
The Parliament of the Commonwealth of Australia

Advisory report:

Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012

House of Representatives
Standing Committee on Social Policy and Legal Affairs

June 2012
Canberra

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Foreword

Graham Perrett MP
Chair



Membership of the Committee

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Terms of reference

On Thursday 16 February 2012, the House of Representatives Selection Committee asked the Committee to inquire into and report on the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012.



List of abbreviations and acronyms

ACL	Australian Christian Lobby
ACT	Australian Capital Territory
AFA	Australian Family Association
AME	Australian Marriage Equality
G+T	Gilbert + Tobin Centre for Public Law
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCA	Law Council of Australia
LPDM	Lawyers for the Preservation of the Definition of Marriage
PFLAG	Parents and Friends of Lesbians and Gays
the Bandt/Wilkie Bill	Marriage Equality Amendment Bill 2012
the Jones Bill	Marriage Amendment Bill 2012
the Marriage Act	<i>Marriage Act 1961 (Cth)</i>

Introduction

- 1.1 On 13 February 2012, Mr Adam Bandt MP (Greens) and Mr Andrew Wilkie MP (Independent) introduced the Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill) and Mr Stephen Jones (Labor) introduced his private member's bill, the Marriage Amendment Bill 2012 (the Jones Bill). Both bills propose amendments to the *Marriage Act 1961* (Cth) (the Marriage Act).
- 1.2 On Thursday 16 February 2012, the House of Representatives Selection Committee asked the Committee to inquire into and report on these two bills.
- 1.3 Mr Bandt was nominated as a supplementary member to the Committee for the purpose of this inquiry on 16 February 2012.
- 1.4 On Monday 27 February 2012, the Committee released a media alert about the inquiry and launched an online survey on its website to provide the public with a quick and anonymous means to make their views known. The Committee sent invitations to a selected, balanced number of religious, legal, family and gay advocacy organisations to make written statements.
- 1.5 All responses, received via the online survey, email, fax or post by 20 April 2012, were accepted by the Committee as evidence to the inquiry.
- 1.6 The Committee received 276 437 responses to the online survey, including 213 524 general comments and 86 991 comments on the legal and technical aspects of the bills. A summary of the responses and a selection of the anonymous comments were published on the Committee website at www.aph.gov.au/marriage.
- 1.7 The online survey was not a statistically valid, random poll. Respondents were self-selected, in that they chose to participate if they wished. It was

also anonymous, so it cannot be ascertained whether it is truly a representative sample of the broadly-held views of Australians.

- 1.8 The Committee accepts that some respondents may have completed the survey more than once in order to ‘boost the numbers’. However, the data was able to be checked for responses from duplicate or invalid email addresses as well as for multiple responses at one time from the same IP address. This occurred with those who supported the bills and those who opposed them, but at such an insignificant rate (4.4 per cent) as to have little effect on the overall numbers.
- 1.9 An additional 2 353 responses were received by email, fax or post. Some of these respondents may have participated in the online survey as well. A small number of written statements, representing a diversity of views, listed in Appendix A, was published on the Committee website at www.aph.gov.au/marriage.
- 1.10 The Committee held a public hearing in Sydney on Thursday, 12 April 2012. The list of witnesses who gave evidence at the public hearing is published at Appendix B.

The Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill)

- 1.11 The long title of the Bandt/Wilkie Bill is ‘A Bill for an Act to amend the *Marriage Act 1961* to create the opportunity for marriage equality for people regardless of their sex, sexual orientation or gender identity, and for related purposes’.

Objects

- 1.12 The objects of the Bandt/Wilkie Bill are:
- to remove from the *Marriage Act 1961* discrimination against people on the basis of their sex, sexual orientation and gender identity;
 - to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and
 - to promote acceptance and the celebration of diversity.

Schedule 1—Amendment of the Marriage Act 1961

- 1.13 The Bandt/Wilkie Bill contains one schedule comprising nine items.

- 1.14 Item 1 proposes that the definition of marriage in Subsection 5(1) of the Marriage Act be repealed and replaced with the words:
- marriage** means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life.
- 1.15 Item 3 proposes that the words ‘a man and a woman’ in Subsection 46(1) of the Marriage Act be substituted with the words ‘two people’, changing the speech required of an authorised celebrant, not being a minister of religion, to:
- Marriage, according to the law in Australia, is the union of two people to the exclusion of all others, voluntarily entered into for life.
- 1.16 Similarly, Item 7 proposes that the words ‘a husband and a wife’ in Part III of the Schedule (table item 1) be substituted with the words ‘two people’. Table item 1 of the Schedule (Persons whose consent is required to the marriage of a minor) would then read:
1. Where the minor was adopted by two people jointly
- 1.17 Items 2 and 5 recommend adding the words ‘or partner’ to those spoken by the marriage parties:
- I call upon the persons here present to witness that I, A.B. (*or* C.D.), take thee, C.D. (*or* A.B.), to be my lawful wedded wife (*or* husband *or* partner).
- 1.18 Section 47 states that ‘Nothing in this Part’ shall oblige ministers of religion to solemnise any marriage. Item 4 strengthens this section by adding the words ‘or in any other law’ after the word ‘Part’.
- 1.19 In addition, Item 8 clarifies that the proposed amendments will not change Section 47.
- 1.20 Item 6 recommends repealing Section 88EA, which reads as follows:
- 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.
- 1.21 Item 9 advises that amendments may be made to Acts other than the Marriage Act if they are consequential to the passing of the Bandt/Wilkie Bill.

The Marriage Amendment Bill 2012 (the Jones Bill)

- 1.22 The long title of the Jones Bill is ‘A Bill for an Act to amend the *Marriage Act 1961* to establish marriage equality for same-sex couples, and for related purposes’.

Objects

- 1.23 The object of the Jones Bill is to ‘amend the *Marriage Act 1961* to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life.’

Schedule 1—Amendment of the Marriage Act 1961

- 1.24 The Jones Bill contains one schedule comprising five items.

- 1.25 Item 1 proposes that the definition of marriage in Subsection 5(1) of the Marriage Act be repealed and replaced with the words:

marriage means the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life.

- 1.26 Item 2 proposes that the words ‘a man and a woman’ in Subsection 46(1) of the Marriage Act be substituted with the words ‘two people’, changing the speech required of an authorised celebrant, not being a minister of religion, to:

Marriage, according to the law in Australia, is the union of two people to the exclusion of all others, voluntarily entered into for life.

- 1.27 Similarly, Item 5 proposes that the words ‘a husband and a wife’ in Part III of the Schedule (table item 1) be substituted with the words ‘two people’. Table item 1 of the Schedule (Persons whose consent is required to the marriage of a minor) would then read:

1. Where the minor was adopted by two people jointly

- 1.28 Item 3 proposes an additional paragraph (aa) for Section 47 so that it would read as follows:

Nothing in this Part:

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

(aa) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex; or

(b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:

(i) longer notice of intention to marry than that required by this Act is given; or

(ii) requirements additional to those provided by this Act are observed.

1.29 Item 4 recommends repealing Section 88EA, which reads as follows:

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.

Purpose of inquiry

1.30 The purpose of this advisory report is for the Committee to scrutinise the two marriage bills before the Parliament. It is for the Parliament to determine whether a bill legalising same-sex marriage will be passed. The report aims to aid the Parliament in determining how it will proceed on these bills.

1.31 To this end, the Committee examined historical and contemporary approaches to marriage and relationship recognition, social values and opinions regarding the proposed changes, and technical differences in the drafting of each bill.

Scope of the report

1.32 The Committee has examined the proposed changes to the Marriage Act contained in the Bandt/Wilkie and Jones Bills. In summary, the proposed amendments seek to change the definition of marriage to include two people of the same sex and to repeal the section that prohibits recognition of same-sex marriages conducted overseas.

- 1.33 Neither bill proposes any changes to the protections that currently exist in the Marriage Act, such as the marriageable age, the prohibition against consanguineous relationships, or the religious freedom of ministers of religion to refuse to solemnise any marriage.
- 1.34 This report focuses solely on the intent and content of the two bills. Neither bill proposes any changes to the words ‘to the exclusion of all others’ in the definition of marriage. Neither do they propose any changes to Section 94, which makes bigamy an offence. As such, polygamy, the practice of having more than one spouse, is not of relevance in considering these bills, despite having been raised by some respondents. Should a bill be introduced in the future that proposes to expand the definition of marriage to accommodate more than two people and to repeal Section 94, then polygamy would be a relevant topic of discussion.
- 1.35 Many objections to the bills have been based on concerns about the adoption of children by same-sex married couples. However, adoption rights come under state legislation and are not addressed in the Marriage Act that the proposed bills would amend. Moreover, marital status is not necessarily linked to adoption rights. All states and territories, with the exception of South Australia, allow single people to adopt children. The Australian Capital Territory, New South Wales and Western Australian permit same-sex couples to adopt children. The remaining states could change legislation to extend adoption rights to same-sex couples without any changes to the Marriage Act.
- 1.36 Should same-sex marriage be legalised by the Australian Parliament, this would not change adoption rights for same-sex couples without subsequent legislative changes being agreed to by individual state and territory governments.

Structure of the report

- 1.37 The next chapter outlines the history of marriage laws in Australia and examines legally-recognised relationships other than marriage.
- 1.38 Chapter 3 discusses the public responses to the inquiry, based around common themes that featured predominantly during the course of this inquiry. Selected quotations from the numerous responses are presented in this chapter.
- 1.39 Chapter 4 addresses the legal issues with respect to the two bills, and the different wording proposed in each bill.

- 1.40 The final chapter provides the Committee's concluding remarks. The Committee chose not to make a recommendation in this report. Some members have made recommendations in their additional comments. These reflect the diversity of views within the Committee.

History of Marriage Laws in Australia

- 2.1 This chapter provides a history of marriage laws in order to situate the current bills under scrutiny alongside legal changes that have taken place in marriage and relationship recognition in Australia since Federation.
- 2.2 It presents a brief overview of progressive changes enacted affecting marriage laws and a person's eligibility to marry in Australia. The chapter then reviews the legal recognition and social standing of relationships other than marriage, such as opposite-sex and same-sex de facto relationships.

Pre-1961

- 2.3 Governments across different jurisdictions have administered marriage laws in Australia since European settlement. These laws were not immutable. In fact, at various points in time, governments have seen fit to legislate on citizens' eligibility to marry. Those considered minors by today's standards were permitted to marry, and restrictions were placed on Indigenous Australians' right to marry whom they chose.
- 2.4 Marriage law was first administered in Australia by the British colonies, which inherited British common law traditions. For some time, the marriage of convicts was limited to those who exhibited good character; convicts who did not demonstrate 'soberness' or 'industriousness' were not permitted to marry.¹
- 2.5 From Federation in 1901 until 1961, each state and territory was responsible for regulating marriage. This resulted in a fractured system

1 A Atkinson, 'Convicts and courtship,' in P Grimshaw, C McConville and E McEwen eds, *Families in Colonial Australia*, Allen & Unwin, Sydney, 1985, p. 25.

where each state and territory had its own marriage law, meaning that the legality of one's marriage could change when crossing a border. Sir Garfield Barwick, then Attorney-General, wrote in 1962 that:

At present there are nine separate systems of marriage law in the States and these Territories; systems which, although possessing many features in common, display considerable diversity in principle and detail.²

- 2.6 A person's eligibility to marry could change from one state to another at different points in time. For example, the marriageable age in Australian states and territories was the same as the age of consent: 14 for men and 12 for women. However, in 1942, Tasmania raised the marriageable age for men to 18 and for women to 16; Western Australia followed suit in 1956 and South Australia in 1957.³
- 2.7 Another example is the variation in state laws pertaining to Indigenous Australians which regulated whom they could or could not marry.
- 2.8 Victoria's *Aborigines Protection Act 1869* (Vic) gave the Board for the Protection of Aborigines the power to refuse marriage applications from Indigenous Victorians.⁴ In Queensland, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) prohibited Indigenous woman from marrying anyone other than an Indigenous man without the permission of an Aboriginal Protector.⁵
- 2.9 In the Northern Territory, which was governed by Commonwealth law, the *Aboriginals Ordinance 1918* restricted marriages between Indigenous women and non-Indigenous men. For example, the marriage of Indigenous or half-caste women to non-Indigenous men required legal permission.⁶

2 G Barwick, 'The Commonwealth Marriage Act 1961', *Melbourne University Law Review*, vol. 3, 1961-1962, p. 277.

3 G Barwick, 'The Commonwealth Marriage Act 1961', *Melbourne University Law Review*, vol. 3, 1961-1962, pp. 284-5.

4 K Ellinghaus, 'Regulating Koori marriages: The 1886 Victorian Aborigines Protection Act', *Journal of Australian Studies*, vol. 67, 2001, p. 23.

5 K Ellinghaus, 'Absorbing the "Aboriginal problem": Controlling interracial marriage in Australia in the late nineteenth and early twentieth centuries', *Journal of Aboriginal History*, vol. 27, 2003, p. 197.

6 ABC, 'Australia's Centenary of Federation' <http://www.abc.net.au/federation/fedstory/ep4/ep4_institutions.htm> viewed 24 April 2012.

Post-1961

2.10 In 1961, the Australian Parliament, using its power to legislate with respect to marriage under Subsection 51(21) of the Constitution, passed the *Marriage Act 1961* (the Marriage Act) to regulate marriage law uniformly across the country.

2.11 The Marriage Act did not include a definition of marriage in Section 5 at the time of promulgation. Senator John Grey Gorton argued at the time that:

I am inclined to think that the reason why marriage has not been defined previously in legislation of this kind is because it is rather difficult to do so. Marriage, of course, can mean a number of things. For instance, it can mean a religious ceremony; it can mean a civil ceremony; and it can mean a form of living together. There are several meanings covered by the word 'marriage', which are quite different one from the other.⁷

2.12 However, Section 46 requires authorised celebrants to explain the nature of marriage and provides some sample words:

... the authorised celebrant shall say to the parties, in the presence of the witnesses, the words:

'I am duly authorised by law to solemnise marriages according to the law.

Before you are joined in marriage in my presence and the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.

Marriage, according to law in Australia, is the union of a man and woman to the exclusion of all others, voluntarily entered into for life.'

Or words to that effect.

2.13 Senator Gorton elaborated during the second reading debate that:

I want to make it clear that the fact of a celebrant saying those words, which clause 46 requires him to say, does not have the force of law to define a marriage in the sense in which the insertion of a definition ... would have.⁸

7 Senator the Hon. John Grey Gorton, *Senate Hansard*, 18 April 1961, p. 544.

8 Senator the Hon. John Grey Gorton, *Senate Hansard*, 18 April 1961, p. 544.

- 2.14 In 2004, the Australian Parliament enacted the Marriage Amendment Bill 2004, introduced by then Attorney-General Mr Philip Ruddock. The bill sought to formalise the definition of marriage and to respond to the legalisation of same-sex marriages in some overseas countries.⁹
- 2.15 The *Marriage Amendment Act 2004* inserted the following definition of marriage into Subsection 5(1) of the Marriage Act:
- ‘marriage’** means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.
- 2.16 In addition, the *Marriage Amendment Act 2004* inserted Section 88EA into the Marriage Act to prohibit the recognition in Australia of same-sex marriages performed in foreign countries.
- 2.17 In 2009, Senator Sarah Hanson-Young (Greens) introduced the Marriage Equality Amendment Bill 2009 in the Senate, which sought to eliminate exclusionary references to sexual orientation and gender identity in the Marriage Act. The bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report, and was subsequently defeated in the Senate at the Second Reading Stage on 25 February 2010.
- 2.18 Senator Hanson-Young then introduced a similar bill, the Marriage Equality Amendment Bill 2010. The bill was again referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry, and the report will be tabled on 25 June 2012.¹⁰
- 2.19 In 2012, the Marriage Amendment Bill 2012 (the Jones Bill) and the Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill) were introduced into the House of Representatives, and referred to this Committee for inquiry and report.

Relationships other than marriage

De facto relationships

- 2.20 Many people in Australia live together in marriage-like relationships without formalising the relationship through a marriage ceremony with a

⁹ The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 24 June 2004, p. 31460.

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs.

registrar, celebrant or minister of religion. These relationships are defined as de facto relationships for the purposes of law.

- 2.21 According to the *Family Law Act 1975* (Cth), the definition of a de facto relationship is one where:
- the two persons are not legally married to each other;
 - the two persons are not related by family; and
 - the two persons have a relationship as a couple living together on a genuine domestic basis.¹¹
- 2.22 The last condition is determined by proving aspects of the relationship such as duration, the existence of a sexual relationship, care of children, cohabitation, mutual commitment, public recognition, and sharing of property and finances. If the relationship is registered under a state or territory relationship register, the partnership is automatically considered to be a de facto relationship without having to prove any of the above aspects.
- 2.23 In the 1980s, Australian state and territories began amending their legislation to provide de facto couples with similar rights to married couples. In terms of family and employment benefits and property settlement, de facto couples were treated as if they were married.

Same-sex de facto relationships

- 2.24 From the end of the 1990s, states and territories also began to extend these rights to same-sex de facto couples to remove discrimination based on sexual orientation in relationships.
- 2.25 In 2007, the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) conducted an inquiry into discrimination against people in same-sex relationships.
- 2.26 The resulting report identified 58 Commonwealth laws that denied same-sex de facto couples some financial and work-related entitlements that are afforded to opposite-sex de facto or married couples.¹² The following year, acting on a 2002 referral of power from the states, the

11 *Family Law Act 1975*, s. 4AA.

12 Australian Human Rights Commission, 'Same Sex: Same Entitlements' May 2007 <http://www.humanrights.gov.au/human_rights/samesex/report/pdf/SSSE_Report.pdf> viewed 1 May 2012.

Australian Government introduced reforms to remove the discriminations in the identified pieces of legislation.¹³

- 2.27 There no longer exist legal differences to the status of same-sex and opposite-sex de facto couples under Commonwealth law.

Relationship registers and civil unions

- 2.28 De facto couples, both same-sex and opposite-sex, can register formally their relationships in Tasmania, Victoria, New South Wales, Australian Capital Territory (ACT) and Queensland. These states, with the exception of Victoria, recognise relationships registered in the other states.
- 2.29 The benefit of registering a relationship is to obtain proof of the relationship, similar to having a marriage certificate. Couples in a registered relationship do not have to prove their de facto status, as described above. Registering a relationship may be attractive to same-sex couples who do not have the option of obtaining a marriage certificate.
- 2.30 Civil unions are conducted only in the ACT and Queensland. Civil union legislation provides for a ceremony to declare a civil partnership in addition to providing for relationship registration. On Tuesday, 12 June, the Queensland premier announced amendments to the *Civil Partnerships Act 2011* (Qld) that would remove the option of a state-sanctioned ceremony.¹⁴ Civil unions are available to both same-sex and opposite-sex couples in Queensland, but only to same-sex couples in the ACT.¹⁵
- 2.31 Civil union ceremonies must be conducted by an official civil notary, and eligibility requirements are similar to those prescribed in the Marriage Act, i.e. that notice of declaration must be given in a certain time period, neither party is already married or in a civil partnership, or is in a prohibited relationship with the other party. Civil union legislation also provides for formal termination of the civil partnership.

13 See the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), the *Same Sex Relationships (Equal Treatment in Commonwealth Laws - Superannuation) Act 2008* (Cth) and the *Same Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008* (Cth).

14 M McKenna and R Barrett, 'Newman weakens Same-Sex Reforms', *The Australian*, 13 June 2012, p. 1.

15 *Civil Partnerships Act 2011* (Qld); Civil Unions Bill 2011 (ACT) Explanatory Statement, p. 4.

The difference between marriage and other relationships

- 2.32 De facto, registered or civil union relationships do not equate to marriage. Although the vast majority of state and federal legislation apply equally to couples regardless of marital status and sexual orientation, there remain a few areas in which non-married couples are disadvantaged due to their lack of marital status, such as providing proof of relationship.
- 2.33 Whereas opposite-sex de facto or registered couples can choose to marry and avail themselves of the full rights that come with a marriage certificate, same-sex couples are prohibited by law to choose this option.
- 2.34 The Jones and Bandt/Wilkie Bills seek to change the Marriage Act to enable same-sex couples to marry if they so wish.
- 2.35 The debate around same-sex marriage rights is not limited to legal issues. Although solely a legal contract in Australia, marriage is a religious institution for many that is closely entwined with religious tradition, ceremony and meaning. It is also a symbolic social contract, reflecting Australia's values about relationships and families, the meaning of the institution of marriage, and equality. These issues are discussed in the next chapter.

Values in Australian society

- 3.1 This chapter provides a discussion of some of the key social values in Australia, in particular family constructs, religious beliefs and freedoms, and a commitment to equality and acceptance, that were raised in relation to the bills under scrutiny.
- 3.2 The chapter includes a number of text boxes which provide a selection of the responses made to the inquiry around the bills and the values in Australian society.

Families and marriage

- 3.3 Families are an essential part of our society. The International Covenant on Economic, Social and Cultural Rights (ICESCR) states that the family unit is the fundamental unit in society and the International Covenant on Civil and Political Rights describes families as the 'natural and fundamental group unit of society [that] is entitled to protection by the State'.¹
- 3.4 The importance of the family unit was apparent in the inquiry evidence. The Australian Christian Lobby (ACL) said that the family is 'society's most fundamental unit' and 'the core social unit around which communities are built'.²

1 Castan Centre for Human Rights Law (Castan Centre), *Submission 40*, p. 7.

2 Australian Christian Lobby (ACL), *Submission 21*, pp. 3, 39.

Family & marriage

The following comments are drawn from written and survey responses received by the Committee.

- Marriage is essential to strong, stable family units, which in turn are essential in protecting the stability of our society. (Even some in favour of same-sex marriage have acknowledged this fact and try to use it to further their own position!)
- Stable families create a stable society. 00:30, 14 April
- The government should support the marriage of 2 people that wish to wish to create a family unit. This will result in a more stable family unit without prejudice. 14:10, 20 April
- Marriage is the foundation of family which in turn is the foundation [of] society. 3:53, 31 March
- As Australian citizens it is our firm belief that the social fabric of this wonderful country of ours is held together by the foundation of the family, underpinned by marriage. 14:55, 24 March
- I have felt privileged to interact with people from such a diverse range of family backgrounds, who have shown me firsthand that families don't all have to look the same to share in the same love and positivity I believe we all value and want for our families. 11:53, 16 March
- I have grave concerns for the concept of family and the long term legal, morale and social implications of this legislation. 4:37, 10 April
- The values and traditions surrounding marriage in Australia are applicable to all citizens regardless of their sexuality- love, respect, companionship and family. 13:06, 20 April
- To me the criteria for a committed long term marriage is love, respect and a conscious commitment to support each other through life. To me this commitment has nothing to do with a person's sexual preference or orientation. 9:48, 16 April
- Who are we to decide who has the most committed relationship or fits the modern definition of family? 4:43, 10 April

3.5 The Salvation Army's position is that:

In spite of changing lifestyles and values, the family unit – father, mother and children – is still the ideal social institution in contemporary Australian life.³

3.6 The Australian Catholic Bishops Conference stated that:

Families are small communities in themselves on which the wider

3 The Salvation Army Australian Southern Territory, *Submission 18*, p. 1.

community is built and they are the main place in which children are socialised to take their place in the wider community.⁴

3.7 The Australian Family Association (AFA) believes that family is central to identity:

We know that family and identity are closely related, because we have seen in our own nation's history the traumatic loss of identity experienced by several generations of children who, for various reasons, were separated from their biological families, and for which governments have seen fit to apologise ... We know how important biological family ties are when we see the soaring popularity of television programmes like *Find My Family*, and *Who Do You Think You Are?*⁵

3.8 It was observed by some groups that marriage is considered to be a vital ingredient of the family unit. Article 10 of the ICESCR recognises 'the importance of marriage to the family unit'.⁶

3.9 Australian Marriage Equality explained:

Marriage is not just about creating a new legal relationship between two parties, it is about creating a new relationship between the families of those parties. ... That is why we have the terms ... [like] mother-in-law and son-in-law. Marriage creates kinship in a way that other types of legal relationships do not.⁷

3.10 FamilyVoice Australia stated that 'marriage has provided the bedrock of family life that is essential for the survival of society'.⁸ The ACL claimed that marriage is 'a social good, providing the best environment for family to flourish, and in particular, for children to be raised and nurtured.'⁹

4 Australian Catholic Bishops Conference (Catholic Bishops), *Submission 13*, p. 2.

5 Australian Family Association (AFA), *Submission 31*, p. 3.

6 Castan Centre, *Submission 40*, p. 14.

7 Mr Rodney Croome, Campaign Director, Australian Marriage Equality (AME), *Committee Hansard*, Sydney, 12 April 2012, p. 58.

8 FamilyVoice Australia, *Submission 28*, p. 3.

9 ACL, *Submission 21*, p. 3.

3.11 According to the Lutheran Church of Australia:

Marriage, along with the family which revolves around it and is established by it, is the foundational institution for the social and political order of a nation. So the stability and prosperity of marriage and the family, in large part, determines the stability and prosperity of our country.¹⁰

3.12 The Chinese Methodist Church in Australia submitted that 'marriage is the logical basis of the family'.¹¹ The Seventh Day Adventist Church concurred:

... marriage is the natural basis of the family because it secures the relationship between biological parents and their children, and provides a microcosm of social unity that is time-honoured as a core ingredient of stable societies.¹²

3.13 The Rabbinical Council of Victoria took the view that

... the institution of marriage is central to the formation of a healthy society and to the concept of family.¹³

3.14 In a speech submitted to the inquiry by the Hon. Michael Kirby, he explained that:

Marriage tends to be beneficial for the individuals who chose its status. It is an affirmation of relationships before society. Such relationships are generally to the advantage of their participants and of society itself. They involve very substantial health benefits; as well as civic benefits in terms of the mutual support and protection provided to individuals within marriage.¹⁴

3.15 The ACL told the Committee that:

The modern state does not usually regulate interpersonal relationships among its citizens. One of the few exceptions is marriage. Its interest in regulating marriage stems from the importance of marriage as a foundational unit in society, of upholding marriage as an ideal.¹⁵

10 Lutheran Church of Australia, *Submission 5*, p. 1.

11 Chinese Methodist Church in Australia, *Submission 16*, p. 1.

12 Seventh-day Adventist Church, *Submission 24*, p. 1.

13 Rabbinical Council of Victoria, *Submission 29*, p. 1.

14 The Hon. Mr Michael Kirby, *Submission 3*, p. 12.

15 ACL, *Submission 21*, p. 5.

- 3.16 The Australian Catholic Bishops Conference pointed out that:
- Governments promote stable marriages because they are important to the welfare of children and because marriages and families are key to the future of the community.¹⁶
- 3.17 Moreover, the AFA suggested to the Committee that government involvement in the regulatory environment relating to marriage:
- ... has do to with recognising the significant public interest in fostering lifelong, exclusive fidelity between a man and a woman intending to engage in a relationship whose very nature is oriented towards the creation of children and of a new biological family unit.¹⁷
- 3.18 New South Wales MLA the Hon. Trevor Khan stated that:
- ... marriage is no longer seen as the starting point at which young people move from the family home, commence an intimate relationship and 'set up home'. Instead marriage is, for the majority of young Australians, a later step in the relationship. It is occurring at a point long after the commencement of a sexual relationship, and indeed long after co-habitation.¹⁸
- 3.19 Mr Khan further noted that:
- ... reasons such as love, stability, sexual satisfaction and companionship are all recognised in contemporary Australian society as valid reasons for marriage.¹⁹
- 3.20 According to Australian Bureau of Statistics data, 31 per cent of the 121 000 marriages conducted in 2010 were solemnised by ministers of religion and 69 per cent by civil celebrants.²⁰
- 3.21 As the organisation Engage Celebrants pointed out:
- We have solemnised first marriages between people who haven't yet lived together, those who already have children together, blended families and older couples where there is no possibility for children to be born into the marriage. We've even officiated

16 Catholic Bishops, *Submission 13*, p. 2.

17 AFA, *Submission 31*, p. 2.

18 The Hon. Mr Trevor Khan, *Submission 32*, p. 14.

19 Mr Khan, *Submission 32*, p. 15.

20 Australian Bureau of Statistics, '4102.0 – Australian Social Trends, March Quarter 2012' <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30March+Quarter+2012#MARRIAGES>> viewed 13 June 2012.

over marriages that, due to medical reasons, will never be consummated.²¹

- 3.22 In addition to nuclear families, Australian families are represented by single-parent families, extended families and blended families of step- and half-siblings.
- 3.23 Couples may have no children, biological children, adoptive children or children conceived through IVF or surrogacy. Depending on state laws, single parents and same-sex couples have adopted children.
- 3.24 Professor Kerry Phelp, from Parents and Friends of Lesbians and Gays (PFLAG), observed that:
- ... quite a number of children, and an increasing number of children, are being raised in single-parent families and in blended families where there are one or two step-parents, and some children are being raised by grandparents, some children have two fathers and some children have two mothers and so forth, whatever the shapes of those children's families are it should be acknowledged and respected.²²

Religious values

- 3.25 Many of the above opinions about family and marriage derive from religious beliefs and traditions.
- 3.26 Religious traditions form an integral part of Australian society. While Australia was founded as a predominantly Christian British colony, processes of migration and shifts towards embracing multiculturalism have created a modern Australia that is rich in religious diversity. The varieties of communities that practice religion in Australia have many different structures of beliefs and values that shape people's attitudes to life.
- 3.27 While Australian society includes citizens of differing faith beliefs and their respective faith-based organisations, it is a secular state. This means that citizens can hold whatever religious beliefs they choose. However, as Professor Andrew Lynch commented, the Constitution of Australia

21 Engage Celebrants, *Submission 26*, p. 1.

22 Professor Kerry Phelp, Representative, Parents and Friends of Lesbians and Gays (PFLAG), *Committee Hansard*, Sydney, 12 April 2012, p. 51.

‘ensures that the Commonwealth cannot impose any religious observance upon people’.²³

3.28 Section 116 of the Constitution sets out the separation of the Church and State in Australia. It states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.²⁴

3.29 This means that although Australia respects religious beliefs and traditions, legislation is a matter reserved for the deliberation of parliaments in our secular state in the best interests of society and without favour to one or other faith system.

3.30 Australia’s religious diversity was evident at the Sydney public hearing which included the participation of representatives of the Anglican, Catholic, Lutheran and Seventh Day Adventist Churches, the Salvation Army, the Union of Progressive Judaism, the Federation of Australian Buddhist Councils, the Hindu Council of Australia, and the Sikh Council of Australia.

3.31 In addition to the participation of these organisations, the Committee received written responses from a range of other religious organisations, including Quakers Australia, the Chinese Methodist Church in Australia, the Episcopal Assembly for Oceania and the Rabbinical Council of Victoria.

3.32 The religious representatives who spoke to the Committee at the public hearing held a range of views about the nature of marriage and of the passage of the two Bills. A common view held by all the participants was that marriage has a spiritual component in addition to it being a social or legal contract between two people. The views diverged, however, when it came to same-sex marriage.

3.33 Reverend Dr Michael Semmler, President of the Lutheran Church of Australia, strongly supported the separation of church and state, saying that Lutherans ‘do not want to interfere with the government ordering society’, but urged the government to ‘preserve the uniqueness of the husband/ wife – the male/ female – in marriage’.²⁵

23 Professor Andrew Lynch, *Committee Hansard*, Sydney, 12 April 2012, p. 15.

24 *Australian Constitution*, s 116.

25 Reverend Dr Michael Semmler, President of the Church, Lutheran Church of Australia, *Committee Hansard*, Sydney, 12 April 2012, p. 3.

Religious values

The following comments are drawn from written and survey responses received by the Committee.

- [My photos of same-sex couples who have been together for more than 8.7 years include] people of different religions – so far I have taken photos in a Buddhist temple, a Jewish synagogue and a Church. And many others who are committed to their religion and spirituality. 4.23pm, 29 March
- Our culture is based on the Christian religion and God loves both men and women. 12:50, 20 April
- Marriage is deeply held by a large proportion of the population for cultural and religious reasons. 23:13, 9 April
- Marriage regulation should not be the exclusive right of religious groups. I am a religious person, and had a church marriage, but I believe those of other persuasions should also have the right to publicly affirm their commitment to another person. 12:11, 20 April
- Marriage should be a civil right in Australia for all who choose it. Religion is a choice and people should be free to follow the religious teachings of their choice it has nothing to do with a person's right to marriage. 1:13, 10 April
- Marriage has always been defined by our society and by the religions of many of our citizens and their ancestors as between a man and a woman. 23:27, 12 April
- I believe that marriage is a covenant relationship that is recognised according to Christian beliefs and values. 11:57, 20 April
- In a country that holds separation of church & state in high regard, and wishes to maintain a respectful position on human rights, there is no reason to treat same-sex couples as inferior citizens. 17:05, 16 March
- On religious grounds, I believe that a same-sex union should not be called a marriage. 10:46, 30 April

3.34 According to Professor Nihal Singh Agar, marriage within the Hindu religion 'is between a man and a woman for progeny and for their spiritual growth'.²⁶ Similarly, Mr Bawa Singh Jagdev stated that according to the Sikh religion, marriage 'unites a man and a woman for the purpose of procreation and raising children in a caring and loving family environment'.²⁷

26 Professor Nihal Singh Agar, Chairman, Hindu Council of Australia, *Committee Hansard*, Sydney, 12 April 2012, p. 2.

27 Mr Bawa Singh Jagdev, Secretary, Sikh Council of Australia Inc, *Committee Hansard*, Sydney, 12 April 2012, p. 2.

- 3.35 Representatives of the Salvation Army and the Anglican, Catholic and Seventh Day Adventist Churches all held marriage to be a spiritual and social joining of a man and a woman to the exclusion of all others.²⁸
- 3.36 Conversely, Mr Steve Denenberg from the Union for Progressive Judaism supported the bills and took the position that ‘it is time for our society to move on’.²⁹ Similarly, Venerable Bhante Sujato from the Federation of Australian Buddhist Councils said that ‘the overwhelming response of the Buddhist community has been supporting marriage equality’.³⁰
- 3.37 It was made apparent to the Committee that even within faith-based organisations, there is often a wide range of divergent beliefs and values on the question of the recognition of same sex marriage. The Uniting Church in Australia acknowledged this diversity, stating that:
- There is a great diversity of opinion amongst our Church members, derived from the different ways in which people understand the Bible and their own Christian faith.³¹
- 3.38 While some Christian churches are adamant that marriage is a lifelong union solely between a man and a woman, others support marriage equality for same-sex partners. Reverend Greg Smith from the Metropolitan Community Church Sydney, said that:
- We at MCC Sydney strongly believe in the holy rite of marriage for all couples ... Practicing the rite of holy matrimony for same sex couples is as much a part of our faith as is practicing the rite of holy matrimony for opposite sex couples.³²
- 3.39 Different attitudes arise from different values placed on, or interpretations of, religious texts. For example, while the Rabbinical Council of Victoria does not support the bills on the basis that the Torah’s ‘conception of marriage is a covenantal relationship between men and women’, the Union of Progressive Judaism considers ‘that the behaviour of people has to reflect both modern values as well as the eternal values that we have from the Torah’.³³

28 See *Committee Hansard*, Sydney, 12 April 2012, pp. 2–4.

29 Mr Steve Denenberg, Executive Director, Union for Progressive Judaism, *Committee Hansard*, Sydney, 12 April 2012, p. 2.

30 Venerable Bhante Sujato, Monastic Sangha Representative, Federation of Australian Buddhist Councils, *Committee Hansard*, Sydney, 12 April 2012, p. 2.

31 UnitingJustice Australia, *Submission 42*, p. 3.

32 Quoted in Mr Khan, *Submission 32*, p. 33.

33 Mr Denenberg, *Committee Hansard*, Sydney, 12 April 2012, p. 2.

Equality

The following comments are drawn from written and survey responses received by the Committee.

- All Australian citizens should be treated equally - no matter what race, religion, colour or sexual orientation. 12:25, 20 April
- Same sex couples already have all [the] rights of a married couple enshrined in law and this is equitable and just. 01:04, 27 March
- Our values as a country are based on acceptance and a "fair go". 12:14, 20 April
- I believe that same sex relationships already have adequate recognition under current laws, and that same sex couples already have the same legal rights as de facto couples and married couples. There is no reason to change the definition of marriage from what it has always been. 7:49, 15 April
- Australians have come from all creeds, classes and cultures. We are a country that prides ourselves on a fair go, which is another way of saying an equal opportunity for all. 11:22, 20 April
- Marriage equality is about human rights. Same-sex couples should have the same right to marry as other couples. And besides, I think everyone has forgotten, this is just about love. And commitment. 11:13, 17 March
- I believe that same sex couples in committed relationships deserve the same legal rights as de facto or married couples, however I object to it being marriage. 9:21, 28 March
- All people should be treated equally before the law. 11:22, 20 April
- If it is true that the same legal rights are provided to same-sex couples as they are to married couples then the argument is over the definition of a term. I see no reason to redefine a long-standing term. 11:18, 20 April
- All Australians deserve equal rights to love, marriage and family. 11:50, 27 March
- Why would marriage not be for all? 11:35, 20 April

Equality

- 3.40 In addition to the separation of church and state, Australia prides itself on its 'fair go' attitude and respect for equal rights. This was reflected in comments made by legal advocates and religious organisations.

3.41 The Castan Centre for Human Rights referred to ‘the basic Australian ethos of a “fair go” for all’³⁴ and PFLAG called Australia ‘the land of giving everyone a “fair go”’.³⁵

3.42 Liberty Victoria noted that:

Australia was once a leader in the protection of human rights, and in the valuing of a fair go for all, which is at the very foundation of human rights.³⁶

3.43 Auxiliary Bishop Julian Porteous, Catholic Archdiocese of Sydney, observed that:

... in Australia ... we are very strong about human rights, and that is one of our great traditions, and our Constitution and so forth supports it. I would fully support, obviously, the protection of rights.³⁷

3.44 As discussed in Chapter 2, Commonwealth and state and territory legislation has extended married rights to de facto couples, including same-sex couples. The vast majority of respondents to the inquiry were supportive of equal legal status for de facto relationships.

3.45 The ACL stated that:

Non-discrimination against same-sex couples is exactly what Federal Parliament achieved in 2008 when over 80 pieces of legislation were amended by a bipartisan majority. Homosexual couples now enjoy effective equality with married couples in every way short of marriage.³⁸

Moreover, in their evidence given at the public hearing, the ACL stated that:

... we supported that [legislation] because we believe there should be no substantive discrimination.³⁹

34 Castan Centre, *Submission 40*, p. 3.

35 PFALG, *Submission 7*, p. 3.

36 Liberty Victoria *Submission 34*, p. 3.

37 Auxiliary Bishop Julian Porteous, Catholic Archdiocese of Sydney, *Committee Hansard*, Sydney, 12 April 2012, p. 12.

38 Australian Marriage Forum, *Submission 37*, p. 4.

39 Mr Jim Wallace, Managing Director, ACL, *Committee Hansard*, Sydney, 12 April 2012, p. 38.

3.46 The Anglican Church Diocese of Sydney similarly supported such legislation.⁴⁰ Bishop Robert Forsyth told the Committee:

I am not saying there should not be committed, even legally authorised gay relationship matters. I am simply saying calling the two realities by the same name is confusing and it does affect what marriage means. I would not mind a thing called 'gay marriage'.⁴¹

3.47 In contrast, the Committee heard from other organisations who said that legislative reforms to remove discrimination against same-sex de facto couples may have achieved fairness, but not equality, and that banning same-sex couples from taking the further step of marriage creates a two-tier relationship system.

3.48 The Australian Human Rights Commission stated that:

The principle of equality requires that any formal relationship recognition available under federal law to opposite-sex couples should also be available to same-sex couples. This includes civil marriage.⁴²

3.49 The AME noted that some people of faith support marriage equality:

It is because they value fairness; it is because they value the power of love, and it is because they value the importance of equality.⁴³

3.50 UnitingJustice declared that:

... no person in our society should be denied the rights and benefits afforded by the state to others in equivalent situations, based on their sexuality or their involvement in a committed same-sex relationship.⁴⁴

3.51 Professor George Williams noted that:

... nothing competes with marriage for its iconic status, the symbolism that it contains within our society. I am not sure it would be possible to set up a different way of recognising a relationship that could be seen within the eyes of the broader community as being of equivalence. Of course, that is what it is

40 Anglican Church Diocese of Sydney, *Submission 11*, p. 5.

41 Bishop Robert Forsyth, Anglican Church Diocese of Sydney, *Committee Hansard*, Sydney, 12 April 2012, p. 6.

42 Australian Human Rights Commission, *Submission 10*, p. 4.

43 Mr Alex Greenwich, National Convenor, AME, *Committee Hansard*, Sydney, 12 April 2012, p. 59. See also AME, *Submission 30, Attachments 8 and 9*.

44 UnitingJustice Australia, *Submission 42*, p. 3

about. It is about an equality and equivalence. I think even in countries where they have had [relationship] registration schemes it has not prevented the debate moving onto a marriage debate as it has here.⁴⁵

- 3.52 UnitingJustice stated that without equal access to marriage, same-sex relationships may be seen as less significant than heterosexual relationships:

Without acknowledgement of same-sex relationships under the Marriage Act, there runs the very real risk of viewing same-sex relationships as somehow inferior to opposite-sex relationships.⁴⁶

- 3.53 The Gay and Lesbian Rights Lobby added that:

Marriage offers symbolic as well as legal recognition. Relationship 'apartheid', where couples are granted equal rights but different status promotes a cultural hierarchy of relationships. Whilst legal entitlements between de facto and married couples are virtually the same, the absence of marriage places same-sex relationships as 'inferior' or 'lesser than' heterosexual married couples.⁴⁷

- 3.54 According to the Australian Human Rights Commission:

We do hold a very genuine concern that anything that publicly legitimises discrimination of any kind does play to a feeling, in some sections of our community, that these relationships are second class and therefore the people can be treated with less respect.⁴⁸

- 3.55 The Public Interest Advocacy Centre submitted:

To some extent, by failing to provide equal recognition of committed same-sex relationships, it might even reinforce the notion that committed relationships between heterosexual and homosexual couples are not equal.⁴⁹

- 3.56 It was submitted by Gilbert + Tobin Centre for Public Law that although same-sex couples have the same legal rights as any de facto couple, 'heterosexual couples are able to have their relationship formally recognised under law by taking the deliberate step of marriage, [but] this

45 Professor George Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 20.

46 UnitingJustice Australia, *Submission 42*, p. 5.

47 Gay and Lesbian Rights Lobby, *Submission 8*, p. 12.

48 Ms Catherine Branson, President, Australian Human Rights Commission, *Committee Hansard*, Sydney, 12 April 2012, p. 43.

49 Public Interest Advocacy Centre, *Submission 9*, p. 7.

is not an option open to same-sex couples'.⁵⁰ Professor Andrew Lynch elaborated that this 'then means that there are legal disabilities associated with same-sex couples because they do not have that ability to choose between a de facto status and married status'.⁵¹

3.57 Australian Marriage Equality argued that:

... 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.⁵²

3.58 The Defence Lesbian, Gay, Bisexual, Transgender and Intersex Information Service provided many examples of the inability to marry negatively affecting Australian Defence Personnel because de facto recognition is not sufficient for accessing Defence family benefits, such as those attached to overseas postings.⁵³

3.59 Mr Alex Greenwich, National Convenor of Australian Marriage Equality, told the Committee about his impending marriage:

This is a celebration that I am really looking forward to. I unfortunately have to go overseas to marry my partner. I have to go to another country to give me more rights than the country that I am a citizen of.⁵⁴

3.60 Venerable Sujato asked simply: 'Why marriage. Why not civil union? Because marriage really means something to people.'⁵⁵

Acceptance

3.61 Throughout the course of the inquiry, the Committee heard much about the symbolic significance of marriage equality to the social and family acceptance of same-sex couples.

3.62 Ms Shelley Argent, a mother of a gay son said:

It is about inclusion. It is not necessarily about the wedding ceremony. It is about what that piece of paper represents. It is the

50 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 1.

51 Professor Lynch, *Committee Hansard*, Sydney, 12 April 2012, p. 15.

52 AME, *Submission 30*, p. 18.

53 See DEFGLIS, *Submission 25*.

54 Mr Greenwich, *Committee Hansard*, Sydney, 12 April 2012, p. 48.

55 Venerable Sujato, *Committee Hansard*, Sydney, 12 April 2012, p. 9.

symbolism. That piece of paper would tell my son and the rest that his relationship was equal. And it is equal.⁵⁶

3.63 The Union for Progressive Judaism noted that:

What we do find of the gay groups within our movement is that they feel they have been excluded, possibly for centuries. Homophobia has been prevalent in our society, so when we have offered same-sex commitment ceremonies for many of them it is insufficient.⁵⁷

3.64 Australian Marriage Equality fears that:

... the negative messages sent out by discrimination in marriage foster prejudice, discrimination and unequal treatment against same-sex relationships in the wider community.⁵⁸

3.65 Professor Phelps noted that:

Amending the Marriage Act for equality is not going to solve this problem overnight, but it is a hugely symbolic gesture towards saying that we respect you, we respect the fact that you may form a relationship with somebody of either the opposite gender or the same gender and, regardless of that, you can aspire to having a loving, lifelong, committed marriage at some point in your future, should you choose to do so.⁵⁹

3.66 PFLAG concluded:

... what marriage equality will do is remove the feeling from our sons and daughters that they are seen as second rate citizens with second rate relationships and provide them with the same rights, responsibilities, privileges and choices as their siblings, colleagues and society generally which is the right to have their relationships legally celebrated and recognised in their home country.⁶⁰

56 Ms Shelley Argent, National Spokesperson, PFLAG, *Committee Hansard*, Sydney, 12 April 2012, p. 57.

57 Mr Denenberg, *Committee Hansard*, Sydney, 12 April 2012, p. 7

58 AME, *Submission 30*, p. 19.

59 Professor Phelps, *Committee Hansard*, Sydney, 12 April 2012, p. 62.

60 PGLAF, *Submission 7*, p. 4.

Responses

- 3.67 In addition to the evidence received at the Sydney public hearing and the 42 written statements published on the inquiry website, the Committee received a large number of responses via email and post and through the online survey.
- 3.68 The online survey was established to provide a simple means for the public to engage with the inquiry, especially those who wished to remain anonymous. It is also provided a viable means to collate and record responses, as the Committee had anticipated a very large response that could not have been processed in the usual way by existing staff resources.
- 3.69 The online survey was not a statistically valid, random poll. Respondents were self-selected, in that they chose to participate if they wished. It was also anonymous, so it cannot be ascertained whether it is truly a representative sample of the broadly-held views of Australians.
- 3.70 The Committee accepts that some respondents may have completed the survey more than once in order to ‘boost the numbers’. However, the data was able to be checked for responses from duplicate or invalid email addresses as well as for multiple responses at one time from the same IP address. This occurred with those who supported the bills and those who opposed them, but at such an insignificant rate (4.4 per cent) as to have little effect on the overall numbers.
- 3.71 The anonymous online survey received 276 437 responses, the majority of which were supportive of the bills. When asked about the specific bills, 64 per cent of the respondents supported the Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill), and 60 per cent supported the Marriage Amendment Bill 2012 (the Jones Bill).

Table 1 Support for the bills

	Support	Don't support
Marriage Equality Amendment Bill 2012 (Mr Bandt and Mr Wilkie)	64.0%	36.0%
Marriage Amendment Bill 2012 (Mr Jones)	60.5%	39.5%

Please note that the results are not statistically significant. There is an insignificant rate of duplication of approximately 4.4% (3.6% for ‘agree’ responses and 0.8% for ‘disagree’ responses) of the responses.

3.72 In response to specific elements of the proposed amendments, 177 663 people supported the legalisation of same-sex marriage in Australia whereas 98 164 people opposed and 610 people were unsure. A similar number, 177 035, supported the legal recognition in Australia of same-sex marriages performed overseas, whereas 94 449 people did not agree and 4 953 were unsure. Only 37 252 people disagreed that religious ministers should not be obliged to perform same-sex marriage, while 24 786 were unsure.

Table 2 Responses to proposed amendments

	Agree	Disagree	Not sure	Total
The law should be changed to legalise same sex marriages in Australia	177 663	98 164	610	276 437
Same sex marriages performed in foreign countries should be recognised in Australia	177 035	94 449	4953	276 437
Authorised celebrants, being ministers of religion, should not be obliged to perform same sex marriages. (Note: authorised celebrants, being ministers of religion, are not currently obliged to perform any marriage)	214 399	37 252	24 786	276 437

Please note that the results are not statistically significant. There is an insignificant rate of duplication of approximately 4.4% (3.6% for 'agree' responses and 0.8% for 'disagree' responses) of the responses.

3.73 The online survey elicited 213 524 general comments and 86 991 comments about the legal or technical aspects of the bills.

3.74 Of the 2 353 emailed and posted responses, 142 were in support of the Jones and Bandt/Wilkie Bills, and 2 211 were against. A large number of those responses were form letters in support of or in opposition to the bills.

3.75 The Committee thanks the public for their contribution to the inquiry. Many people provided personal stories about their marriages, relationships and families to the Committee in person or in writing. Others talked about faith and soul-searching. Some provided comprehensive research papers.

3.76 Notwithstanding that the survey was anonymous, the number of responses was the largest received in the history of federal parliamentary committees, thus representing very high community engagement with this issue. It demonstrates that this topic goes to the heart of so many people's beliefs and values about family, marriage, religion and equality.

Legal issues

- 4.1 This chapter considers the power of the Australian Parliament to make laws in relation to marriage, and then examines the amendments proposed in each bill against the objectives of the bill.
- 4.2 In this chapter the report makes comment on the text of each bill, specifically in regard to how effectively the bill may achieve its stated purpose.

Marriage power

- 4.3 Section 51 of the Constitution gives Parliament the power to make laws with respect to marriage. It is not clear, however, if this power includes the power to make laws with respect to same-sex marriage.¹
- 4.4 Parliament does not have the power to define the term marriage; only the High Court can define the word 'marriage' as used in the Constitution and interpret the Section 51 power to make laws with respect to marriage.² Parliament can pass legislation with a provision that defines marriage, but the High Court is the authority that determines if that provision is consistent with the Constitutional definition, in accordance with the doctrine that 'the stream cannot rise above its source'.³
- 4.5 Australia's constitutional system allows for Parliament to pass legislation that it believes it has the power to do so, and for the legislation to be challenged subsequently in the High Court, should its constitutionality be

1 Law Council of Australia (LCA), *Submission 22*, p. 9.

2 Gilbert + Tobin Centre of Public Law (G+T), *Submission 2*, p. 2; Lawyers for the Preservation of the Definition of Marriage (LPDM), *Submission 9*, p. 3; LCA, *Submission 22*, p. 10.

3 Professor George Williams, Private briefing, Canberra, 22 March 2012, p. 13.

in question. However, a challenge can only be taken to the High Court once a law is passed, not before.⁴

4.6 The process of Parliament passing legislation that is then challenged in the High Court is not an uncommon occurrence, and is at the heart of Australia's democracy and constitutional system of separation of powers.

4.7 Thus far the High Court has not defined marriage or the limits of Commonwealth power to legislate in respect to marriage. The 2004 amendment to the Marriage Act included a provision which defined marriage so narrowly that there was no basis for a challenge.⁵

4.8 Legal pronouncements have been made both in support of and in opposition to the possibility of the High Court defining marriage to include same-sex couples. Some insist that the meaning of marriage in 1901 when the Constitution was enacted must remain the meaning in perpetuity to reflect the intentions of the drafters of the Constitution; others point to High Court precedents where the evolving nature of society has been taken into account.⁶

4.9 Should the High Court subsequently define marriage to include same-sex marriage, then it is likely that the High Court would consider it within Parliament's power to make laws with respect to same-sex marriage. If the High Court retains the original meaning of marriage, it is possible that the High Court would consider that Parliament's power to make law with respect to marriage does not extend to same-sex marriages.

4.10 However, it is not certain how the High Court would approach the issue. As Mr Rocher, of the Lawyers for the Preservation of the Definition of Marriage, noted, 'Nothing in the High Court is a certainty.'⁷ Professor George Williams elaborated that:

[The outcome] would depend upon when it goes to the [High Court] given that there are four appointments – the majority of the court – over the coming years and, if nothing else, it will depend upon who those people are and on how they approach the matter.

...

The simplest way is for the Parliament to pass legislation that it believes has a reasonable chance of passing through the High

4 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 7.

5 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 13.

6 G+T, *Submission 2*, p. 3; LCA, *Submission 22*, p. 9.

7 Mr Neville Rochow, LPDM, *Committee Hansard*, Sydney, 12 April 2012, p. 16.

Court. If that proves to be incorrect, then matters are taken into hand.⁸

- 4.11 The Law Council of Australia submitted that it 'considers that there is sufficient scope for the Committee to proceed to examine draft legislation on the basis that the Commonwealth Parliament has such power'.⁹
- 4.12 The report notes the debate regarding the Commonwealth Parliament's power to enact the changes as proposed in these bills. The report is satisfied that this debate is not central to its inquiry into the two bills or to the consideration of the bills in Parliament. Rightly, arbitration on the powers of Parliament can only take place in the High Court in the event of the enactment of either bill.

Provisions of the bills

- 4.13 For practical purposes, it may be desirable for the proponents of the two bills to discuss agreeing on the text of a single bill for the Parliament to consider. However, for the purposes of this report, the Committee has considered the two bills referred to it, and has made comments on the texts of these bills.

Objects

- 4.14 The object of the Marriage Amendment Bill 2012 (the Jones Bill) is to 'amend the *Marriage Act 1961* to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life.'
- 4.15 The Law Council of Australia pointed out that the word 'adult' should be removed to avoid any confusion, as:

Part II of the Marriage Act allows people under the age of 18 to marry in certain circumstances. Including the word 'adult' in the objects clause leads to inconsistency with Part II.¹⁰

8 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 16.

9 LCA, *Submission 22*, p. 10.

10 LCA, *Submission 22*, p. 10.

4.16 The objects of the Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill) are:

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

4.17 Although several submissions supported the Bandt/Wilkie Bill, the Committee also heard several objections to the wording of the objects of the Bandt/Wilkie Bill.¹¹ Mr Frederick Brohier, from the Lawyers for the Preservation of the Definition of Marriage, told the Committee that ‘Parliament should think very carefully about the objects as expressed in Mr Bandt’s bill’.¹²

4.18 FamilyVoice Australia argued that:

... the claim that ‘freedom of sexual orientation and gender identity are fundamental human rights’ is not recognised in any declaration or convention adopted by the United Nations.

4.19 The Anglican Church Diocese of Sydney prefers the object in the Jones Bill, pointing out that although the second object of the Bandt/Wilkie Bill purports to recognise human rights:

...there is no provision in the bill recognising freedom of sexual orientation and gender identity as fundamental human rights.¹³

The Anglican Church also challenged the third object regarding the celebration of diversity:

Such an object may be appropriate in the context of anti-discrimination legislation but not for a bill to amend the definition of marriage. It is not immediately apparent how objects expressed in such loose terms could affect the construction of the substantive provisions of the Bill. However their retention may give rise to an unintended interpretation of the substantive provisions in view of section 15AA of the *Acts Interpretation Act 1901* (Cth) which requires that in interpreting a provision of an Act, the

11 For example, Australian Psychological Society, *Submission 39*; Gay and Lesbian Rights Lobby, *Submission 8*; UnitingJustice Australia, *Submission 42*; Australian Human Rights Commission, *Submission 10*.

12 Mr Frederick Brohier, LPDM, *Committee Hansard*, Sydney, 12 April 2012, p. 22.

13 Anglican Church Diocese of Sydney (Anglican Church), *Submission 11*, p. 5.

interpretation that would best achieve the purpose or object of the Act is to be preferred to each other interpretation.¹⁴

- 4.20 Australian Marriage Equality (AME) suggested that in addition to protecting the rights of same-sex couples, the objects should include reference to ‘the benefits of marriage equality for the families of same-sex partners and for society’.¹⁵
- 4.21 Regardless of divisions of opinion on the desirability of the various objects, the text and objects of each bill should be assessed as to how effectively it achieves the purpose of that bill. I

Subsection 5(1) (definition of *marriage*)

- 4.22 The Bandt/Wilkie Bill proposes that the words ‘a man and a woman’ in the definition of marriage in the *Marriage Act 1961* (Cth) (the Marriage Act) be replaced with ‘two people, regardless of their sex, sexual orientation or gender identity’.
- 4.23 The Jones Bill proposes that the words ‘a man and a woman’ in the definition of marriage in the Marriage Act be replaced with ‘two people, regardless of their sex’.
- 4.24 While both definitions seek to enable same-sex couples to marry, the report notes that there are differences regarding the most appropriate wording.
- 4.25 The Law Council of Australia stated that:
- ... the phrase ‘regardless of their sex’ may be too narrow to achieve marriage equality for same-sex couples as the reference to ‘sex’ in this context may not encompass all people who consider themselves part of the Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) community. Other concepts associated with gender or sexual orientation may be more inclusive of members of the LGBTI community.¹⁶
- 4.26 New South Wales MLA the Hon. Trevor Khan submitted that:
- In my view, any Bill that seeks to amend s. 5 (1) of the Marriage Act 1961 must not only refer to same sex-couples, but to sexual

14 Anglican Church, *Submission 11*, p. 5.

15 Australian Marriage Equality (AME), *Submission 30*, p. 72.

16 LCA, *Submission 22*, p. 11.

orientation and gender identity, so as to remove any doubt that transgender and intersex people are caught by the amendment.¹⁷

4.27 The Australian Human Rights Commission advised that ‘we support each bill but we prefer the wider of the definitions.’¹⁸

4.28 AME also noted that ‘the longer definition makes it clear that discrimination on the additional grounds of sexual orientation and gender identity are as unacceptable as discrimination on the grounds of sex.’¹⁹

4.29 TransGender Victoria expressed preference for the definition in the Bandt/Wilkie Bill:

... due to the inclusion of the words ‘sex, sexual orientation or gender identity’ as distinct from simply ‘sex.’ We would note, however, that we would prefer [the Jones Bill] be passed than neither bill be passed.²⁰

4.30 However, legal opinion suggested by Gilbert + Tobin Centre of Public Law that the words ‘regardless of sex’ would cover people of any sexual orientation or gender identity. They submitted that this wording ‘is clearly sufficient to provide for same-sex marriage and it is not apparent that any material difference is made’ by the longer definition in the Bandt/Wilkie Bill.²¹

4.31 Professor Williams advised the Committee that he prefers the ‘simplicity’ of the definition in the Jones Bill, which he considers ‘is extremely broad, and the courts would see that’.²² He elaborated:

I think that you could go long form and try and set out all the different ways in which people are described, [but this] is problematic because even if you adopt ‘gender identity’, ‘sexual orientation’ and ‘regardless of sex’, perhaps in the future there are other ways in which we understand what it means to be a person.²³

17 The Hon. Mr Trevor Khan, *Submission 32*, p. 3.

18 Ms Catherine Branson, President, Australian Human Rights Commission, *Committee Hansard*, Sydney, 12 April 2012, p. 42.

19 AME, *Submission 30*, p. 73.

20 TransGender Victoria, *Submission 20*, p. 2.

21 G+T, *Submission 2*, p. 2.

22 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 15.

23 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 19.

- 4.32 Professor Williams then went on to support the even simpler definition of a 'union of two people'.²⁴
- 4.33 The Law Council of Australia noted that in Canada the definition of marriage does not refer to sex at all, simply referring to 'two persons'.²⁵ They stated that:
- ... the phrase "regardless of sex, sexual orientation and gender identity" may need to be defined given that these concepts do not appear to be settled.²⁶
- 4.34 Given the intention of the bills, Professor Williams opined that 'it is problematic that we seek to remove discrimination while still putting in indicators of that, even if it is meant to be in a positive way'²⁷ and that 'it runs a little perversely against the intention of having equality in the space'.²⁸
- 4.35 Liberty Victoria considers that the phrase 'regardless of their sex, sexual orientation or gender identify' is not required in the definition of marriage and could instead be inserted in a definition of the word 'people':
- While fervently agreeing with the sentiment it expresses, in Liberty's view the statement of non-discrimination would be better located as a separate subsection of the definitions section, leaving the marriage definition simple, and placing the non-discrimination phrase at a more general level.²⁹
- 4.36 The report notes concerns raised that the definition of marriage as proposed in these bills may not encompass transgender or intersex people, or those with non-typical sex chromosomes. As the objects of both bills clearly seek to remove discrimination in the Marriage Act and provide inclusiveness, it is important that the proposed amendments do not inadvertently fall short of removing discrimination against all couples who wish to marry and are eligible to do so under the other sections of the Marriage Act (for example, meeting the eligibility criteria of age, not being married, having provided a valid notice of an intention to marry).

24 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 19.

25 LCA, *Submission 22*, p. 15.

26 LCA, *Submission 22*, p. 15.

27 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 19.

28 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 15.

29 Liberty Victoria, *Submission 34*, p. 6.

- 4.37 The evidence tendered above by legal organisations suggests that it is preferable to avoid placing limitations on the meaning of ‘people’ in terms of sex, sexual orientation or gender identity in the definition of marriage.

Section 47 (ministers of religion not bound to solemnise marriage)

- 4.38 Australia’s Constitution provides for freedom of religious practice. This is reflected in the Marriage Act, which specifies in Section 47 that ministers of religion, who are celebrants, are not bound to solemnise any marriage. That is, ministers of religion may refuse to solemnise a marriage that does not comply with that particular religion’s prerequisites for marriage.

- 4.39 Professor Williams advised:

That is the nature of religious freedom in this particular space – particularly when it comes to marriage, it is recognised that marriage goes to the heart of many religious faiths. To require them to be involved in marriages which may go against those faiths is not appropriate. It also arguably breaches the Constitution. Section 116 says that the federal parliament cannot breach the free exercise of any religion.³⁰

- 4.40 The Committee received overwhelming support for Section 47 to apply to same-sex marriages should such legislation be enacted. In the online survey, more than 200 000 people indicated that they support this exemption.

- 4.41 Metropolitan Community Church Sydney stated that:

MCC Sydney supports the freedom of religion for all faiths. ... Some Christian churches only marry those who are members of their church. Some Christian churches will marry people who have been divorced while others will not. If legal, some Christian churches will marry same-sex couples while others will choose not to. MCC Sydney supports the rights of all churches to practise their faith according to their own [conscience].³¹

- 4.42 AME reported that a number of clergy support same-sex marriage, who have noted that:

While the issue of same-sex marriage is supported by some churches and opposed by others, one area that all churches would agree on is that religious ministers should be under no obligation

30 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 8.

31 Mr Khan, *Submission 32*, p. 33.

to perform same-sex marriages if it does not accord with the doctrines of their faith.³²

4.43 AME stated that 'if religious bodies wish to retain an exclusive definition of religious marriage they have that right'.³³

4.44 The Association of Australian Christadelphian Ecclesias submitted that:

We appreciate the provision of Section 47 of the Act which allows our marriage celebrants, as ministers of religion, to exercise their individual conscience in accepting or declining to solemnise the marriage of any couple. We firmly believe and uphold that the Bible teaches scriptural marriage is only between a man and woman for life and our marriage celebrants will continue to conduct our ceremonies on that basis. ... We request that the clear intent of Section 47 in its current form be preserved.³⁴

4.45 Both bills intend for this provision to continue should same-sex marriage be legalised. The Jones Bill proposes the insertion of a clause specifically releasing ministers of religion from being obliged to perform same-sex marriage; whereas the Bandt/Wilkie Bill includes a note on application to emphasise that Section 47 would apply to same-sex marriages. The Bandt/Wilkie Bill also proposes to extend the protections in Section 47 to 'any other law'.

4.46 UnitingJustice noted that both bills 'provide model clauses that effectively balance the rights associated with freedom of religion with the rights of non-discrimination and equality.'³⁵

4.47 Gilbert + Tobin Centre of Public Law advised that:

... section 47 already provides that religious ministers can refuse to solemnise any particular marriage. However, being as explicit as the Bill on this point in the context of same-sex marriage may be desirable, particularly given the Constitution's guarantee in section 116 that the Commonwealth cannot limit the free exercise of religion.³⁶

32 AME, *Submission 30, Attachment 9*, p. 1.

33 AME, *Submission 30*, p. 37.

34 Association of Australian Christadelphian Ecclesias, *Submission 41*, p. 1.

35 UnitingJustice Australia, *Submission 42*, p. 6.

36 G+T, *Submission 2*, p. 6.

4.48 Professor Williams added, 'I do not have a problem with section 47 being extended to make it clear to people that it is indeed the case. But as to whether it is a legal necessity, it is not.'³⁷

4.49 The Anglican Church Diocese of Sydney prefers that the bills:

... provide for the insertion of the words 'or any other law' in section 47 of the *Marriage Act 1961* following the words 'Nothing in this Part' to make it clear that there is no other source of legal obligation (such as anti-discrimination or equality laws) for a minister of religion to solemnise a marriage involving a same-sex couple.³⁸

4.50 However, it is noted that inserting a specific reference to same-sex marriages to a provision that already covers any marriage, only serves to highlight the very discrimination that is being legislated against. For this reason, AME prefers the Bandt/Wilkie Bill:

... both Bills still seek to allay outstanding concerns about the freedom of religious celebrants not to marry same-sex couples should either Bill become law. Australian Marriage Equality supports provisions which make it clear that religious celebrants will be under no obligation to marry same-sex couples, should it be against their doctrine, values or wishes ... [but] our preference is for the relevant provision in the [Bandt/Wilkie] Bill. It reinforces the religious freedom inherent in s47 without singling out same-sex marriages. The relevant provision of the [Jones] Bill does single out same-sex marriages. This suggests that same-sex marriages are somehow different to, or less acceptable than, other marriages which religious celebrants may be disinclined to solemnise, such as marriages between divorcees or marriages between people of different faiths or no faith. It also suggests there is special repugnance to same-sex marriages among people of faith which is not the case for most Australian Christians, as polls we have cited show.³⁹

4.51 Liberty Victoria goes further in its objection to both bills' reassurance that Section 47 would apply to same-sex marriages:

Liberty ... does not endorse adding, as the [Bandt/Wilkie and Jones] Bills seek to do, a special section to emphasize, in relation to same-sex couples, what s.47 already does in relation to other

37 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 23.

38 Anglican Church, *Submission 11*, p. 7.

39 AME, *Submission 30*, pp. 74–75.

marriages that religious bodies currently refuse to perform, such as those involving a divorced person, or a non-member of the faith in question. Such unnecessary singling out serves only to leave a residual stench of past discrimination, and should be avoided.⁴⁰

4.52 The emphasis on same-sex marriages in particular may arise from concerns among religious groups that changing the definition of marriage might impinge upon their religious freedom. Bishop Forsyth acknowledged that ‘there is a lot of fear out there amongst Christians, which I think is unrealistic. I do not believe there is any intention’ to restrict religious freedom.⁴¹

4.53 Professor Andrew Lynch advised the Committee that such fears are:

... quite palpable, but section 116 really does provide a very clear answer to that ... [as it] ensures that the Commonwealth cannot impose any religious observance upon people. There is quite a clear distinction between talking about marriage recognised in a secular way and solemnisation with respect of churches.⁴²

4.54 Section 47 as it currently stands in the Marriage Act is sufficient to protect the religious freedom of ministers of religion when solemnising marriages, including same-sex marriages should they be legal.

4.55 It may be appropriate to insert the words ‘or in any other law’ into Section 47, as per the Bandt/Wilkie Bill, to allay any fears that freedom of religious conscience might be eroded in future.

4.56 The provisions in Section 47 should apply to all authorised celebrants and not just to ministers of religion, as authorised celebrants are not necessarily secular. The Coalition of Celebrants Association asserted that:

All authorised celebrants registered under Subdivision C of Division 1 of Part IV of the [Marriage] Act, irrespective of their beliefs, should benefit from this provision. Some civil and non-aligned religious celebrants would have difficulty continuing in their role if this section is not extended to cover their beliefs.⁴³

4.57 Engage Celebrants concurred:

In the same way that religious ministers are able to deny ceremonies to those who don’t fit all the requirements of their

40 Liberty Victoria, *Submission 34*, p. 5.

41 Bishop Forsyth, *Committee Hansard*, Sydney, 12 April 2012, p. 15.

42 Professor Andrew Lynch, *Committee Hansard*, Sydney, 12 April 2012, p. 15.

43 Coalition of Celebrants Association, *Submission 15*, p. 2.

church, celebrants should be able to choose not to offer their services to couples if they feel they cannot fully support that couple. In reality it is unlikely to ever be an issue as couples will choose a celebrant who they get along with and who can deliver their vision of their day. However it is important that legislation is enacted to protect celebrants so that we don't end up with nuisance complaints which are purely attention-seeking and which could cause damage to the celebrant industry.⁴⁴

4.58 The Anglican Church Diocese of Sydney recommended:

... an extension of the protections in section 47 of the *Marriage Act 1961* to civil celebrants where the marriage to be solemnised is between persons of the same sex.⁴⁵

4.59 Neither of the bills under scrutiny proposes amendments to the sections of the *Marriage Act* which delineate the categories of authorised celebrants. Consequently these issues are outside the scope of this inquiry. However, advice from the Attorney-General's Department notes that:

While there is no similar provision in the [Marriage] Act for authorised celebrants who are not ministers of religion, the [Marriage] Act does not impose a positive obligation on such a celebrant to solemnise any marriage. An authorised celebrant with concerns about whether to solemnise a marriage is entitled not to proceed.⁴⁶

4.60 Both bills ensure continuation of the existing Section 47 of the *Marriage Act* which provides that ministers of religion are not obliged to solemnise any marriage.

4.61 There is no evidence to suggest that either the approach of the Bandt/Wilkie Bill (which relies on the existing Section 47 provisions in the *Marriage Act*) or the approach of the Jones Bill (which reiterates these provisions) is preferable. Accordingly, the evidence makes no distinction between the bills on these grounds and considers that both adequately ensure that ministers of religion are not obliged as celebrants to solemnise any marriage, including same-sex marriages should they be legalised.

44 Engage Celebrants, *Submission 26*, p. 3.

45 Anglican Church, *Submission 11*, p. 2.

46 Attorney-General's Department, *Guidelines on the Marriage Act 1961 for Marriage Celebrants 2012*, p. 99.

Section 88EA (recognition of overseas same-sex marriages)

- 4.62 Both bills seek to repeal Section 88EA, which was inserted in the Marriage Act in 2004 to expressly disallow the recognition in Australia of same-sex marriages performed overseas.
- 4.63 The Law Council of Australia submitted that it has 'previously expressed concerns ... that this section may contravene Australia's obligations under Article 9 of the Hague Convention on the Celebration and Recognition of the Validity of Marriages'.⁴⁷
- 4.64 The Gay and Lesbian Rights Lobby claimed that 88EA is a 'disgraceful demonstration of Australia's discriminatory position on civil marriage equality'.⁴⁸
- 4.65 Professor Kerry Phelp, from Parents and Friends of Lesbians and Gays, told the Committee:
- On a professional level, I see people of all ages all the time saying that they feel so discriminated against in Australia that they feel compelled, ... like me, to travel overseas to formalise in a legal sense our partnerships.⁴⁹
- 4.66 Mr Khan provided examples of the experiences of some of his same-sex married constituents:
- When we flew out of Canada bound for our home in Sydney we were somehow unmarried somewhere over the ocean;
 - We're 'married' under British law but as soon as we stepped out of the Consulate onto Australian soil (where we are citizen and live), our contract became null and void.⁵⁰
- 4.67 Given that both bills aim to remove discrimination in the Marriage Act, the report considers repealing Section 88EA to be a necessary amendment in order to achieve this purpose. Both bills propose repealing this section; accordingly the report makes no distinction between the bills on these grounds, and considers that both effectively achieve their stated objects.

47 LCA, *Submission 22*, p. 13.

48 Gay and Lesbian Rights Lobby, *Submission 8*, p. 10.

49 Professor Kerry Phelp, Representative, Parents and Friends of Lesbians and Gays, *Committee Hansard*, Sydney, 12 April 2012, p. 49.

50 Mr Khan, *Submission 32*, p. 32.

Consequential amendments

- 4.68 Item 9 of the Bandt/Wilkie Bill notes that the Governor-General may make regulations to amend other Acts that are consequential to the enactment of the Bandt/Wilkie Bill.
- 4.69 Liberty Victoria recommended that this item be included in both bills.⁵¹
- 4.70 For the bills to effectively achieve their purposes, the need may arise for consequential amendments to other Acts. The report notes the inclusion of this provision in the Bandt/Wilkie Bill and considers that the same inclusion in the Jones Bill would strengthen that bill in achieving its objects.

51 Liberty Victoria, *Submission 34*, p. 5.

In conclusion

- 5.1 This was an inquiry held to examine legal and social issues relating to the two bills, and the effectiveness of each bill in achieving its stated purpose. It was not an inquiry to determine the merits of same-sex marriage. It is for the Parliament to determine the passage of the bill and this report aims to inform the Parliament in its debate on the text and outcome of each bill.
- 5.2 While the intent of both bills is to legalise same-sex marriage, the bills feature differences in wording. The report has provided comments in regards to the capacity of each bill to achieve its purpose of removing discrimination in the *Marriage Act 1961* (Cth) and legalising same-sex marriage.
- 5.3 As the Parliament will debate these bills, the Parliament may wish to note the following amendments suggested by the evidence taken during the course of the inquiry.
- 5.4 The Marriage Equality Amendment Bill 2012 should be amended as follows:
- remove the words ‘regardless of their sex, sexual orientation or gender identity’ in the definition in Item 1; and
 - replace the Objects with the words ‘The object of this Act is to amend the *Marriage Act 1961* to ensure equal access to marriage for all couples who have a mutual commitment to a shared life’.

- 5.5 The Marriage Amendment Bill 2012 should be amended as follows:
- remove the words 'regardless of their sex' in the definition in Item 1;
 - remove the word 'adult' in the Objects;
 - after 'Part', insert 'or in any other law' in Section 47;
 - remove Item 3 in Schedule 1; and
 - insert an additional item in Schedule 1 that acknowledges regulations may make consequential amendments of Acts.

Mr Graham Perrett MP
Chair
18 June 2012



Appendix A – List of published statements

- 1 Amnesty International Australia
- 2 Gilbert + Tobin Centre of Public Law
- 3 The Hon. Michael Kirby AC CMG
- 4 Sikh Council of Australia
- 5 Lutheran Church of Australia
- 6 Quakers Australia
- 7 Parents and Friends of Lesbians and Gays
- 8 Gay and Lesbian Rights Lobby
- 9 Public Interest Advocacy Centre Ltd
- 10 Australian Human Rights Commission
- 11 Anglican Church Diocese of Sydney
- 12 Hindu Council of Australia
- 13 Australian Catholic Bishops Conference
- 14 Catholic Archdiocese of Melbourne
- 15 Coalition of Celebrant Associations
- 16 Chinese Methodist Church in Australia
- 17 Federation of Australian Buddhist Councils Inc.
- 18 The Salvation Army Australia Southern Territory
- 19 Lawyers for the Preservation of the Definition of Marriage
- 20 TransGender Victoria

- 21 Australian Christian Lobby
- 22 Law Council of Australia
- 23 Union for Progressive Judaism
- 24 Seventh-day Adventist Church
- 25 DEFGLIS
- 26 Engage Celebrants
- 27 Episcopal Assembly of Oceania
- 28 FamilyVoice Australia
- 29 Rabbinical Council of Victoria
- 30 Australian Marriage Equality
- 31 Australian Family Association
- 32 The Hon. Trevor Khan MLC
- 33 ACT Legislative Assembly
- 34 Liberty Victoria
- 35 Ambrose Centre for Religious Liberty
- 36 Democratic Labor Party of Australia
- 37 Australian Marriage Forum
- 38 The Hon. Mr Greg Donnelly MLC
- 39 The Australian Psychological Society Limited
- 40 Castan Centre for Human Rights Law
- 41 Association of Australian Christadelphian Ecclesias
- 42 UnitingJustice Australia



Appendix B – List of witnesses appearing at public hearing

Thursday, 12 April 2012 - Sydney

Individuals

Professor Andrew Lynch

Professor George Williams

Anglican Church Diocese of Sydney

Bishop Robert Forsyth

Australian Christian Lobby

Mr Daniel James Simon, Research Officer

Mr Jim Wallace AM, Managing Director

Australian Family Association

Mrs Catherine Dodd, New South Wales President

Mrs Terri Kelleher, Victorian President

Australian Human Rights Commission

Ms Catherine Branson, President

Australian Marriage Equality

Mr Rodney Croome, Campaign Director

Mr Alexander Hart Greenwich, National Convenor

Catholic Archdiocese of Sydney

Auxiliary Bishop Julian Porteous

Civil Celebrations Network Inc.

Mr Stephen Carey, Member

Ms Rona Goold, Chairperson

Coalition of Celebrant Associations

Mr Keith Lammond, Representative

Engage Celebrants

Ms Suzanne Holland, Celebrant

FamilyVoice Australia

Dr David Phillips, National President

Mr Graeme Mitchell, State Officer, NSW and ACT

Federation of Australian Buddhist Councils Inc.

Venerable Bhante Sujato, Monastic Sangha Representative

Hindu Council of Australia

Professor Nihal Singh Agar, Chairman

Lawyers for the Preservation of the Definition of Marriage

Mr Frederick Brohier, Barrister

Mr Neville Grant Rochow SC, Council Member

Lutheran Church of Australia

Reverend Dr Michael Semmler, President of the Church

Salvation Army

Major Graeme Rigley, Chairman, Moral and Social Issues Council

North New South Wales Conference of Seventh-Day Adventists

Pastor Peter Bradfield Cousins

NSW Gay and Lesbian Rights Lobby

Mr Justin Koonin, Co-Convenor

Mr Senthorun Raj, Senior Policy Adviser

Parents and Friends of Lesbians and Gays

Ms Shelley Argent, National Spokesperson

Professor Kerry Phelp, Representative

Public Interest Advocacy Centre Ltd

Ms Elizabeth Simpson, Senior Solicitor

Sikh Council of Australia Inc

Mr Bawa Singh Jagdev OAM, Secretary

Union for Progressive Judaism

Mr Steve Denenberg, Executive Director

