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Submission of the New South Wales Council for Civil Liberties (CCL)
to the Senate Legal and Constitutional Committee
concerning the Marriage Equality Amendment Bill 2009.

CCL thanks the Senate Committee for the opportunity to make a submission on this bill.

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.

A. Marriage equality.

The basic human right to equal respect and concern implies that people should be treated equally unless there are morally relevant differences between them. Laws which make distinctions between groups on the basis of characteristics which are not morally relevant to the purposes of those laws are necessarily unjust.

Marriage provides benefits both for the individuals involved and for society. For individuals, it provides security in intimate companionship, a vehicle for their ongoing commitment to each other, mutual support, a degree of financial security, and opportunities for joy and companionship in the growth and expression of human love. Above all, it provides them with the recognition by society of their value and the value of their ongoing relationship. For society, it provides a stable and loving environment for the raising of children, and a secure basis for those broader interactions that are the foundation of a good and safe society.

It is unreasonable and unjust to provide these benefits to heterosexual couples while denying them to same sex couples. There is no good reason for doing so.[1]

B. Harms to society.

Arguably, the current situation contributes to harm.

[1] The Ontario Court of Appeal, in Halpern v Canada ((Attorney General) (2003) 65 OR (3rd) 161 (CA)) found that denying same-sex couples access to marriage licences and registration was discrimination [69-71], that defining marriage as the union of a man and a woman demeans and offends the dignity of person in same-sex relationships [107], and that and that there is no rational reason to maintain marriage as an exclusively heterosexual institution [127-132].

Continuing legal discrimination against gays and lesbians is likely to foster and perpetuate existing prejudices against person who are attracted to others of the same sex. Harm is caused by such prejudices—and not only to those who are subjected to them.

Same sex attracted persons have suffered substantially in Australia. They have been imprisoned, been subjected to barbarous psychological experiments, been the targets of blackmail and threats. They have been brutally attacked, sometimes by police. Some have been murdered, in at least one case, by police.

Harm is caused also to those who perpetrate these wrongs and are subsequently punished for them. These are often young—boys or young men.[2]

The passage of this legislation will be an important recognition of the wrongness of these actions, and for gay men and lesbians, of their equality as human beings.

The notion that society will be harmed by the proposed change to the institution of marriage is shown to be false by experience in those jurisdictions where the change has been made. In Canada, in Spain, in six states in the United States, in South Africa, in the Netherlands and in Belgium, the change has taken place without serious problems resulting.

C. The assertion that marriage just is the union of a man and a woman, to the exclusion of all others.

It should be noted that the institution of marriage has altered a great deal over the centuries (as has the relation between marriage and religions).

To support their view that contemporary marriage is very different from 19th century marriage, the Full Court of the Family Court cited this passage from the Law Commission of Canada:

> Women have achieved recognition of their independent legal personalities and equal political rights. Gender-neutral laws have replaced legislation that accorded different legal rights and responsibilities to husbands and wives. Contemporary family laws recognize marriage as a partnership between equals. Sexual assault within marriage and other forms of domestic abuse can give rise to criminal prosecution. Marriages are no longer legally indissoluble: the availability of no-fault divorce makes the continuation of a marital union a matter of mutual consent. The decision whether or not to procreate and raise children is an issue of fundamental personal

[2] The conviction for murder and subsequent imprisonment of schoolboys who kicked a gay man to death in Prince Alfred Park in Sydney is a striking example. Perpetuating injustice and prejudice can make our children vulnerable.

> choice. The heavy legal and social penalties imposed on non-marital cohabitation or children born out of wedlock have been removed. The law has had to recognize that children formerly known as 'illegitimate' are part of society – not recognizing their existence does not make them less so and fails to protect their basic interests.[3]

The notion that marriage involves a union to the exclusion of all others has not been universally accepted—in France, for instance, the king's mistress could be included in his household—effectively, as part of the marriage arrangements. Polygamy and polyandry are or have been practised in a number of societies.

The notion that marriage has always been the same, and that it just is the union of a man and a woman to the exclusion of all others is not informed by knowledge of the history of the institution.

Further, that notion involves essentialism with respect to the concept of marriage. That is, it supposes that the meaning of the word cannot be changed. But, like institutions, the meanings of words are within our control. There can be good reasons for declining to change them—but it requires argument to show this in individual cases. To merely assert that marriage just is 'the union of a man and a woman, to the exclusion of all others', and that therefore nothing else can be called marriage is to argue in a circle. The principle reason for adjusting the concept of marriage[4] is that the present concept is discriminatory, and fosters harm.

D. A recent opinion poll.

An opinion poll published in Australian newspapers in June this year indicates that more than 60% of Australians now believe that same-sex marriage should be instituted.[5]

Recommendation 1: That the Senate Committee support the bill.

E. Forcing people to comply.

There is nothing in the bill to imply that a celebrant may be required to conduct a marriage ceremony which is in a form that is contrary to the celebrant's religious beliefs. However, there is the possibility that people may feel such pressures, and be unhappy with the bill becoming law for that reason. The CCL therefore proposes a pair of amendments, which would make the situation clear.

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[3] *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94, [85], quoting the Law Commission of Canada, 'Beyond Conjugality: recognising and supporting close personal adult relationships' (2001) <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>.

[4] Both the legal concept and the everyday one.

[5] http://news.theage.com.au/breaking-news-national/sixty-per-cent-back-gay-marriage-survey-20090616-cfi5.html

Recommendation 2: That the bill be amended by adding the following item to the Schedule:

Section 9C.
After subsection (6) add:

(7). For the sake of clarity,
a. Nothing in this act requires a celebrant to officiate or permits a celebrant to be required to officiate at a marriage ceremony which includes content which is contrary to the celebrant's religious beliefs.

b. Nothing in this act requires a religious institution to offer its building or permits it to be required to offer its building for a marriage ceremony which includes content which is contrary to the doctrines of the institution.

CCL would be happy to make further comment, if the Senate Committee requests us to.

Martin Bibby
Co-Convenor, Civil and Indigenous Rights Subcommittee
NSW Council for Civil Liberties
August 25, 2009.