201...>) Is this an

American “separation from view? “ If so I guess I would have to say I do not agree in terms of the history of Australia’s development in this area which I feel is more along the lines as outlined above.

(In this regard refer to the history work of Dr. Stephen Chavura, of the Department of Modern History, Politics and International Relations, Macquarie University, in, for example, Chapter 3 of “Religion and the State. Preservation. A Comparative Sociology” edited by Jack Barbalet, Adam Passamai and Bryan Turner. London. Anthem Press. 2011. ISBN: 9780857287984.) His distinction is “Distinct from” for 1 and “Exclusive of for 2) for the above items.

Then again I could be wrong and the above Canberra Times reported point does not apply to the view expressed.

**Paul Kelly, Editor at Large of the Australian, and a well respected political commentator,** comments in his paper on the 30 November, 2011, “**In political terms, legalisation of same-sex marriage brings state and church into direct conflict.** To try to solve this problem, Labor activists specify that changes to the Marriage Act will not impose an obligation on a minister of religion to solemnise any marriage. This is the escape clause and it is pivotal. It is designed to permit religious freedom to continue to exist in Australia. Only a fool would accept this at face value.

The churches know this issue penetrates to the heart of religious freedom. Once the state changes the meaning of marriage, can you imagine the pressures all religions will face to perform same-sex wedding ceremonies against their will? The Christian churches, at some point, will become the focus of attack for denying gay marriage ceremonies in the name of religious faith.

While churches will enjoy an initial exemption from the state's law, that exemption over time will be attacked as an anomaly. No religion will accept at face value any guarantee from the Labor Party.

This is obvious from the recent struggle over the statutory bill of rights. The churches opposed the rights charter because its anti-discriminatory provisions could be applied to churches and their institutions (schools and charities) to remove their religious character and practices, unless exemptions were granted. Some politicians opposed the exemptions.

The campaign against religious freedom has much traction. It is manifested in frequent demands that religion be driven from the public square into a strictly private realm; an idea that constitutes a betrayal of the secular state whereby the state was to guarantee religious liberty." End of quote.

**Some overseas experience might be appropriate here in considering the wider effects of legalising same-sex marriage.**

\* **Professor Margaret Somerville** an Ethicist amongst other things, (Professor of Law. Professor in the faculty of medicine and founding director of the Centre for Medicine, Ethics and Law at McGill University, Montreal) in an article in the Australian on the 23-24 July 2011, Entitled "It is all about the children, not selfish adults" commented- "We also need to consider the wider effects of legalising same-sex marriage. It can result in restrictions on Freedom of Conscience and Religion and Freedom of Speech. We have seen that happen in **Canada**". – She then goes onto quote various cases.

I guess that the situation in Australia would depend upon exemptions given in law though I tend to support Paul Kelly's view outlined above here.

\* In the case at the European Court of Human Rights in Strasbourg, France, previously mentioned in Section 2 the Judge/s said “that if homosexual/lesbian couples are allowed to marry, any church that offers weddings will be guilty of discrimination if it declines to marry same-sex couples.” (Mail

19)

Online 20 March 22012.) Again, I suppose the nature of any exemption granted in Australia would apply. But this not always satisfactory in terms of social pressure to remove them as outlined by Paul Kelly above.

## **7B. Church and State.**

Opposition to same-sex marriage has been expressed quite widely from Christian and other religious traditions. Some have been previously been quoted but maybe repeated here again.

\* Brian Lucas, General Secretary of the Australian Catholic Bishops Conference in the Canberra Times of the 6 December 2011. (Refer <http://www.canberratimes.com.au/news/local/news/general/church-marriage-opposition...>)

\* Catholic Bishop Geoffrey Jarrett and Dr. Ray Campbell. (Refer to <http://www.catholicleader.com.au/news.php/top-stories/human-rights-not-the-issue-77>)

\* Six Catholic Bishops in Victoria. 30 March 2012. (Refer to <http://www.optuszoo.com.au/news-com-au/catholic-church-marshalls-anti-gay-marriage-army/629202>)

\* Catholic Church mounts national campaign against gay marriage. AAP. South Australia. 30 March 2012. (Refer to <http://www.adelaidenow.com.au/news/national/catholic-church-mounts-nationalcam...>)

\* Pope Benedict expressed his opposition to same-sex marriage. 11 January 2012. (Refer to <http://www.smh.com.au/lifestyle/life/gay-marriage-risk-to-family-cell-says-pope-20/>)

\* Anglican Archbishop of Sydney Peter Jensen. Archbishop of the senior and largest Diocese in Australia.

\* Plus other Protestant denominations.

Jewish Faith.



In the Australian on the 6 December 2011 Rabbi David Freilich (President of the Organisation of Rabbis of Australasia) expressed their opposition to same-sex marriage.

20)

**Some other religious opposition.**

**ABC Religion and Ethics program 30 November 2011.**

**Professor David Novak**, Professor of the Study of Religion and Professor of Philosophy at the University of Toronto, Canada, sets out a long and comprehensive argument against same-sex marriage. It is too long to set out here. Some areas covered are “The rational validity of “Marriage”” covering the overturning of racial segregation laws as a precedent for legalizing same-sex marriage. Equal access argument. “Why marriage?”- Rights. Also addressed are “Some objections.” Infertile couples. Homosexuals “have” or “create “ children. Children from previous heterosexual marriage. Surrogacy or artificial insemination and adoptions. He supports traditional marriage.

(Refer to <http://www.abc.net.au/religion/articles/2011/11/30/31154445.htm>)

### **Appendix 1.**

Acknowledgement is given for the items in the text of the above submission or to the following sources, references and material. As far as I am aware copyright has not been infringed. If it has an apology is given.

#### Section 1.

- \* Australian Family Association 9 March 2012. <http://www.family.org.au>.
- \* Messages for National Marriage Day. 15 August 2011.
- \* Institute of Family Studies 2010. "Families then and now 1980-2010."
- \* VoxBrief. May 2011.

#### Section 2.

- \*Margaret Somerville, Samuel Gale Professor of Law, Professor in the faculty of Medicine and founding Director of the Centre for Medicine, Ethics and Law at McGill University, Montreal, Canada.
- \* C-FAM. New York-Washington DC 3 February 2011.

#### Section 3.

- \* Paul Kelly. 30 November 2011. Passion for same-sex marriage: a problem for Labor.
- \* Messages for National Marriage Day 15 August 2011.
- \*Australian Family Association. 9 March 2012.
- \* The Drum Opinion 6 December 2011. ABC. Marriage and Equality:secrets behind a successful campaign. K Donnelly.
- \* VoxBrief. May 2011.
- \* Girgis,Sherif "What is marriage?". Harvard Journal of Law and Public Policy. Vol 34, No 1, Winter 2010, PP245-287, p249

#### Section 4.

- \* Reading of State and Commonwealth Hansards

## Section 5.

\* Professor James Allan. Garrick Professor of Law at the University of Queensland. Australian. 26 November 2010.

22)

- \* BBC News. US and Canada. 18 February 2012. New Jersey Governor.
- \* Long Island Press. 22 March 2012. <http://www.longislandpress.com21/3/12>
- \* Chicago Tribune. 5 July 2011. Dennis Byrne. <http://www.chicagotribune.com>
- \* Associated Press. Google. 15 June 2011. [http://www.google.com\(hostednews\)](http://www.google.com(hostednews))
- \* National Review Online 17 May 2012. "The Corner" W C Duncan.
- \* Family Organisation. 9 March 2012. [Hhttp://www.family.org.au](http://www.family.org.au)
- \* Australian Family Association. 9 March 2012.
- \* Book of the States (I have a personal hard copy which I bought in the United States of America- Washington- in 2010.)

## Section 6.

- \* Paul Kelly. "Passion for same-sex marriage a problem for Labor. Australian 30 November 2011.
  - \* Senate Hansard. 5 July 2011.
  - \* Petition. (Refer <http://www.acl.org.au/2011/12/100000-people-urge-labor-to-keep-its-election-marriage..>)
  - \* Galaxy Polls. Australian 20-21 August 2011.
  - \* Voter poll finds most against gay marriage. Electoral Voter Poll. Australian 25 August 2011.
  - \* Australian Editorial. "Lukewarm on Gay Marriage." – Australians regard many other issues as more important. 24 November 2011.  
<http://www.onlineopinion.com.au>
  - \* Rudd's sister quits Labor over gay marriage. ABC. Refer <http://www.abc.net.au/news/2011-12-13>
  - \* Barry Cohen's articles. Australian 14 April 2011 and Backlash item 12 December 2011.
- ACL. <http://www.acl.org.au>