Submission of the New South Wales Council for Civil Liberties (CCL) to the Senate Legal and Constitutional Committee concerning the Marriage Equality Amendment Bill 2010.

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.

The submission below draws upon, modifies and adds to some of the arguments CCL made to the Senate Committee in relation to the Marriage Equality Amendment Bill 2009.

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.

1. The current situation contributes to harm.

Continuing legal discrimination against gays and lesbians fosters and perpetuates 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.

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[1] [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].

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

It is not only those who are same-sex attracted who are attacked. Heterosexual males walking together are subject to violent attack by prejudiced persons who make assumptions about their sexuality.

Harm is caused also to those who perpetrate these wrongs and are subsequently punished for them. These are often young—boys or young men. 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 even our heterosexual children vulnerable.

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.

2. It is no longer plausible to assert that harmful social consequences will follow from legislating for marriage equality.

The notion that society will be harmed by the change 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, in Argentina, in Iceland, in Mexico, in Norway, in Portugal, in Sweden and in Belgium, the change has taken place without serious problems resulting. There is no threat to the institution of marriage.

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

There are two versions of this argument.

It is said that the word ‘marriage’ means ‘the union of a man and a woman to the exclusion of all others’, so any institution that involved a same sex union could not be a marriage.

And it is said that the meaning of the word ‘marriage’ in the Australian Constitution is ‘the union of a man and a woman to the exclusion of all others’, so the introduction of same sex marriages is beyond the power of the Federal Parliament.

1. It has never been the case that ‘marriage’ in English has meant ‘the union of a man and a woman to the exclusion of all others’.

Before there was an English language, the practice of polygamy amongst Muslims and others was well-known. So was that of concubinage, co-existing in ancient Hebrew culture amongst others with polygamy or with otherwise monogamous marriage, and the role of concubinae

and concubini in ancient Rome. The English word 'marriage' came into existence in the context of these cultural variations. It described them all. The word 'marriage' is not as limited as the objectors suppose.

This is clear also from the fact that it has been possible for many decades to discuss the desirability of homosexuals marrying each other. This would not have been possible—it would not have been comprehensible—if marriage was by definition heterosexual.[2]

2. 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 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 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.

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[2] One could compare 'gay marriage' with 'married bachelor'. The former is instantly comprehensible: the latter is nonsense.

[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>.

In any case, it is a logical fallacy to argue from the supposed current meaning of the word 'marriage' to what our behaviour or institutions ought to be.

Recommendation 1: That the Senate Committee support the bill.

D. Forcing people to comply.

As the Australian Human Rights Commission notes in its submission:

> 34. It is important to note that supporting same-sex marriage need not, and does not, raise any conflict between the right to equality and the right to freedom of religion. Currently the Marriage Act does not require any religious minister to marry any person contrary to its religious tenets, and the amendments in the Bill would not affect this position.
> 35. The proposed amendments to the Marriage Act would provide same-sex couples with access to civil marriage only.21 The Marriage Act need not require any religious institution to marry two people of the same sex if that is against the tenets of that institution. The South African Constitutional Court has directly addressed this issue in Fourie.22 It has also been addressed in Canada by the British Columbia Court of Appeal.23 There is nothing in the Canadian Civil Marriage Act 2005 (Can) that impairs the freedom of officials or religious groups to refuse to perform marriages not in accordance with their 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 suggests that the bill include a section such as that contained in the Marriage Amendment Bill 2012.

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

Section 47

After paragraph (a), insert:
(aa) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex; or

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

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NSW Council for Civil Liberties
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