

Dear Secretary,

I wish to make a submission to the Committee on the matter of marriage equality.

Do to time limits, I cannot make a lengthy submission, but I would be happy to expand my thesis at a later time.

By way of curriculum vitae, I advise I am a lawyer practising in Geraldton, WA. I have been in practice for seven years, firstly as an employed practitioner and for the last 16 months as a sole practitioner.

My solution is simple, and well within then legislative power of the Commonwealth. In order to achieve "marriage equality", abolish all of the legal consequences of marriage. In those areas where some of the matters traditionally regarded as "legal consequences of marriage" have social merit (for example, rights under Family Provision Legislation in each state or territory for a widow(er) to claim that insufficient provision has been made by his/her spouse under his/her Will), those consequences should flow from the nature and duration of the relationship between the parties, and not from the parties choosing to become "married".

The concepts of marriage being permanent, and "wedlock" have long since expired in our society. We have realised that it is essential to allow people who no longer wish to be married to each other to be able to have their marriage dissolved. As a result, marriage is no longer the "commitment" it was once regarded as. Rather, the degree of commitment between people in a relationship arises from their own actions in determining how they wish to intertwine their affairs, such as by having children together, owning property jointly, making mutual Wills, powers of attorney or authority to make decisions regarding medical care.

A good example of the abolition of legal consequences of marriage is the *Acts Amendment (Equality of Status) Act 2002 (WA)*. This act, so far as the limits of the State legislative power allowed, removed the distinction in WA law between people who were married and people in de facto relationships (including de facto relationships with multiple partners and same sex relationships).

The last 120 or so years have shown a gradual and unidirectional erosion of what was traditionally regarded as the institution of marriage, and for very good reasons. Marriage originated as a means of controlling women (and later, to a lesser extent, lower class men). "Natural consequences" of marriage, such as permanent consent to sex and the right of a husband to beat his wife, have no place in our society and have been abolished by the legislature. Union of property was abolished with the *Married Women's Property Acts* of the late 19th Century, after trust law had developed over several hundred years to avoid some of the harshness of that union.

Some of the surviving remnants of the legal consequences of marriage arguably have little benefit. Spousal privilege (the right not to give evidence against a spouse), where it survives (it has been abolished in most states for the most serious crimes) has little, if any, social value. If the legislature were to decide that there were circumstances where person A should not be required to give evidence against person B, it is incongruous that persons A and B should be able to contract themselves into a situation to attract that protection. In any other situation, they would be charged with attempting to pervert justice.

I could go on to give many other examples, but time is limited.

One of the advantages I see in my approach is it is simple. The Commonwealth could easily pass an Act called (for example) the Marriage (Legal Consequences) Act, which provides that all such legal consequences are abolished, and that any law of any state which provides otherwise is void. It is well within the power under s. 51(xxi) to, for example, provide that the common law rule that any Will made

prior to a marriage is revoked by that marriage unless it is expressed to be made in contemplation of that marriage. Any provision of any State law seeking to resurrect the common law rule would be invalid under s. 109.

Attempting to identify the rights which might be extended to, for example, same sex couples, and amending the *Marriage Act* to allow such marriages, is somewhat more complicated. The High Court has repeatedly said that the Commonwealth Parliament cannot define its own legislative powers. It cannot extend a power granted by s. 51 by redefining the words in that section. Any attempt to redefine marriage is certain to attract a constitutional challenge, and such a challenge would probably be successful.

I must stress that I am not saying the Commonwealth should abolish or ban marriage. If people feel the need (particularly for cultural or religious reasons) to participate in a ritual of marriage, that is entirely their choice. But it is entirely a matter of their choice and should not result in their relationship being privileged in any way compared to those people who do not feel such a need.

If you wish me to provide further examples or expand on this submission, I am happy to do so.

Kind Regards

Ryan Arndt  
Barrister and Solicitor