



**Submission to the
Legal and Constitutional Affairs Legislation Committee
Concerning the Recognition of Foreign Marriages Bill 2014**

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Introduction

The Australian Christian Lobby (ACL) welcomes this opportunity to make a submission on the Recognition of Foreign Marriages Bill 2014 (“the Bill”).

ACL represents a significant constituency in the Australian community. Its supporters are mainly Christians, coming from a wide range of denominations across Catholic, Orthodox, evangelical, and Pentecostal traditions.

ACL has supports the definition of marriage as defined in the *Marriage Act 1961*:

*“marriage” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*¹

This definition codifies the common law definition that has existed since at least 1866, when Lord Penzance said in *Hyde v Hyde and Woodmansee*:

*Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.*²

The *Hyde* definition itself was simply an articulation of the historic meaning of marriage, one that has been held in the Christian tradition for millennia. Furthermore, defining marriage as an opposite-sex union is not merely a Christian tradition, nor is it only a religious peculiarity. It has held throughout history, transcending time, religions, cultures, and people groups.

Marriage predates church and government regulation of marriage. Law professor Bruce Hafen described “patterns of marriage and kinship” as “[d]omestic patterns universally accepted before the dawn of law and government”.³ Church, and then state, saw fit to regulate marriage because of its importance to society and social wellbeing.

Australia has rightly maintained the integrity of marriage in law despite numerous attempts to remove the gender requirement in the *Marriage Act*. In doing so, Australian law upholds the long-held understanding of marriage as the union of a man and a woman. This relationship is the foundation of society’s most fundamental unit, the family, and is itself a social good worthy of protection in law. It provides the best environment for family to flourish and for children to be raised and nurtured.

It is this function of marriage that allows the state to take an interest in its regulation. Ordinarily the state would not regulate interpersonal relationships among adults. Only because of its position as a foundational building block of society is marriage an exception.

The Recognition of Foreign Marriages Bill seeks to remove section 88EA from the *Marriage Act*. This section clarifies that unions solemnised under the domestic laws of foreign countries between a two men or two women are not recognised as marriages in Australia. The section does not add any new requirements to the Act. It simply removes doubt, if there were any doubt, that only the union of a

¹ Section 5, *Marriage Act 1961*.

² *Hyde v Hyde and Woodmansee (1866)*, [LR] 1 P&D 130.

³ Bruce Hafen (1983), *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Michigan Law Review 463, 472.

man and a woman is recognised as a marriage under Australian law, regardless of where that union was formed and whether it was solemnised under some other law.

This submission will not reiterate all the arguments in favour of retaining marriage in the *Marriage Act*. ACL has presented these before in its 2012 submission to the Senate inquiry into domestic same-sex marriage,⁴ and more recently in a submission to a NSW inquiry.⁵ In addition to the considerations presented in this submission, ACL's previous submissions demonstrate why marriage, as currently defined, is an invaluable public good. Its importance in uniting a man and a woman who may then become a father and a mother to resulting children cannot be overstated. Redefining marriage in law would, as matter of public policy, remove any acknowledgement of the biological relationship between children and their natural mothers and fathers. This would represent an egregious injustice to children.

The case for marriage has also been made powerfully by academics such as Monte Stewart,⁶ and by Robert George, Sherif Girgis, and Ryan Anderson in their 2012 book *What is Marriage?*⁷ This book is an adaptation of their 2010 essay of the same name, published by the Harvard Journal of Law & Public Policy.⁸

This submission will focus specifically on the contents of this bill, and argue that Australia should continue to consistently define marriage as the union of a man and a woman.

International Law

This bill, like the similar bill last year, removes only section 88EA. It does not amend section 88E or any other part of Part VI of the *Marriage Act*, which, as Senator George Brandis pointed out, makes the bill incompetent to achieve its objective.⁹ Section 88E, which existed prior to the 2004 amendments that added section 88EA, validates marriages that are solemnised in a foreign country and that would be recognised as valid in Australia under the common law rules of private international law.

The 2004 amendments did add, in addition to section 88EA, section 88B(4), which reads:

(4) To avoid doubt, in this Part (including section 88E) marriage has the meaning given be subsection 5(1).

⁴ ACL (April 2012), submission to the Legal and Constitutional Affairs Legislation Committee Concerning the Marriage Equality Amendment Bill 2010, <http://www.acl.org.au/2012/04/acls-submission-to-the-senates-same-sex-marriage-inquiry/>.

⁵ ACL (March 2013), submission to the NSW Legislative Council Standing Committee on Social Issues Inquiry into same-sex marriage laws, <http://www.acl.org.au/wp-content/uploads/2013/03/ACL-NSW-Marriage-Submission.pdf>.

⁶ Monte Stewart (2008), *Marriage Facts*, 31 Harvard Journal of Law & Public Policy, http://digital.library.ucla.edu/websites/2008_993_107/assets/Harvard_Marriage_Article.pdf.

⁷ Sherif Girgis, Ryan T Anderson, and Robert P George, *What is Marriage?*, (Encounter Books, 2012).

⁸ Sherif Girgis, Robert P George, and Ryan T Anderson (2010), *What is Marriage?*, Harvard Journal of Law and Public Policy, Vol 34, No 1, pp 245-287, <http://www.harvard-jlpp.com/wp-content/uploads/2013/10/GeorgeFinal.pdf>.

⁹ Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2013, p 3501 (Senator Brandis).

This meaning, of course, is that marriage is “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”¹⁰

Section 88B(4) clarifies that Part VI of the *Marriage Act* prevents the recognition of foreign unions which are not recognised as marriages under Australian law. Commenting on the clause, the Department of Parliamentary Services notes:

*the reference to section 88E in [section 88B(4)] is designed to **ensure that foreign same sex marriages cannot be recognised in Australia** either under the Marriage Convention or under the common law rules of private international law.*¹¹

As Senator Brandis said, the question raised by this bill is whether “Australian law should recognise foreign marriages that Australian law does not recognise”.¹²

The question of whether to redefine marriage for the purposes of Australian law has been overwhelmingly rejected multiple times. It would be poor policy to recognise an alternative definition of marriage that directly conflicts with the definition of marriage in Australian law. As Senator Brandis said, it would be a “bizarre result that Australian law would recognise marriages between same-sex couples solemnised overseas but would leave unaffected the prohibition of the solemnisation of such marriages in Australia.”¹³

Australian sovereignty

This bill is more than an effort to recognise same-sex marriages “entered into by the parties with sincerity and commitment”, as Senator Hanson-Young said in her second reading speech.¹⁴ Senator Hanson-Young admitted that the bill “offers a modest and practical step forward to marriage equality”,¹⁵ revealing that this bill is intended to be a different path to redefine marriage in Australian law. This is a cynical attempt to redefine marriage and shows contempt for Australia’s democratic processes which have dealt with the issue multiple times.

Liberal Senator Sue Boyce, who crossed the floor when the Senate rejected the previous bill, candidly acknowledged the strategy when she said:

*I am not normally in favour of backdoor ways of doing things, **which is what this bill is – it is a backdoor way to try to increase the pressure for same-sex marriage in Australia... but I think that in this circumstance... there is a valid reason to support this legislation.***¹⁶

In her second reading speech, Senator Hanson-Young spoke of the spread of same-sex marriage in other countries around the world. She claimed that same-sex couples who have been “travelling the world over the past decade to get married” return to Australia and are forced to “leave their

¹⁰ Section 5(1), *Marriage Act*, 1961.

¹¹ Commonwealth of Australia (2004), ‘Marriage Legislation Amendment Bill 2004’, Department of Parliamentary Services, Bills Digest No. 155 2003-04, <http://www.aph.gov.au/binaries/library/pubs/bd/2003-04/04bd155.pdf>. Emphasis added.

¹² Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2013, p 3501 (Senator Brandis).

¹³ Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2013, p 3501 (Senator Brandis).

¹⁴ Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 May 2014, p 2727 (Senator Hanson-Young).

¹⁵ Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 May 2014, p 2727 (Senator Hanson-Young).

¹⁶ Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2013, p 3507 (Senator Boyce).

marriage at the customs gate”.¹⁷ This emotive assertion ignores the fact that, since 2008, same-sex couples have had identical legal rights and responsibilities under Commonwealth law as all other couples, including married couples, after the Labor government amended 85 pieces of legislation to remove any discrimination.¹⁸

Regardless of this, Australia is a sovereign nation responsible for its own policies. The fact that New Zealand, the UK, and a small group of other countries have legislated to redefine the most fundamental relationship in society does not compel Australia to follow suit. Australia has had a lengthy debate on marriage, and has rejected a redefinition. This position is consistent with the majority of countries in the world, with only sixteen countries and a handful of sub-national jurisdictions, mainly in the USA, having legislated same-sex marriage.

Australia has taken its own path on domestic policy on other matters also. After the Port Arthur massacre, the Howard Government implemented tough gun restriction laws, despite the gun lobby pointing to much more liberal laws in the United States. While highlighting the common ground shared between Australia and the US, John Howard rated the different path taken by Australia with gun laws as one of his “proudest actions” as Prime Minister.¹⁹ Australia does not allow visiting Americans to carry concealed weapons, despite the legality of this in their home states.

Australia does not have to bow to international pressure to conform to any currently fashionable policy. There is no reason for Australia to follow the lead of a small group of other countries when deciding its domestic marriage policy.

Child marriage

In addition to same-sex unions, Australian law does not recognise other types of relationship which, in other parts of the world, are considered marriage. Child marriage is common in some jurisdictions. Yemen has no legal minimum age for marriage, and it is estimated that a majority of girls are married before the age of 18.²⁰ It is common in India,²¹ Pakistan,²² and throughout Africa.²³

¹⁷ Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 May 2014, p 2727 (Senator Hanson-Young).

¹⁸ Attorney-General's Department, *Same-Sex Reforms*, <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx>.

¹⁹ John Howard (1 August, 2012), 'Brothers in arms, yes, but the US needs to get rid of its guns', *Sydney Morning Herald*, <http://www.smh.com.au/federal-politics/political-opinion/brothers-in-arms-yes-but-the-us-needs-to-get-rid-of-its-guns-20120731-23ct7.html>.

²⁰ Abdulhadi A AlAmodi (14 December 2013), 'Child marriage in Yemen', *The Lancet*, Volume 382, Issue 9909, pp 1979-1980, http://download.thelancet.com/pdfs/journals/lancet/PIIS0140673613626537.pdf?id=iaaWUQwEgcy_4aSANR_Du.

²¹ Nirmalya Dutta (14 October, 2013), 'Why is India refusing to sign the UN resolution against child marriage?', *The Health Site*, <http://www.thehealthsite.com/diseases-conditions/why-is-india-refusing-to-sign-the-un-resolution-against-child-marriage/>.

²² The Express Tribune (31 August, 2013), 'Social customs: 'Nearly half of Pakistan women are married before the age of 18'', *The International New York Times*, <http://tribune.com.pk/story/597697/social-customs-nearly-half-of-pakistani-women-are-married-before-the-age-of-18/>.

²³ See United Nations Population Fund, 'Child Marriage Fact Sheet', http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm.

Child marriage also takes place in Western countries. It has been described as an “epidemic” in the UK among the Muslim community.²⁴ According to some reports, it is “commonplace” in some communities in Australia.²⁵

Nevertheless, Australia refuses to acknowledge these marriages in Australian law.²⁶ Legal recognition of these unions overseas and the existence of such unions in Australia are not reasons for Australian law to recognise them as marriages in Australia.

Polygamy

Polygamy is practised in many parts of the world, particularly in Muslim countries. The status of polygamous relationships varies, but it is fully legal in many countries in northern Africa and the Middle East, and is civilly recognised in some other countries such as South Africa.

The recent success of same-sex marriage campaigns in some jurisdictions has resulted in an attempt by practising polygamists in western countries to have their polygamous relationships recognised also. The most prominent examples of these are conservative Mormon groups, including a group from Bountiful, British Columbia in Canada. The group used the 2003 *Halpern v Canada* decision of the Ontario Court of Appeals, which ruled that the man-woman definition of marriage violated the dignity of same-sex couples and was discriminatory according to Canada’s Charter of Rights.²⁷ They argued that:

*this new definition discriminates against them because it continues to insist on monogamy in the same way that the previous definition insisted on both monogamy and heterosexuality.*²⁸

In dismissing the case, Chief Justice Bauman declared that the case was “essentially about harm”, specifically to women and children, as well as to society and marriage itself.²⁹ In an indication the issue might not end there, the decision was criticised by one of the lawyers arguing against British Columbia, who said

*Three consenting adults who are causing no harm ought not to be committing a crime.*³⁰

The other most prominent case of recent years was in the USA, where Kody Brown and his four “wives” came to national attention in the reality television show “Sister Wives”. Mr Brown, a strict Mormon, is arguing that his polygamous marriage should not be illegal, based on *Lawrence v Texas*,

²⁴ Soeren Kern (15 October, 2013), ‘Britain’s Underage Muslim Marriage Epidemic’, *Gatestone Institute*, <http://www.gatestoneinstitute.org/4017/uk-muslim-underage-marriage>. Accessed 25 July 2014.

²⁵ Mark Coultan (8 February, 2014), ‘Forced underage marriage ‘common’’, *The Australian*, <http://www.theaustralian.com.au/national-affairs/state-politics/forced-underage-marriage-common/story-e6frgczx-1226821064701>.

²⁶ Section 88E(2) forbids any marriage solemnised in a foreign country from being recognised as valid if either party was not of marriageable age under the Act, defined in section 11 as 18 years old.

²⁷ *Halpern v Canada (Attorney general)*, 2003 CanLII 26403 (ON CA), <http://canlii.ca/t/6v7k>, [108], [142].

²⁸ Neil Addison (November 30, 2011), ‘Polygamy in Canada: a case of double standards’, *The Guardian*, <http://www.guardian.co.uk/commentisfree/belief/2011/nov/30/heterosexuality-canada-law-monogamy-polygamy>.

²⁹ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, <http://canlii.ca/t/fnzqf>, [5].

³⁰ CBC News (November 23, 2011), ‘Canada’s polygamy laws upheld by B.C. Supreme Court’, *CBC News*, <http://www.cbc.ca/news/canada/british-columbia/story/2011/11/23/bc-polygamy-ruling-supreme-court.html>.

the US Supreme Court case which struck down sodomy laws in Texas, and along with it 13 other states, as unconstitutional intrusions into private matters.³¹

Mr Brown's attorney Professor Jonathan Turley said that the fundamental reasoning restricting polygamy is "outdated and has been swept away by cases like *Lawrence*". Addressing the usual concern that polygamous households may involve abuse, domination, or repression, Professor Turley added that "there are many religious practices in monogamous families that many believe as obnoxious and patriarchal".³²

Turley's comments challenge the strength of Chief Justice Bauman's argument in the *Bountiful* case. Chief Justice Bauman's understanding of marriage as an institution limited to two people is, in Professor Turley's view, "outdated", much as the traditional understanding of marriage is regarded as "outdated" by same-sex marriage advocates. Chief Justice Bauman's concern about the harm caused by polygamy is also at odds with the views of Professor Turley and many polygamists who do not believe polygamy is harmful.

Given the large Muslim population in Australia,³³ the present of polygamous relationships already in Australia,³⁴ and calls from prominent Muslims for legal recognition of polygamy,³⁵ it is surely likely that there will be calls for the recognition of foreign polygamous marriages, entered into in countries where such marriages are legally recognised. To recognise same-sex unions, which are explicitly excluded from the definition of marriage in the *Marriage Act*, but to refuse to recognise equally legal polygamous unions, which are also excluded by the *Marriage Act*, would be confusing and contradictory.

Polyamory

Polyamory is a broad term to describe relationships involving more than two people. There are an estimated 500,000 polyamorous relationships in the United States,³⁶ many advocating for legal recognition of the relationship. Polyamorous groups have been involved in the Sydney Gay and Lesbian Mardi Gras for several years, and there was controversy in the 2012 parade when the organisers refused to allow the polyamorous float to participate.³⁷ The very first same-sex wedding

³¹ *Lawrence v Texas* (2003), 539 US 558.

³² John Schwartz (July 11, 2011), 'Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law', *The New York Times*, <http://www.nytimes.com/2011/07/12/us/12polygamy.html>.

³³ 2.2 per cent, according to the Australian Bureau of Statistics (21 June, 2012), '2011.0 – Reflecting a Nation: Stories from the 2011 Census, 2012-2013', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>.

³⁴ Chris Merritt (July 20, 2011), 'Sharia law at work in Australia', *The Australian*, <http://www.theaustralian.com.au/national-affairs/sharia-law-at-work-in-australia/story-fn59niix-1226097889992>.

³⁵ Keysar Trad (October 2, 2009), 'Why should polygamy be a crime?', *The Sydney Morning Herald*, <http://www.smh.com.au/federal-politics/society-and-culture/why-should-polygamy-be-a-crime-20091002-gfdg.html>.

³⁶ Jessica Bennett (July 28, 2009), 'Only You. And You. And You.', *The Daily Beast*, <http://www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.html>.

³⁷ Matt Akersten (February 4, 2012), 'Polyamorists defend parade spot', *SameSame*, <http://www.samesame.com.au/news/local/7953/Polyamorists-defend-parade-spot.htm>.

performed in the United States involved the director of the Unitarian Universalist Funding Program,³⁸ which is closely associated with the Unitarian Universalists for Polyamory Awareness.³⁹

The polyamory movement has traction in Australia as well. Ean Higgins made the following comment in *The Australian*:

*The [polyamorist] agenda now is to seek recognition and the removal of prejudice... perhaps legislation to grant them civil unions and even legalised polyamorous marriage.*⁴⁰

Higgins asks whether:

*those who support gay marriage on the basis of equal rights are hypocritical in not being prepared to even discuss the possibility of committed polyamorists being eligible.*⁴¹

Psychologist Nina Melksham says the polyamory community has “always been supportive of the values of equality and acceptance” and, regarding the possibility of marriage recognition for polyamorists, says “any change that moves us towards a more loving, open and accepting society can only be a positive”.⁴²

Australian Katrina Fox, a freelance writer who has “written extensively for the gay and lesbian media locally and internationally for more than a decade and is the editor of three books on sex, gender and sexuality diversity”,⁴³ penned an article for the mainstream opinion website *The Drum* entitled “Marriage needs redefining”.⁴⁴ She argued:

*Surely it makes more sense [than just legalising same-sex marriage] to expand the definition of marriage to include a range of relationship models including polyamory, instead of holding up monogamy as the gold – indeed only – standard.*⁴⁵

Thus, there is a push for legal recognition of polyamorous relationships, both within Australian and internationally. There is also precedent for this. In The Netherlands – which, not insignificantly, was the first country to redefine marriage – legal recognition of a threesome was given to Victor de Bruijn and his two “brides”. The women are bisexual and are sexually active with each other as well

³⁸ New York Times Style (May 23, 2004), ‘Weddings/Celebrations; Hillary Goodridge, Julie Goodridge’, *The New York Times*, <http://www.nytimes.com/2004/05/23/style/weddings-celebrations-hillary-goodridge-julie-goodridge.html>.

³⁹ Unitarian Universalist Association of Congregations, ‘Related Organizations’, <http://www.uua.org/directory/organizations/details.php?id=351111>.

⁴⁰ Ean Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*, <http://www.theaustralian.com.au/news/features/three-in-marriage-bed-more-of-a-good-thing/story-e6frg6z6-1226218569577>.

⁴¹ Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*.

⁴² Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*.

⁴³ ABC, Katrina Fox, *The Drum*: <http://www.abc.net.au/unleashed/katrina-fox-32758.html>.

⁴⁴ Katrina Fox (March 2, 2011), ‘Marriage needs redefining’, *The Drum*, <http://www.abc.net.au/unleashed/44576.html>.

⁴⁵ Fox (March 2, 2011), ‘Marriage needs redefining’, *The Drum*.

as with Mr De Bruijn. Not technically a marriage, the relationship is a *samenlevingscontract* or “cohabitation contract”,⁴⁶ similar to what we might call a civil partnership.

In the Senate inquiry into the Marriage Equality Amendment Bill 2010, during the hearings, Senator Cash raised the question of multi-partner relationships with former High Court Justice Michael Kirby. Mr Kirby replied:

*Nothing is finally written. The question that is before the parliament at the moment is the question of equality for homosexual people. **There may be, in some future time, some other question. The lesson in courts and in the parliament, I suggest, is that you take matters step by step.***⁴⁷

Prior to this, Mr Kirby had remarked:

*Examination of the history shows... that you are never at the last step in the journey. The journey continues. **We do not know what the future decades may hold in terms of relationships.** I have known homosexual people in a relationship of three. I have known a couple who married as heterosexuals but who then discovered or were willing to acknowledge a homosexual element in one of them and accepted that reality. Human relationships are complicated, **but these, I would respectfully suggest, are issues for the future.***⁴⁸

It would be difficult to argue that, while continuing to define marriage in domestic law as the union of one man and one woman, Australia should recognise same-sex unions solemnised overseas, but should not likewise recognise polyamorous or polygamous unions solemnised overseas. As Mr Kirby’s comments indicate, the focus may currently be on foreign same-sex couples, but it is unlikely that the discussion would end there.

Democratic Process

Previous attempts to legislate same-sex marriage

Australia has already rejected a substantially similar bill. Just under a year before introducing the current bill, Senator Hanson-Young introduced the Marriage Act Amendment (Recognition of Foreign Marriages for Same-Sex Couples), an almost identical bill. This bill was soundly defeated, 44-28, in the Senate.

Australia has also overwhelmingly defeated domestic same-sex marriage bills, first in the House of Representatives, when the Marriage Amendment Bill 2012 was defeated 98-42, and secondly in the Senate, when the Marriage Amendment Bill (No 2) 2012 was defeated 41-26.

⁴⁶ Stanley Kurtz (December 26, 2005), ‘Here Come the Brides’, *The Weekly Standard*, <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/494pqobc.asp>.

⁴⁷ Evidence to the Legal and Constitutional Affairs Legislation Committee, Senate, Sydney, 3 May, 2012, p 13 (Michael Kirby).

⁴⁸ Evidence to the Legal and Constitutional Affairs Legislation Committee, Senate, Sydney, 3 May, 2012, p 12 (Michael Kirby).

Before these bills were introduced, the Greens' Adam Bandt moved that parliamentarians consult their electorates on the issue of same-sex marriage. On August 24, 2011, 30 parliamentarians reported back on this process, with only seven electorates showing majority support. Overwhelmingly, the electorates showed that they did not agree with changing the *Marriage Act*,⁴⁹ mostly by large margins.⁵⁰

Senator Hanson-Young's introduction of this issue a second time in 12 months reveals her disdain for the democratic process in this country. The federal parliament has already rejected same-sex marriage and the recognition of international same-sex unions.

Much is made of the Coalition not allowing a conscience vote, but even prominent supporters of changing the definition of marriage, such as Malcolm Turnbull, acknowledge that a conscience vote would make little difference to the Parliament's support for man-woman marriage.⁵¹

Polling

Despite reports that polling is starting to show support among the population for same-sex marriage,⁵² a deeper look at this issue reveals a different picture.

A recent Crosby Textor poll framed a question about changing the definition of marriage this way: "if it doesn't hurt anyone else, gay couples should be able to do what makes them happy, including marry".⁵³ Seventy-eight per cent agreed with this statement. There is of course a big "if" in this question. If Australians were aware of the cases cited above of harm to peoples' businesses, conscience and religious beliefs, poll results such as this may well be quite different. Framing questions like this distorts the results, and it also ignores the low priority placed on this issue, as discussed above.

Questions such as this also ignore the deep ethical issue that arises from same-sex marriage of whether or not children are entitled to know and be raised by, wherever possible, their biological mother and father. Polling conducted by the Ambrose Centre for Religious Liberty, discussed below, showed that while a majority might support same-sex marriage, when asked if a child has a right to her or his mother and father, more than 70 per cent agree. Society can't have it both ways and a more mature debate is required before Parliamentarians consider any legislative changes.

An in-depth analysis conducted by the Ambrose Centre for Religious Liberty found that despite majority agreement with same-sex couples having a legal right to marry, a minority of people

⁴⁹ Paul Kelly (27 August, 2011), 'MPs won't jump on same-sex bandwagon', *The Australian*, <http://www.theaustralian.com.au/national-affairs/opinion/mps-wont-jump-on-same-sex-bandwagon/story-e6frgd0x-1226123175832>.

⁵⁰ See also House of Representatives Hansard (24 August, 2011).

⁵¹ Sydney Morning Herald (3 November, 2013), 'Turnbull signals Coalition support for conscience vote on gay marriage', *Sydney Morning Herald*, <http://www.smh.com.au/federal-politics/political-news/turnbull-signals-coalition-support-for-conscience-vote-on-gay-marriage-20131103-2wuc2.html>.

⁵² Lisa Cox (July 15, 2014), 'Poll shows growing support for same-sex marriage', *The Sydney Morning Herald*, <http://www.smh.com.au/federal-politics/political-news/poll-shows-growing-support-for-samesex-marriage-20140714-3bxaj.html>.

⁵³ Australian Marriage Equality (17 July, 2014), 'Media Release: Study Reveals Values Behind Australia's Record Support For Marriage Equality', <http://www.australianmarriageequality.org/2014/07/17/media-release-study-reveals-values-behind-australias-record-support-for-marriage-equality/>.

support changing the *Marriage Act*.⁵⁴ The polling found that only 35 per cent support changing the *Marriage Act* if doing so is divisive;⁵⁵ 69 per cent agree that marriage is an important social institution that should be upheld;⁵⁶ and 73 per cent agree that society should try to ensure that children are raised by their natural mother and father whenever possible.⁵⁷ This is obviously impossible to achieve if marriage is changed.

Polling also does not reflect the importance placed on same-sex marriage by its supporters. The Ambrose study also found that only 14 per cent of people “strongly support” redefining marriage, compared to 18 per cent who “strongly oppose” it.⁵⁸ This finding is supported by research conducted after the 2013 election by JWS Research. Same-sex marriage was ranked ninth as an issue voters were concerned about, with only 13 per cent of people ranking it as a top-three issue.⁵⁹ The research was conducted within days of the election and followed high profile campaigning on the issue by then Labor Prime Minister Kevin Rudd.

Even among the supporters of left-wing lobby group GetUp, same-sex marriage was ranked 10th out of 11 “Top Campaign Issues”.⁶⁰ Only two per cent of GetUp’s supporters rated it a top issue, and though a majority of 70 per cent rated it as a “high priority” issue, this is significantly fewer who than for every one of the other ten issues surveyed.⁶¹

These figures show that simple polls do not tell the full story. Same-sex marriage has been one of the most prominent issues in the media in recent years, but even with consistent pressure from some sections of the population, it remains an underwhelming issue for most ordinary Australians.

Not only has this issue already been rejected by federal parliaments, it is not even an issue of great importance to most Australians.

Freedom of religion

One of the most important reasons Australia has consistently rejected a legal redefinition of marriage is the impact that legislating same-sex marriage has had on freedom of religion, freedom of speech, and freedom of conscience in other parts of the world.

People of all faiths have, through history, regarded marriage as a unique and sacred union. This continues to be the case today, as most people of faith still regard marriage as a fundamental union of spiritual significance.

⁵⁴ Ambrose Centre for Religious Liberty (November 22, 2011), *Public attitudes towards same sex marriage in Australia*, <http://www.ambrosecentre.org.au/images/survey%20final%20report%20for%20web.pdf>, p 13.

⁵⁵ Ambrose (2011), *Public attitudes towards same sex marriage*, p 16.

⁵⁶ Ambrose (2011), *Public attitudes towards same sex marriage*, p 17.

⁵⁷ Ambrose (2011), *Public attitudes towards same sex marriage*, p 17.

⁵⁸ Ambrose (2011), *Public attitudes towards same sex marriage*, p 26.

⁵⁹ JWS Research (2013), Same-Sex Marriage Survey. See Dennis Shanahan (September 14, 2013), ‘Voters cool on same-sex unions’, *The Australian*, <http://www.theaustralian.com.au/national-affairs/election-2013/voters-cool-on-same-sex-unions/story-fn9qr68y-1226718868853>.

⁶⁰ See GetUp (2014), <http://vision2014.getup.org.au/?t=dXNlcmIkPTMxOTIyMCxlbWFpbGlkPTQ2MDk=> (accessed July 24, 2014).

⁶¹ The least important issue to GetUp supporters is constitutional recognition of indigenous people, with two per cent rating it as a top issue but 82 per cent rating it as a high priority.

If the state defines marriage in a particular way, people of faith will come into direct conflict with the law when they continue to adhere to their religious doctrines.

Although marriage would continue to be defined a particular way in the *Marriage Act*, this bill would mean some same-sex unions are recognised as marriages.

In the few jurisdictions that have redefined marriage, those who hold to marriage are increasingly subject to ridicule, abuse, and even legal persecution where marriage has been redefined.

Some of the more prominent recent cases have involved small businesses who have declined to provide services for same-sex union ceremonies.

In New Mexico, which still defined marriage as a man-woman union at the time, photographer Elaine Huguenin was found guilty of unlawful discrimination by the New Mexico Human Rights Commission when she declined to photograph a “commitment ceremony” for two women. Huguenin, who runs her photography business from home, was ordered to pay over \$6,000.⁶² The New Mexico Supreme Court upheld the decision in 2013, and the US Supreme Court refused to hear an appeal.⁶³

In Colorado, baker Jack Phillips was ordered to “cease and desist from discriminating” after he declined to bake a cake for a same-sex wedding because it violated his beliefs.⁶⁴ He was further ordered to “take remedial measures to ensure compliance” with the state anti-discrimination legislation, “including but not limited to comprehensive staff training”. The Order also obligated Phillips to provide quarterly compliance reports for two years.⁶⁵

Phillips has appealed the decision to the Court of Appeals.⁶⁶

In Washington state, florist Barronelle Stutzman is being sued by the attorney-general for refusing to provide flowers for a same-sex wedding.⁶⁷ Stutzman’s objection was not out of any animosity or prejudice against homosexual people, as the couple were long time customers. Rather, Stutzman could not violate her conscience by participating in a same-sex marriage, and politely advised the couple of this.

Many more cases like this demonstrate how religious freedom is threatened by the state imposing same-sex marriage.

⁶² Sara Israelsen-Hartley (February 12, 2012), ‘Colliding causes: Gay rights and religious liberty’, *Deseret News*, <http://www.deseretnews.com/article/700224421/Gay-Liberty.html>.

⁶³ Tom McCarthy (8 April 2014), ‘US supreme court declines appeal of photographer who refused gay couple’, *The Guardian*, <http://www.theguardian.com/world/2014/apr/07/supreme-court-gay-marriage-new-mexico-photographer>.

⁶⁴ Ivan Moreno, Associated Press (12 June, 2013), ‘Judge orders Colo. cake-maker to serve gay couples’, *The Denver Post*, http://www.denverpost.com/news/ci_24672077/judge-orders-colorado-cake-maker-serve-gay-couples.

⁶⁵ See State of Colorado Civil Rights Commission, *Craig and Mullins vs Masterpiece Cakeshop, Inc.*, Final Agency Order, p 2. Accessible at <http://www.adfmedia.org/files/MasterpieceFinalAgencyOrder.pdf>.

⁶⁶ 7News Denver, (17 July, 2014), ‘Masterpiece Cakeshop owner Jack Phillips appeals order to provide same-sex wedding cakes’, <http://www.thedenverchannel.com/news/local-news/masterpiece-cakeshop-owner-jack-phillips-appeals-order-to-provide-same-sex-wedding-cakes>.

⁶⁷ Lornet Turnbull (25 July 2014), ‘State sues florist over refusing service for gay wedding’, *The Seattle Times*, http://seattletimes.com/html/localnews/2020743969_floristlawsuitxml.html.

Freedom of religion in Australia

In Australia, although marriage is still defined as between a man and a woman, we are already seeing the erosion of religious freedom under anti-discrimination law. In one prominent case in Victoria, Christian Youth Camps Limited (CYC) was sued by a community organisation, Cobaw. Cobaw provided services to “same sex attracted young people” and attempted to make a booking at the CYC campsite on Phillip Island, but CYC could not in good conscience take a booking for a group that encouraged a lifestyle that the campsite objected to.

The Tribunal found against CYC and fined the campsite. Justice Hampel said in her opinion that freedom of religion is not a “stand-alone right” and may be trumped by the rights to equality and non-discrimination found in section 8 of Victorian *Charter of Rights and Freedoms*.⁶⁸ She said there is an “obligation, when rights compete... to determine the least limit which can be imposed on the enjoyment of both rights to achieve a balance between them”.⁶⁹

The Victorian Court of Appeals dismissed CYC’s appeal.⁷⁰ However, in a powerful dissenting judgment, discussing the exemption found in the *Equal Opportunity Act 1995* Justice Redlich argued:

*The language is clear as to when the proscribed conduct in Part 3 will not apply. The section does not confine the right to manifest religious beliefs to those areas of activity intimately linked to private religious worship and practice. The legislature intended that it operate in the commercial sphere... [the exemptions in the Act] permits a person’s faith to influence them in their conduct in both private and secular and public life.*⁷¹

Justice Redlich’s judgment articulated that obedience to religious belief extends beyond the private sphere.

David Marr is a prominent critic of religious exemptions in anti-discrimination legislation. Marr has taken aim at the freedom of religious organisations to choose employees who subscribe to the ethic of the organisation, as in a February, 2011 article,⁷² and later at the Festival of Dangerous Ideas in Sydney.⁷³ Marr told the *Gay News Network*:

⁶⁸ *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)*[2010] VCAT 1613, [325]

⁶⁹ *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)*[2010] VCAT 1613, [39]

⁷⁰ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014).

⁷¹ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014), per Redlich J, [551].

⁷² David Marr (February 14, 2011), ‘Faiths rule on sex from staffroom to bedroom’, *The Sydney Morning Herald*, <http://www.smh.com.au/national/faiths-rule-on-sex-from-staffroom-to-bedroom-20110214-1asj0.html>. First published in a shorter version by *The Age*: David Marr (February 13, 2011), ‘Holy unrest over religious right to discriminate’, *The Age*, <http://www.theage.com.au/national/holy-unrest-over-religious-right-to-discriminate-20110212-1areb.html>.

⁷³ David Marr & Jim Wallace: *Gays and Lesbians Do Not Belong in the Classroom*, <http://play.sydneypoperahouse.com/index.php/media/1535-gays-and-lesbians-do-not-belong-in-the-classroom.html>.

*church organisations... don't, in my view, have a right to be exempted from anti-discrimination law.*⁷⁴

Marr asserts, according to the article, that “religious exemptions from anti-discrimination laws represent the biggest threat to substantive equality [homosexuals] face”.⁷⁵

When the ACT was considering passing territory-based same-sex legislation, Attorney-General Simon Corbell stated, in a letter to the ACL’s Managing Director Lyle Shelton:

*...any right to express contrary opinions is balanced under section 7 and 20 of the Discrimination Act 1991 (ACT). **It would be unlawful for those who provide goods, services and facilities in the wedding industry to discriminate against another person on the basis of their sexuality or their relationship status.** This includes discrimination by refusing to provide or make available those goods, services or facilities. Australians are free to express contrary views... provided they do so within the law.*⁷⁶

This is a frank admission by the ACT attorney-general that territory-based same-sex marriage laws would directly impinge on freedom of religion and freedom of conscience.

It is not difficult to imagine such a clash of rights should Australia recognise foreign same-sex unions as marriages while Australian law continues to define marriage as between a man and a woman.

Freedom of religion for churches

But there are further pressures on Christians to violate their faith where same-sex marriage has been legislated. Ministers, churches, and marriage celebrants have been pressured to officiate at same-sex weddings, and some have been dismissed for refusing to do so.

In 2005, Canadian marriage commissioner Orville Nichols refused to perform a wedding for two men. Taken to court, it was declared that he did not have the right to refuse to perform the wedding, and he was ordered to pay \$2,500 to one of the men. In July 2009, Nichols lost his appeal, with Justice McMurty ruling that the Saskatchewan Human Rights Commission had correctly “established discrimination” and that:

*accommodation of Mr. Nichols’ religious beliefs was not required.*⁷⁷

In 2011 the Netherlands, the first country in the world to redefine marriage, voted to amend the law to force civil servants to conduct same-sex marriages.⁷⁸ On the same day, Christian civil servant Wim Pijl was fired by his employer, the city of The Hague, simply for stating his desire not to perform

⁷⁴ Garrett Bithell (September 30, 2011), ‘Marr’s Attack’, *Gay News Network*, <http://gaynewsnetwork.com.au/feature/feature/1701-marr-s-attack.html>.

⁷⁵ Garrett Bithell (September 30, 2011), ‘Marr’s Attack’, *Gay News Network*, <http://gaynewsnetwork.com.au/feature/feature/1701-marr-s-attack.html>.

⁷⁶ Letter from Simon Corbell MLA, ACT Attorney-General to Lyle Shelton, ACL Managing Director, 21 November, 2013, p 2.

⁷⁷ CBC News (July 23, 2009), ‘Commissioner who refused to marry same-sex couple loses appeal’, *CBC News*, <http://www.cbc.ca/news/canada/saskatchewan/story/2009/07/23/marriage-ruling.html>.

⁷⁸ Dutch News (November 15, 2011), ‘MPs vote to stop civil servants refusing to carry out gay weddings’, *DutchNews.nl*, http://www.dutchnews.nl/news/archives/2011/11/mps_vote_against_gay_marriage.php.

same-sex marriages.⁷⁹ According to one Dutch politician, Pijl, who did officiate at a same-sex wedding, was not dismissed “because he concretely refused to preside over a gay marriage, but because he expressed his views on same-sex marriage”.⁸⁰

In the UK, marriage registrar Lillian Ladele was forced to leave her job when she refused to act against her faith by officiating at same-sex ceremonies. This was prior to the UK legislating same-sex marriage, but after the *Civil Partnership Act 2004* provided for same-sex civil partnerships. Ladele’s case was appealed to the European Court of Human Rights, where she lost. Her case was remarkable not only because the courts decided that religious freedom could be discarded, but because Ladele took her job in 2002, before the *Civil Partnership Act*. As the two dissenting judges wrote:

There is nothing to suggest... that it was to be expected... that marriage registrars would have to officiate at these ceremonies in the future.

The dissenting judges added that:

*a combination of backstabbing by [Ladele’s] colleagues and the blinkered political correctness of the borough of Islington (which clearly favoured “gay rights” over fundamental human rights) eventually led to her dismissal.*⁸¹

It is not just civil celebrants being sued or compelled by the state to perform same-sex weddings. In England, despite assurances of a “quadruple lock”⁸² to ensure “religious groups” and churches would not be compelled to perform same-sex weddings, the Church of England was immediately taken to court when same-sex marriage was legislated in the UK.⁸³ In 2012, Denmark introduced laws compelling all churches to conduct same-sex weddings. Individual priests are permitted to refuse to conduct the ceremony, but a replacement priest must be arranged by the local bishop.⁸⁴

There has been virtually no discussion in the long-running debate about same-sex marriage in Australia of the very real consequences to freedom of religion, speech and conscience the flow from changing the law. If Australians were aware of the consequences that are flowing in other jurisdictions, they would be much more circumspect about answering polling questions which assume there is no impact on anyone apart from the couple involved.

⁷⁹ Stefan J Bos (November 15, 2011), ‘Dutch Christian Civil Servant Fired For Opposing Gay Marriage’, *BosNewsLife*, <http://www.bosnewslife.com/19058-news-alert-dutch-christian-civil-servant-fired-for-opposing-gay-marriage>.

⁸⁰ Stefan J Bos (November 16, 2011), ‘Dutch Town Urk Supports Officials Opposing Gay Marriage’, *BosNewsLife*, <http://www.bosnewslife.com/19075-dutch-town-urk-supports-officials-opposing-gay-marriage>.

⁸¹ Mark Hill (17 January 2013), ‘Lillian Ladele is the real loser in Christian discrimination rulings’, *The Guardian*, <http://www.theguardian.com/commentisfree/belief/2013/jan/17/lillian-ladele-loser-christian-discrimination-rulings>.

⁸² Patrick Wintour (12 December, 2012), ‘Gay marriage plans offer ‘quadruple lock’ for opposed religious groups’, *The Guardian*, <http://www.theguardian.com/society/2012/dec/11/gay-marriage-quadruple-lock-religious-groups>.

⁸³ Steve Doughty (3 August, 2013), ‘Millionaire gay fathers to sue the Church of England for not allowing them to get married in the church’, *Daily Mail*, <http://www.dailymail.co.uk/news/article-2383686/Millionaire-gay-fathers-sue-Church-England-allowing-married-church.html>.

⁸⁴ Richard Orange (7 June, 2012), ‘Gay Danish couples win right to marry in church’, *The Telegraph*, <http://www.telegraph.co.uk/news/worldnews/europe/denmark/9317447/Gay-Danish-couples-win-right-to-marry-in-church.html>.

During the 2012 marriage debate in the Federal Parliament which rejected changing the definition of marriage, several supporters of change said their support was contingent on no harm occurring to people who held religious and conscientious objections. Member for Canberra Gai Brodtmann said:

*We are not here today discussing unions sanctioned by the church, we are talking about the sanctions by the state. No church should ever be forced to marry same-sex couples and I will never support that.*⁸⁵

Similarly, Member for Corio Richard Marles said:

*There are churches that feel a sense of threat about societal norms impacting upon their ability to express their faith. In taking the position that I do in this debate I also take a position that their right to freedom of religious expression must be defended, and I absolutely commit myself to that.*⁸⁶

While admirable, it is clear that what these MPs are seeking cannot be achieved given that a change to the legal definition of marriage will likely flow through to State and Commonwealth anti-discrimination law, as demonstrated by the ACT Attorney-General's letter. ACL contends that Australians would not wish to see their fellow citizens falling foul of the law simply because they wished to uphold the time-honoured definition of marriage. Fines and re-education programs for the crime of believing marriage is between a man and a woman is unlikely to be a path Australians would want to go down.

⁸⁵ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 September 2012, p 10066 (Ms Brodtmann).

⁸⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 September 2012, p 10075 (Mr Marles).

Conclusion

The Committee should recommend that the Senate reject this bill.

This bill would create a conflicted law which defined marriage as between a man and a woman but recognised other relationships outside this definition as marriage also. Australian law would “recognise foreign marriages that Australian law does not recognise”,⁸⁷ an absurd result. But it would not end there, as this bill is merely “a backdoor way to try to increase the pressure for same-sex marriage in Australia”.⁸⁸ It would be a small step from passing this bill to redefining marriage in Australian law, and all the egregious effects for family, children, and society more broadly that would follow in consequence.

If passed, this bill would create pressure on churches and people of faith to conform to an alternative definition of marriage to which they cannot in good conscience acquiesce. It would result in an erosion of religious liberty, as well as freedom of speech and freedom of conscience.

Australia has debated this issue and rejected a redefinition of marriage time and time again. Australia has no obligation to cede its sovereignty based on trends in other parts of the world.

ACL recommends rejecting this bill.

Yours sincerely,

Lyle Shelton

Managing Director

Australian Christian Lobby

⁸⁷ Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2013, p 3501 (Senator Brandis).

⁸⁸ Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2013, p 3507 (Senator Boyce).