Human Rights
Law Centre Ltd
ABN 31 117 719 267

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By email: **legcon.sen@aph.gov.au**

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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100, Parliament House
Canberra ACT 2600

Inquiry into the Marriage Equality Amendment Bill 2010

The Human Rights Law Centre (***HRLC***) welcomes the opportunity to provide a submission to the Senate Inquiry on its inquiry into the *Marriage Equality Amendment Bill 2010* (Cth).

In its current form, the *Marriage Act 1961* (Cth) (the **Marriage Act**) legalises and entrenches unacceptable discrimination against lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people. The exclusion of LGBTI people from the Marriage Act denies them a right that is afforded to all other Australians.

The HRLC previously made a submission to the Inquiry into the Marriage Equality Amendment Bill 2009 entitled '*Marriage Equality – A Basic Human Right'* (**2009 Submission**). A copy of this submission is attached. We refer to and reiterate the recommendations contained in the 2009 Submission.

The 2009 Submission focussed on the need to remove all forms of sexual-orientation discrimination from the Marriage Act. The HRLC therefore welcomes the introduction of the *Marriage Equality Amendment Bill 2010* and its stated objective of removing discrimination from the Marriage Act to ensure that all people, regardless of their sex, sexual orientation or gender identity, have the opportunity to marry.

In addition to the recommendations made in the 2009 Submission, the HRLC emphasises the need to achieve marriage equality for intersex persons. The HRLC endorses the view of Organisation Intersex International Australia (***OII***) as expressed in its submission to the Federal Marriage Equality Amendment Bill Committee dated 28 August 2009.[1]

Yours sincerely

Anna Brown
Director - Advocacy & Strategic Litigation

[1] Submission available at (http://oiiaustralia.com/3383/submission-federal-marriage-equality-amendment-bill-committee/)

Marriage Equality – A Basic Human Right

Submission to the Inquiry into the

Marriage Equality Amendment Bill 2009

August 2009

Human Rights Law Resource Centre Ltd

Magdalena McGuire, Rachel Ball and Emily Howie
Human Rights Law Resource Centre Ltd

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

(a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

(b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and

(c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

(a) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;

(b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;

(c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and

(d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

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Acronyms

Human Rights Committee	HRC
Human Rights Law Resource Centre	HRLRC
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic Social and Cultural Rights	ICESCR
Lesbian, gay, bisexual and transgender	LGBT

1. Introduction

1. On 24 June 2009, the Marriage Equality Amendment Bill 2009 (**the Bill**) was lodged in the Senate by Greens Senator Sarah Hanson-Young. The Bill seeks to amend the *Marriage Act 1961* (Cth) (**Marriage Act**) so that:

   (a) same-sex partners are able to marry and;

   (b) same-sex marriages legally entered into in other jurisdictions are recognised in Australia.

2. One day after the Bill was lodged, the Senate voted to send the Bill to an inquiry (**the inquiry**). The inquiry is being conducted by the Senate's Legal and Constitutional Affairs Committee and is due to report by 26 November 2009.

3. This submission is made by the Human Rights Law Resource Centre (**HRLRC**). The submission focuses on the need to remove all forms of sexual-orientation discrimination from the Marriage Act. The HRLRC considers that the most effective way to do this is through a human rights framework.

4. In its current form, the Marriage Act legalises and entrenches unacceptable discrimination against lesbian, gay, bisexual and transgender (**LBGT**) people. The exclusion of LGBT people from the Marriage Act denies them a right that is afforded to all other Australians. The Marriage Act is underpinned by the view that the relationships and commitments of LGBT people are somehow different and inferior, and that they themselves can never be full and equal members of Australian society. This view is out of step with human rights norms and principles. Furthermore, it fails to reflect the reality of contemporary relationships and values in Australian society. Recent evidence indicates that the majority of Australians now support same-sex marriage.[1] These developments should be taken into account by the inquiry in its assessment of the Marriage Act. The HRLRC considers that the Marriage Act should reflect an inclusive approach to marriage that upholds the human rights of *all* Australians – regardless of sexual identity and orientation.

[1] Galaxy Research (June 2009) *Same Sex Marriage Report* (Report prepared for Australian Marriage Equality) 5, available at http://www.australianmarriageequality.com/Galaxy200906.pdf

2. Executive Summary

2.1 Introduction

5. The HRLRC considers that the most effective way to end marriage discrimination is to reform the Marriage Act through a human rights framework. To this end, the HRLRC supports the Bill's objective in removing all forms of sexual-orientation discrimination from the Marriage Act. The HRLRC reminds the inquiry that systemic discrimination against LGBT people will continue to be pervasive so long as marriage is available to heterosexual people only. The Marriage Act should be reformed so that the equal worth and dignity of same-sex relationships are recognised in Australia.

6. The recommendations set out in this submission are aimed at ensuring that the Marriage Act is reformed in light of the human rights principles of fairness, equality, dignity and respect. The HRLRC submits that marriage equality is a basic human right that all Australians are entitled to enjoy.

2.2 Recommendations

7. To this end, the HRLRC makes the following recommendations for reform of the Marriage Act:

Recommendation 1: A Human Rights Framework

The human rights principles of equality and freedom from discrimination should form the basis of reform to the Marriage Act.

Recommendation 2: The Approach to Marriage Under the ICCPR

The narrow definition of marriage adopted by the UN Human Rights Committee in *Joslin v New Zealand* should not be applied to the Australian context. Instead, Australian law should adopt a broad approach which recognises that marriage equality is a basic human right that is available to all people regardless of sexual orientation or identity.

Recommendation 3: An Inclusive Definition of Marriage

The definition of marriage under section 5(1) of the Marriage Act should be amended to read: "marriage means the voluntary union of two people, regardless of their sex, sexuality or gender identity, entered into for life".

Recommendation 4: In Their Own Words

The references to 'wife' and 'husband' should be removed from section 45(2). Instead the Marriage Act should enable parties to use words of their own choosing to indicate that they take each other to be lawfully wed.

Recommendation 5: The Union of Two People

The gendered term 'man and woman' should be deleted from section 46(1) of the Marriage Act. The marriage celebrant should instead be authorised to declare: "Marriage, according to law in Australia, is the union of two people to the exclusion of all others, voluntarily entered into for life".

Recommendation 6: Form and Ceremony of Marriage

Section 72(2) of the Marriage Act, which deals with the form and ceremony of marriage, should be amended to enable parties to use words of their own choosing to indicate that they take each other to be lawfully wed.

Recommendation 7: Foreign Marriages Recognised in Australia

Same-sex marriages lawfully entered into in a foreign country should be recognised in Australia. Accordingly, section 88EA of the Marriage Act must be repealed.

Recommendation 8: Removal of Discriminatory Language

The Schedule in Part III of the Marriage Act dealing with 'persons whose consent is required to the marriage of a minor' should be amended. The discriminatory term 'husband and wife' should be changed to 'two people'.

3. A Human Rights Framework

3.1 The Human Right to Equality

8. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties,[2] human rights instruments,[3] national laws,[4] and jurisprudence.[5]

9. Both the ICCPR and the ICESCR contain comprehensive prohibitions on discrimination. For example, article 2(1) of the ICCPR guarantees that all people are entitled to enjoy the rights recognised in the Covenant without distinction of any kind, including on the grounds of sex. Article 2(2) of the ICESCR contains a similar provision on the right to equality of treatment.

10. The principle of equality is further elaborated in article 26 of the ICCPR. Article 26 guarantees that all people are equal before the law, and are entitled to the equal protection of the law without discrimination of any kind, including on the grounds of sex. Article 26 is a free-standing non-discrimination clause that prohibits discrimination – in fact or in law – in all aspects of public life.

[2] See, eg, International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171 (**ICCPR**), arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (*entered into force* Jan. 3, 1976), 993 UNTS 3 (**ICESCR**), art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (**CEDAW**); International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**), Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (**CRPD**), art. 5.

[3] See, eg, Human Rights Committee (**HRC**), *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); Committee on Economic, Social and Cultural Rights (**CESCR**), *General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005); CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Elimination of Discrimination against Women (**CEDAW Committee**), *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004).

[4] See, eg, *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

[5] See, eg, *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zgraggen v Switzerland*, Ser. A No. 263 (1993).

11. The jurisprudence of the HRC confirms that the reference to 'sex' in articles 2 and 26 of the ICCPR should be taken to include sexual orientation. This position was first suggested by the HRC in the 1994 case of *Toonen v Australia*[6]. Following this in the 2000 decision of *Young v Australia*,[7] the HRC more clearly confirmed that 'sexual orientation' was a prohibited ground of discrimination under article 26. Read together, these cases indicate that sexual-orientation rights are embedded in the text of the ICCPR.

12. The right to equality under international human rights law places the Australian government under an obligation to ensure that LGBT people are not discriminated against on the grounds of their sexual orientation or identity. The HRLRC considers that a law such as the Marriage Act – which gives heterosexual but not same-sex couples the right to marry – is a clear example of discrimination based on the grounds of sexual-orientation and identity. This discrimination is perpetuated by the fact that the *Sex Discrimination Act 1984* prohibits discrimination on the ground of marital status but does not protect same-sex couples from discrimination on the basis of their relationship status.[8]

13. The failure to protect LGBT people from discrimination is incompatible with Australia's obligations under both articles 2 and 26 of the ICCPR, which require States parties to ensure that all people can enjoy their ICCPR rights without discrimination, that the content of legislation is not discriminatory, and that legislation is not applied in a discriminatory way.[9] The HRLRC considers that the most effective way to end marriage discrimination is to use a human rights framework to guide reform to the Marriage Act.

> ***Recommendation 1: Human Rights – A Framework for Reform***
>
> The human rights principles of equality and freedom from discrimination should form the basis of reform to the Marriage Act.

3.2 Reassessing the Approach in *Joslin*

14. The approach to same-sex marriage under the ICCPR was considered by the HRC in the 2002 case of *Joslin v New Zealand*.[10] In this case, the HRC decided that a state's failure to

[6] *Mr Nicholas Toonen v Australia*, Communication No. 488/1992, U.N. Doc.A/49/40 (1994).

[7] *Mr Edward Young v Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

[8] See, eg, Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008), 147.

[9] UN Human Rights Committee, *General Comment 18: Non-discrimination*, CCPR 10/11/89 (1989).

[10] *Ms Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

recognise same-sex marriage did not constitute a breach of the ICCPR. The HRC found that the text of article 23(2) only requires states to recognise as marriage a union that takes place between a man and a woman. In focusing narrowly on the definition of marriage, the majority decision does not expressly consider how the marriage provision relates to the broader equality principles established by the ICCPR. However the case did confirm that, whilst article 23(2) does not create a positive obligation for states to recognise same-sex marriages, it does not prevent them from doing so.

15. One of the key difficulties with *Joslin* is that it failed to address the important public policy issues raised by the applicants in the case. The decision hinged strictly on the HRC's interpretation of the definition of marriage. The majority found that, as article 23(2) is the only provision in the ICCPR to use gender-specific language, it applies only to the right of men and women to marry each other (and not the right of men and women 'to marry whomever they please'). The HRC decided that the exclusion of same-sex couples from the ICCPR's definition of marriage is not discriminatory because it is valid form of differential treatment.

16. A key reason for this conclusion is the majority's view that the applicants failed to prove that "by *mere refusal* to provide for marriage between homosexual couples" the state had discriminated against them.[11] However, the logic of this statement is unconvincing. If marriage is a universal human right, it follows that the systematic denial of this right to a particular group of people must be based on "reasonable and objective criteria".[12] In *Joslin*, the criteria for restricting marriage to heterosexual couples was not made apparent. By focusing narrowly on the interpretation of marriage – without exploring the concepts or values that drive this particular interpretation – the decision failed to explain why same-sex couples are not entitled to enjoy the same rights as heterosexual couples. [13] In other words, the decision does not provide the underlying justification for excluding a particular group of people from the definition of marriage under the ICCPR.

17. In light of the sexual orientation rights embedded in the ICCPR, there are compelling reasons in favour of interpreting the marriage provision (article 23(2)) broadly so as to include same-sex couples. This is particularly so given that the marriage provision does not explicitly state that men can only marry women or that women are only permitted to marry men. Admittedly, as the HRC points out, article 23(2) is the only provision in the ICCPR to use gender-specific

[11] See note 9 at 8.3 (emphasis added).

[12] *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 (1990) at para 13.

[13] Giedre Zukaite (2005) "Does the Prohibition on Same-Sex Marriage Violate Fundamental Human Rights and Freedoms?" 2 *International Journal of Baltic Law* 1-24 at 5.

language. However, this in itself does not foreclose the possibility of interpreting the article in a manner that supports same-sex marriage. Given that the reference to 'sex' in articles 2 and 26 can be taken to include 'sexual orientation', the HRLRC considers that the marriage provision should also be given a broad interpretation that is informed by the reality of contemporary relationships. This approach is entirely consistent with the notion that the ICCPR is a living document that is capable of responding to the changing norms and values of society. Likewise, this approach is supported by the overarching purpose of the ICCPR. By ratifying the ICCPR, states make a formal commitment to recognising the inherent dignity and equal worth of each individual. Eradicating marriage discrimination marks an important step towards recognising the inherent worth of same-sex relationships and achieving substantive equality for LGBT people.

18. Substantive equality is concerned not only with formal rights, but also with the *effects* of laws, policies and practices, and with ensuring that these do not maintain, but rather alleviate, the inherent disadvantages faced by particular groups of people.[14] An important aspect of achieving substantive equality is eradicating systemic discrimination against underrepresented and marginalised groups of people. Systemic discrimination refers to practices which are absorbed into institutions and social structures, including the law, and which have a discriminatory effect.[15] What *Joslin* fails to appreciate is that the issue of same-sex marriage cannot be viewed in isolation. Rather, it must be set in the context of the ongoing systemic discrimination faced by LGBT people. By failing to recognise same-sex marriage, states perpetuate systemic discrimination against LGBT people and deny them a right which is afforded to all heterosexuals. In this context, the idea that a state's "mere refusal" to recognise same-sex marriage amounts to a form of differentiation, rather than discrimination, simply does not hold true.

19. Given the difficulties inherent in *Joslin*, this case should be approached with a note of caution. The HRLRC reminds the inquiry that *Joslin* does not prevent states parties from recognising same-sex marriage. The majority decision in the case merely stands for the proposition that the ICCPR does not impose a positive obligation on states to do so.

20. The HRLRC also considers that the narrow definition of marriage in *Joslin*, adopted almost a decade ago, is out of step with current human rights principles and with the values of

[14] For an analysis of substantive equality see, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005) *The equal right of men and women to the enjoyment of all economic, social and cultural rights*, E/C.12/2005/4, 11 August 2005.

[15] See, for example, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) [12].

contemporary Australians. Recent evidence indicates that the majority of Australians now support same-sex marriage.[16] In light of these considerations, the HRLRC submits that the *Joslin* approach to marriage should not be applied in the Australian context. Instead, the Marriage Act should adopt a broad approach which recognises that marriage equality is a basic human right that is available to all people in Australia.

> ***Recommendation 2: The Approach to Marriage Under the ICCPR***
>
> The narrow definition of marriage adopted by the UN Human Rights Committee in *Joslin v New Zealand* should not be applied to the Australian context. Instead, Australian law should adopt a broad approach which recognises that marriage equality is a basic human right that is available to all people regardless of sexual orientation or identity.

3.3 Lessons from Other Jurisdictions

21. Judicial bodies worldwide are increasingly recognising that sexual orientation discrimination is incompatible with human rights principles and standards.[17] Since *Joslin* was decided in 2002, the movement for marriage equality has steadily gathered momentum in Australia and abroad. On the international front, the number of jurisdictions opting to eliminate marriage discrimination has steadily increased and now includes countries such as Canada, South Africa, Belgium and Spain.

22. The experience of other jurisdictions is that recognising marriage equality does not threaten the institution of marriage, nor does it detract from the rights of heterosexual people in any way. For example, a recent study exploring the impact of legalising same-sex relationships in Scandinavia showed that there had not been any negative effects as a result of changes to the law. Indeed, the study found that after Denmark legalised same-sex marriage, the total number of marriages – including heterosexual marriages – had increased.[18]

23. Like heterosexual couples, not all same-sex couples view marriage as the ultimate endorsement of their relationship. Nonetheless, a state's formal recognition of same-sex

[16] See note 1, above.

[17] Amnesty International (2009) *Marriage Equality*, available at http://www.amnestyusa.org/lgbt-human-rights/marriage-equality/page.do?id=1551077

[18] Giedre Zukaite (2005) "Does the Prohibition on Same-Sex Marriage Violate Fundamental Human Rights and Freedoms?" 2 *International Journal of Baltic Law* 1-24 at 17.

marriage constitutes an important public acknowledgment of the equal rights of LGBT people and the value of their relationships.[19]

24. The jurisprudence of the South African Constitutional Court provides useful guidance on this complex area of law and policy. In Minister *of Home Affairs v Fourie*[20], Justice Albie Sachs was emphatic in finding that the damage caused by marriage discrimination was not merely 'symbolic' or academic.[21] In fact, this form of discrimination could be as serious as material deprivation. Justice Sachs noted that: [22]

> It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law. It is equally evident that same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different from the norm.

25. Justice Sachs went on to find that the gender specific language in South Africa's Marriage Act did not prevent the law from evolving in accordance with contemporary norms and values. Indeed, in his opinion, the Marriage Act's reference to "men and women" was merely "descriptive of an assumed reality, rather than prescriptive of a normative structure for all time".[23]

26. The HRLRC submits that Australia can learn from the experience of jurisdictions which recognise same-sex marriage. The experience of these jurisdictions indicates that recognising marriage equality will not only ensure that Australia's human rights obligations are fulfilled, but will also assist to develop laws and policies that promote the inherent equality and dignity of all people in Australia.

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[19] Aaron Xavier Fellmeth (2008) "State Regulation of Sexuality in International Human Rights Law and Theory" 50 *William & Mary Law Review* 797-936 at 847.

[20] *Minister of Home Affairs v. Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

[21] Ibid at para 62.

[22] Ibid at paras 75-76.

[23] Ibid at para 100.

4. Reform of the Marriage Act

4.1 Introduction

27. The HRLRC commends the introduction of this Bill, which seeks to remedy marriage discrimination in Australia. The Bill recognises that, in order not to discriminate against individuals in same-sex relationships, Australia must enable them to have their relationships publicly affirmed and protected in the same way as heterosexual relationships. The HRLRC reminds the inquiry that, in order to comply with its human rights obligations, Australia must take positive steps to ensure the human right to equality is achieved for LGBT people. To this end, the HRLRC considers that the Marriage Act needs to be reformed within the terms set out by the Bill. The Bill establishes that the Marriage Act should be amended to enable: (a) same-sex couples to marry, and: (b) same-sex marriages entered into overseas to be recognised in Australia.

4.2 Recommendations

28. To this end, the HRLRC recommends that the Bill should be implemented in full. The changes that should be made to the Marriage Act are as follows:

Recommendation 3: An Inclusive Definition of Marriage

The definition of marriage under section 5(1) of the Marriage Act should be amended to read: "marriage means the voluntary union of two people, regardless of their sex, sexuality or gender identity, entered into for life".

Recommendation 4: In Their Own Words

The references to 'wife' and 'husband' should be removed from section 45(2). Instead the Marriage Act should enable parties to use words of their own choosing to indicate that they take each other to be lawfully wed.

Recommendation 5: The Union of Two People

The gendered term 'man and woman' should be deleted from section 46(1) of the Marriage Act. The marriage celebrant should instead be authorised to declare: "Marriage, according to law in Australia, is the union of two people to the exclusion of all others, voluntarily entered into for life".

Recommendation 6: Form and Ceremony of Marriage

Section 72(2) of the Marriage Act, which deals with the form and ceremony of marriage, should be amended to enable parties to use words of their own choosing to indicate that they take each other to be lawfully wed.

Recommendation 7: Foreign Marriages Recognised in Australia

Same-sex marriages lawfully entered into in a foreign country should be recognised in Australia. Accordingly, Section 88EA of the Marriage Act must be repealed.

Recommendation 8: Removal of Discriminatory Language

The Schedule in Part III of the Marriage Act dealing with 'persons whose consent is required to the marriage of a minor' should be amended. The discriminatory term 'husband and wife' should be changed to 'two people'.