

AUSTRALIAN MARRIAGE EQUALITY

SUBMISSION TO

**THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS
COMMITTEE**

INQUIRY INTO

**THE MARRIAGE
EQUALITY AMENDMENT BILL 2009**

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1. Introduction

a) Who are we?

Australian Marriage Equality (AME) is a community-based organisation dedicated to removing those discriminatory provisions of the Australian *Marriage Act 1961* (Cth) (hereafter, “the *Marriage Act*”) which prevent same-sex partners entering legal marriages and which also prohibit the recognition of overseas same-sex marriages. AME is the only Australian organisation dedicated entirely to marriage equality. AME is also Australia’s largest national, membership-based, lesbian, gay, bisexual, transgender and intersex (LGBTI) human rights organisation. For more on AME visit www.australianmarriageequality.com

b) Acknowledgements

AME would like to thank its campaign co-ordinator, Rodney Croome AM, for his authorship of this submission. We acknowledge Mr Croome’s contribution of original research in section 4.h of this submission on Indigenous Australians and freedom to marry.

We also thank Dr Sharon Dane for her contribution of recently-completed research into the preferences of Australian same-sex partners regarding legal status. This research has been cited in sections 5.1 and 6 of this submission.

c) What is marriage equality?

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

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

d) A note on terminology

In this submission we use the term “marriage equality” to describe the legislative reform necessary to ensure that same-sex couples have the right to marry under the *Marriage Act 1961*. We do not use the term “gay marriage” because this may suggest that the reform we seek is something, special, lesser or different than marriage for different-sex couples. The term “marriage equality” makes it clear that once reform has occurred the rights, responsibilities and status of marriage will be exactly the same for different and same-sex couples.

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

partners may identify as bisexual or transgender.

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

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

When we use the term “civil union” we refer to all schemes for the formal recognition of same-sex and other personal relationships, other than marriage. In common usage in Australia the term has come to mean a union formalised under a marriage-like civil union scheme (for example, the ACT’s quashed Civil Union Act 2006). But given our belief that no civil union scheme is an adequate substitute for marriage equality no matter what its marriage-like qualities (see section 6.b for more), we conform with international usage that designates all formalising schemes “civil unions” including relationship and domestic partner registers, and civil partnership schemes.

e) A note on citing the personal views of others

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

2. Executive summary and recommendations

a) Executive summary

~ The issue

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

~ Growing support

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

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

~ Human rights

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

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

Courts in other countries have highlighted a range of other rights, apart from equality, which are also breached by discrimination in marriage. These include the right to marry, the personal autonomy or "liberty" to choose one's own marriage

partner, and the right to privately pursue consensual family relationships without state interference. For those people denied the right to marry the person they love, marriage is synonymous with freedom from second-class legal and social status. The association between the equality in marriage and freedom from second-class status is well understood in the context of the struggle for the civil rights of people of colour, including indigenous Australians.

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

~ Practical and other benefits

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

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

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

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

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

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

~ Objections to equality

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

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

Another common argument against marriage equality is that, regardless of all the above-mentioned changes, marriage has traditionally been an exclusively heterosexual institution, and is exclusively heterosexual in other non-western cultures and/or non-Christian faiths. But we should not continue a discriminatory practice simply because it was practised in the past and continues to be practised by others. Also, same-sex marriages have been legally recognised in the European tradition and in other cultures and faiths.

Some objections to marriage equality are overtly religious. However, in Australian law, and, before that, the British legal system Australia inherited, there has been a clear distinction between civil and religious for several centuries. It is because of this clear distinction that our law a) allows divorce, even though this is expressly prohibited by Jesus, b) prohibits polygamy, arranged marriages, child betrothal and the subordination of married women, even though these are commonly found in the Old Testament, and c) allows marriage between people of different faiths or no faith. According to the Australian Bureau of Statistics 62.9% of marriages performed in 2007 were performed by a civil celebrant rather than a minister of religion. This compares to 40.3% in 1987.

An argument that derives from the above religious case against marriage equality is that allowing same-sex marriages will impinge on religious freedom; in particular, religious marriage celebrants and civil celebrants with a religious faith will be forced to marry same-sex partners against their beliefs. Australian Marriage Equality supports an exemption for religious marriage celebrants who do not wish to marry same-sex partners.

A very common argument against marriage equality is that marriage is for the bearing and raising of children, and that same-sex partners cannot, themselves, bear children, and/or should not raise them. However, there is no legal requirement for marrying different-sex partners to intend to have children. The other side of the procreation argument is that an increasing number of same-sex couples are raising children and raising them well. We note that in the most recent opinion poll on marriage equality that 70% of respondents with children supported same-sex marriage, a result 10% higher than the population as a whole. Clearly, Australian parents do not feel that marriage equality threatens their families or children.

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

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

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

Some opponents of marriage equality argue that we should not redefine marriage for the sake of a sub-class of people within an already-small minority. But, given that 60% of Australians support marriage equality, the argument that a small minority should not define marriage is an argument for reform.

Some equality opponents argue that most same-sex couples do not want to marry. But studies in the gay, lesbian, bisexual and transgender community show that there is overwhelming support for the right to marry. When it comes to same-sex partners who would marry if the choice was available, the percentages are lower, but steadily rising.

~ Alternatives to full equality

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

Some opponents of marriage equality pose civil unions as an alternative which solves the evidentiary problem associated with de facto relationships. However, an increasing body of jurisprudence and social research indicates that civil unions do not provide the same legal equality, protection or recognition for same-sex couples as marriage, and that these couples find civil unions much less desirable than marriage.

~ Other issues

It is currently Australian Government policy not to grant Certificates of No-impediment to Marriage (CNIs) to Australians entering same-sex marriages overseas.

Also, under the previous Federal Government a set of new policies were issued governing strictly governing marriage ceremonies. We oppose both sets of policies.

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

b) Recommendations

Recommendation One

We recommend that section 88EA of the *Marriage Act 1961* (Cth) be amended to make it clear that same-sex marriage solemnised overseas shall be recognised in Australia.

In effect, the current section

Certain unions are not marriages
A union solemnised in a foreign country between:
(a) a man and another man; or
(b) a woman and another woman;
must not be recognised as a marriage in Australia

will become

Certain unions are marriages
A union solemnised in a foreign country between:
(a) a man and another man; or
(b) a woman and another woman;
shall be recognised as a marriage in Australia.

Recommendation Two

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

In effect the current section

Marriage, means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

will become,

Marriage, means the union of two people to the exclusion of all others, voluntarily entered into for life.

Recommendation Three

We recommend that the Government reform Australia's policy on Certificates of No-impediment to Marriage so that they are issued to same-sex partners who intend to marry on the same basis as they are issued to different-sex partners who intend to marry.

Recommendation Four

In regard to marriage ceremonies, we recommend that the requirement for a celebrant to declare that marriage is between a man and a woman be removed, that the prohibitions on celebrants and marrying partners listed in this submission also be removed, and that these changes be communicated to all registered marriage celebrants.

3. The context

a) The context of this inquiry

In June this year the Australian Greens' spokesperson on sexual and gender diversity, Senator Sarah Hanson-Young, introduced the Marriage Equality Amendment Bill 2009. That Bill will allow same-sex marriages to be solemnised in Australia and overseas same-sex marriages to be recognised.

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

b) The broader Australian context

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

The amendment was ostensibly in response to an appeal to the Family Court from two Australian same-sex couples who sought recognition of their Canadian marriages under Australian law. The amendment removed the court's discretion to grant such recognition. After the amendments were passed the appeals were not continued¹.

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

In 2008, the Federal Labor Government recognised same-sex de facto partners in almost 100 different federal laws. But it too refused to consider marriage equality. Federal Labor opposition to marriage equality has been confirmed at two successive National Conferences.

¹ For comments on the case from one of the couples involved in this unsuccessful appeal see <http://www.australianmarriageequality.com/news/20060108.htm>

4. The case for marriage equality

The case from increasing recognition and support

a) Increasing recognition of marriage equality overseas

Seven other nations allow same-sex couples to marry. Together with the dates when marriage equality was achieved, they are, the Netherlands (2001), Belgium (2003), Canada (provincially beginning in 2003, nationally in 2005), Spain (2005), South Africa (2006), Norway (2009) and Sweden (2009). In five of these nations marriage equality was achieved through legislative change alone. In two, reform was prompted by successful appeals under the equality provisions of constitutionally-entrenched bills of rights.

Six American states allow, or will soon allow, same-sex marriage. They are Massachusetts, Connecticut, Iowa, Vermont, Maine and New Hampshire (in the states of New York, Rhode Island and the District of Columbia same-sex marriages are not solemnised but out-of-state same-sex marriages are recognised). In about half of these jurisdictions reform was achieved by legislative change alone.

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

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

b) Growing popular support for same-sex marriage in Australia

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

In 2004 a Newspoll commissioned by SBS Television found that 38% of those surveyed supported marriage equality while 44% opposed and 18% were undecided².

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

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

² A copy of this poll can be found at http://www.newspoll.com.au/image_uploads/cgi-lib.17497.1.0601_gay.pdf

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

On the trends indicated by these polls we can expect support for marriage equality to keep on increasing.

A copy of the 2009 poll has been enclosed as attachment 1.

Studies in the LGBTI community show support for marriage equality to be extremely high. These are dealt with at greater length in section 5.n.

c) Growing recognition of overseas same-sex marriages in Australia

In line with increasing popular support for marriage equality, a rapidly increasing number of Australia's private corporations, unions and local governments are recognising the overseas same-sex marriages of their employees.

These include, Australia and New Zealand Banking Group Ltd (ANZ), the City of Sydney, the Commonwealth Bank of Australia, the Kogarah Council (NSW), Qantas Airways, Telstra, and Westpac Banking Corporation³.

The Australian Bureau of Statistics says that it will allow same-sex partners to record if they are married in the 2011 National Census. In May this year the ABS will publish the resulting figures as a standard output⁴.

The case from first principles

d) Equality: removing inequality and discrimination from the law

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

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

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

*"...Redefinition of marriage to include same-sex couples...is the only road to true equality for same-sex couples."*⁵

³ For the full list see <http://www.australianmarriageequality.com/employers.htm>

⁴ For more see <http://www.australianmarriageequality.com/news/20090507.htm>

⁵ *Barbeau v British Columbia* (Attorney General), 2003 BCCA 251 at 156, also Ontario Court of Appeal, Halpern v Canada (2003).

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

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

*“...in contrast to earlier times, our state now recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual’s sexual orientation, and, more generally, that an individual’s sexual orientation — like a person’s race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights. We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.”*⁶

It is incontestable that the same principles generally apply in Australian public policy. Australia accepts it has an obligation under the International Covenant on Civil and Political Rights to remove laws which discriminate on the grounds of sexual orientation⁷. This obligation has been acted upon through the recognition of same-sex de facto relationships at a state and federal level. There is no justification for not extending the principle of anti-discrimination to marriage (for more on Australia’s international human rights obligations see section 7.d below).

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

e) The broader implications of equality: reducing prejudice and discrimination

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

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

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

These negative messages are magnified by the fact that marriage is the only federal law which still discriminates, and because marriage is such an important social institution (for more see section 4.1 below).

⁶ *In re Marriage Cases* (2008) 43 C4th 757

⁷ see *Toonen v Australia* [1994] PLPR 33. And, *Young v Australia* (2003). UN Doc CCPR/C/78/D/941/2000 (12 August 2003)

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

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

Surveys within the LGBTI community consistently find that LGBTI people experience unacceptably high levels discrimination in the workplace, discrimination in other aspects of their lives including at school and in their families, and hate-motivated assault⁸. Gay and lesbian Australians are also more likely to experience below-average health outcomes including higher levels of depression, due to this prejudice and discrimination.

The statistics are particularly alarming for younger and newly-identifying LGBTI people who have consistently higher rates of drug and alcohol abuse, homelessness, early school leaving, conflict with peers and parents and suicide ideation, all directly related to the discrimination and prejudice they experience⁹.

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

For example, according to a study by Herdt et al published in 2006 in the Journal of the San Francisco National Sexuality Resource Center, laws that prevent same-sex couples from marrying cause the couples to devalue their relationships, feel discriminated against, and experience high levels of stress and other mental health problems.

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

A copy of this study has been enclosed as attachment 2.

We understand the Committee has received numerous submissions outlining how the failure of the law to allow same-sex marriage has lowered the self-esteem of

⁸ For workplace discrimination see, "The Pink Ceiling is Too Low: workplace experiences of lesbians, gay men and transgender people", NSW Gay and Lesbian Rights Lobby, 1999, http://glrl.org.au/images/stories/the_pink_ceiling_is_too_low.pdf. For hate crime see Mason, G., "Violence against lesbians and gay men", Australian Institute for Criminology, 1993, <http://www.aic.gov.au/documents/D/2/2/{D22F8857-A477-4BA0-BAB8-5C04C2B1E7E9}vpt2.pdf>

⁹ For more on health risk in young people see "Writing Themselves in Again, the 2nd national report on the sexual health and wellbeing of same-sex attracted young people", Australian Centre for Sex, Health and Society, http://www.glhv.org.au/files/writing_themselves_in_again.pdf

young same-sex attracted people, and heightened levels of prejudice and discrimination in families and the workplace.

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

Personal views: inequality in marriage results in stigma and discrimination

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

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

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

Isn't time to empower our young so that they don't have to be burdened with inequality under the law. It's about giving them some extra breathing space so that they can deal with life's complexities without this sort of discrimination hanging over the heads.

Here lies the cusp of this whole predicament: denying equal rights to all but some drives a rift into the subconscious of all Australians, creating an undesirable "us and them" frame of mind.

f) Conditions on equality and non-discrimination: acknowledging that same-sex relationships and marriage are compatible

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

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

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

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

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

g) Choice and freedom: the right to marry, personal autonomy and privacy

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

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

“Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.”¹⁰

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

“the constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be

¹⁰ *Goodridge v Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own — and, if the couple chooses, to raise children within that family — constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.”¹¹

In regard to marriage and privacy the California Court found

“the state constitutional right to marry, while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual’s interest in personal autonomy by California’s explicit state constitutional privacy clause. (See, e.g., Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at p. 34 [the interest in personal autonomy protected by the state constitutional privacy clause includes “the freedom to pursue consensual familial relationships”]; Valerie N., supra, 40 Cal.3d 143, 161.)”¹²

Personal views: democratic values and citizenship

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

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

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

h) The broader implications of freedom and choice: the link between freedom to marry and full citizenship

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

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

¹¹ *In re Marriage Cases* (2008) 43 C4th 757. Page 8, http://www.aclu.org/images/asset_upload_file713_35332.pdf

¹² *op cit*, p50

colour.

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

*“When any society says that I cannot marry a certain person, that society has cut off a segment of my freedom.”*¹³

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

*“The right to marry whoever one wishes is an elementary human right compared to which 'the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one's skin color or race' are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to 'life, liberty and the pursuit of happiness' proclaimed in the Declaration of Independence, and to this category the right to home and marriage unquestionably belongs”.*¹⁴

Inspired by this idea, a black woman from Virginia, Mildred Loving, and her white husband, Richard, took state laws barring their interracial union all the way to the US Supreme Court and in 1967 succeeded in having them struck down¹⁵. □

What many Australians don't know is that laws with a similar effect to those against which Mrs Loving fought, existed here for a century, and were central to the struggle for Aboriginal rights¹⁶. Beginning in Victoria in the 1860s and reaching their apogee in Western Australia and Queensland in the 1930s, Aboriginal Protection Acts included provisions allowing state officials to determine who Aborigines could or could not marry. These laws were used for different purposes at different times. Queensland's policy was generally one of preventing black/white unions. WA's evolved in the opposite direction, preventing “half-castes” from marrying other Aborigines in order to “breed out the colour”. But no matter what the racist purpose of these policies, the effect was the same: personal tragedy and political disenfranchisement.

The Sydney and Melbourne-based Aboriginal activists who emerged from the labour movement in the 1920s to fight for better wages and conditions for black workers, were slow to pick up on the link between the freedom to marry and full citizenship. Not so those directly disadvantaged by the laws, including the “half-caste” women of

¹³ King (Jr), M. L., Carson, C., Luker, R., and Russell, P. A., (2000) *The Papers of Martin Luther King, Jr: Symbol of the movement, January 1957*, University of California Press, Berkeley. Page 436.

¹⁴ Arendt, H. and Baehr, P. R. (ed), (2000) *The portable Hannah Arendt*, Penguin Group, New York. Page 236.

¹⁵ *Loving v Virginia* (1967) 388 U.S. 1

¹⁶ the historical analysis of Aboriginal rights included here is extracted from an unpublished manuscript by this submission's author, Rodney Croome. It is based on several key primary and secondary sources including archival material, memoirs of Aborigines denied freedom to marry their partner and standard Aboriginal rights texts.

Broome, who declared in a petition in 1935,□□

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

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

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

“I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. I am proud that Richard's and my name are on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight, seek in life.”□¹⁷

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

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

Personal views: the racial parallel

¹⁷ Loving, M (2007), "Loving for All", June 12, 2007. http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf

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

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

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

i) The limits of freedom and personal autonomy: establishing that marriage equality causes no harm

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

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

The case from practical benefits

j) The practical legal benefits of marriage equality

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

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

Civil union schemes offer an alternative way to immediately access and guarantee relationship entitlements. But as shown in section 6.b below, these schemes do not provide the same access to, or guarantees of, legal entitlements that marriage does.

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

Personal views: many practical problems arise from marriage discrimination

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

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

It might be hard to comprehend if you are not in a same-sex relationship, but we are often not even sure what our rights are a lot of the time, especially in different states. It can be very confusing, and it can be very hard to find information, and it is very sad, that in this day and age in Australia, the land of the 'fair go', there is still a group of citizens like us, who have to regularly log on to Google and devote significant chunks of time to working out what our rights are in different parts of Australia, whenever we embark on a normal couple milestone, such as moving interstate, buying a house, having children etc. Can you imagine, what that is like, to live every day with the reality that you have to research your rights whenever you want to organise something significant in your life?

k) Recognition of existing overseas marriages

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

We estimate that between 3000 and 4000 Australian couples have married overseas. This estimate is based on the numbers of couples who have contacted us for advice, and the numbers who have entered into British civil partnerships in UK consulates in Australia. Mostly these couples have married in countries without residency requirements for marriage, such as Canada (we estimate the number of Australian

couples who have entered into Canadian same-sex marriages to be about 2000). But we have been contacted by couples who have married in all the nations which allow same-sex marriage.

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

First, for most of these couples, travelling overseas to marry is not their preference. They would marry in Australia if it were allowed because a) they would be closer to family and friends, b) a marriage at home is cheaper and much easier to arrange, and c) they would not risk the legal and financial complications associated with marriage and/or divorce in other jurisdictions (for example, non-residents can marry in Canada but only residents can divorce, and unlike Australia, divorce in Canada is fault-based). We understand the Committee has received submissions from couples married overseas which outline some of these problems.

Secondly, after going to so much trouble to marry overseas, couples have no legal recognition of their legal status or solemn vows when they return to Australia. This is deeply offensive to these couples, as well as creating the above-mentioned legal disadvantages.

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

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

Recommendation One

On the basis of the points made in this section, we recommend that section 88EA of the *Marriage Act 1961* (Cth) be amended to make it clear that same-sex marriage solemnised overseas shall be recognised in Australia.

In effect, the current section

Certain unions are not marriages

A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman;

must not be recognised as a marriage in Australia

will become

Certain unions are marriages

A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman;

shall be recognised as a marriage in Australia.

In the event that the substantive definition of marriage in the *Marriage Act* is reformed to allow same-sex marriages (see recommendation 2), we would support the repeal of section 88EA. But we would not support a situation in which section 88EA is repealed but the substantive definition of marriage in the *Marriage Act* remains as it is. This would create an unacceptable situation in which courts will be required to determine if overseas same-sex marriages are recognised in Australia in the light of an over-arching prohibition on the solemnisation of same-sex marriages under Australian law.

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

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

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

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

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

1) Other benefits for same-sex partners, their children, families and communities

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

Symbolic of this social aspect of marriage is the fact that marriage conventionally creates kinship between families as well as partners, hence terms such as “mother-in-law” and “brother-in-law”. Also, marriages are conventionally solemnised by a

representative of the state, not only between the marrying partners, but in the presence, and with the explicit assent, of family members and friends.

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

For example, two landmark studies led by MV Lee Badgett, Professor of Economics at the University of Massachusetts, describe and quantify some of these benefits in two separate jurisdictions, the Netherlands and Massachusetts. We understand Professor Badgett has made a submission to the inquiry which details her findings. But it is still worth considering these findings.

In their Massachusetts study Badgett et al found that same-sex partners overwhelmingly,

- marry for the same reasons as different-sex couples, chiefly because of their shared love and commitment
- felt marriage had increased their commitment and their sense of responsibility, and had generally strengthened their relationships
- felt acceptance in their families and communities had increased because of their marriage
- believed their children were better off after their marriage, chiefly through legal protection for those children and enhanced feelings of security, stability and acceptance in the children

These results closely replicated results in the Dutch study also conducted by Badgett.

Badgett's research has also shown the immense economic benefit of marriage equality to Massachusetts through spending on weddings¹⁸. She notes related research which shows the additional economic benefits which accrue from greater levels of immigration to places with marriage equality by members of the creative class (see also section 4k above).

Her conclusion is that,

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

Clearly, these same conclusions would apply to Australia. The similarity between the Massachusetts and Dutch findings suggest that legal and cultural differences play

¹⁸ Badgett, et al, “The Business Boost from Marriage Equality: Evidence from the Health and Marriage Equality in Massachusetts Survey”, Williams Institute, May 2009.
<http://www.law.ucla.edu/WilliamsInstitute/pdf/BusinessBoost.pdf>

little role in the importance of marriage equality for same-sex partners and their families and communities. In this country, same-sex couples and their families and communities would benefit just as much from inclusion in such a key legal and social institution as marriage.

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

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

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

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

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

I lived with my mum and her same sex partner from the age of 10. I could not have had a better set of parents. They are my role models when it comes to how a long term relationship should look, and I hope my husband and I are as happy as they when we have been together for 20 years. Yet these women, who I love dearly, are denied the opportunity to legally marry. They came to my wedding and celebrated with me - yet I cannot celebrate the same happy occasion with them. Their union is like a marriage in every sense, so why are they denied that legitimacy? Why was I denied the legitimacy of my parents being married? It is time to end this discrimination.

As a Civil Celebrant, I've conducted many Lesbian and Gay Commitment Ceremonies. I've seen the joy in the celebration, the support of friends and family and heard about couple's hopes and dreams for their shared future. I've also seen their grief and sadness about not being able to be legally married as is the rest of the community.

I am a heterosexual woman who is almost 30. I have two children who are pre-school aged. I would hope that whether they grow up to be homosexual or heterosexual their relationships would be seen as equal regardless of the sex or gender of their chosen partner. I couldn't look my child in the face and tell her that her love was not legitimate.

m) The benefits of marriage equality for marriage

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

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

Allowing same-sex couples to marry will admit many couples who seek to uphold the core values of marriage and are enthusiastic for the institution. It will send out the message that marriage is defined by love and respect not prejudice and discrimination.□ Marriage equality will prompt different-sex couples to re-think and re-value wedlock as a site of love, devotion, and, not least, social inclusion. It will show that marriage is relevant and resilient enough to embrace changing social

attitudes in the same way it did last century when married women were given legal equality and interracial marriages were allowed.□

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

*“there is no evidence that allowing same-sex couples to marry weakens the institution. If anything, the numbers indicate the opposite”.*¹⁹□□

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

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

n) The benefits for religious institutions: enhancing religious freedom

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

In reality marriage equality does not infringe religious freedoms. The demand at the core of marriage equality is for civil marriage. If religious bodies wish to retain an exclusive definition of religious marriage they have that right. What they do not have a right to do is impose that religious definition on a secular legal system and a secular society (for more see sections 5.d and 5.k below).

If freedom of religion plays a legitimate role in the current debate it is because

¹⁹ Spedale, D. R., and William N. Eskridge Jr, W. N., "The Hitch", Wall Street Journal, October 27, 2006. Reprinted at <http://www.law.yale.edu/news/3708.htm>

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

The following extract from the US Lambda Legal Defence Fund, a litigant in a court appeal for marriage equality in New Jersey, succinctly makes the case²⁰.

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

We understand the Committee has received a number of submissions from religious organisations and officials in Australia that currently allow and/or conduct same-sex union ceremonies and wish to conduct same-sex marriages, but are denied the right by current marriage law to legally solemnise same-sex marriages.

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

The conservative case for marriage equality

o) Economic conservative case: fostering financial self-reliance

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

The Economist, on the need for gay marriage, January 1996²¹

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

The economic case, highlighted in the above quote from *The Economist*, is that the

²⁰ See http://data.lambdalegal.org/publications/downloads/fs_freedom-of-religion-and-from-discrimination.pdf

²¹ "Let them wed", *The Economist*, January 4, 1996. Available at http://www.economist.com/PrinterFriendly.cfm?Story_ID=2515389

failure of the state to allow same-sex couples to marry limits financial self-reliance and heightens the risk of welfare dependence of these couples.

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

“Since same-sex partnerships are not legally recognised, homosexual people do not have the possibility to form their own legally protected family. (Legally recognized) families ... represent strong safety nets for individual workers and this possibility of ‘income-insurance’ is not open to homosexuals.” □ ²² □

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

p) Morally conservative case: inculcating traditional values

Social conservatism is considered synonymous with opposition to marriage equality. However, some social conservatives make the case that allowing same-sex couples to marry will inculcate in these couples values like fidelity, commitment, self-discipline, and responsibility. According to conservative US columnist, David Brooks²³,

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

Gay conservatives or “homocons” like Jonathan Rauch and Andrew Sullivan take the argument a step further. They argue that giving equal rights and status to same-sex relationships will “civilise” homosexuals, in particular men. Rauch claims that

²² Calandrino, M. (1999) Sexual Orientation Discrimination in the UK Labour Market, St Anthony's College, University of Oxford.

²³ Brooks, D., *New York Times*, 22.11.03

reform is less about civil rights than responsibility. He calls same-sex marriage a form of “soft-coercion” away from “a Peter Pan culture of libertinism and liberation” towards “a social compact forged of responsibility”²⁴. □ □

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

Personal views: other benefits of equality and costs of inequality

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

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

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

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

q) A final word in favour of equality

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

We are talking, of course, about the quality of love, intimacy, happiness, care and commitment in same-sex relationships. At its best, the love between two men or the love between two women can endure all, sustain all, uplift all and conquer all. At its best this love is as good and true as any love. There are no studies which prove this

²⁴ Rauch, J., *Gay Marriage: why it is good for gays, good for straights, and good for America*, Henry Holt and Company, New York, 2004

and no legal decisions which uphold it. There is simply the experience of many tens of thousands of Australians lived quietly, joyfully and, in the face of discrimination, derision and ignorance, bravely.

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

Recommendation Two

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

In effect the current section

Marriage, means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

will become,

Marriage, means the union of two people to the exclusion of all others, voluntarily entered into for life.

5. The case against reform

Objections regarding perceived characteristics marriage

a) The definition of marriage

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

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

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

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

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

b) Marriage is an unchanging institution

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

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

Citing these examples reminds us, not only that change occurs, but that change is good for marriage. Imagine if marriage was the same institution today that it was when any of the above-mentioned conditions prevailed? It would no longer be considered relevant and few couples would wish to marry. The same consideration applies to same-sex marriage. As society becomes more accepting of same-sex relationships, the current prohibition on same-sex marriages will come to be seen as

anachronistic and the institution of marriage as whole will be increasingly seen as an instrument of prejudice rather than a symbol of love (for more see section 4.m above)

c) Historical tradition and the cross-cultural experience

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

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

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

The historian, John Boswell, has published extensively on the solemnisation of same-sex unions in pre-modern Europe²⁵. His research includes Catholic liturgies written specifically for such ceremonies. This research is summarized by William Eskridge in *The case for same-sex marriage*, and placed in the broader context of the recognition of same-sex marriages from ancient times through to the industrial revolution²⁶. Eskridge also reviews the extensive evidence for legally-recognised same-sex marriages in other cultures and religions from pre-modern China and Japan, through pre-modern Africa to indigenous cultures around the world.

d) Religion

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

Amongst many non-literalists, there is the belief that the Bible does not prohibit same-sex relationships as we understand them today, or that whatever prohibitions do exist in the Bible are no longer relevant. It is on the basis of this belief that some Christian denominations, leaders and congregations support same-sex marriages and assert that their freedom of religion is impaired by the failure of the law to allow these marriages to be solemnised. To back up their case, these inclusive people of faith who support equality point to the religious liturgies celebrating same-sex unions cited in section 5.c above. We understand the Committee has received numerous

²⁵ Boswell, J., *Same-sex unions in pre-modern Europe*, Random House, New York, 1994

²⁶ Eskridge, WN, *The case for same-sex marriage*, Free press, New York, 1996

submissions from Christians who support marriage equality so it is not necessary for us to explore the debate on same-sex marriage among Christians.

Instead, we will focus on the secular response to those people of faith who oppose marriage equality.

Marriage pre-exists all modern religions, including Christianity. According to Professor Boswell, cited above, early Christians married under Roman civil law and did not observe marriage as a sacrament. Only in the later Middle Ages and the Renaissance did marriage as a legal and civil institution and marriage as a religious sacrament or covenant converge. Even then the degree of convergence differed between jurisdictions and between Christian denominations.

In modern times religious and civil marriage have again diverged. In Australian law, and, before that, in the British legal system Australia inherited, there has been a clear distinction between civil and religious for several centuries.

It is because of this clear distinction that our law a) allows divorce, even though this is expressly prohibited by Jesus, b) prohibits polygamy, arranged marriages, child betrothal and the subordination of married women, even though these are commonly found in the Old Testament, and c) allows marriage between people of different faiths or no faith.

The distinction between civil and religious marriage is increasingly pronounced in contemporary Australia with the majority of different-sex couples now choosing to marry outside a church setting by a civil celebrant. According to the Australian Bureau of Statistics 62.9% of marriages performed in 2007 were performed by a civil celebrant rather than a minister of religion. This compares to 40.3% in 1987.

e) The freedom of religious officials and institutions will be violated

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

Australian Marriage Equality supports an exemption for religious marriage celebrants who do not wish to marry same-sex partners, although we believe religious marriage celebrants should be able to marry same-sex partners if they wish (see section 4.n above).

We do not support exemptions in the *Marriage Act* for the other situations we have described. Existing religious exemptions from laws prohibiting discrimination on the

grounds of marital and/or relationship status, and existing policies governing services to and curricula on unmarried different-sex relationships, are sufficient to protect religious freedoms.

f) Procreation

A very common argument against marriage equality is that marriage is for the bearing and raising of children, and that same-sex partners cannot, themselves, bear children, and/or should not raise them.

In the Australian context the most famous expression of this argument was by former Prime Minister, John Howard. When explaining his rationale for the 2004 *Marriage Act* amendments which entrenched marriage as a male to female union, he declared “same-sex marriage does not contribute to the survival of the species”²⁷.

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

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

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

Studies from Australia and overseas show a) there is a significant number of children being raised by two parents of the same sex, b) these children are not disadvantaged by being raised by same-sex parents and c) these children benefit from the legal recognition of their parents’ relationships.

The best summary of the research in regards to points a) and b) has been put together by Assistant Professor Jenni Millbank in 2002²⁸.

Regarding numbers, Prof Millbank concluded,

“Of the lesbian and gay population, there are many studies that have attempted to quantify how many are parents or live with children. Surveys of gay men in the USA have suggested that around 10% of gay men are parents. American and Australian surveys of lesbians and NZ census data suggest that between 15-20% of lesbians have children. Australian surveys suggest that this proportion is likely to increase in the next 5 years as many lesbians also indicate that they are planning to have children in the future.”

²⁷ See <http://www.highbeam.com/doc/1P1-77144847.html>

²⁸ Millbank, J., “Meet the Parents”, 2002, http://glrl.org.au/images/stories/meet_the_parents.pdf

Regarding parenting outcomes she concluded,

"Over the past 25 year a considerable body of credible social science research on lesbian and gay parents and their children has built up. It shows convincingly that lesbian and gay parents are like heterosexual parents in that their children do not demonstrate any important differences in development, happiness, peer relations or adjustment."

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

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

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

g) Gender complementarity

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

The prominent columnist Piers Akerman argues,

"Among humans, marriage is the joining of a man and a woman, different sexes, one whole....At the simplest, a marriage is reflected in the relationship between a nut and bolt. A single nut is not much use. Neither is a bolt, but the two used in tandem as they are designed to be used, form an effective fastener. Two nuts don't make it, nor two bolts. Try to put them together and they don't marry."²⁹

This argument is profoundly sexist insofar as it assumes gender is a more important feature of an individual than his or her character, abilities or morality.

It is also highly contestable from a philosophical point of view.

In Plato's *Symposium*, Aristophanes makes it clear that gender is the very last personal characteristic which determines complementarity in romantic, marriage-like relationships.

²⁹ Akerman, P., "When convenience and distraction unite", *Daily Telegraph*, 3.8.09, http://blogs.news.com.au/dailytelegraph/piersakerman/index.php/dailytelegraph/comments/when_convenience_and_distraction_unite/

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

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

h) Marriage will be diminished, demeaned, degraded or destroyed

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

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

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

The other response is again to refer to the impact of marriage equality on different-sex marriages in those places where marriage equality has been achieved. In section 4.m we looked at evidence that the formal recognition of same-sex relationships may encourage different-sex marriages by effectively “rejuvenating” marriage. There is also evidence that marriage equality does not have a direct relationship with different-sex divorce rates. For example, the US state of Massachusetts has that nation’s lowest divorce rate, and was also the first to allow same-sex marriages³⁰. Other US states which came early to either marriage equality or civil union schemes also have relatively low divorce rates. This should not be surprising. It is very difficult to imagine a situation where a different-sex couple would feel their marriage is worth less and/or not worth continuing, because same-sex partners can marry.

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

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

In a recent opinion piece against same-sex marriage in the Launceston *Examiner*, the

³⁰ See <http://www.cdc.gov/nchs/data/nvss/Divorce%20Rates%2090%2095%20and%2099-07.pdf>

managing director of the Australian Christian Lobby, Jim Wallace, wrote,

*“A large number of the current problems encountered by society are caused by family breakdown. As a society we need to be doing all we can to promote stable marriages and family life, not changing what marriage means”.*³¹

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

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

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

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

i) Harm to families and children

An argument that brings together the cases from procreation, from gender complementarity and from harm-to-marriage is that marriage equality will somehow harm families and children.

This argument assumes both that marriage is primarily about children and that it preferable for all children to have a father and a mother. The conclusion is that same-sex marriage would harm children by officially sanctioning sub-optimal environments for raising them.

To quote again from Jim Wallace of the Australian Christian Lobby,

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

³¹ Wallace, J., “Should we legalise gay marriage?, *Examiner*, 4.9.09, p23

need this ideal of marriage to aspire to.

“Any redefinition of marriage risks deliberately placing children in relational constraints which deny them a mother or a father.”³²

Our response to this can be gathered from the points made above. There is no intrinsic association between marriage and the raising of children. There is no evidence that children fair worse when raised by two parents of the same sex. Indeed, the children raised by same-sex partners benefit from marriage equality. Therefore, there is no basis upon which to assert that children will be harmed by same-sex marriage.

We believe Australian parents understand that the case put forward by groups like the ACL is not true. We note that in the most recent opinion poll on marriage equality that 70% of respondents with children supported same-sex marriage, a result 10% higher than the population as a whole. Clearly, Australian parents do not feel that marriage equality threatens their families or children.

j) The slippery slope

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

Some argue that marriage equality for same-sex partners will lead other people to demand the right to marry their dogs, cars, plasma screens, or other animals or inanimate objects their hold dear. This case is probably made facetiously, but it is still deeply offensive to same-sex partners to have their relationships compared to the relationship between a car owner and his or her car. It is also absurd. Marriage is a legal contract and as far as we know there is no proposal to give pets or household items legal standing to sign contracts.

A more serious argument is that allowing same-sex marriage will lead to polygamy. Prominent columnist and marriage equality opponent, Andrew Bolt, makes this argument in terms of the principle of freedom of choice referred to in section 4.g above.

“...how can a society that's moving to give a man the right to marry another man then refuse a man the right to marry two women? Give way on gay marriage, you must give way on polygamy. In both cases it's about consenting adults, right?”³³

As we have indicated above, marriage equality is about the principle of freedom of choice, but not only about that principle. There are also important legal, social and

³² *ibid*

³³ Bolt, A., “Polygamy - the right to put down women”, *Herald Sun*, 28.6.08, <http://www.news.com.au/heraldsun/story/0,21985,23928410-25717,00.html>

cultural limits on this freedom. When these are taken into account we can see that the above argument makes no sense.

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

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

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

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

The same legal, social and cultural factors come into play when we consider other forms of unconventional marriages such as child betrothals or other, less common forms of multiple marriages. Some may argue they are justified by freedom of choice, but society erects limits to this right which makes them inappropriate.

k) Equality is opposed by key constituencies

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

As noted in section 4.b above, it is clear that a majority of Australians support marriage equality.

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

The most recent poll on marriage equality shows that, while support is less among blue collar, lower income, less-well-educated, older, male and Liberal-voting respondents, marriage equality still has the support of the greatest number of respondents in each of these categories. Clearly, none of these demographic groups strongly oppose reform.

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

We believe this assertion should not be taken for granted. A diversity of views on marriage equality is as likely to exist in these religious denominations as it is in others.

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

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

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

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

Objections regarding perceived characteristics of same-sex relationships

1) Same-sex relationships are shorter, less happy, less stable and less committed

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

One common example is a Dutch study which opponents of equality claim found that gay men in Amsterdam have an average of eight partners a year³⁴.

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

The same point can be made about those studies which compare generally unmarried same-sex couples to married different-sex couples³⁵.

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

- have committed relationships. For example, in the US survey data indicate that between 40% and 60% of gay men and between 45% and 80% of lesbians are currently involved in a romantic relationship³⁶
- have the same level of relationship quality and commitment as different-sex couples³⁷, and
- often form durable relationships. For example, US survey data indicate that between 18% and 28% of gay couples and between 8% and 21% of lesbian couples have lived together 10 or more years³⁸

³⁴ Xiridou et al, "The contribution of steady and casual partnerships to the incidence of HIV infection among homosexual men in Amsterdam", *AIDS*, Issue 7, Vol 17, May, 2003, pp 1029-1038, <http://journals.lww.com/aidsonline/pages/articleviewer.aspx?year=2003&issue=05020&article=00012&type=fulltext>

³⁵ For example, Weedon-Fekjr, H., "The demographics of same-sex marriages in Norway and Sweden", *Demography*, Feb, 2006.

³⁶ For example, Bradford, J., Ryan, C., & Rothblum, E. (1994). "National lesbian healthcare survey: Implications for mental health", *Journal of Consulting and Clinical Psychology*, 62, 228-242.

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

Morris, J., Balsam, K., & Rothblum, E. (2002). "Lesbian and bisexual mothers and nonmothers: Demographics and the coming-out process," *Developmental Psychology*, 16, 1441-56.

³⁷ Peplau, L. A., & Beals, K. P. (2004). "The family lives of lesbians and gay men", in A. L. Vangelisti (Ed.), *Handbook of family communication* (pp. 233-248). Mahwah, NJ: Erlbaum

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

³⁸ Blumstein, P., & Schwartz, P. (1983). *American couples: Money, work, sex*. New York: William Morrow and Company, Inc.

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

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

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

The Netherlands is the obvious jurisdiction to turn to first because marriage equality has been in place for almost a decade. What we find in that country is that divorce rates among same-sex and different-sex couples married in the same year is exactly the same³⁹.

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

Some researchers have also speculated that the stability of same-sex couples would be enhanced if partners from same-sex couples enjoyed the same levels of social support and public recognition of their relationships as partners from heterosexual couples do⁴⁰.

There also are studies which suggest a correlation between the legal recognition of same-sex relationships and the duration of these relationships⁴¹.

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

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

m) We should not radically redefine marriage for a small minority of people

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

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

³⁹ Gottlieb, S. (2006) "Five years of gay marriage", *Radio Nederland Wereldomroep*.

<http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/gay060403-redirec>

⁴⁰ Kurdek, L. A. (2004). "Are gay and lesbian cohabiting couples really different from heterosexual married couples?" *Journal of Marriage and Family*, 66, 880-901.

⁴¹ For example, Oswald et al, "Structural and Moral Commitment Among Same-Sex Couples: Relationship Duration, Religiosity, and Parental Status", *Journal of Family Psychology*, No3, Vol 22, 2008, pp411-419,

<http://www.clarku.edu/faculty/goldberg/OSWALD%20GOLDBERG%20ET%20AL.%20JFP%202008.pdf>

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

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

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

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

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

"The number of people living in a same-sex couple relationship has also increased over the past decade. In 1996, 0.2% of all adults said they were living with a same-sex partner. By 2006, this had increased to 0.4% (to around 50,000 people). However, these figures may be an undercount of the true number of people living in same-sex relationships. Some people may be reluctant to identify as being in a same-sex relationship, while others may not have identified because they didn't know that same-sex relationships would be counted in the census."⁴²

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

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

The final point to be made about same-sex partners as a minority is this: according to the most recent national polling, the percentage of Australians who support marriage equality is a large majority of 60%. Only 36% oppose it. The argument that a small minority should not define marriage is an argument for marriage equality.

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

Permitting same-sex partners to marry does not significantly change the definition of

⁴² The full paper can be found at, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009>

marriage. Marriage will remain the union of two people for life. Indeed, the core values of marriage, love and commitment, will be enhanced by the institution's embrace of loving committed same-sex couples in the same it was enhanced by the embrace of interracial couples.

As explained in section 5.h above, opponents of past marriage reforms, including divorce reform and the recognition of de facto relationships, also argued these changes would radically redefine marriage. History has shown this was not the case. Marriage in law, and the associations marriage has in popular understanding, remain largely unchanged. Where there has been change in marriage through the elimination of discrimination, that change has never been for the worse.

n) Most same-sex couples do not want to marry and are happy as they are

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

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

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

For example the Victorian Gay and Lesbian Rights Lobby's, “Not Yet Equal” report (2005) found that 79.8% of the LGBTI people surveyed wanted marriage to be available to same-sex partners⁴³. This figure was higher than for any other form of relationship recognition including domestic partnership or partnership registration.

An even higher figure of 86.3% was returned in the NSW Gay and Lesbian Rights Lobby's “All Love is Equal, Isn't It?” report (2007)⁴⁴.

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

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

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

⁴³ “Not Yet Equal”, <http://www.vgrrl.org.au/files/publications/NotYetEqualFullReport.pdf>, p38

⁴⁴ “All Love is Equal, Isn't It?”, http://glrl.org.au/images/stories/all_love_is_equal_isnt_it.pdf, p17

as attachment 3).

“Not So Private Lives” is the only national study on same-sex relationship recognition yet conducted, and the first since last year’s federal recognition of same-sex de facto couples. This may be the cause of the higher level of interest in marrying compared to previous studies. But more likely, the higher figure reflects an overall upwards trend in interest in marriage among same-sex partners over time. Many same-sex attracted people alive today grew up when legally-solemnised same-sex marriage was either inconceivable or highly improbable. Remember, it has been less than a decade since the first same-sex marriages in the world took place in the Netherlands. Rising interest in marriage is probably due to the growing hope that the option will, at some stage, become available. If this is true, we will continue to see a rise in the percentage of LGBTI people who will marry if they have the option.

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

Personal views: refuting the case against reform

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

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

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

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

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

6. The alternatives to reform

a) De facto partnerships

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

However, as indicated in section 4.j above, there are significant drawbacks to being deemed to be in a legally-entitled relationship rather than nominating oneself for such recognition.

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

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

These practical and cultural issues are reflected in the results of the recent Australian same-sex relationships survey cited in section 5.n above (Dane et al). It shows that 55.4% of respondents who were currently in a same-sex de facto relationship would marry under Australian law if they had the choice.

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

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

Personal views: de facto recognition is not enough

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

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

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

I live with my partner, who is also female. According to the new laws, she is my 'DeFacto'. But I really don't think that that term even begins to describe what we have together. Our relationship has survived us living in different states. It has survived everything that has tried to pull us together. We survived when I moved to a new state, with no money or work. She pulled me through the depression, anxiety, self-hatred, and lack of self-esteem...In turn, I support her now, when she cannot work due to a work injury. I take care of her on the days that she is in too much pain to move. I drive her to all of her appointments, and I console her on the days when it's all too much. I give her the courage to keep going when others try to make her feel that she has nothing wrong with her. I love her, and I would be honoured to call her My Wife. Is this extraordinary? No. It's just what any couple should do for each other. We have our good times, and our bad times, and we stick together always. How are we less than worthy? How are we not enough?

b) Civil unions

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

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

To this submission we have attached a pamphlet published by AME which summarises this jurisprudence and research (attachment 4).

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

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

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

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

Professor Badgett and others conducted a study in 2008 which compared take-up rates for civil unions and marriage across those US states where one or the other was available to same-sex couples. The result was a consistently higher take-up rate for marriage⁴⁵.

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

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

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

Personal views: civil unions are not a substitute

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

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

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

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

⁴⁵ "Marriage, registration and dissolution by same-sex couples in the U.S.", The Williams Institute, July 2008, <http://www.law.ucla.edu/WilliamsInstitute/publications/Couples%20Marr%20Regis%20Diss.pdf>

7. Associated issues

a) Certificates of No-impediment to Marriage

It is currently Australian Government policy not to grant Certificates of No-impediment to Marriage (CNIs) to Australians entering same-sex marriages overseas.

Since the end of 2005 we have received a steady stream of complaints from Australians seeking to marry their same-sex partners overseas for whom the Government's refusal to provide a CNI has caused immense frustration. These complaints include one from Peter Kakucska whose case has received media attention⁴⁶. As the case of Mr Kakucska illustrates, this refusal makes it more difficult for Australian same-sex partners to enter marriages in countries which require CNIs before marriages are solemnised. It has also caused immense frustration for other governments. We understand that the Dutch Government has responded by waiving the CNI requirement for Australians entering same-sex marriages. We have been told the only other nationality it does this for is Zimbabweans. The Committee may wish to verify this.

The Australia Government's stated reason for not providing same-sex partners with CNIs is that same-sex marriages are not recognised in Australia.

However, our understanding is that CNIs are issued to establish that there is no impediment to an Australian marrying overseas, not to establish there is no impediment to the recognition in Australia of the marriage they intend entering.

This is confirmed by the documentation publicly available⁴⁷. For example, the application form for an Australian CNI asks the applicant to confirm they are not already married to another person in Australia. It does not ask if they seek to enter a same-sex marriage. It asks if they are already in "a prohibited relationship". But this cannot be construed to include a same-sex marriage because (a) they are not yet in a married relationship, and (b) same-sex marriages are not prohibited in Australia, simply not recognised.

Our understanding of the role of CNIs is also supported by the international experience. Other governments request CNIs from Australia to ascertain whether there are impediments to them solemnising marriages involving Australian citizens. Chief amongst such impediments are whether the Australian citizens in question are already married in Australia and are of marriageable age. Foreign governments are aware of the discriminatory nature of Australian law, and are not seeking further information about such discrimination because it is not relevant to them.

⁴⁶ Szego, J, "Gays hit in overseas nuptial bid", *The Age*, January 14 2006.
<http://www.theage.com.au/news/national/gays-hit-in-overseas-nuptial-bid/2006/01/13/1137118970292.html>

⁴⁷ See http://www.smartraveller.gov.au/no_impediment_marriage_form.pdf

We note that when the issuing of CNIs to same-sex partners became a public issue the Department of Foreign Affairs and Trade website was changed to state,

*"Certificates of No Impediment to Marriage are issued by the Department of Foreign Affairs and Trade through overseas missions and state and territory offices to Australian citizens seeking to marry overseas. Certificates of No Impediment to Marriage are not a requirement of Australian law. They are issued purely at the request of overseas countries seeking to ensure that a marriage involving one or two Australian citizens, celebrated in that overseas country, will also be recognised as a valid marriage by Australian authorities."*⁴⁸

As we note above this is incorrect.

We assume the justification for the current policy is recognising the existence of overseas same-sex marriages, and/or facilitating their solemnisation, is somehow to condone or endorse them.

This is both incorrect as a principle of law and policy, and an insufficient reason to deny one group of Australians their rights as citizens.

Recommendation Three

We recommend that the Government reform Australia's policy on CNIs so that they are issued to same-sex partners who intend to marry on the same basis as they are issued to different-sex partners who intend to marry.

b) Regulations and policies governing marriage ceremonies

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

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

⁴⁸ See http://smarttraveller.gov.au/marriage_os.html

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

Recommendation Four

We recommend that the requirement for declaring that marriage is between a man and a woman be removed, that the prohibitions listed above also be removed, and that these changes be communicated to all registered marriage celebrants.

c) Constitutional issues: the respective powers of federal and state governments

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

For example, during his speech to the 2009 Australian Labor Party National Conference, Attorney-General, Robert McClelland said that,

“...we acknowledge and commit to the definition of marriage, that is defined in the Marriage Act as being between a man and a woman. And indeed that definition, I believe, is certainly consistent with the provision of the Australian Constitution.”

This suggests Mr McClelland believes marriage between two men or between two women may not be consistent with the meaning of marriage in the Constitution.

As the Committee will be aware, the High Court has not defined marriage in its constitutional context. Indeed, as a report on the matter from the Parliamentary Library concludes, the Court has not clearly indicated whether the term used in the constitution should be defined by its contemporary usage, or by what was intended by the framers of the Constitution.

“...were the Commonwealth to legislate for the recognition of same sex marriage a question arises regarding its constitutional underpinning. As noted, the High Court's consideration of s. 51(xxi) leaves open whether Parliament can determine the meaning of marriage or whether the term has a fixed intrinsic meaning.”⁴⁹

Put another way, the debate about the meaning of marriage in the Constitution is often framed “in the context of an ongoing debate between originalists and non-originalists”, to use the words of Associate Professor Kristen Walker.

Prof Walker has written a paper in which she summarises the views of a range of legal theorists on the meaning of marriage in the Constitution, as well as the debate

⁴⁹ Ireland, I "The High Court and the Meaning of 'Marriage' in Section 51(xxii) of the Constitution", *Law and Bills Digest Group*, 12 February 2002. <http://www.aph.gov.au/library/Pubs/RN/2001-02/02rn17.htm>

over whether the High Court would be guided by the original intent of the framers of the Constitution or more contemporary definitions of marriage⁵⁰.

She concludes, perhaps counter-intuitively, that originalism can allow the recognition of same-sex marriages, and that non-originalism, may not.

Some opponents of marriage equality may argue that this uncertainty means the Federal Parliament cannot or should not amend the *Marriage Act* to allow for same-sex marriages.

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

Further, section 51 (xxi) of the Constitution is only one head of power the Federal Parliament can draw on. It can also base marriage equality on the treaty obligations we address in sections 4.d and 7.d of this submission.

Given the above-cited precedents and options available to the Federal Parliament, our conclusion is that failure to allow same-sex marriage is not due to legal and constitutional constraints, but to a lack of political will. A lack of will may be dressed up as constitutional powerlessness or uncertainty. But the naked truth is that marriage discrimination is due either to prejudice against same-sex relationships in Government ranks or the Government's fear of such prejudices among some voters (see section 5.k).

Questions have also arisen regarding the constitutional powers of the States to legislate for same-sex marriages. Professor George Williams and Associate Professor Walker have made the point that the constitutional marriage power is a concurrent power⁵¹. This means the States have the power to legislate for whatever marriages the Commonwealth does not legislate for. In effect, when the Commonwealth *Marriage Act* was amended in 2004 to make it clear that same-sex marriages cannot be solemnised, the power to legislate for these marriages fell to the States. This view has seen legislation for same-sex marriage introduced in Tasmania. It has also drawn criticism, much of it informed by a misunderstanding of the nature of our federal arrangement. Although it was less than 50 years ago, many Australians seem to have forgotten that all marriages were solemnised under State law until the Federal Parliament acted on its constitutional power and enacted the current *Marriage Act*.

⁵⁰ Walker, K., "The same-sex marriage debate in Australia", *The International Journal of Human Rights*, Vol 11, No 1, pp109-130

⁵¹ http://tglrg.org/more/82_0_1_0_M3/

We understand that the detailed views of Professors Williams and Walker have been submitted to the Committee so we will not explore the constitutional aspects of State same-sex marriage laws any further. As a matter of principle, AME supports the right of the states to recognise same-sex relationships in whatever way they see fit. However, our primary goal remains amendment of the Commonwealth *Marriage Act*.

d) Australia's international obligations: the ICCPR and the right to marry

In section 4.d above we state our belief that communications to the UN Human Rights Committee from Australia have established Australia's obligations to remove legally-entrenched discrimination on the grounds of sexual orientation.

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

*"Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."*⁵²

This finding has been widely criticised by human rights experts as an unduly literalist reading of Article 23 which is inconsistent with the general principles of treaty interpretation⁵³. One such principle is that treaties should be read as a whole. Clearly, the Human Rights Committee read Article 23 without reference to the general anti-discrimination provisions of Article 2 (see "Freedom from discrimination", below). Another such principle is that treaty interpretation should be guided by contemporary context not original intent. Again, the HRC clearly allowed itself to be guided by what was intended by the framers of the ICCPR in a way which, if applied to all the Covenant's provisions, would render that document irrelevant very quickly. For these reasons many human rights experts believe that the HRC's interpretation of Article 23 is seriously flawed and will not stand.

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

⁵² *Joslin et al. v New Zealand*, Communication. No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

⁵³ for a general overview of the *Joslin* decision and its critics see Aleardo Zanghellini, "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men" 9(1) *Melbourne Journal of International Law*, 2008

Personal views: the last word

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