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14 February 2012

Submitted online

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

Dear Committee Members,

Subject:       **Marriage Equality Amendment Bill 2010**

Thank you for the opportunity to make a submission to the Committee.

This submission advocates for marriage equality and canvasses arguments for and against allowing same-sex marriage. I shall try to be as succinct as possible.

### **Introduction**

As a fundamental principle and as a principle of “equality” and “fairness”, no Australian laws on any matter should discriminate as between individuals or groups of individuals.

If a law or a proposed law is discriminatory, it should be repealed or not enacted or there must be very clear and compelling reasons for any discriminatory aspects.

### ***Marriage Act 1961 (the Act)***

Marriage equality should really be a non-issue, a no-brainer, and it seems clear that most Australians would certainly agree to the *Marriage Act* 1961 definitions being amended to read:

*“Marriage” means the union of two persons regardless of their sex, sexuality or gender identity, to the exclusion of all others, voluntarily entered into for life”*

or perhaps the Canadian *Civil Marriage Act* puts it more simply:

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*“Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others”<sup>1</sup>*

and for Section 46 of the Act to be similarly amended.

Galaxy Research (2009-2011) reportedly indicated that 62% of Australians support marriage equality, a majority of Christians (53%) and 80% of young people (18-24 years)<sup>2</sup>

### **Discriminatory aspects of the *Marriage Act* 1961**

In the present context, the Section 5 definition and the requirements of Section 46 of the *Marriage Act* are clearly discriminatory as the definition of “marriage” restricts access to that recognised legal status to a man and a woman.

### **Arguments for and against marriage equality**

So, are there very clear and compelling reasons for the discriminatory provisions in the *Marriage Act* 1961?

#### Other discriminatory elements

1. There are of course other discriminatory elements in the Act. The requirement for both partners to be 18 years of age - this presumably to ensure the ability to enter into a marriage with “informed consent”. Then there is the requirement that both parties be unmarried - presumably to prevent bigamy or polygamy.

However, there appears to be no clear and compelling reason to restrict marriage between two persons to those of the opposite sex.

#### The principles of marriage are the same

2. The principles for heterosexual marriage are the same for same-sex marriage – love, commitment, faithfulness, loyalty, honour and respect. How can we deny that to anyone? (Johnson)<sup>3</sup>.

“Strong and stable relationships” are indeed a great foundation for an enduring, peaceful society and formally recognised same-sex relationships can only have a positive, reinforcing effect in this regard.

Even without more, it seems entirely rational to “recognise a union between two loving adults of the same sex.”

#### No effect on existing marriage

3. If same-sex unions are legalized, neither existing straight marriages nor future straight marriages will be affected by the legal changes.

4. The rules governing how a man marries a woman, and the legal terms of that marriage, will be unchanged in civil marriages.
5. The religious sacrament of marriage will be unchanged too - and since religious authorities have long distinguished between civil and sacramental marriage among their flocks, doing so is clearly possible. (Friedersdorf)<sup>4</sup>

#### The procreation argument

6. Although gay couples won't be able to conceive children together - something traditionalists regard as a core purpose of marriage - even the current legal regime permits marriages among people who cannot conceive children. Sterile people and folks who marry past childbearing age are two examples. (That there is no interest in prohibiting such unions makes gay-marriage proponents suspicious that (the) 'inability to conceive' in fact drives the controversy) (Ibid).

#### Same-sex marriage is not "natural"

7. Some argue that same-sex marriage is not "natural".

Same sex partnerships in today's society already and increasingly play a part in the formation and nurturance of children via adoption, surrogacy, and foster parenting. Who ... [would] suggest that their unions are not suitable for creating a loving family because they are not "natural"? (McGuier)<sup>5</sup>

Couples marry for many reasons. Those in their golden years who marry out of pure love, devotion and companionship. Those who marry in a hospice, knowing their time is short. Those of childbearing age who simply want to remain that ... a couple.

How arrogant to assert that the primary purpose of marriage and heterosexual union is to procreate (Ibid).

#### "Family" is the basis of society

8. "Families" are formed by many circumstances: step-parenting, grand-parenting, foster-parenting, legal guardianship, and adoption to name a few. None of these situations fits ... [a] narrow definition of "family" ... [or] ... that they are [to be considered] second best (Ibid).

The studies that same-sex marriage opponents often cite do not include gay and lesbian parents at all.

Many studies that do include gay and lesbian parents show that their children do just as well as other children on all measures. See, for example, "How Does the Gender of Parents Matter?" Journal of Marriage and Family, February 2010<sup>6</sup> (Powell)<sup>7</sup>.

The literature strongly suggests that there are no adverse effects on children brought into or brought up by parents in same-sex relationships. Indeed,

formally recognising same-sex relationships through marriage equality would bring about all the legal protections necessary to safeguard the interests of children already living in same-sex families and those that will do so in the future.

#### Access to assisted reproduction technology

9. The question of whether single women should have access to IVF was addressed 12 years ago in *John McBain v. The State of Victoria & Ors* FCA [2000] 1009 (28 July 00)<sup>8</sup>.

There really is no rational basis for arguing that a woman should be denied access to IVF if she is in a same-sex relationship.

#### Adoption and fostering of children

10. Already same-sex couples are adopting children (under the ACT *Adoption Act* 1993, the SA *Adoption Act* 1988, the NSW *Adoption Act* 2000, the Western Australia *Adoption Act* 1994 and in Victoria, a judge has allowed a gay man in a same-sex relationship to adopt his foster child).

The Victorian Law Reform Commission said in 2005 “it makes no sense that same-sex couples are able to be approved as permanent and short-term carers for children in need but not assume the full range of legal parental powers and responsibilities”<sup>9</sup>.

#### Weakening the institution of marriage

11. When gay-marriage [opponents] think about their own marriages, or the future marriages they hope to enter into, the legality or illegality of same-sex unions doesn't affect how they conceive of the institution, with the single exception of straight people who are boycotting marriage until gays can marry, a case in which legalizing gay marriage would *strengthen* it among straights (Friedersdorf).
12. One *never* encounters a gay-marriage opponent who'll consider their own marriage vows less valid, the marriages performed by their church less sanctified, or their relationship with their spouse weaker, if gays are permitted to marry (Ibid).
13. Same-sex marriage opponents can offer no specific mechanism by which permitting gays to marry will undermine civil marriage as it currently exists; and when they make vague claims about how the institution will be weakened, they often misrepresent reality - that is to say, instead of arguing that the institution of civil marriage *as it currently exists* will be weakened, they proceed with their argument as if they're protecting something that has been around for thousands of years.

But marriage as it was understood thousands of years ago and civil marriage as it is codified in law today (even before same-sex marriage) are radically

different institutions. For example, a man takes one wife, not several; marriages are typically not arranged, and are often entered into by individuals rather than families; civil rather than religious officials often perform the ceremony; there is no-fault divorce; there are no longer dowries; the age of consent is different; there are spousal-rape laws on the books; and serial marriage is common. Given all these changes, permitting same-sex unions is arguably not the most significant change in the institution of marriage over the centuries, especially since it applies to a very small percentage of the population (Ibid).

#### Civil Unions versus same-sex marriage

14. Some have argued that separate civil unions or civil partnerships laws should be extended to same-sex couples rather than marriage. Such a move, whilst initially attractive - being better than the present Federal situation - is not the answer. Clearly, “separate” is seldom, if ever “equal” (Massachusetts Supreme Judicial Court)<sup>10</sup>.

This separate but not equal aspect is demonstrable in jurisdictions that have adopted the separate civil unions approach and now are moving toward full marriage equality (for example in Denmark, England and Scotland).

#### Separation of church and state

15. We live in a secular society and as such the separation of Church and State is fundamental to the structure of our system of government. One might be forgiven for taking the view that religious considerations are having an undue influence on the debate in Australia on this issue.

Government action must have a secular purpose and the government cannot entangle government and religion.

Of course, there should be no compulsion for religious organisations to marry same-sex couples. That should be entirely a matter for those organisations to decide.

#### The end of society as we know it

16. When you look back in the recent past to advances in the law as it applies to the gay, lesbian and transgender community you see evidence of the usual suspects making mostly similar claims about the end of life as we know it. Subsequent history has shown that to be far from the truth and our societies are now more integrated than before.

More particularly, since 2001 the 18 jurisdictions around the world that have granted equal marriage rights have now accumulated an aggregate of over 75 years experience and there is no evidence of any detrimental effects<sup>11</sup>.

None of the negative arguments put forward by same-sex marriage opponents have come to pass - anywhere.

The sun still rises and sets as usual.

### **Conclusion**

Having regard to the foregoing, it is submitted that it is the wish of a majority of Australians that this issue be resolved positively with the enactment of amending legislation, permitting persons of the same gender to enter into marriage.

At the very least, all members of the Parliament should be given the opportunity for quiet, personal reflection on the above issues in order that they may make a mature decision absent any influence of bigotry and exercise a conscience vote on this issue having regard only to the concepts of equality and fairness.

Yours faithfully,

David B. Allan

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<sup>1</sup> Civil Marriage Act S.C. 2005, c.33 <http://canlii.ca/en/ca/laws/stat/sc-2005-c-33/latest/sc-2005-c-33.html#sec2>

<sup>2</sup> Australian Marriage Equality <http://www.australianmarriageequality.com/wp/who-supports-equality/a-majority-of-australians-support-marriage-equality/>

<sup>3</sup> Shari Johnson “My Lesbian Daughter, The Bible and Sex” 06 January 2012  
<http://www.foxnews.com/opinion/2012/01/06/my-lesbian-daughter-bible-and-sex/#ixzz1iizXFQ8e>

<sup>4</sup> Conor Friedersdorf “The Logical Fallacy Gay-Marriage Opponents Depend Upon” 17 January 2012  
<http://www.theatlantic.com/politics/archive/2012/01/the-logical-fallacy-gay-marriage-opponents-depend-upon/251486/>

<sup>5</sup> Maggie McGuire “Stale Argument Redux” 16 January 2012  
<http://blog.thenewstribune.com/opinion/2012/01/16/stale-argument-redux/>

<sup>6</sup> Journal of Marriage and Family “How Does the Gender of Parents Matter” February 2010  
<http://www.apa.org/pi/lgbt/resources/biblarz-stacey.pdf>

<sup>7</sup> Trevor Powell “Research doesn’t show gay parent disadvantage” 22 January 2012  
[http://www.nj.com/gloucester/voices/index.ssf/2012/01/research\\_doesnt\\_show\\_gay\\_paren.html](http://www.nj.com/gloucester/voices/index.ssf/2012/01/research_doesnt_show_gay_paren.html)

<sup>8</sup> AustLII: McBain v. Victoria [2000] FCA 1009  
[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2000/1009.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/1009.html)

<sup>9</sup> Victorian Law Reform Commission: “Assisted Reproductive Technology & Adoption: Final Report, Chapter 10 Adoption” at 107  
<http://www.lawreform.vic.gov.au/resources/7/0/70e7150047410de2b09eb502d2d761c8/chapter+10+adoption.pdf>

<sup>10</sup> Massachusetts Supreme Judicial Court “Opinions of the Justices” 802 N.E. 2d at 569 n.3, SJC-09163 at 9 <http://www.gaylawnet.com/laws/cases/SJC-09163.pdf>

<sup>11</sup> Argentina (July 2010), Belgium (June 2003), Canada (July 2005), Iceland (June 2010), Netherlands (April 2001), Norway (January 2009), Portugal (May 2010), Spain (July 2005), South Africa (November 2006), Sweden (May 2009), Mexico City (March 2010) and in the United States of America, the States of Connecticut (November 2008), Iowa (April 2009), Massachusetts (May 2004), New Hampshire (January 2010), New York (July 2011), Vermont (September 2009), Washington DC (December 2009). <http://www.gaylawnet.com/laws/laws.htm>