

**Submission by  
New South Wales Young Lawyers**

**Parliamentary Inquiry into the Same-Sex  
Relationships (Equal Treatment in  
Commonwealth Laws – General Law Reform)  
Bill 2008**

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16 September 2008

Dear Committee Secretariat,

**Parliamentary Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008**

NSW Young Lawyers is grateful for the opportunity to make a submission to the *Parliamentary Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*.

NSW Young Lawyers is made up of law students and legal practitioners who are in their first 5 years of practice or under the age of 36. This submission has been prepared by members of the NSW Young Lawyers Human Rights, Public Law and Family Law Committees. The Human Rights Committee is concerned with a range of human rights issues in both Australia and abroad and aims to raise awareness and provide education to the legal profession and wider community on these issues. The Public Law Committee is concerned with public and administrative law and aims to raise awareness of the importance of public law for the protection of public rights. The Family Law Committee aims to provide professional education in family law for the whole profession and to proactively monitor and have input into changes in family law.

The submission has also been given national Young Lawyer endorsement by the Law Council of Australia's Australian Young Lawyers Committee.

If you have any questions in relation to the matters raised in this submission, please contact Mila Cerecina, Chair of the NSW Young Lawyers Human Rights Committee ([hrc.chair@younglawyers.com.au](mailto:hrc.chair@younglawyers.com.au)), Rocelle Ago, Chair of the NSW Young Lawyers Public Law Committee ([publiclaw.chair@younglawyers.com.au](mailto:publiclaw.chair@younglawyers.com.au)) or Joshua Knackstredt, President of NSW Young Lawyers ([president@younglawyers.com.au](mailto:president@younglawyers.com.au)).

Yours faithfully,

Josh Knackstredt

President

NSW Young Lawyers

## **SUBSTANTIVE SUBMISSION**

New South Wales Young Lawyers (NSWYL) would like to express its support for the Australian Government's decision to hold a Parliamentary Inquiry into the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*.

However, we emphasise the importance of abolishing marriage discrimination inherent in our current legal system and statutory provisions. We remind the Commonwealth Government that discrimination against same-sex couples and families continues to be pervasive so long as marriage is available to heterosexual couples only.

### ***The Right to Marry in Australia***

Pursuant to the *Marriage Act 1961* (Cth), a marriage is defined as;

*“the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.*

In August 2004 amendments were made to the *Marriage Act 1961* (Cth) reinforcing the common law position in Australia that a valid marriage is one that can only be entered to between a heterosexual couple.

In Australia's recent Common Core Document to the United Nations Human Rights Committee (reporting on the period June 1997 to June 2006), Australia referred to amendments to the *Marriage Act 1961* (Cth) and the continued exclusion of same sex couples from the definition of 'marriage' under the heading "Right to marry and found family, protection of the family and mother and child".

The Common Core Document described these amendments as follows:

*“The Australian Government believes that same-sex marriages should not be given the same legal status as [traditional] marriage...amendments were made to the formal definition of marriage in the Marriage Act 1961 and were passed with bi-partisan support in 2004. The amendments also confirm that*

*Australia will not recognise as valid same-sex marriages entered into another country*".<sup>1</sup>

Ultimately, this means that a full range of legal recognitions conferred by marriage will, without further action, remain unattainable to same-sex couples in Australia.

### ***The Right to Marry in International Law***

The right to marriage in Article 23(2) refers to the right of "*men and women ... to marry and to found a family*".

The international community considered the concept of marriage in the *Hague Convention on the Recognition and Celebration of Marriages*<sup>2</sup> (the Convention) to which Australia is a signatory. The Convention also avoids a definition of marriage, the effect being that there is no express exclusion of same-sex marriage from the definition of marriage. As the Human Rights and Equal Opportunity Commission (HREOC) has observed, the explanatory report to the Convention deliberately failed to define marriage and stated that "the term 'marriage' in the convention should be understood in its 'broadest international sense'".<sup>3</sup>

In 2002 the United Nations Human Rights Committee (UNHRC) considered whether this right gave rise to an obligation on state parties to protect same sex marriage in the case of *Joslin v New Zealand*.<sup>4</sup> The Committee found that under Article 23(2) states are only required to recognise marriage between a man and a woman.

The right to non-discrimination, equality before the law and the equal protection of the law are protected by Article 26 of the ICCPR and are accepted as fundamental *jus cogens* principles of human rights law. Decisions of the UNHRC<sup>5</sup> have made it clear that the obligation in Article 26 extends to an obligation to prevent discrimination in the law, such as on the grounds of sexual preference, in the

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<sup>1</sup> Common Core Document at para 335

<sup>2</sup> Opened for signature, 14 March 1978, [1991] ATS 16, entered into force for Australia and generally on 1 May 1991.

<sup>3</sup> A Malmstrom, *Explanatory Report, Actes et Documents de la XIIIe Session 1976*, Tome III, p41, cited in 'HREOC Submission to the Senate Legal and Constitutional Legislation Committee on The Provisions of the Marriage Legislation Amendment Bill 2004', 26 August 2004.

<sup>4</sup> *Joslin v New Zealand* (2002) Communication No 902/1999.

<sup>5</sup> See for example *Young v Australia* (2002) Communication No 941/2000.

application of the law or in any action under the authority of the law. It follows that a narrow interpretation of marriage which only recognises a particular sector of Australian society is inherently discriminatory.

It is relevant to note that in *Joslin*, two members of the HRC opined that, if states parties deny marriage to same-sex couples, they must extend marriage-like rights to same-sex couples under a separate regime. The absence of an equivalent national civil alternative to marriage, providing same-sex couples the opportunity to publicly affirm their commitment to each other denies formal recognition of their relationships and status as family units under Article 23.

Article 17 of the ICCPR also establishes a prohibition on arbitrary interference with the family. It is arguable that the continued prevention of same-sex marriage constitutes an arbitrary interference with the family unit, where a couple wishes to formally recognise their relationship. Such interference is unjustified when same-sex couples (and their children) will continue to cohabit as families despite their legal status as partners.

Although it is crucial not to equate same-sex *sexual* expression with homosexual identity, undeniably same-sex attraction is a part of such identity for many individuals, and couples who wish to self-determine by marrying their partners are formalising their same-sex relationship with all its sexual and non-sexual components. By denying such couples the right to marry, the federal government may be breaching the right to privacy as well as the right to self-determination.

The right to marry for same-sex couples is further supported by Article 1 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in relation to self-determination. As was iterated in the South African case of *Fourie*:

*“it follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.”*<sup>6</sup>

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<sup>6</sup> *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 1 [71]-[72] (Sachs J for the court)

Borrowing from this reasoning, a denial of the right to marry also breaches the right to take part in cultural life under Article 15(1)(a) of ICESCR.

By balancing Article 23 with other rights provided under the ICCPR and ICESCR, Australia owes an obligation to ensure all Australians enjoy equality before the law and equal protection of the law, including same-sex couples. Such an obligation is not *fully* discharged by the current Bill.

### ***Evolving concept of 'marriage' at the Domestic Level***

In Australian jurisprudence, the High Court has also foreshadowed that the concept of marriage may evolve. McHugh J, in *Re Wakim; Ex parte McNally* said:

*.. in 1901 'marriage' was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.<sup>7</sup>*

A number of state and territory governments have also recognised the evolving concept of marriage within Australian society and have addressed the issue within the scope of their power. For example, in Tasmania, the *Relationships Act 2003* granted couples including same-sex couples the opportunity to register a deed of relationship in relation to a “significant or caring relationship”. It fell short only of calling those relationships “marriage”, though for all intents and purposes the outcome was intended to be the same.

The Australian Capital Territory's (ACT) *Civil Unions Act 2006* aimed achieved similar outcomes. The *Civil Unions Act* enabled couples including same-sex couples to enter into and register a “civil union” which is defined as a legal recognised relationship that may be entered into by two people regardless of sex. The Act did not mention marriage but provided an alternative vehicle for state recognition of relationships, whether same-sex or otherwise.

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<sup>7</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553.

In addition, in May 2008 the ACT Government passed the *Civil Partnerships Act 2008* (ACT) which allows same sex couples to register their relationships as a civil partnership, but excludes any legally binding 'civil ceremony'.

On 13 June 2006, the Australian Government acted to invalidate the *Civil Union Act* which it believed "compromised the unique status of marriage."<sup>8</sup> As a result there is now no legal basis for the formation of civil unions in the ACT.

NSWYL firmly believes that the current exclusion of same-sex couples from the definition of marriage results in wide-spread legal inequality between same-sex and opposite-sex couples. Although the effects of such inequality are not easily perceived and indeed may be glossed over where one can point to tangible financial equality, the exclusion of same-sex couples from a powerfully symbolic tradition constitutes nothing less than a modern form of segregation, albeit it one which is experienced psychologically.

The consequence of hidden segregation is that it can serve to sanction homophobic violence and intimidation. Any attempt to comprehensively analyse the completeness of the current Bill and the incumbent justification for continued exclusion must factor in the cost of policing and prosecuting homophobic crime, as well as supporting the victims of such crime. Research in the United States of America and Australia leaves little doubt that stigmatisation of sexuality is a significant contributor to both the high rates of violence towards boys perceived as gay and to male youth suicide.<sup>9</sup> The 1994 Legislative Council Standing Committee on Social Issues report entitled "Suicide in Rural New South Wales" found that this was particularly the case in rural New South Wales, where support services, such as counselling, are not readily available.

NSWYL submits that the exclusion of same-sex marriage under federal legislation provides tacit support to entrenched homophobic elements that negatively impact upon social integration and the psychological health of young gay men and women.

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<sup>8</sup> Common Core Document at para [335]

<sup>9</sup> Mr Bob Debus Hon, Second Reading Speech, *Crimes Amendment (Sexual Offences) Bill*, Hansard, Legislative Assembly, 7 May 2003. Research has found that young gay men are up to 300 per cent more likely to commit suicide than their heterosexual peers, making suicide the leading cause of death among young gay men.

In its submission to HREOC, the Australian Medical Association noted that in relation to intersex people:

*“anecdotal research indicates that experiences or expectations of discriminatory treatment may lead to decreased accessing of healthcare facilities. This has flow on effects for untreated mental and physical health problems.”<sup>10</sup>*

The same affects can no doubt be observed in relation to same-sex couples in general. This not only represents an indirect cost to the Australian taxpayer and the government, but it undermines the general welfare of society which the government is intent on protecting, by increasing levels of crime, increasing the risk of undiagnosed mental health problems, and reducing social cohesion.

Passing the proposed Bill will achieve much to redress decades of discrimination. But the object and tenor of the Bill will be undermined, and so too the desire for a free and democratic society, by continuing to declare that the love of gay and lesbians is somehow unequal.

### ***Evolving concept of ‘marriage’ at the International Level***

Many jurisdictions have chosen to recognise that marriage is not limited to a union between heterosexual couples. Same-sex marriages are now legally recognised in jurisdictions including:

- Netherlands
- Belgium
- Spain
- Canada
- South Africa
- Massachusetts and in California.

There is also legal recognition of the union of same-sex couples in a number of other foreign jurisdictions including:

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<sup>10</sup> Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p 365.



- France
- Germany
- New Zealand
- Denmark
- Finland
- Norway
- Portugal
- Sweden
- Switzerland
- United Kingdom.

The legitimacy of the right to marry for same-sex couples has been recognised in Canada. In *M. v. H.*,<sup>11</sup> the Supreme Court of Canada upheld that the right of a person to seek spousal support from a same-sex partner with whom that person had cohabited. The Court considered the impact of excluding same-sex couples from legally recognised marriage and stated that this exclusion promotes the view that they are:

*“less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples...it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”*

A similar conclusion was reached in May 2008 by the Supreme Court of California in *re Marriage Cases*.<sup>12</sup> This case was a consolidated appeal of six cases concerned with whether the Constitution of California prohibited the marriage of same-sex couples. The Court held that there was no express prohibition. In coming to its decision, the Court reasoned that **the concept of marriage is imbued with basic substantive rights and attributes that are integral to an individual’s personal liberty and autonomy.**

The Court opined that the core substantive rights of marriage include:

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<sup>11</sup> *M. v. H.*, [1999] 2 S.C.R. 3, (1999), 171 D.L.R. (4th) 577, per Justices Cory and Iacobucci.

<sup>12</sup> *Re Marriage Cases* (2008) S147999 [Super. Ct. S.F. City & County, No. 4365].

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

These developments in secular, pluralistic societies should be considered by Australia as setting the benchmark for the evolving concept of marriage.

NSWYL firmly submits that the determination of the Australian Government to preserved state-sanctioned relationships available only to heterosexual couples is inherently discriminatory and clearly contravenes the ICCPR.