



AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS

2 April 2012

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

Dear Secretary

Marriage Equality Amendment Bill 2012

**1 Introduction**

1.1 Australian Lawyers for Human Rights ('ALHR') is a national network of Australian lawyers and law students active in practising and promoting awareness of human rights. We have over 2000 members across the nation, and active National, State and Territory Committees.

**2 Summary of Recommendations**

2.1 ALHR strongly supports the objectives of the Bill, which are:

- (a) to remove from the *Marriage Act 1961* discrimination against people on the basis of their sex, sexual orientation or gender identity; and
- (b) to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and
- (c) to promote acceptance and the celebration of diversity.

2.2 ALHR submits that the current definition of marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”, constitutes unjustifiable discrimination against persons who wish to marry someone of the same sex.

2.3 ALHR submits that this discrimination is harmful to the dignity of people who are denied the right to marry because of their sex, sexual orientation or gender identity, and to their families. This damage persists, despite the fact that the passing of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008* has removed discriminatory provisions against same-sex couples in most pieces of Commonwealth legislation.

2.4 The damage done to individuals who are discriminated against in this way outweighs any benefit that may exist in preserving a ‘traditional’ conception of marriage as between a man and a woman.

2.5 ALHR notes that the global context is one in which an increasing number of the world’s most tolerant and liberal states are permitting marriage regardless of the sex, sexual orientation or gender identity of the couple who wish to wed.

2.6 ALHR proposes a definition of marriage as simply “the voluntary union of two individuals.” ALHR submits that this definition would serve the objectives of the Bill, reflect the legal and social reality of the institution of marriage and address some of the concerns of those who oppose broadening the parameters of marriage to include same-sex couples.

### **3 Background and Social Context**

3.1 ALHR submits that the proposed marriage equality reforms reflect current public values, and would enjoy the support of the majority of Australians. Recent national opinion polls provide strong and consistent evidence that the majority of Australians support marriage equality, and that this support is likely to be enduring. A Newspoll survey conducted in November 2010 found that 65% of the respondents polled had “no problem” with allowing same-sex marriage. Similarly, national Neilson surveys from November 2010 and March 2011 show 57% support for same-sex marriage.<sup>1</sup> Even allowing for religious beliefs, 53% of Christians polled by Galaxy Research conducted in August 2011 supported same-sex marriage.<sup>2</sup> In the same survey, people of other religions polled their support at 62%, and people of no religious affiliation polled their support at 67%.

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<sup>1</sup> Australian Marriage Equality, Marriage equality and public opinion, Fact Sheet, available online: <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/10/AMEpollfactsheet@Jun11.pdf> (accessed 21 March 2012) cited in Gareth Griffith, “Same-sex marriage briefing paper no. 3/2011,” July 2011, NSW Parliamentary Library Research Service, at p 1 available online: [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/Same-sexmarriage/\\$File/SAME-SEX+MARRIAGE+BP.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/Same-sexmarriage/$File/SAME-SEX+MARRIAGE+BP.pdf) (accessed 21 March 2012)

<sup>2</sup> Galaxy Research Poll 5-7 August 2011 Commissioned by Australians for Marriage Equality. Available online: <http://www.australianmarriageequality.com/wp/wp-content/uploads/2011/08/marriagereligion.pdf> (accessed 21 March 2012).

- 3.2 The assumption that only people in a particular group or demographic display majority support for marriage equality is not borne out in the results of the opinion polls. Polling showed that 59% of rural and regional dwellers support marriage equality, 57% of men support marriage equality, and 57% of blue-collar workers support equality.<sup>3</sup>
- 3.3 Support for marriage equality is highest among families with young children (72%) and people below 24 years of age (80%).<sup>4</sup> The only age demographic in which support for marriage equality is not higher than levels of opposition are people over 50 years of age. The split is 46% support and 46% opposition.<sup>5</sup> This suggests that support for marriage equality reflects a social value that is likely to become an enduring mainstream norm.
- 3.4 Further, a Galaxy Research poll conducted nationally in May 2011 found that 75% of Australians believed that reform to allow same-sex marriage is inevitable.<sup>6</sup> This was echoed by the Prime Minister at a dinner she hosted at The Lodge.<sup>7</sup>
- 3.5 ALHR submits that not only would public opinion support proposed marriage equality reforms, it would also have the effect of improving the mental and physical health and well-being of same-sex attracted individuals, particularly for adolescents and young adults. Further, while it is sometimes argued by opponents of same-sex marriage that the issue of marriage discrimination affects only a minority of Australians, the ALHR argues that it is still a very significant minority.
- 3.6 The Australian Bureau of Statistics ('ABS') 2009 Australian Social Trends Report<sup>8</sup> outlined that, in the ABS Census 2006, approximately 0.4% of Australians reported that they were in same-sex relationships, (approximately 50,000 people), an increase from the figure of 0.2% reported in 1996. Despite the increase, the ABS still considered the 2006 figure to be an under-estimation as people may be reluctant to identify as being in same-sex relationships, or may have not been aware that same-sex relationships would be counted in the census.<sup>9</sup>
- 3.7 The negative impact on the health and well-being of continued marriage discrimination on same-sex attracted individuals is supported by psychological research. Based on the evidence, the Australian Psychologists Association issued a statement in December 2011

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<sup>3</sup> Australian Marriage Equality, Marriage equality and public opinion, Fact Sheet, available online: <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/10/AMEpollfactsheet@Jun11.pdf> (accessed 21 March 2012)

<sup>4</sup> See note above.

<sup>5</sup> See note above.

<sup>6</sup> See note 1.

<sup>7</sup> Jessica Wright, "Gay marriage 'inevitable' Gillard tells guests" 22 February 2012, Sydney Morning Herald, available online: <http://www.smh.com.au/opinion/political-news/gay-marriage-inevitable-gillard-tells-guests-20120221-1t1un.html> (accessed 21 March 2012)

<sup>8</sup> Australian Bureau of Statistics, 4102.0 Australian Social Trends March 2009, 25 March 2009, available online: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009> (accessed 21 March 2012)

<sup>9</sup> See note above.

urging Government to reform the Marriage Act to allow for same-sex marriage. Professor Simon Crowe, President of the APS said:

“Decades of psychological research provides the evidence linking marriage to mental health benefits, and highlighting the harm to individuals’ mental health of social exclusion. The APS supports the full recognition of same-sex relationships, on the basis of this evidence.”

3.8 The Gay and Lesbian Medical Association (‘GLMA’) Marriage Equality Initiative, noted that the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, the American Academy of Paediatrics, California District, and the American Psychoanalytic Association have reviewed the research and issued policy statements endorsing equal access to civil marriage for same-sex couples.<sup>10</sup> This Association notes that marriage equality can help promote the mental and physical health of lesbians and gay men, and that other forms of relationship recognition do not provide the same benefits. Further, marriage equality can help protect the mental and physical health of children being raised by same-sex parents, as well as the health of aging same-sex attracted individuals.<sup>11</sup>

3.9 Marriage equality is particularly crucial to the well-being and development of adolescent and young gay and lesbian individuals. The GLMA Marriage Equality Initiative cite<sup>12</sup> the research of Herdt and Kertzner<sup>13</sup> which states that marriage discrimination reinforces the stigma associated with sexual orientation and undermines well-being, “an effect to which adolescents and young adults are particularly sensitive.” Further, “The ability to be married increases developmental options for lesbian and gay adolescents and young adults, who could envision marriage as a key element of their adulthood.”<sup>14</sup>

#### 4 Non-Discrimination and Equality Before the Law

4.1 The rights to non-discrimination and equality are fundamental to human rights law and ensure the universal enjoyment of human rights. They are found in a wide range of human rights treaties which Australia has ratified.<sup>15</sup>

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<sup>10</sup> Gay and Lesbian Medical Association Marriage Equality Initiative ‘Same Sex Marriage and Health’ September 2008, available online: [http://www.lgbthealthinitiative.com/pdf/Same-Sex\\_Marriage\\_and\\_Health.GLMA.08%5B1%5D.pdf](http://www.lgbthealthinitiative.com/pdf/Same-Sex_Marriage_and_Health.GLMA.08%5B1%5D.pdf) (accessed 21 March 2012).

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Herdt, G & Kertzner, R.M. (2006). ‘I do, but I can’t: The impact of marriage denial on the mental health and sexual citizenship of lesbians and gay men in the United States.’ *Sexuality Research and Social Policy: Journal of NSRC*, 3(1), 33-49.

<sup>14</sup> Ibid.

<sup>15</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171, arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3, 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; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of the Child, Nov. 20, 1989 (entered into force Sept. 2, 1990), 1577 UNTS 3, art

- 4.2 Article 26 of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that all persons are entitled without any discrimination to the equal protection of the law and the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- 4.3 The United Nations Human Rights Committee ('HRC') has expressed the view that the scope of Article 26 is not restricted to the prohibition of discrimination in relation to the rights provided for in the ICCPR but obliges States to ensure that the content of legislation and its application are not discriminatory.<sup>16</sup>
- 4.4 It is also clear that Article 26 includes protection against discrimination on the grounds of sexual orientation. The HRC expressed the view that the reference to 'sex' in articles 2 and 26 of the ICCPR should be taken to include sexual orientation and sexual orientation is a prohibited ground of discrimination.<sup>17</sup>
- 4.5 The HRC has examined the meaning of 'discrimination' as no definition is found within the ICCPR.<sup>18</sup> The HRC notes that guidance can be found in other human rights treaties that do contain a definition. The HRC considers that 'discrimination' means 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'
- 4.6 ALHR submits that international human right law imposes an obligation on the Australian Government not to discriminate against people on the basis of their sexual orientation. ALHR submits that the *Marriage Act 1961* ('the Act') breaches Australia's obligations under Article 26 ICCPR and the fundamental rights of equality and non-discrimination. The Act directly discriminates on the grounds of sexual orientation in denying same-sex couples the right to marry.

### **Marriage as a Human Right**

- 4.7 Article 23 of the ICCPR provides for the right of 'men and women of marriageable age to marry'. The right to marry is one of the only Articles to use the phrase 'men and women' as opposed to 'everyone', 'every human being' or 'all persons'.<sup>19</sup> The HRC has considered the

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2; 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), art. 5.

<sup>16</sup> *Broeks v Netherlands* (172/1984) [12.3] UN Doc A/42/40 (1987); *Zwaan-de Vries v Netherlands* (182/84) [12.3] UN Doc A/42/40 (1987); UN Human Rights Committee, General Comment 18: Non-discrimination, CCPR 10/11/89 (1989) [12].

<sup>17</sup> *Mr Nicholas Toonen v Australia*, Communication No. 488/1992, U.N. Doc.A/49/40 (1994) [8.7]; *Mr Edward Young v Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

<sup>18</sup> UN Human Rights Committee, General Comment 18: Non-discrimination, CCPR 10/11/89 (1989) [6]-[7].

right of marriage in relation to same-sex couples in *Joslin v New Zealand* ('*Joslin*').<sup>20</sup> In *Joslin* the HRC read the phrase narrowly as if the words 'each other' were present after the word 'marry'. The HRC failed to address at all Ms Joslin's arguments in relation to equality and non-discrimination.

4.8 ALHR submits that the meaning of a treaty's terms is not static and must be interpreted within 'the framework of the entire legal system prevailing at the time of the interpretation.'<sup>21</sup> ALHR therefore submits that the decision in *Joslin* should not be treated as an authoritative interpretation of Article 23 but, rather, as likely to be revisited by the HRC when an opportunity presents itself. ALHR submits the HRC inadequately dealt with arguments relating to equality and non-discrimination and that State practice has now changed such that same-sex marriage is being recognised. Significant from an Australian perspective is the shift in the attitudes of the Australian populace in favour of marriage equality.

4.9 ALHR also submits that the purpose of the right to marry contained within Article 16 of the Universal Declaration of Human Rights must be considered in detail. It is on this Article that Article 23 ICCPR was based. Article 16 provides:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

4.10 The South African Constitutional Court has held in relation to Article 16:

'The reference to "men and women" is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time. Its terms make it clear that the principal thrust of the instruments is to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage.'<sup>22</sup>

4.11 In *Joslin*, New Zealand argued that the travaux préparatoires of Article 23 contains repeated references to "husband and wife" and that (at the time of its submissions) marriage was

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<sup>19</sup> The only other Article to use the phrase is Article 3 which provides for equal rights for men and women.

<sup>20</sup> Ms Juliet Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 (2002).

<sup>21</sup> Namibia (Legal Consequences), Advisory Opinion, ICJ Rep (1971), 31.

<sup>22</sup> *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) [100].

universally understood as open only to individuals of opposite sexes, and was so recognised in the civil law of all other States parties to the ICCPR.<sup>23</sup>

- 4.12 ALHR submits that today it can no longer be argued that marriage is universally understood to be open only to individuals of opposite sexes.<sup>24</sup> It cannot be said that the general understanding of what marriage is, is the same today as it was in 1948 when the Universal Declaration of Human Rights was proclaimed or 1966 when the ICCPR was open for signature or even a decade ago in 2002 when the HRC published its views in *Joslin*.
- 4.13 Courts are recognising that not allowing same-sex marriage is discriminatory and a violation of the right to equality.<sup>25</sup> Furthermore it has been held that to prevent marriage between two people of the same sex creates 'second-class citizens'.<sup>26</sup>
- 4.14 ALHR submits that, as marriage is a universal human right, the systematic denial of this right to a particular group of people must be based on 'reasonable and objective criteria'.<sup>27</sup> In *Joslin*, this was not addressed at all. ALHR submits that the majority of Australians support same-sex marriage;<sup>28</sup> State practice (particularly in States comparable to Australia) supports same-sex marriage; and human rights law prohibits discrimination on the grounds of sexual orientation. ALHR submits therefore there are no reasonable and objective criteria for the systematic denial of the right to marry persons of the same sex.
- 4.15 ALHR submits that laws putting de facto same-sex relationships on equal footing with de facto heterosexual relationships still deny those in same-sex relationships the choice to marry.
- 4.16 The creation of civil unions also fails to provide equality. ALHR submits that, even if civil unions provided all the same legal consequences as marriage, it creates a situation similar to the 'separate but equal' response in America during the era of segregation and maintains an inequality that violates the rights to non-discrimination and equality.
- 4.17 ALHR submits that, while a textual analysis of the ICCPR might suggest that Article 23 should be read as only allowing heterosexual union, the text on its face does not demand such a restrictive interpretation and must be read in light of developments in law and State practice.

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<sup>23</sup> Ms Juliet Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 (2002) [4.4]-[4.5].

<sup>24</sup> Australian Coalition for Marriage Equality, [http://www.australianmarriageequality.com/international.htm#Rest\\_of\\_World](http://www.australianmarriageequality.com/international.htm#Rest_of_World) (accessed 17 March 2012).

<sup>25</sup> See for example: Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs CCT60/04; CCT10/05; *Halpern v Canada* [2003] 65 OR (3d) 161 (CA); *Barbeau v British Columbia* (A-G) 2003 BCCA 251.

<sup>26</sup> *Goodridge v. Department of Public Health*, 440 Mass. 309 at 312 (Marshall CJ).

<sup>27</sup> *Broeks v Netherlands* (172/1984) [13] UN Doc A/42/40 (1987).

<sup>28</sup> Australian Marriage Equality, <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/10/AMEpollfactsheet@Jun11.pdf> (accessed 17 March 2012).

4.18 ALHR submits that a purposive interpretation should be preferred. ALHR submits that the purpose of Article 16 of the Universal Declaration of Human Rights (from which Article 23 ICCPR was drawn) is not to protect heterosexual marriage but to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage. The ICCPR requires that all persons have a right to equality and non-discrimination before the law and in the enjoyment of their rights under the ICCPR. ALHR submits that to deny persons the right to marry others of the same sex is to breach Articles 2, 23 and 26 of the ICCPR. Other aspects of the Universal Declaration of Human Rights and subsequent treaties, which reflected social norms at the time, have been modified in light of contemporary social standards.<sup>29</sup> The ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) can address contemporary issues not contemplated when those treaties were made.<sup>30</sup> Examples include changing attitudes to corporal punishment,<sup>31</sup> and privacy<sup>32</sup>. Perhaps even more relevant here, is that the male pronoun in ICESCR must be understood more broadly and is not be simply a reference to men.<sup>33</sup> This also lends support to the position that current societal attitudes to gender and sexuality must inform what is required under human rights standards about discrimination on these grounds.

### The Hague Convention

4.19 Australia is a State party to the Hague Convention on the Recognition and Celebration of Marriages ('the Hague Convention').<sup>34</sup> Pursuant to Article 9 of the Convention, Australia is required to recognise a marriage that is validly entered into in a foreign State (whether or not the State is a party to the Hague Convention).

4.20 The Hague Convention does not contain a definition of the term 'marriage'. Same-sex marriages are not listed in the excluded types of marriage,<sup>35</sup> or included in the circumstances in which State parties may refuse to recognise the validity of a marriage.<sup>36</sup>

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<sup>29</sup> eg. *Case of the Mayagna (Sumo) Awas Tingni Community -v- Nicaragua* (Inter-American Court of Human Rights, Series C No. 79, 2001) at [148] (commending an evolutionary interpretation of international human rights instruments).

<sup>30</sup> Koen de Feyter, 'Treaty Interpretation and the Social Sciences' (Paper presented at the International Conference on Methods of Human Rights Research, Maastricht, 22-24 Nov 2007) 3. Contrast Ulf Linderfalk, *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007), 178-181 who argues that interpretation should normally be consistent with *the time the treaty was made*. Such an approach does not seem to be accepted, given the jurisprudence noted in the preceding and three following footnotes.

<sup>31</sup> *Case of Selmouni -v- France* (European Court of Human Rights, Application no. 25803/94, 1999), [101] (changing understanding of what constitutes torture); see also *Kracke -v- Mental Health Review Board* [2009] VCAT 646 (Victorian Civil and Administrative Tribunal), [31].

<sup>32</sup> Eg. HRC, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, UN doc A/43/40 (1988), [7] (right to privacy depends on societal norms).

<sup>33</sup> eg. CESCR, *General comment 4: The right to adequate housing*, UN doc E/1992/23 (1991), [6] ('himself' in ICESCR now understood as gender neutral).

<sup>34</sup> Opened for signature, 14 March 1978, [1991] ATS 16, entered into force for Australia and generally on 1 May 1991.

<sup>35</sup> Art 8 of the Convention.



- 4.21 The only way that a same-sex marriage could not be recognised as valid under the Hague Convention would be if recognition were 'manifestly incompatible with [Australia's] public policy'.<sup>37</sup>
- 4.22 The explanatory report to the Hague Convention states that the omission of a definition of marriage was 'deliberate' and, as such, the term 'marriage' in the Hague Convention should be understood in its 'broadest international sense'.<sup>38</sup>
- 4.23 As submitted above, the international definition of marriage is changing to include same-sex marriages. Although only a minority of states currently recognises such marriages, 5% of the world's population live in jurisdictions that allow same-sex marriage.<sup>39</sup> The definition of 'marriage' in its *broadest* international sense surely must include same-sex marriages.
- 4.24 Developments in international law after the Universal Declaration of Human Rights or its implementing treaties (ICCPR and ICESCR) can inform how those standards are interpreted.<sup>40</sup> Accordingly, 'marriage' in the ICCPR should have this broader understanding informed by the Hague Convention and laws in other States.
- 4.25 Section 88EA of the Act specifically excludes the recognition of same-sex marriages in foreign countries. Section 5 explicitly confines the definition of marriage to heterosexual marriages. On this basis, same-sex marriage could be argued to be manifestly incompatible with public policy.
- 4.26 ALHR submits, however, that the exclusion of same-sex marriage does not reflect Australia's public policy. As noted above, the majority of Australians support same-sex marriage. The Labor Party has included the amendment of the Act to recognise same-sex marriage in its National Platform<sup>41</sup> as have the Australian Greens.<sup>42</sup> ALHR submits that ss. 5 and 88EA of the Act violate Australia's obligations under the Hague Convention.

## 5 Defining 'marriage' in contemporary Australia

- 5.1 ALHR has argued above that contemporary Australian society largely recognises that all Australians have an equal right to marry, regardless of their sex, sexual orientation or gender

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<sup>36</sup> Art 11 of the Convention.

<sup>37</sup> Art 14 of the Convention.

<sup>38</sup> A. Malmstrom, Explanatory Report, Actes et Documents de la XIIIe Session 1976, Tome III, p 41.

<sup>39</sup> Chamie, J., Mirkin, B 'Same-Sex Marriage - A New Social Phenomenon' (2011) 37(3) *Population and Development Review* 529, 531

<sup>40</sup> eg. *Vienna Convention on the Law of Treaties* (UN Treaty Series, vol. 1155, p. 331 (1969), art 31(4); HRC, *General Comment No. 29: States of Emergency*, [9] & [10], UN doc CCPR/C/21/Rev.1/Add.11 (2001); *Case of the Yakye Axa Indigenous Community v. Paraguay* (Inter-American Court of Human Rights, Series C No. 125, 2005) at [126]-[127].

<sup>41</sup> Australian Labor Party, National Platform, Chapter 9, [126], <http://www.alp.org.au/getattachment/cff0ca1c-d5bf-429f-b8e3-d9fe2308e972/our-platform/> (accessed 20 March 2012).

<sup>42</sup> The Greens, Policies, 'Care for people', 'Sexuality and gender identity', [7] and [15], <http://greens.org.au/policies/care-for-people/sexuality-and-gender-identity> (viewed 20 March 2012).

identity. Further, we have argued that to deny someone this right is unjustifiable discrimination.

- 5.2 The character of this discrimination is captured in comments made by Supreme Court Master Millibank in *Mair v Hastings*.<sup>43</sup> Discussing a gay partner's largely successful family provision claim made under the de facto category of the *NSW Family Provisions Act*, Master Millibank concluded the judgment with the following words:

“The relationship was a long one. It was for 31 years. It had its own commitments between the two parties to the relationship, but it must be noted that, in fact, it was only a de facto relationship and in this sense one cannot quite compare it to the situation of a married heterosexual couple who have made the public commitment of marriage....”<sup>44</sup>

- 5.2 Such comments imply that unions where both partners are of the same sex are somehow of less value than “real” heterosexual unions, which are capable of recognition in the institution of marriage. One of the ideas underpinning this kind of thinking is the notion that “real” heterosexual unions are distinguished by their biological potential to create a child without reproductive assistance, and that the societal value of marriage is that it provides the framework within which children can be born and raised.
- 5.3 ALHR submits that, if this were a sound reason for denying certain people the right to marry, then heterosexual couples who are unable or unwilling to have children, should also be denied access to the institution of marriage. The cruelty, incoherence and illogic of such a position in relation to heterosexual couples, also applies to couples where both partners are the same sex.<sup>45</sup>
- 5.4 At the same time, ALHR acknowledges that children are a relevant consideration to the idea of marriage. Many couples and their children value the symbol of permanence and stability that the institution of marriage provides to modern families. We point out that many same-sex couples are successfully raising children, whether through adoption, surrogacy, or assisted reproductive services. There is no sound reason why marriage, and the notions of permanence and stability that come with it, should be denied to same-sex couples and their children. The question then is how best to define ‘marriage’.
- 5.5 Prior to the 2004 amendment of the Act it contained no definition of ‘marriage’. The 2004 amendment inserted for the first time a definition of ‘marriage’, as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.” The amendment also inserted Section 88EA into the Act, to specify that overseas unions between: (a) a man and another man; or (b) a woman and another woman, must not be recognised as a marriage in Australia.

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<sup>43</sup> *Mair v Hastings* [2002] NSWSC 522, (Unreported, Master Maccready, 31 May 2002) .

<sup>44</sup> *Ibid*, 50.

<sup>45</sup> Mohr, R.D., 'Case for Gay Marriage, The' (1995) 9 Notre Dame JL Ethics & Pub. Pol'y 215

- 5.6 At the time of the 2004 amendment, the Hon. Alastair Nicholson, former Chief Justice of the Family Court, described it as “one of the most unfortunate pieces of legislation that has ever been passed by the Australian Parliament.”<sup>46</sup> It was unfortunate because, as this submission argues, it was an act of deliberate and specific discrimination: it singled out people who wish to marry someone of the same sex for differential treatment in legislation. There was at the time, and remains, no justification for this discrimination.
- 5.7 We support the current attempt to undo the effect of the 2004 amendment. We accept that the phrase ‘regardless of their sex, sexual orientation or gender identity’ in the Marriage Equality Amendment Bill 2012, is intended to make explicit that same-sex marriage is recognised under Australian law, and to make clear that marriage should no longer be restricted to ‘a man and a woman’.
- 5.8 However, we consider that the phrase ‘regardless of their sex, sexual orientation or gender identity’ to be superfluous. We submit the words ‘two individuals’ are sufficiently broad and flexible to rid the section of any restrictive connotations regarding gender and sex. Implicit in the neutrality of the phrase ‘two individuals’ is the notion that the gender of those persons is irrelevant to the institution into which they are entering. Furthermore, we submit that there is so clear a movement in Australia towards a popular understanding of marriage as an institution open to *all* couples who intend to share as partners the burdens, travails, intimacies and joys of life, that it will, in a few short years, seem a legislative anachronism to have deemed it necessary to specify “regardless of their sex, sexual orientation or gender identity.”
- 5.9 We suggest that defining marriage simply as ‘the voluntary union of two individuals’ would assist in assuaging the concerns of those who argue that explicitly specifying marriage as possible between members of the same sex denigrates the idea of the institution that they intend to or have committed themselves to. ALHR’s proposed definition is silent on the question of the sex of parties to a marriage. This preserves, for all those who care about the institution, whatever connotation of marriage is important to them, while not prohibiting the union of same-sex couples.
- 5.10 The 2004 definition also references the conception of marriage put forward in 1866, in the middle of Queen Victoria’s reign, by Lord Penzance in *Hyde v Hyde*.<sup>47</sup> His Lordship defined marriage “in Christendom” to mean “the voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>48</sup> The elements of the definition as being a union ‘for life’ and ‘to the exclusion of all others’ have been transmitted through the jurisprudence of many common law countries.
- 5.11 But, as Chief Justice Nicholson has pointed out, the definition was at the time and remains inaccurate. In the first place, the passage of legislation establishing civil divorce means that

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<sup>46</sup> A. Nicholson ‘The Legal Regulation of Marriage’ (2005) 29 *The Melb. UL Rev.* 556.

<sup>47</sup> (1866) LR I P& D 130, 133.

<sup>48</sup> *Ibid.*

marriage cannot be described as 'a union for life'. The high number of second marriages is testament to this fact.<sup>49</sup>

5.12 ALHR agrees, as one learned commentator has noted, that a definition that misleads through its inaccuracy "simultaneously distracts attention away from a more meaningful ceremony in which people might appreciate the full significance of what they are doing."<sup>50</sup> For these reasons, ALHR submits that the current definition of marriage in the Act, which is: "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" (Subsection 5(1)), should be amended to read simply "the voluntary union of two individuals". We consider the phrase "regardless of their sex, sexual orientation or gender identity" to be superfluous, and "entered into for life" to be inaccurate.

5.13 ALHR supports the repeal of Section 88EA of the Act. This section provides that certain unions are not marriages, and stipulates that unions solemnised in a foreign country between a man and another man, or a woman and another woman, must not be recognised as a marriage in Australia.

## **6 Developments around the World**

6.1 Same-sex marriages are undertaken in ten countries with a combined population of 223 million people.<sup>51</sup>

6.2 Within Mexico, Brazil and the United States, marriage has been redefined to include same-sex couples. In six U.S. states and one U.S. district,<sup>52</sup> no distinction is made between same-sex and opposite-sex marriages. The Brazilian state of Alagoas performs same-sex marriages. Mexico City performs same-sex marriages and the marriage certificates are recognised in all 31 Mexican states.

6.3 When these territories are combined with the countries recognizing same-sex marriages, a total of 319 million people, or 5 per cent of the world's population, live in jurisdictions that recognise same-sex marriage.<sup>53</sup> Same sex marriage is recognised, but not performed, in Israel. Same-sex marriage is currently being considered by the governments of Slovenia, Brazil and Nepal.

6.4 In 32 countries (15 per cent of the world's population), same-sex couples are legally recognised as domestic partnerships, civil unions, or registered/unregistered cohabitants.<sup>54</sup>

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<sup>49</sup> See: Poulter, S., 'The definition of marriage in English Law' (1979) 42(4) *The Modern Law Review* 409

<sup>50</sup> *Ibid*, 429.

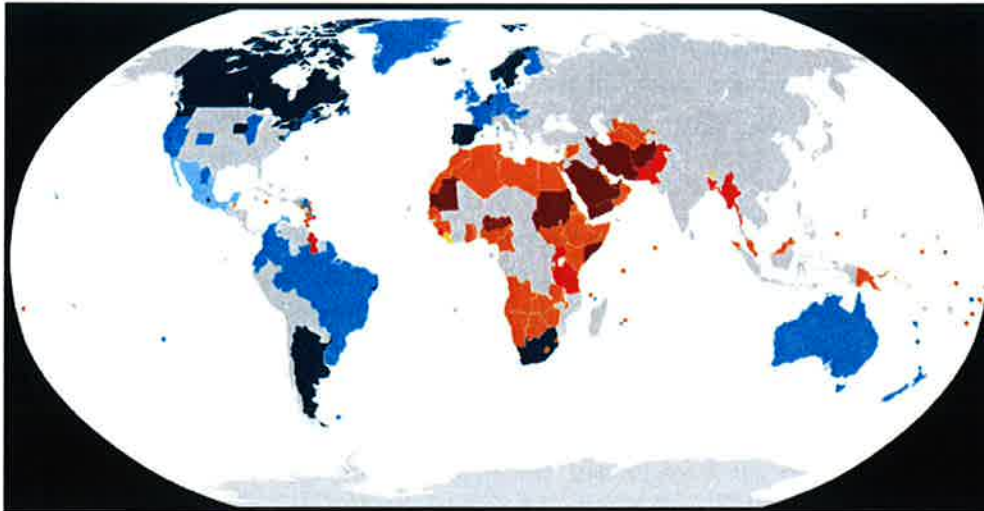
<sup>51</sup> Chamie, J., Mirkin, B 'Same-Sex Marriage - A New Social Phenomenon' 37(3) *Population and Development Review* 529, 531.

<sup>52</sup> Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and the District of Columbia.

<sup>53</sup> Chamie, J., Mirkin, B 'Same-Sex Marriage - A New Social Phenomenon' 37(3) *Population and Development Review* 529, 531.

<sup>54</sup> *Ibid*, 536-7.

6.5 By the end of 2009, the total cumulative number of same-sex marriages that had legally taken place worldwide was nearly 100,000.<sup>55</sup> It is estimated that approximately 2-3 per cent of all marriages contracted in a single year in European countries are same-sex unions<sup>56</sup>.



Laws regarding same-sex sexuality<sup>57</sup>

**Homosexuality legal**

- Same-sex marriage
- Other type of partnership (or unregistered cohabitation)<sup>1</sup>
- Foreign same-sex marriages recognised<sup>1</sup>
- No recognition of same-sex couples

**Homosexuality illegal**

- Minimal penalty
- Large penalty
- Life in prison
- Death penalty

6.6 In *Schalk and Kopf v Austria*<sup>58</sup>, the European Court of Human Rights held that same-sex partnerships fell in both the categories of 'private life' and 'family life' enshrined in Article 8 of the European Convention of Human Rights. However, an attempt to challenge the Austrian Civil Code which restricted the capacity to marry to two persons of opposite sex, failed. The First Chamber of the European Court of Human Rights held that States were not currently required to allow same-sex partners to enter into legal marriage, and declined to consider whether there was an obligation to grant same-sex couples a minimum form of recognition.<sup>59</sup>

6.7 The Netherlands became the first country to officially afford marriage equality on April 1, 2001. Following the introduction of registered partnerships, a large proportion of rights attributed to married couples were afforded to registered couples. Over 6,000 same-sex couples registered their partnerships in the Netherlands between 1998 and 2001.

<sup>55</sup> However, Chamie and Merkin argue that this figure is likely to be an underestimate (ibid).

<sup>56</sup> Ibid.

<sup>57</sup> 'World Homosexuality Laws' [http://en.wikipedia.org/wiki/File:World\\_homosexuality\\_laws.svg](http://en.wikipedia.org/wiki/File:World_homosexuality_laws.svg) last updated 14 March 2012, accessed 16 March 2012.

<sup>58</sup> [2010] ECHR 995.

<sup>59</sup> See N. Bamforth 'Families but not (yet) marriages? Same-sex partners and the developing European Convention 'margin of appreciation' (2011) 23 *Child and Family Law Quarterly* 128.

- 6.8 On January 1, 2000, it became possible in Belgium for any couple, heterosexual or homosexual, to go before an *officier de l'état civil* and publicly choose to register and live under the legal regime of *cohabitation legale*. "Legal cohabitation" was an institution somewhere between marriage and informal cohabitation. The rights and obligations accorded by *cohabitation legale* were limited to the division of goods and debts and continuation of rent after death of the partner. There were no rights with respect to children. On May 28, 2002, a bill legalising same-sex marriage was introduced into Parliament.<sup>60</sup>
- 6.9 The Spanish parliament passed same-sex civil marriage legislation via Law 13/2005 on June 30, 2005. Spanish law now states that: "Marriage will have the same requirements and results when the two people entering into the contract are of the same sex or of different sexes." The change was grounded in the right to free development of personality and equality based on Article 32 of the Spanish Constitution, which states that men and women have the right to enter into marriage with full legal equality.<sup>61</sup> The legislation also granted inheritance rights for same-sex couples. However some disparities between homosexual and heterosexual marriages remain in relation to adoption.<sup>62</sup> Same-sex marriages account for 1.8% of all marriages in Spain since its legalization in 2005.<sup>63</sup>
- 6.10 Following the Supreme Court of Canada ruling that same-sex marriages had constitutional validity, following challenges by individuals who sought to have their marriage certificates registered by state officials, the Court compelled the Canadian federal government to enact legislation to recognise gay marriage. The Canadian legislature codified the revised definition of civil marriage ("marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others") in the Civil Marriage Act via Bill C-38 in July 2005. The only restriction is that, under Article 3 of the Civil Marriage Act, officials of religious groups can refuse to perform marriages that are not in accordance with their religious beliefs.<sup>64</sup>
- 6.11 South Africa was the first country in Africa, and the second outside Europe, to recognise marriage equality. A 2005 decision in the Constitutional Court of South Africa held unanimously that the common-law definition of marriage and the marriage formula in the Marriage Act, to the extent that they excluded same-sex partners from marriage, were unfairly discriminatory on the basis of human dignity, equality and freedom. The court held that restrictive measures were unjustifiable, and therefore unconstitutional and invalid. 'Statistics South Africa' reports that a total of 2,460 marriages and civil partnerships were

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<sup>60</sup> M. Saez, 'Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World - Why Same is So Different' 19 *Am. U.J. Gender Soc. Pol'y & L.* 1, 4.

<sup>61</sup> Saez, M 'Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World - Why Same is So Different' 19 *Am. U.J. Gender Soc. Pol'y & L.* 1, 5.

<sup>62</sup> Williams, S. 'Which Countries have Legalised Gay Marriage?' 31 January 2010 <<http://www.care2.com/causes/which-countries-have-legalized-gay-marriage.html>> accessed 17 March 2012.

<sup>63</sup> Chamie, J., Mirkin, B 'Same-Sex Marriage - A New Social Phenomenon' 37(3) *Population and Development Review* 529, 531.

<sup>64</sup> S. Williams 'Which Countries have Legalised Gay Marriage?' 31 January 2010 <<http://www.care2.com/causes/which-countries-have-legalized-gay-marriage.html>> accessed 17 March 2012.

registered under the Civil Union Act up to the end of 2010.<sup>65</sup> However, this figure only reflects marriages in which at least one of the spouses is a South African citizen or permanent resident. Further, not all marriages under the Civil Union Act are between partners of the same sex, though most opposite-sex couples continue to marry under the 1961 Marriage Act.

- 6.12 In Norway, a marriage bill was presented to Norway's Parliament in June 2008. The bill read that "two persons of opposite sex or of the same sex may contract marriage". A majority of the state's Evangelical Lutheran Church supported the legislation. In 2007 the Church lifted a ban barring gays living in partnerships from serving in the clergy. According to Religion News Service (June 12 2008), 85 per cent of Norway's 4.7 million people are registered with the church.<sup>66</sup>
- 6.13 In Sweden, a gender-neutral marriage bill was passed in 2009. In June 2002, Sweden had passed a law allowing same-sex couples to adopt. In October 2009, Sweden's Lutheran Church voted to permit gay marriages to be carried out in its congregation. This decision was a result of a vote, in which nearly 70 per cent of the 250 synod members of the Church of Sweden voted in favour of the move to liberalise marriage.<sup>67</sup> Around three in four Swedes are members of the Lutheran Church.<sup>68</sup>
- 6.14 On January 8, 2010, via Law 9 of 2010, Portugal's parliament voted to approve marriage regardless of gender, by redefining marriage as a contract 'between two people that intend to form a family through a community of life.' The bill was passed by 125 votes to 99.
- 6.15 On 11 June 2010, Iceland's parliament voted unanimously to change the wording of marriage legislation to include matrimony between "man and man, woman and woman," in addition to unions between men and women.<sup>69</sup> At the time of the vote, Iceland's Protestant Church was still debating whether it should recognise same-sex unions. During a meeting of religious leaders in April 2010, 91 out of the 125 attending theologians and priests voted to support the equal marriage bill.<sup>70</sup>

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<sup>65</sup> "Statistical release P0307: Marriages and divorces, 2010". Statistics South Africa. 12 December 2011. p. 28. Accessed 17 March 2012.

<sup>66</sup> Bourassa, K.; Varnell, J. 'Norway's expansion of human rights' 17 June 2008 <<http://www.samesexmarriage.ca/equality/nor170608.htm>> accessed 17 March 2012.

<sup>67</sup> AFP 'Sweden's Lutheran Church to celebrate gay weddings' 22 October 2009 <<http://www.google.com/hostednews/afp/article/ALeqM5gBRXyAD2aAX4i7H5M0LuikDR0RhQ>> accessed 17 March 2012.

<sup>68</sup> Ibid.

<sup>69</sup> B. Bjornsdotti ; N. Vinocur 'Iceland passes gay marriage law in unanimous vote' 11 June 2010 <<http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611>> accessed 17 March 2012.

<sup>70</sup> S. Williams 'Iceland's Parliament Approves Gay Marriage' 11 June 2010 <<http://www.care2.com/causes/icelands-parliament-passes-gay-marriage-bill-49-0.html>> accessed 17 June 2010.

6.16 In July 2010, Argentina became the first country in Latin America to give homosexuals full legal rights, responsibilities and protections. Despite its overwhelmingly Catholic population, Argentinian opinion polls consistently showed that citizens supported gay marriage. In granting gay marriage rights, Argentina has managed to bypass civil unions and achieve full equality for all citizens, regardless of sex, sexual orientation and gender identity.<sup>71</sup> Even before this historic vote, there had been some recognition of marriage equality within Argentina. Some same-sex couples had obtained marriage licenses by challenging Argentina's gay marriage ban on the grounds that it was unconstitutional, and had received permission to marry.

## 7 Concluding Comments

7.1 In this submission, ALHR has endeavoured to demonstrate:

- (a) that there exists widespread popular support amongst Australians for the proposed reform of the Marriage Act 1961;
- (b) that there is a sound basis in international human rights law to support a redefinition of 'marriage' to enable *all* persons to marry the partner of their choice;
- (c) that to deny some persons the right to marry, on the basis of sex, sexual orientation or gender identity, undermines the dignity of those persons and that of their families, causing unjustifiable harm;
- (d) that there may be advantages in simplifying the definition of marriage to simply 'the voluntary union of two people', in that such a definition would better reflect the contemporary practice of marriage, and better preserve the ideal of marriage for all people;
- (e) that the proposed amendments would bring Australia, as a modern, liberal and democratic state, into line with developments in other such states who have in past decades moved to liberalise marriage.

ALHR is willing to provide further submissions, if requested to do so.

Stephen Keim  
President  
Australian Lawyers for Human Rights

Kate Cornford  
Australian Lawyers for Human Rights

Siobhan Hobbs  
Australian Lawyers for Human Rights

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<sup>71</sup> S. Williams 'Argentine Senate Votes to Legalise Gay Marriage!' 16 July 2010 <<http://www.care2.com/causes/argentina-legalizes-gay-marriage.html>> accessed 17 June 2010.



Nathan Kennedy  
Convenor, NSW Branch  
Australian Lawyers for Human Rights

Victoria Kuek  
Australian Lawyers for Human Rights

Catherine Renshaw  
Convenor, NSW Branch  
Australian Lawyers for Human Rights