

# CHAPTER 1

## Introduction

### Referral of the inquiry

1.1 The Marriage Equality Amendment Bill 2010 is a private senator's bill that was introduced into the Senate by Senator Sarah Hanson-Young from the Australian Greens on 29 September 2010.<sup>1</sup>

1.2 On 8 February 2012, the Senate referred the Marriage Equality Amendment Bill 2010 (Senator Hanson-Young's Bill) to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 25 May 2012.<sup>2</sup> The reporting date was subsequently extended to 6 June 2012.<sup>3</sup> On 31 May 2012, the committee advised the Senate in an interim report that it intended to present its final report by 25 June 2012.<sup>4</sup>

### Purpose of the bill

1.3 Senator Hanson-Young's Bill would amend the current definition of marriage in the *Marriage Act 1961* (Cth) (Marriage Act) – 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'<sup>5</sup> – to 'the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life'.<sup>6</sup>

1.4 In her second reading speech, Senator Hanson-Young stated that the purpose of the bill is 'to provide equality for same-sex couples...[by removing] discrimination under the Marriage Act so that while marriage is still a union between two consenting adults, it is not defined by gender'.<sup>7</sup>

1.5 Section 3 of Senator Hanson-Young's Bill reflects this intention, setting out the objects of the bill:

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1 Journals of the Senate, No. 2 – 29 September 2010, p. 100.

2 Journals of the Senate, No. 74 – 8 February 2012, p. 2053.

3 Journals of the Senate, No. 77 – 28 February 2012, p. 2138.

4 Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Marriage Equality Amendment Bill 2010*, May 2012.

5 Subsection 5(1) of the *Marriage Act 1961* (Marriage Act).

6 Item 1 of Schedule 1 of the Marriage Equality Amendment Bill 2010 (Senator Hanson-Young's Bill).

7 *Senate Hansard*, 29 September 2010, p. 307.

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

### **Provisions of the bill**

1.6 The key provision in Senator Hanson-Young's Bill is item 1 of Schedule 1, which repeals the current definition of marriage in the Marriage Act and substitutes the new definition.

1.7 Item 5 of Schedule 1 of Senator Hanson-Young's Bill repeals section 88EA of the Marriage Act. Section 88EA provides that certain unions are not marriages: specifically, a union 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.

1.8 Consequential amendments in items 2, 3, 4 and 6 of Schedule 1 change references in the Marriage Act to reflect the amended definition of marriage in item 1 of Schedule 1. For example, subsection 46(1) of the Marriage Act requires that, before a marriage is solemnised by, or in the presence of, an authorised celebrant (not being a minister of religion of a recognised denomination), the celebrant shall say a specific form of words to the parties getting married to explain the nature of marriage. The specific form of words the celebrant is required to say under subsection 46(1) includes the statement that marriage is a union of 'a man and a woman'. Item 3 of Schedule 1 amends the words that the celebrant is required to say to the parties, replacing 'a man and a woman' with the words 'two people'.

### **Other marriage equality bills before parliament**

1.9 There are currently two other bills before the parliament containing proposed amendments to the Marriage Act that would allow for marriage equality for same-sex couples: the Marriage Amendment Bill 2012, introduced into the House of Representatives by Mr Adam Bandt MP and Mr Andrew Wilkie MP (Bandt/Wilkie Bill); and the Marriage Equality Amendment Bill 2012, introduced into the House of Representatives by Mr Stephen Jones MP (Jones Bill).

1.10 While all three bills before the parliament have the purpose of amending the Marriage Act to provide for marriage equality, there are some key differences between the bills.

1.11 The definition of marriage in the Jones Bill is 'the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life'.<sup>8</sup>

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8 Item 1 of Schedule 1 of the Marriage Amendment Bill 2012 (Jones Bill).

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The definition of marriage in the Bandt/Wilkie Bill is identical to the definition in Senator Hanson-Young's Bill.<sup>9</sup>

1.12 Part IV of the Marriage Act deals with the solemnisation of marriages in Australia. Section 47 of the Marriage Act provides that nothing in Part IV imposes an obligation on authorised celebrants who are ministers of religion to solemnise *any* marriage.<sup>10</sup> The Jones Bill amends section 47 to insert a subparagraph which explicitly provides that authorised celebrants who are ministers of religion are not obliged to solemnise a marriage where the parties to the marriage are of the same sex.<sup>11</sup>

1.13 The Bandt/Wilkie Bill amends section 47 to clarify that nothing in the Marriage Act, or any other law, imposes an obligation on a minister of religion to solemnise any marriage.<sup>12</sup> Further, the Bandt/Wilkie Bill contains an application clause which clarifies that, for the avoidance of doubt, the bill does not limit the effect of section 47 of the Marriage Act (but this clause does not actually amend section 47 itself).<sup>13</sup> Senator Hanson-Young's Bill does not amend section 47 of the Marriage Act in any way.

1.14 A table comparing all the amendments proposed in each of the three bills is set out in Appendix 1 to this report.

1.15 The Bandt/Wilkie Bill and the Jones Bill were jointly referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report. That committee tabled its report on 18 June 2012.<sup>14</sup>

### **Previous Senate committee inquiries on marriage bills**

1.16 In recent years, the committee has conducted two inquiries into legislation which has proposed changes to the definition of 'marriage' in the Marriage Act.

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9 Item 1 of Schedule 1 of the Marriage Equality Amendment Bill 2012 (Bandt/Wilkie Bill).

10 See subparagraph 47(a) of the Marriage Act (emphasis added).

11 Item 3 of Schedule 1 of the Jones Bill.

12 Item 4 of Schedule 1 of the Bandt/Wilkie Bill.

13 Item 8 of Schedule 1 of the Bandt/Wilkie Bill. The committee also notes the motion moved by Mr Wilkie, agreed to by the House of Representatives on 31 May 2012, that, should the Marriage Act be amended to allow for the marriage of same-sex couples, any such amendment should ensure that there is no obligation imposed on any church or religious minister to perform such a marriage: House of Representatives, Votes and Proceedings, No. 112—31 May 2012, p. 1545.

14 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory report: Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, June 2012. Available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=spla/bill/marriage/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill/marriage/report.htm) (accessed 18 June 2012).

### ***Inquiry into the Marriage Legislation Amendment Bill 2004***<sup>15</sup>

1.17 On 23 June 2004, the Senate referred the Marriage Legislation Amendment Bill 2004 (First 2004 Bill) – a bill introduced into the House of Representatives on 27 May 2004 by the then Attorney-General, the Hon Philip Ruddock MP – to the committee for inquiry and report on 7 October 2004.<sup>16</sup> Schedule 1 of the First 2004 Bill proposed to amend the Marriage Act to:

- define marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life; and
- confirm that unions solemnised overseas between same-sex couples will not be recognised as marriages in Australia.

1.18 Schedule 2 of the First 2004 Bill proposed amendments to the *Family Law Act 1975* to prevent inter-country adoptions by same-sex couples under multilateral or bilateral agreements or arrangements.

1.19 The Explanatory Memorandum to the First 2004 Bill stated that the purpose of that bill was:

[T]o give effect to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage.<sup>17</sup>

1.20 On 24 June 2004, the Marriage Amendment Bill 2004 (Second 2004 Bill), was introduced by Mr Ruddock into the House of Representatives.<sup>18</sup> The Second 2004 Bill contained Schedule 1 of the First 2004 Bill (relating to the amendment of the Marriage Act). The Explanatory Memorandum to the Second 2004 Bill reiterated the purpose of that bill as seeking to ensure that same-sex relationships were not to be equated with marriage.<sup>19</sup>

1.21 The Second 2004 Bill was passed by the House of Representatives on the same day it was introduced, was passed by the Senate on 13 August 2004, and received Royal Assent on 16 August 2004.

1.22 The committee received over 16,000 submissions for its inquiry into the First 2004 Bill. Most submissions related to Schedule 1 of the First 2004 Bill (the marriage aspect). However, as the committee noted:

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15 See Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Legislation Amendment Bill 2004*, 6 September 2004.

16 Journals of the Senate, No. 153 – 23 June 2004, p. 3653.

17 Explanatory Memorandum to the Marriage Legislation Amendment Bill 2004, p. 2.

18 House of Representatives, Votes and Proceedings, No. 184 – 24 June 2004, p. 1742.

19 Explanatory Memorandum to the Marriage Amendment Bill 2004, p. 1.

The effect of the Senate passing the Second [2004] Bill was that the Senate indicated that it no longer required the committee's advice on that part of the [First 2004] Bill. In the absence of any further direction from the Senate, the Committee was only obliged to report on the remaining part of the [First 2004] Bill, that is, the schedule in relation to adoption by same-sex couples.<sup>20</sup>

1.23 On 31 August 2004, the Governor-General prorogued the 40th Parliament and dissolved the House of Representatives. Accordingly, the committee resolved not to continue its inquiry into Schedule 2 of the First 2004 Bill.<sup>21</sup>

### ***Inquiry into the Marriage Equality Amendment Bill 2009***<sup>22</sup>

1.24 On 24 June 2009, Senator Hanson-Young introduced the Marriage Equality Amendment Bill 2009 (2009 Bill) into the Senate. The 2009 Bill is identical to the current version of the bill, apart from some key differences to the definition of 'marriage'.<sup>23</sup> On 25 June 2009, the Senate referred the Marriage Equality Amendment Bill 2009 to the committee for inquiry and report by 26 November 2009.<sup>24</sup> The committee received in excess of 28,000 submissions for the 2009 inquiry: approximately 11,000 in favour of the bill; and 17,000 opposed to it.<sup>25</sup>

1.25 In its report, the committee recommended that the 2009 Bill should not be passed (Recommendation 3). The committee also recommended:

- that the government review (by reference to the Australian Law Reform Commission, or some other appropriate mechanism) relationship recognition arrangements with the aim of developing a nationally consistent framework to provide official recognition for same-sex couples and equal rights under federal and state laws (Recommendation 1);<sup>26</sup> and

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20 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Legislation Amendment Bill 2004*, 6 September 2004, p. 1.

21 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Legislation Amendment Bill 2004*, 6 September 2004, p. 2.

22 See Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009.

23 The Marriage Equality Amendment Bill 2009 (2009 Bill) used the term 'sexuality', which has been replaced by 'sexual orientation' in the current Bill. The definition of marriage in the 2009 Bill did not include the phrase 'to the exclusion of all others'.

24 Journals of the Senate, No. 77—25 June 2009, p. 2206.

25 See Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, pp 1-2.

26 The committee noted that such a reform should 'synthesise and harmonise' law reforms made in 2008 to remove discrimination against same-sex couples: see Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, p. 39. The 2008 same-sex law reforms are discussed below in paragraphs 1.28 and 1.29.

- that the Department of Foreign Affairs and Trade issue Certificates of Non-Impediment to couples of the same sex on the same basis as they are issued for couples of different sexes (Recommendation 2).<sup>27</sup>

1.26 In February 2010, the Senate voted on the 2009 Bill, and it was defeated.<sup>28</sup>

1.27 The committee notes that the Australian Government has implemented Recommendation 2 of the committee's report, which will enable same-sex couples to take part in a marriage ceremony overseas and to be recognised as being married according to the laws of that country.<sup>29</sup>

### Same-sex law reforms

1.28 In 2008, the Australian Government amended 85 Commonwealth laws, to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veterans' affairs, workers' compensation, educational assistance, superannuation, family law and child support. The aim of the reforms was to ensure that same-sex couples and their families are recognised and have the same entitlements as opposite-sex de facto couples.<sup>30</sup>

1.29 These reforms did not include amending the Marriage Act.

### Conduct of the current inquiry

1.30 The committee advertised the current inquiry in *The Australian* on 15 and 29 February, and 14 March 2012. Details of the inquiry, including links to the bill and associated documents, were placed on the committee's website at [www.aph.gov.au/senate/legalcon](http://www.aph.gov.au/senate/legalcon). The committee also specifically invited a number of organisations and individuals to make submissions. The closing date for submissions was 2 April 2012.

1.31 The committee held public hearings in Sydney on 3 May 2012, and in Melbourne on 4 May 2012. A list of witnesses who appeared at the hearings is at

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27 Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, p. vii.

28 Journals of the Senate, No. 112 – 25 February 2010, p. 3228. The 2009 Bill was defeated by a vote of 45-5.

29 See the Hon Nicola Roxon MP, Attorney-General, *Certificates of No Impediment to marriage for same-sex couples*, Media release, 27 January 2012, available at <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/27-January-2012---Certificates-of-No-Impediment-to-marriage-for-same-sex-couples.aspx> (accessed 14 May 2012).

30 See, Attorney-General's Department, *Same-Sex Reforms*, available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx> (accessed 16 May 2012).

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Appendix 3, and copies of the *Hansard* transcripts are available through the committee's website.

### ***Numbers, categorisation and publication of submissions***

1.32 The committee received approximately 75,100 submissions by midnight on 2 April 2012 (the closing date for submissions): of these 43,800 supported the bill and 31,300 opposed it.<sup>31</sup> Between 3 April 2012 and 25 June 2012 (the reporting date for the inquiry), the committee received an additional 4,100 submissions, of which 2,600 supported the bill and 1,500 opposed it. This amounts to 79,200 submissions in total: 46,400, or approximately 59 per cent, supporting Senator Hanson-Young's Bill; and 32,800, or approximately 41 per cent, opposing it. This is a record number of submissions for a Senate committee inquiry.

1.33 Due to the unprecedented number of submissions received, along with obvious limitations on committee resources and staffing, it was not feasible to publish all submissions on the committee's website. Accordingly, the committee made the following decision: all submissions received from organisations would be published on the website, along with a selection of submissions from individuals which represented a broad range of views indicative of the types of arguments received. The committee also decided to publish an equal number of individual submissions supporting and opposing the bill.

1.34 In total, the committee published 360 submissions: 125 submissions from organisations; 116 submissions from individuals supporting the bill; 116 submissions from individuals opposing the bill; and three submissions from individuals or organisations presenting a position which neither supported nor opposed the bill. The submissions published on the committee's website are listed at Appendix 2 to this report.

1.35 For the purposes of the committee's administrative processes, the committee resolved that submissions that were not published on the website would be categorised as: form letters (or variations of form letters); or short or general statements. A submission was categorised as a form letter where it contained a specific, or easily identifiable, template of words. A submission was categorised as a variation to a form letter where the template was modified in some way but could still be identified as a particular type of form letter, or where the template was supplemented with additional material, such as a personal story or other original content.

1.36 Of submissions received by midnight on 2 April, most were categorised as various types of form letters, or variations thereof: 43,000 form letters in support of the bill, and 24,200 form letters opposing it (a total of 67,200). A large number of form letters in support of the bill contained lengthy and detailed personal stories

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31 All figures have been rounded to the nearest 100, with the exception of the numbers of submissions published on the committee's website.

which set out the experiences of same-sex couples (typically related by them or their friends or relatives) and explanations of what marriage equality means to them.

1.37 The remaining submissions received by midnight on 2 April (that is, those submissions that were not published on the committee's website or did not fall neatly within a form letter type) were categorised as short or general statements (600 in support of the bill, and 6,900 opposing it). Many of the submissions categorised as short or general statements in opposition to the bill were only one or two sentences in length or simple short paragraph statements of opposition to the bill.

1.38 The committee did not further categorise the submissions it received after the closing date for submissions into form letters and short or general statements, and so does not have a further breakdown of figures beyond 'for' and 'against' for those submissions received between 3 April and 25 June 2012.

### ***Categorisation system and 'weighting' of submissions***

1.39 The committee notes comments made by certain witnesses during the course of the inquiry that those submissions comprising the category of short or general statements represent 'considered' submissions,<sup>32</sup> as opposed to form letters. The committee wishes to clarify that such assertions are not correct. The separation of submissions into form letters and short or general statements was simply an *administrative* system of categorisation, designed to streamline some of the committee's internal document-handling processes in an inquiry in which the volume of submissions – and associated administration – created an enormous workload for committee staff.

1.40 The committee wishes to state for the record that, for the purposes of its deliberations, all submissions are treated the same and there is no 'weighting', or greater value, placed on submissions simply because of the format in which they are received. This is the case for each and every inquiry conducted by the committee and, despite the volume of submissions received for this inquiry, the committee does not believe that there is any reason that a different process should apply in this case.

1.41 The committee strongly refutes assertions that one type of submission is 'considered' or deserves a heavier weighting simply because it has been categorised for the committee's administrative purposes as something other than a form letter.

1.42 Further, the committee would like to put on the record a statement about how it conducts its inquiries. The conduct of the committee's inquiries is a matter for the committee, and only the committee, to determine in each case. In particular, the acceptance, methods of processing and publication, and deliberations on the treatment of submissions and the weighting of evidence, are all matters for the committee. Since

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32 See Mr Neville Rochow SC, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 3 May 2012, p. 25 and Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 24.



it is for the committee to determine how it conducts its inquiries, it is entirely inappropriate for anyone to purport to dictate to the committee the manner in which it should carry out its business.

### ***Orchestrated submission campaigns and role of committee***

1.43 The committee also wishes to correct certain claims relating to the inquiry – namely, that the inquiry was 'reduced...to the status of a cheap public poll'.<sup>33</sup> For the record, the establishment of this inquiry was in no way different to the establishment of any other Senate committee inquiry. In this inquiry, however, the committee's usual submission process was targeted by orchestrated email campaigns facilitated by groups on both sides of the debate. Most of these emails were generated by external websites – whereby forms could be filled out and automatically sent to the committee's email address – or were encouraged through identified campaigns which directed submitters to send submissions to the committee's email address.<sup>34</sup>

1.44 Despite the fact that both sides of the debate appeared to treat the committee's submission process as a 'numbers game', the committee rejects any characterisation of its inquiry as a 'cheap public poll'. The role of the committee in this inquiry, and every other inquiry, is to inquire into and report on the provisions of specific legislation, and policy issues related to that legislation. This involves detailed and comprehensive consideration, examination, and analysis of the validity and merits of all relevant evidence. The committee's role is not to record its support or opposition to legislation based on the numbers of submissions received.

### ***Validity of submissions***

1.45 The committee considers that the majority of submissions, including form letters, that it received from individuals during this inquiry were legitimate and from genuine persons. The committee decided that submissions that contained what were obviously 'false' names, or invalid email or other addresses, would not be accepted; and, as far as possible, duplicate and multiple submissions from the same individuals, as well as anonymous submissions, would be eliminated and not included in the final count.<sup>35</sup> Submissions would also be invalidated in cases where they could not be accessed (that is, where an electronic document could not be opened).

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33 Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 24.

34 See, for example, Australian Marriage Equality, Senate submission webpage, <http://www.australianmarriageequality.com/senate-inquiry-submission-form/> (accessed 10 May 2012) and Australian Family Association, Submission to the same-sex marriage inquiry, [http://www.family.org.au/index.php?option=com\\_content&view=article&id=1014:submission-to-the-inquiry-into-the-marriage-equality-amendment-bill-2010&catid=53:federal&Itemid=53](http://www.family.org.au/index.php?option=com_content&view=article&id=1014:submission-to-the-inquiry-into-the-marriage-equality-amendment-bill-2010&catid=53:federal&Itemid=53) (accessed 10 May 2012).

35 Submissions were deemed to be anonymous where no identifying information whatsoever was provided, including a valid email address.

## **Scope of this report**

1.46 The committee's report is structured in the following way: chapter 2 discusses various policy arguments in support of, and in opposition to, marriage equality in Australia; chapter 3 examines the key issues raised during the committee's inquiry in relation to specific aspects of Senator Hanson-Young's Bill and its constitutional validity; and chapter 4 sets out the committee's views and recommendations.

## **Note on terminology**

1.47 The purpose of Senator Hanson-Young's Bill is to provide for marriage equality – that is, legislative reform that allows couples who are currently unable to marry because of their sex, sexual orientation or gender identity, to marry under the Marriage Act. The committee prefers the term 'marriage equality' to 'same-sex marriage' in this context. However, the committee has used the term 'same-sex marriage' in order to distinguish 'marriage' as it is currently defined under the Marriage Act as between a man and a woman ('traditional' marriage). The committee has also retained the term 'same-sex marriage' where it is used in submissions or by witnesses, and where the committee is referring to that evidence.

1.48 The committee also refers to 'same-sex couples' as those couples who are currently prohibited from marrying under the Marriage Act due to their sex, sexual orientation or gender identity. The committee notes, however, that in using this terminology transgender and intersex persons who may not be in a 'same-sex' relationship are also affected by the current exclusion constraining access to marriage.

1.49 The committee uses the term 'LGBTI' for Lesbian, Gay, Bisexual, Transgender, and Intersex persons. The committee acknowledges that the use of this term is disputed but uses the term in recognition of the fact that marriage equality is an issue across the broader LGBTI community.

## **Note on references**

1.50 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

## **Acknowledgement**

1.51 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.