

## Marriage Equality Amendment Bill 2013

*Introduced into the Senate on 25 February 2013*

*By: Senator Hanson-Young*

1.52 This bill seeks to amend the *Marriage Act 1961* to define marriage as a union of two people (regardless of gender); to clarify that ministers of religion are not bound to solemnise marriage by any other law; to remove the prohibition of the recognition of same sex marriages solemnised in a foreign country; and to include a regulation-making power so that consequential amendments can be made to other Acts.

### Compatibility with human rights

1.53 The bill is accompanied by a self-contained statement of compatibility. The statement notes that the bill 'does not negatively engage any of the applicable rights or freedoms' and positively engages with the rights contained in article 23 of the International Covenant on Civil and Political Rights (ICCPR) (the right of men and women of marriageable age to marry), article 26 of the ICCPR (equal protection of the law), and article 12 of the International Covenant on Economic, Social and Cultural Rights (right to the highest attainable standard of health).

1.54 Similar bills have been the subject of a number of recent Parliamentary inquiries, including inquiries by House of Representatives Standing Committee on Social Policy and Legal Affairs (which did not make recommendations on the substance of the bills it considered)<sup>9</sup> and the Senate Legal and Constitutional Affairs Legislation Committee (which did make such recommendations).<sup>10</sup> The Senate Committee report comprised a majority report and a dissenting minority report. The provisions of the bill are consistent with the recommendations of the majority report.

1.55 Many of the human rights issues involved have been explored in depth by these and earlier reports; the discussion below seeks to highlight the major issues.

### *Same-sex marriage and international human rights law*

1.56 International human rights jurisprudence and practice has not, to date, unequivocally found that the right of men and women of marriageable age to marry

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9 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report on the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, 18 June 2012.

10 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Marriage Equality Amendment Bill 2010*, 25 June 2012.

and found a family, the right to privacy and family life or the right to equality, obliges states to provide for the possibility of marriage between persons of the same sex. At the same time, human rights law does not present any barriers to providing for same-sex marriage, and commentators have argued that the case law and practice on this issue is evolving towards recognition of an obligation to permit such marriage. Providing for same-sex marriage may be seen as consistent with the promotion of the right to equality as well as other human rights.

1.57 Human rights jurisprudence has continued to expand its protection of same-sex couples against discrimination, so that it is now broadly accepted under the ICCPR and similar instruments that same-sex couples are generally entitled to be treated equally to unmarried opposite-sex couples.<sup>11</sup> This means that in many respects same-sex couples will also be entitled to identical treatment with married opposite-sex couples. A significant number of jurisdictions comparable to Australia have provided for marriage between persons of the same sex.

#### *Right of men and women of marriageable age to marry*

1.58 The statement of compatibility states that the bill ‘enhances the right of men and women of marriageable age to marry by extending the right of marriage to all people regardless of whether they wish to marry a same-sex or a different-sex partner.’ While the international case law has not yet gone so far as to accept that the guarantee *requires* the recognition of same-sex marriage,<sup>12</sup> some of the authorities are not recent and there appears to be a trend towards reviewing the case law in the light of the broader guarantees of equality and non-discrimination contained in the various human rights treaties. The position is, as the Australian Human Rights Commission (among others) has noted, that these authorities ‘do not prevent the recognition of same-sex marriage, they merely conclude that the ICCPR does not impose a positive obligation on states to do so.’<sup>13</sup>

#### *Right to freedom of religion and belief*

1.59 The bill also has the potential to engage the right to religious freedom guaranteed by article 18 of the ICCPR, if an authorised marriage celebrant were

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11 See, eg, *Young v Australia*, UN Human Rights Committee, Communication No. 941/2000 (2003); *X v Austria*, App no 19010/07, European Court of Human Rights, Grand Chamber, 19 February 2013; *Atala v Chile*, Inter-American Court of Human Rights, 24 February 2012.

12 See, eg, *Joslin v New Zealand*, UN Human Rights Committee, Communication No 902/1999 (2002), and *Schalk and Kopf v Austria*, App no 30141/04, European Court of Human Rights, 24 June 2010. The issues are discussed in detail in Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Marriage Equality Amendment Bill 2010*, 25 June 2012. Majority report, paras 2.12 to 2.33 and Dissenting report, paras 1.63 to 1.72.

13 Australian Human Rights Commission, *Position Paper on Marriage Equality* (2012), p 3.

obliged to carry out a marriage ceremony for a same-sex couple when to do so may be inconsistent with the celebrant's religious beliefs. Currently, section 47(a) of the *Marriage Act 1961* provides that nothing in that Act imposes an obligation on an authorised celebrant who is a minister of religion, to solemnise any marriage. The bill (clause 8 of the schedule) provides that, to avoid doubt, the amendments made by this bill do not limit the effect of section 47 of the *Marriage Act 1961*. The bill does not address the situation of authorised celebrants who are not ministers of religion whose religious beliefs might be inconsistent with their solemnising a marriage of a same-sex couple.<sup>14</sup>

### *Right to health*

1.60 The statement of compatibility states that the bill enhances the right of everyone to the enjoyment of the highest attainable standard of physical and mental health:

It is the clear advice of Australia's top psychological experts that, for those same-sex couples who do wish to marry, the continued discrimination against them in existing marriage laws is a source of great mental anguish and sometimes mental ill-health. By removing the discrimination from the law, this Bill reduces in part the overall discrimination and alienation suffered by gay and lesbian people which may give rise, in some people particularly young people, to an improvement in physical and mental health.

### *Equal protection of the law – recognition of overseas same-sex marriages*

1.61 At present, section 88EA of the *Marriage Act 1961* provides that:

A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

must not be recognised as a marriage in Australia.

1.62 The bill proposes the repeal of section 88EA,<sup>15</sup> thus providing for the recognition in Australia of marriages between same-sex couples which have been validly entered into overseas in a jurisdiction in which same-sex marriages are lawful. To the extent that the differential treatment of the recognition in Australia of same-sex and opposite-sex couples solemnised overseas may be considered

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14 See the discussion of this point in House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report on the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, 18 June 2012, paras 4.56 to 4.59.

15 Schedule, clause 6 of the bill.

discriminatory, the bill would promote enjoyment of the right to equal protection of the law guaranteed by article 26 of the ICCPR.

**1.63 The committee considers that the bill does not give rise to issues of incompatibility with human rights.**