

Dissenting Report of an Individual Labor Senator

1.1 This Bill seeks to amend the *Marriage Act 1961* (Marriage Act) to remove the prohibition on the recognition of same-sex marriages solemnised under foreign law.

1.2 Accordingly the focus of the Senate Committee's inquiry is restricted to this issue, rather than the broader issue of marriage equality. However, as acknowledged in the Majority Report, the bulk of the submissions provided to the committee contained arguments going to the broader issue of marriage equality.

1.3 These issues were comprehensively reported in the 2012 Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill 2010.

1.4 The only significant developments since the tabling of that report have been continued growth in both public support of marriage equality in Australia¹ and the number of countries that have legalised same-sex marriage.²

1.5 Full marriage equality, irrespective of an individual's sexual orientation, gender identity or intersex status, is long overdue in Australia. Whilst any discrimination exists there is no equality, action must be taken in Australia to bring about true equality for same-sex couples.

1.6 The current definition of marriage contained within the Marriage Act discriminates against same-sex couples, denying them the fundamental social, cultural, psychological, health, administrative and legal benefits marriage can provide.

1.7 All adults, irrespective of their sexual orientation, gender identity or intersex status, deserve to have their relationships treated with dignity and respect and that is why marriage equality is critically important. Allowing all couples access to marriage under Australian law will only strengthen the institution of marriage, increasing its value and significance in the modern Australian community.

1.8 Whilst this Bill does not go far enough in addressing this issue, I believe that any move to bring Australia closer to marriage equality is positive.

1.9 I therefore reject the recommendation of the Majority Report and support an amended Bill. I also recommend that all political parties allow their federal senators

1 The Crosby/Textor survey on Australians attitudes to same-sex marriage from July 2014 found that 72% of Australians support marriage equality.

2 Note that for the purposes of this report the term 'same-sex marriage' is intended to be inclusive of two people of marriageable age irrespective of sexual orientation, gender identity or intersex status.

and members a genuine conscience vote in relation to the marriage equality, including recognition of foreign same sex marriages.

1.10 The Bill should be amended to adequately address concerns raised about the drafting, including the removal of gender specific terms which could exclude people who are intersex or transsexual.³

Recognition of Foreign Same-Sex Marriage in Australia

1.11 The number of foreign jurisdictions allowing same-sex couples to marry continues to grow. At the time of this inquiry the following countries had legalised same-sex marriage: The Netherlands; Belgium; Spain; Canada; South Africa; Norway; Sweden; Portugal; Iceland; Argentina; Denmark; Uruguay; New Zealand; France; Brazil; England and Wales; Luxembourg; and Scotland.⁴

1.12 Additionally, same-sex couples can marry in a number of sub-national jurisdictions of the Unities States of America and Mexico.⁵

1.13 A number of other jurisdictions, namely Israel, Japan, Italy, Malta and the Netherlands Antilles, recognise foreign same sex marriages even though they do not allow same-sex marriage under their domestic laws.⁶

1.14 Whilst foreign same-sex marriages are not recognised as marriages under Australian law, they are given some level of recognition, including under family law.⁷

1.15 The Tasmanian relationship recognition scheme automatically recognise foreign same-sex marriages as local civil unions, meaning that same-sex couples married under foreign laws have the same rights as married, civil union or de facto heterosexual couples under the laws of these states.⁸

1.16 In recent years there have also been policy changes in Australia to enable Australia citizens to enter into same-sex marriages under foreign laws.

3 See, for example, Organisation Intersex International Australia Limited, *Submission 26*, p. 1; Law Institute of Victoria, *Submission 39*, p. 2; Law Society of New South Wales, *Submission 17*, p. 2; Human Rights Law Centre, *Submission 20*, p. 3; Australian Marriage Equality, *Submission 19*, p. 6; ACON, *Submission 35*, p. 1 and Australian Sex Party, *Submission 50*, p.1.

4 Australian Marriage Equality, *Submission 19*, p. 4.

5 Victorian Gay and Lesbian Rights Lobby, *Submission 22*, p. 2.

6 Mr Jamie Gardiner, Member of Human Rights Committee and LIVout Working Group, Law Institute of Victoria, *Committee Hansard*, 21 August 2014, p. 42.

7 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 12.

8 Regulation 8, *Relationships Regulations 2013* (Tas).

1.17 Since 1 February 2012 the Commonwealth Government has issued Certificates of No Impediment to Marriage to same-sex couples seeking to marry in foreign countries where such certificates are required, including Portugal, Spain, Norway and South Africa.⁹

1.18 As of June this year Australian same-sex couples who qualify to marry under British Law have been able to marry in British consulates in Australia.¹⁰ However as the Marriage Act stands, these marriages are not be recognised as soon as the couples leave the consulate and return to Australian soil.

1.19 The most recent available Census figures, from 2011, show that more than 1,300 same sex couples have married overseas.¹¹ Evidence provided to the Committee suggests that this figure would be significantly higher now, particular following the legalisation of same-sex marriage in New Zealand and the legalisation of same-sex marriage in Britain (and the policy change which allows couples to marry in British consulates).¹²

1.20 For example, Australian Marriage Equality provided information to the Committee stating that New Zealand Registrar of Births, Deaths and Marriages records show that 234 Australian same-sex couples married in New Zealand between 19 August 2013 and 23 July 2014.¹³

1.21 It is incongruous that in spite of policy changes that enable same-sex couples to marry under foreign laws and the recognition of foreign same-sex marriages as civil unions or de facto partnerships under state and Commonwealth laws, these unions are still not legally considered marriage under Australia law.

Practical benefits of recognition of foreign same-sex marriages

1.22 The Federal Labor Government's 2008 same-sex law reforms made significant progress in removing discrimination against same-sex couples; however it is clear that inequality under the law remains.

9 See the Hon Nicola Roxon MP, Attorney-General, *Certificates of No Impediment to marriage for same-sex couples*, Media release, 27 January 2012, available at <http://www.andrewleigh.com/2130> (accessed on 22 September 2014).

10 Australian Marriage Equality, *Submission 19*, p. 6

11 Australian Bureau of Statistics, 2012, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, cat. No. 2071.0, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013> (accessed on 22 September 2014)

12 Mr Rodney Croome, National Director, Australian Marriage Equality, *Committee Hansard*, 21 August 2014, p. 1.

13 Australian Marriage Equality, *Submission 19*, p. 4.

1.23 Whilst same-sex foreign marriages are largely treated the same as de facto partnerships under many state, territory and Commonwealth laws there still remains a number of legal and administrative impediments for these couples.

1.24 Evidence to the committee provides real life examples of issues faced by same sex couples married under foreign laws, including the interaction between the foreign marriage laws and the state and territory relationship recognition schemes and immigration processes.

1.25 A number of submissions raised concerns about the interaction between some foreign marriage laws and state and territory relationship recognition schemes.

1.26 In their submission the Victorian Gay and Lesbian Rights Lobby states:

The ability for dual citizen couples to attain marriage in another jurisdiction but to not have that marriage recognized in Australia has created an unnecessary and burdensome legal minefield for many Australian based couples. The British Government (and some other jurisdictions) require couples to not be in a marriage or civil partnership (including civil partnership schemes recognized from another jurisdiction) before entering into a marriage under British law. Britain' civil partnership schemes recognises the Australian states and territories civil partnership schemes that operate in NSW, Victoria, Queensland, ACT and Tasmania.¹⁴

1.27 This means that same-sex couples who want to marry under foreign laws, such as those in Britain, but have already had their relationship recognised under one of the state or territories schemes are faced with the need to dissolve their partnership.

1.28 As the Victorian Gay and Lesbian Rights Lobby describe it:

In effect Australian same-sex couples are being forced to choose between the practical protections afforded to the recognition of their relationship under an Australian scheme (next of kin, immigration, legal recognition when not living under one-roof etc); or to have their relationship appropriately recognised as they see it by being legally married under the British scheme.¹⁵

1.29 This was echoed by the evidence of Australian Marriage Equality who argued:

No-one should have to face the choice of having substantive rights through having an Australian certificate or having the dignity and respect of a marriage but none of the rights. Those couples are being forced to make

14 Victorian Gay and Lesbian Rights Lobby, *Submission 22*, p. 3.

15 Victorian Gay and Lesbian Rights Lobby, *Submission 22*, p. 3.

that choice right now. An easy solution to that would be to recognise overseas same-sex marriages.¹⁶

1.30 A number of submissions cite immigration as an area where there would be practical benefits for couples if foreign same-sex marriages were recognised under Australian law.¹⁷

1.31 Specific concerns were raised about the current arrangements for partner visas and the different evidentiary burden placed on a de facto partner (which a member of same-sex couple marriage under foreign law would currently be considered) as opposed to a spouse. The New South Wales Gay and Lesbian Rights Lobby gave the specific example of de facto couples having to prove that they have been in a relationship for a specific length of time.¹⁸

1.32 In response to questions on notice from the Committee the Department of Immigration and Border Protection submitted that:

Same-sex couples who have been legally married overseas may still apply for a Partner visa, the only difference being that the applicant will be assessed as a 'de facto partner', rather than a 'spouse'. This has no impact on the assessment or the outcome of the Partner visa application, which depends on whether an applicant meets all of the relevant criteria.¹⁹

1.33 Further to this the Department's response stated that:

When assessing a spouse or de facto partner relationship for the purpose of a Partner visa, officers must, by law, consider all the circumstances of the relationship, including the:

- a) financial aspects of the relationship;
- b) nature of the household;
- c) social aspects of the relationship; and
- d) nature of the couple's commitment to each other.²⁰

16 Mr Rodney Croome, National Director, Australian Marriage Equality, *Committee Hansard*, 21 August 2014, p. 6.

17 Human Rights Law Centre, *Submission 20*, pp 2-3; Civil Liberties Australia Inc., *Submission 11*, p. 2; National LGBTI Health Alliance, *Submission 33*, pp 2-3; Victorian Gay and Lesbian Rights Lobby, *Submission 22*, p. 3 and Australian Marriage Equality, *Submission 19*, pp 4-5.

18 Mr Corey Irlam, Co-convenor, Victorian Gay and Lesbian Lobby, *Committee Hansard*, 21 August 2014, p. 4.

19 Department of Immigration and Border Protection, *Response to Written Questions on Notice*, 15 September 2014, p. 1.

20 Department of Immigration and Border Protection, *Response to Written Questions on Notice*, 15 September 2014, p. 2.

1.34 However as a number of submissions noted de facto couples face the additional requirement of proving that they have been in a de facto relationship for at least 12 months before the date of application. A requirement which is not applicable to 'spouses'.

1.35 Subregulation 2.03A(3) of the *Migration Regulations 1994* which sets out the criteria applicable to de facto partners states that 12 month criterion must be met by applicants for the following visas:

- a permanent visa
- a business skills (Provisional) (Class UR) visa
- a business skills (Provisional) (Class EB) visa
- a student (Temporary) (Class TU) visa
- a partner (Provisional) (Class UF) visa
- a partner (Temporary) (Class UK) visa
- a general skilled migration visa.

1.36 Another practical issue raised by submitters was the legal ambiguity in relation to divorce and separation where the members of a couple were married under foreign law but are Australian residents or have become Australian citizens.

1.37 In their submission Australian Marriage Equality explained the problem with the current legal situation:

For same-sex partners married overseas this can present a serious problem. They are unable to divorce under the laws of the jurisdiction that married them but are also unable to divorce in Australia because their marriage is not recognised here. The problem would be solved by recognising foreign same sex marriages as marriages for the purpose of Australian Law.²¹

1.38 The Human Rights Law Centre raised the same issue, stating that:

In certain circumstances, the lack of recognition of foreign marriages in Australia can have the cruel effect of denying people access to divorce and separation if they are, or have become, Australian citizens. Clients of community legal centres have found themselves in what is, effectively, a legal void. This can have a profound impact on individuals. The result for some has been that they continue to have legal obligations to a former spouse who continues to reside in their former country. This included continuity of claims to the (now Australian) spouse's estate in that former country.²²

21 Australian Marriage Equality, *Submission 19 – Second Supplementary Submission*, p. 4.

22 Human Rights Law Centre, *Submission 20*, pp 2-3.

1.39 These real life issues raised show that there are practical benefits to recognising same-sex foreign marriage under Australian Law. This Bill would address the legal ambiguities and complexities which have been outlined in evidence to the Committee.

Response to opposition to the Bill

1.40 Evidence to the Committee arguing against this Bill largely focused on the broader issue of marriage equality, rather than the specifics of this Bill.

1.41 As stated above these issues were comprehensively reported in the 2012 Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill 2010.

1.42 In reference to the Bill under consideration by the Committee submitters made specific arguments about differential treatment and rights, including freedom of religion.

1.43 Several submitters raised concerns, including disingenuously by those advocating against marriage equality but also by some supporters of marriage equality, about creating a new form of inequality by restricting same-sex marriage to those with the resources and capacity to travel overseas.

1.44 In their submission Australian Baptist Ministries argue that:

The bill, if it became law, would inevitably lead to the creation of a sub-class of couples who lack the financial resources or nationality to be able to take advantage of marriage equality elsewhere. This should be avoided.²³

1.45 In respect of this argument I concur with the view expressed by the Human Rights Law Centre in their evidence to the Committee. In response to questions on this issue Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, stated:

Obviously discrimination already exists. This Bill remedies some of that discrimination. There is a difference in treatment, but there are differences in treatment at the moment.²⁴

Ms Brown went on:

But it also resolves a whole lot of legal and practical problems for these couples who are already in validly formed overseas same-sex marriages. So we think the benefits of this bill far outweigh arguments put to that effect.²⁵

23 Australian Baptist Ministries, *Submission 8*, p 4.

24 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 14.

25 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 14.

1.46 As set out in the Majority Report, a number of submitters also raised concerns about the impact of the Bill on the religious freedoms of organisations and individuals.²⁶

1.47 To support this argument submitters noted a number of overseas cases of businesses refusing services to same-sex couples being prosecution under anti-discrimination law.²⁷

1.48 This argument should be rejected on two grounds. Firstly, the case law presented did not link to the recognition of same-sex marriage. In fact as noted by Australian Marriage Equality, 4 of the 6 cases cited by the Australian Christian Lobby are from jurisdictions that do not have same-sex marriage. Accordingly it is misleading to assert that these cases have any link to marriage equality laws.

1.49 Secondly and most significantly, the Bill being considered by the Committee in no way changes existing protection of religious freedom under anti-discrimination law or within the Marriage Act. It should be reiterated that this Bill does not seek to amend section 47 of the Marriage Act, which clearly states that Ministers of religion are not obliged to solemnize any marriage. Furthermore the Bill related to marriages solemnize overseas and would therefore not impact on Ministers of religion solemnizing marriages in Australia.

1.50 Additionally, the Bill does not seek to amend existing legislation on discrimination on the grounds of sexuality, transgender identity or intersex status nor does it seek to amend various exemptions for religious institutions that exist under anti-discrimination legislation.

1.51 As canvassed in the Majority Report, submissions in support of and opposition to the Bill both raised the issue of Australia's international human rights obligations.

1.52 Submitters who supported the Bill argued that the current section 88E may contravene Article 9 of the *Hague Convention on the Recognition and Celebration of Marriages* which includes the obligation to recognise marriages lawfully entered into in another country.²⁸

1.53 In their evidence to the committee the Human Rights Law Centre stated:

26 The Australian Family Association, *Submission 2*, pp 5-7; Australian Christian Lobby, *Submission 9*, p. 12 and Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, pp 7-8.

27 Australian Christian Lobby, *Submission 9* and Lawyers for the Preservation of the Definition of Marriage, *Submission 18*.

28 Law Council of Australia, *Submission 4*, p. 2; Australian Lawyers for Human Rights, *Submission 21*, pp 2-4; Law Institute of Victoria, *Submission 39*, p. 1 and Human Rights Law Centre, *Submission 20*, p. 2.

As a matter of international comity, Australia should recognise validly formed marriages from overseas, regardless of the sex or gender of the couple. We are a signatory to the Hague convention on the celebration and recognition of foreign marriages and it is our obligation under that convention to recognise those marriages.²⁹

1.54 These submitters also highlighted Australia's obligations to uphold the fundamental rights of non-discrimination and equality and specific obligations under the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and *Universal Declaration of Human Rights*.³⁰

1.55 Submitters opposed to the Bill argued that restricting marriage to a man and a woman was not discriminatory under human rights law³¹ and that enacting the Bill would breach Australia's obligations under the *Convention on the Rights of the Child*.³²

1.56 Given the number of submissions that raised the rights of the child in relation to the Bill, it is important to clarify that the Bill under consideration does not impact on a couples legal right to foster or adopt children or access Artificial Reproductive Technology (all of which are largely governed by state and territory legislation).

1.57 Furthermore, it should be noted that Australian family law already recognises overseas same-sex marriages for the purposes of property settlement and parenting issues and recognises same-sex couples as parents.³³

Issues for Further Consideration

1.58 Submitters highlighted a number of drafting and substantive issues with the Bill in its current form. Consideration should be given to amending the Bill to ensure that each of these issues are adequately addressed.

1.59 Changes should be made, as necessary, to ensure the amendments would recognise marriages solemnised under foreign law at consulates and high commissions in Australia and marriages solemnised under the laws of sub-national jurisdictions

29 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 11.

30 Human Rights Law Centre, *Submission 20*, p. 2; Law Society of New South Wales, *Submission 17*, pp 1-2; Law Institute of Victoria, *Submission 39*, p. 1; Castan Centre for Human Rights Law, *Submission 29*, pp 2-3 and Australian Lawyers for Human Rights, *Submission 21*, pp 1-2.

31 Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, p. 7; Catholic Archdiocese of Sydney, *Submission 7*, pp 3-4.

32 Reverend Darren Middleton, Convenor of the Church and Nation Committee, Presbyterian Church of Australia, *Committee Hansard*, 21 August 2014, p. 47.

33 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 12.

(where they rather than national laws regulate marriage, for example in the United States of America).

1.60 The Human Rights Law Centre suggest that both the consulate issue and the state based marriage laws in other countries could be addressed by drafting changes such as 'solemnised under foreign law' or 'solemnised outside of Australia'.³⁴

1.61 A number of submissions also highlighted that section 88B(4) of the Marriage Act provides that the meaning of marriage in section 88E is given by section 5(1), which defines a marriage as a union between a man and a woman.³⁵

1.62 The evidence to the Committee suggested that the Bill would fail to achieve its aim unless both sections 88B(4) and 88EA were repealed.³⁶

1.63 A number of submitters highlighted the inadequacy of the Bill in its current form in recognising the foreign marriages of intersex or otherwise gender or sex diverse individuals.³⁷ The Bill should be amended to address this issue.

1.64 As set out at page 17 of the Majority Report, this issue was highlighted to the Committee by the evidence of Tony Briffa, Vice-President of both Organisation Intersex Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc.

1.65 I support the comments in the Majority Report at paragraphs 2.66–267:

The committee is concerned by the issues raised in relation to the recognition of marriages for intersex people, as well as their recognition in Australian birth certificates and passports.

Whilst the recognition of intersex people in Australian birth certificates and passports is not germane to the terms of the Bill subject to this inquiry, the committee urges the Commonwealth government to give further consideration to the evidence of Tony Briffa regarding intersex rights and intersex marriage and to how these issues can be addressed.

1.66 Submitters also suggested that consideration could be given to making amendments to avoid any uncertainty about the status of existing same-sex foreign marriages.

34 Mr Corey Irlam, Co-convenor, Victorian Gay and Lesbian Lobby, *Committee Hansard*, 21 August 2014, p. 7.

35 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 13.

36 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 13.

37 Organisation Intersex International Australia Limited, *Submission 26*, p. 1; Law Institute of Victoria, *Submission 39*, p. 2; Law Society of New South Wales, *Submission 17*, p. 2; Human Rights Law Centre, *Submission 20*, p. 3; Australian Marriage Equality, *Submission 19*, p. 6; ACON, *Submission 35*, p. 1 and Australian Sex Party, *Submission 50*, p.1

Concluding Comments

1.67 It has been 10 years since the Marriage Act was amended to define marriage as being between a man and a woman and to establish that foreign marriages between members of the same-sex would not be recognised as marriages for the purposes of Australian law.

1.68 In this time an increasing number of countries have legalised same-sex marriage and more Australians have entered into foreign same-sex marriages.

1.69 This Bill will not only remove the legal impediments that this Committee have heard evidence of but also to provide the respect and dignity of recognition to those couples who have entered into legally valid marriages under foreign laws.

1.70 Full marriage equality is long overdue in Australia and whilst this will not be achieved by this Bill it is a positive step.

1.71 I strongly support the Bill and call on the major political parties to allow a genuine conscience vote on the matter.

Recommendation 1

1.72 That an amended Bill be passed, which based on my conscience I will be supporting.

Recommendation 2

1.73 That all political parties allow their senators and House of Representatives members a conscience vote in relation to marriage equality, including the recognition of foreign same-sex marriages.

**Senator Carol Brown
Senator for Tasmania**

