

CHAPTER 2

Policy arguments for and against marriage equality

2.1 The vast majority of submissions received by the committee focussed only on broad policy arguments for or against marriage equality for same-sex couples, and not on the specific provisions of Senator Hanson-Young's Bill. This chapter summarises the main arguments for and against marriage equality, as presented in evidence during the course of the inquiry.

Arguments supporting marriage equality

2.2 The principal arguments advanced in support of marriage equality were:

- marriage equality will address the inequality and discrimination that same-sex couples confront in not being able to marry, noting that many same-sex couples value and wish to be able to participate in the institution of marriage;
- same-sex couples have a right to marry and a right to non-discrimination at international law;
- intersex and transgender people should be recognised in the definition of 'marriage' in the Marriage Act;
- marriage will provide psychological and health benefits to Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people;
- there is increasing public support for marriage equality for same-sex couples, due to the recognition of marriage as a life-long, voluntary commitment between two people, regardless of their sex, sexual orientation or gender identity; and
- marriage equality for same-sex couples is recognised in an increasing number of overseas jurisdictions.

Addressing inequality and discrimination

2.3 One of the primary arguments put forward in support of marriage equality was that the Marriage Act discriminates against same-sex couples by prohibiting them access to marriage.¹ Submissions and witnesses argued that same-sex relationships are the same as, and equal to, marriage and deserve recognition as such. As Mr Justin Koonin from the NSW Gay and Lesbian Rights Lobby contended in evidence at the Sydney public hearing:

1 See, for example, Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; National LGBTI Health Alliance, *Submission 157*, p. 4; Human Rights Law Centre, *Submission 161*, p. 1; Law Council of Australia, *Submission 178*, p. 17.

We are here today asking for recognition of the depth of our relationships and the dignity of our sexuality. We are here for all those people in committed long-term same-sex relationships, who deserve the decency and respect of formal recognition.²

2.4 In a similar vein, Mr Malcolm McPherson from Australian Marriage Equality told the committee that marriage is about 'a committed, loving relationship...which is exactly the same whether you are straight, same-sex attracted, transgender or intersex'.³

2.5 Mrs Shelley Argent OAM, representing Parents and Friends of Lesbians and Gays, explained that the families and friends of same-sex couples want these relationships to be recognised as equal:

As a parent, it is quite heartbreaking when I see that my one son has all the advantages and he has not done anything special to have those advantages, and yet my gay son...is the one with the relationship that is seen as second rate. He is now in a relationship with a really nice person, one of the nicest people you could meet. I would love to have this man in our family and call him a son-in-law. That is what it is. We see the relationships as just as valid, no more trivial or anything else.⁴

2.6 The committee also received evidence demonstrating the strong desire of some same-sex couples to marry. The submission by Australian Marriage Equality summarised the findings of several consultations on this point:

In the 2005 Victorian [Gay and Lesbian Rights Lobby's, 'Not Yet Equal'] report, 45% of those surveyed would marry if they had the choice. This was up from 23% in a similar survey conducted in 2000. The 2007 NSW [Gay and Lesbian Rights Lobby's 'All Love is Equal, Isn't It?'] report gave a similar figure of 42%.

The most recent study on this issue, by Dr Sharon Dane et al at the University of Queensland, called 'Not So Private Lives, the Ins and Outs of Same-Sex Relationships', found that 80% of same-sex partners support the right to marry and 55.4% would marry if they had the option.⁵

2.7 A number of submissions argued that marriage equality will strengthen the institution of marriage for all couples.⁶ As Mr Justin Whelan from the Paddington Uniting Church articulated:

2 *Committee Hansard*, 3 May 2012, p. 3. See also: Mr Senthoran Raj, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 3 May 2012, p. 3; the Hon Michael Kirby AC CMG, *Committee Hansard*, 3 May 2012, p. 12.

3 *Committee Hansard*, 3 May 2012, p. 5.

4 *Committee Hansard*, 3 May 2012, p. 4.

5 *Submission 260*, p. 81.

6 See, for example, Mr Brian Greig OAM, *Submission 64*, p. 2; Reverend Nathan Nettleton, South Yarra Community Baptist Church, *Submission 302*, p. 1.

I believe the institution of marriage is under threat...I think marriage is under threat from a consumptive model of relationships in which loved ones are like a shiny object to discard at will. I think marriage is under threat from celebrities who get divorced hours after their weddings and are then still held up as role models. I think it is under threat from reality TV shows which offer marriage as the prize at the end of the shows. But I do not believe that marriage is under threat from people who love each other so much they want to commit to each other for their whole lives—and with the possibility of children—in public and with the support of the community. In fact, I think these people actually strengthen the institution of marriage.⁷

Civil unions and de facto relationships are not equal to marriage

2.8 As noted in chapter 1, the Australian Government's same-sex law reforms in 2008 were enacted to ensure that 'same-sex couples and their families are recognised and have the same entitlements as opposite-sex de facto couples'.⁸ In addition, some states and territories offer formal recognition of same-sex relationships through civil union or relationship registry schemes. In its submission, the Australian Human Rights Commission summarised the different schemes that exist in the states and territories:

Queensland, Tasmania and the ACT have civil union schemes through which couples may have an official ceremony. These three jurisdictions also provide mechanisms for recognising civil unions entered into in other states and other countries. New South Wales has a relationship registration scheme which recognises civil unions entered into in other states. However, there is no allowance for an official ceremony. Victoria also has a relationship registration scheme, although it does not recognise civil unions entered into in other states, and does not allow for an official ceremony. In South Australia, the Northern Territory and Western Australia, same-sex couples can only be recognised as a de-facto partnership – these jurisdictions do not, as yet, have civil union or relationship registration schemes.⁹

2.9 Submissions and witnesses supporting marriage equality argued that other forms of recognition, such as civil unions or partnerships, or de facto-equivalent

7 *Committee Hansard*, 3 May 2012, p. 45.

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

9 *Submission 116*, p. 6. See also: Margaret Brock and Dan Meagher, 'The legal recognition of same-sex union in Australia: A constitutional analysis', (2011) 22 *Public Law Review* 266, pp 273-274. The committee notes that, on 21 June 2012, the Queensland Parliament passed the Civil Partnerships and Other Legislation Amendment Bill 2012 (Qld), which amends the *Civil Partnerships Act 2011* (Qld) to remove provisions that allow a couple to hold a declaration ceremony, before a civil partnership notary, prior to the registration of the relationship: see Part 2, clause 13 of the Civil Partnerships and Other Legislation Amendment Bill 2012 (Qld).

status, are an inadequate means of addressing the discrimination that same-sex couples currently face. For example, Mr Rodney Croome AM from Australian Marriage Equality argued that civil unions, instead of removing discrimination, actually entrench it by reinforcing the sense that same-sex couples 'are somehow different'.¹⁰

2.10 In evidence at the Sydney hearing, the Hon Kristina Keneally MP made the point that relationship registers or civil unions devalue marriage for the whole community:

You are setting up other forms of relationship that undercut marriage – that is, making other forms of union possible, not just for homosexuals but for heterosexuals. You undermine the institution of marriage when you legalise other forms of relationship rather than grant the right to enter the institution of marriage to same-sex and heterosexual couples.¹¹

2.11 Professor Andrew Lynch from the Gilbert and Tobin Centre of Public Law considered that the Australian Government's 2008 same-sex law reforms merely serve to highlight 'the core or primary discrimination experienced by those couples relative to differently sexed couples, which is the ability to choose to have their relationship formally recognised by the state and to obtain the full legal protections of marriage'.¹²

2.12 The Law Council of Australia, while welcoming the law reforms in 2008, noted that 'removing financial discrimination only addresses a particular aspect of discrimination':

If same-sex couples were able to marry, they could more easily access entitlements available to opposite sex couples as a result of marriage. They could also enjoy recognition as equal citizens entitled to the dignity and respect which is fundamental to the concept of human rights.¹³

2.13 In his personal submission to the inquiry, Mr Croome also pointed out that the differences in the rights of de facto couples under relevant state and territory legislation disadvantages same-sex couples:

Some [states and territories] allow same-sex couples equal recognition as parents, others don't. The hurdles couples have to jump over to be deemed

10 *Committee Hansard*, 3 May 2012, p. 5. See also: New South Wales Gay and Lesbian Rights Lobby, *Submission 109*, p. 3; the Hon Don Harwin MLC, *Submission 217*, p. 1; Professor M.V. Lee Badgett, *Submission 293*, pp 3-4.

11 *Committee Hansard*, 3 May 2012, p. 13.

12 *Committee Hansard*, 3 May 2012, p. 17.

13 Law Council of Australia, answer to question on notice, received 11 May 2012, p. 3. See also: Defence Lesbian, Gay, Bisexual, Transgender and Intersex Information Service, *Submission 238*, p. 1.

de factos also vary. In contrast, marriage provides the same rights and responsibilities wherever you live in Australia.¹⁴

Community recognition of marriage equality

2.14 Submissions and witnesses also argued that civil unions (or other schemes providing for the formal recognition of relationships) do not have the same level of recognition as marriage within the broader community.¹⁵ The Peter Tatchell Foundation used the example of the United Kingdom's same-sex civil partnerships to demonstrate this point:

Civil partnerships are viewed as marriages by a minority of people (mostly by those who have had them). They are not publicly or officially recognised as marriages. Nor are they deemed by most people to be on a par with marriage.

One of the biggest practical complaints is that unlike [marriages] UK civil partnerships are not recognised abroad. This means that when civil partners go overseas on holiday, or relocate to another country, they have no legal recognition or rights. This creates serious problems when one partner falls ill, has an accident or dies.¹⁶

2.15 Ms Sophia Alex-Bailey, representing Rainbow Tasmania, spoke to the committee about the significance of 'getting married':

[W]hen it all comes down to it and you want to tell your mum and dad and your extended family something, you do not want to sit down and say: 'You know what? I'm having a civil ceremony.' You want to say, 'I love someone and I'm getting married...It does not have the same value in the community if you cannot say the word marriage.'¹⁷

2.16 Similarly, Professor M.V. Lee Badgett noted the 'rich cultural meaning and emotional value of marriage' compared with the 'dry accounting-like connotation of "registered partnership"'.¹⁸

Marriage equality provides security

2.17 Supporters of marriage equality drew attention to the security that marriage would provide for same-sex couples and their families.

14 *Submission 57*, p. 6.

15 For example, Australian Marriage Equality, *Submission 260*, p. 86; Mrs Shelley Argent OAM, Parents and Friends of Lesbians and Gays, *Committee Hansard*, 3 May 2012, p. 7.

16 *Submission 276*, p. 3.

17 *Committee Hansard*, 4 May 2012, p. 33.

18 *Submission 293*, pp 3-4.

2.18 For example, submissions and witnesses highlighted the importance of having a relationship instantly recognised in times of medical emergency. Mr Stephan Elliott described his personal experience, following an accident:

I had [a] near-death skiing accident in 2004 and I was told I was going to die and my partner of 20 years wasn't allowed in the back of the ambulance with me because he wasn't considered family. A marriage certificate is not just a piece of paper, it is irrefutable evidence of a recognised and legally protected relationship. This recognition and protection is currently denied to same-sex couples in some of the most vulnerable and critical moments in our lives.¹⁹

2.19 In their submission, Dr John Challis and Mr Arthur Cheeseman noted the additional trauma caused to a surviving partner at a time of bereavement in having to provide evidence of a relationship after the death of their long-term partner.²⁰

2.20 Professor M.V. Lee Badgett provided the committee with the following summary from research she has conducted in Massachusetts in the United States in relation to the security marriage provides for children of same-sex couples:

Many parents reported that their children felt more secure and protected. Others noted that their children gained a sense of stability. A third common response was that marriage allowed children to see their families as being validated or legitimated by society or the government...

Parents also reported that marriage made it easier for other people to understand their families. The common social understanding of marriage gave children a way to describe their parents' relationship to their friends and gave parents an understandable relationship to use in dealing with the institutions and people who affected their children's daily life. The most notable situation mentioned concerned children's schools, as well as other government agencies or family members.²¹

Rights to marriage and non-discrimination at international law

2.21 During the course of the inquiry, supporters of marriage equality and proponents of the status quo debated whether the 'right to marry' in international human rights agreements extends to same-sex couples.²² Supporters of marriage

19 *Submission 211*, p. 1. See also: Mr Rodney Croome AM, Australian Marriage Equality, *Committee Hansard*, 3 May 2012, p. 5; Ms Gina Wilson, Organisation Intersex International Australia, *Committee Hansard*, 3 May 2012, p. 57.

20 *Submission 291*, p. 3. See also: Inner City Legal Centre, *Submission 173*, pp 8-9.

21 *Submission 293*, p. 3.

22 See, for example, Castan Centre for Human Rights Law, *Submission 356*, pp 7-9; Ambrose Centre for Religious Liberty, *Submission 156*, pp 3-6.

equality for same-sex couples also noted the right to non-discrimination which exists at international law.²³

Relevant human rights treaties

2.22 The most relevant international human rights treaties in the context of the issue of marriage equality are:

- *Universal Declaration of Human Rights (UDHR)*²⁴

Article 16(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.

- *International Covenant on Civil and Political Rights (ICCPR)*²⁵

Article 2(1) – Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 23(1) – The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

Article 23(2) – The right of men and women of marriageable age to marry and to found a family shall be recognised.

Article 26 – All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, 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.

2.23 Those supporting legislative recognition of marriage equality argued that the language of Article 16 of the UDHR and Article 23 of the ICCPR is sufficiently broad to encompass a right to marriage for same-sex couples. For example, the Hon Michael Kirby AC CMG observed that 'a lot of writing in the field...says the language [of the UDHR] is conformable with this being an emerging human right'.²⁶

23 Australian Lawyers for Human Rights, *Submission 137*, pp 4-5 and Human Rights Law Resource Centre, *Submission 161*, Attachment 1, p. 4 discuss the non-discrimination provisions in a number of international treaties to which Australia is a party.

24 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

25 *International Covenant on Civil and Political Rights* [1980] ATS 23, signed 16 December 1966, entry into force for Australia (except Article 41) 13 November 1980.

26 *Committee Hansard*, 3 May 2012, pp 10-11.

2.24 Australian Lawyers for Human Rights contended that the meaning of a treaty's terms is not static and must be interpreted within the framework of the legal system prevailing at the time of interpretation:

[Although] 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.²⁷

2.25 Australian Lawyers for Human Rights preferred a purposive interpretation of the relevant international treaties, arguing that the aim of 'Article 16 of the [UDHR] (from which Article 23 [of the] 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'.²⁸

International case law

2.26 A number of submissions referred to the case of *Joslin et al v New Zealand* (Joslin case)²⁹ – a United Nations Human Rights Committee (UNHRC) decision in 2002 in which lesbian couples sought marriage licences under the *Marriage Act 1955* (NZ).³⁰ In relation to Article 23 of the ICCPR, the UNHRC found:

Use of the term – men and women, rather than the general terms used elsewhere in [the ICCPR], has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the [ICCPR] is to recognize as marriage only the union between a man and a woman wishing to marry each other.³¹

2.27 However, there are legal decisions in other overseas jurisdictions which have supported a broader interpretation of international human rights agreements than the

27 *Submission 137*, p. 7.

28 *Submission 137*, p. 8. Also see: Professor Ben Saul, Sydney Centre for International Law, University of Sydney, *Submission 45*, p. 1; Women's Law Centre of Western Australia, *Submission 108*, p. 2.

29 *Joslin et al v New Zealand*, United Nations Human Rights Committee, (2002) UN Doc CCPR/C/75/D/902/1999.

30 See Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 4; Australian Lawyers for Human Rights, *Submission 137*, pp 5-7; Public Interest Advocacy Centre, *Submission 138*, pp 5-6; Australian Christian Lobby, *Submission 147*, p. 34; Law Council of Australia, *Submission 178*, pp 15-16; Australian Marriage Equality, *Submission 260*, pp 98-99; Castan Centre for Human Rights Law, *Submission 356*, pp 8-9.

31 *Joslin et al v New Zealand*, United Nations Human Rights Committee, (2002) UN Doc CCPR/C/75/D/902/1999, para 8.2.

UNHRC in the Joslin case.³² For example, the Australian Human Rights Commission cited a case in the South African Constitutional Court which declined to follow the approach taken in the Joslin case. In the South African case, the court 'said the reference to the right of men and women to marry in Article 16(1) of the [UDHR] was "descriptive of an assumed reality, rather than prescriptive of a normative structure for all time" before observing "rights, by their nature, will atrophy if they are frozen"'.³³

2.28 In his submission, the Hon Michael Kirby noted that increasingly such court decisions 'have upheld the principle of marriage equality for opposite sex and same sex couples'.³⁴

2.29 The Castan Centre for Human Rights Law argued that, due to changing societal attitudes to same-sex marriage, the right to marry in Article 23 of the ICCPR would come to be interpreted 'through the lens' of Article 26 of the ICCPR (the right against discrimination):

It was also argued in Joslin, that the Marriage Act breached Article 16 (the right to recognition as a person before the law), Article 17 (unlawful interference with privacy and family) and, most importantly, Article 26, which prohibits discrimination. The [UNHRC] did not address these arguments on the basis that the specific rule in Article 23 overruled the other more general rules. It is likely that the [UNHRC] would have struggled to justify an argument that New Zealand's Marriage Act is not discriminatory, if it had specifically considered the Article 26 claim.³⁵

2.30 The Public Interest Advocacy Centre (PIAC) also pointed out that there are a number of reasons the majority approach in the Joslin case 'should be approached with great caution', including that the Joslin case was heard a decade ago and a number of United Nations member states have now recognised same-sex marriages and/or civil unions for same-sex couples:

This suggests a consensus starting to develop against the continuation of discrimination against same-sex couples wishing to marry. Thus, PIAC contends that the better view is that the failure to recognise a right to marry when a couple is recognised as a family in other areas of law is inconsistent with Article 26 of the ICCPR because it denies a particular kind of

32 See Australian Human Rights Commission, *Submission 116*, pp 5-6, referring to the South African case of *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04;CCT10/05. See also: the Hon Michael Kirby AC CMG, *Submission 74*, pp 7-8, which refers to eight cases in overseas jurisdictions that have upheld the principle of marriage equality for same-sex couples, including *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*.

33 Australian Human Rights Commission, *Submission 116*, pp 5-6.

34 *Submission 74*, p. 7.

35 *Submission 356*, p. 9. See also: Australian Human Rights Commission, *Submission 116*, p. 5.

recognition to some couples on the discriminatory ground of their gender or sexuality.³⁶

2.31 Submissions also noted case law supporting an argument that prohibition of same-sex marriage breaches the right to non-discrimination at international law. In this context, a number of submissions referred to the UNHRC's decision in the case of *Toonen v Australia*.³⁷ In *Toonen*, the UNHRC explicitly stated that the interpretation of the term 'sex' in Articles 2(1) and 26 of the ICCPR extends to sexual orientation, meaning that discrimination based on sexual orientation is prohibited.³⁸

2.32 Opponents of marriage equality also referred to cases of the European Court of Human Rights in support of the argument that there is no right at international law for same-sex couples to marry.³⁹ For example, the Ambrose Centre for Religious Liberty noted the case of *Schalk and Kopf v Austria* (Schalk)⁴⁰ – a European Court of Human Rights decision in 2010 – which clarified that the *European Convention of Human Rights*⁴¹ does not oblige member states to legislate for, or legally recognise, marriages between same-sex couples.⁴²

2.33 However, as Ms Kate Eastman from the Law Council of Australia emphasised in evidence, the important point to note from the decision in Schalk is that there is no *impediment* to states recognising marriage equality:

The clear message I read from the European court's decision [in Schalk] is that there is no positive obligation on the state to make same-sex marriage permissible in domestic law, but, far more importantly, there is no impediment to it. The international human rights law regime makes clear

36 *Submission 138*, pp 5-6.

37 *Toonen v Australia*, United Nations Human Rights Committee, (1994) UN Doc. CCPR/C/50/D/488/92.

38 See, for example, Amnesty International Australia, *Submission 58*, p. 3; Australian Human Rights Commission, *Submission 116*, pp 4-5; Australian Lawyers for Human Rights, *Submission 137*, p. 5.

39 See, for example, National Marriage Coalition, *Submission 134*, p. 11; Australian Christian Lobby, *Submission 147*, p. 34; Australian Marriage Forum, *Submission 199*, p. 7.

40 European Court of Human Rights, Application No. 30141/04, 24 June 2010.

41 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), opened for signature 4 November 1950, entered into force 3 September 1953.

42 *Submission 156*, pp 5-6. Submissions also referred to the case of *Gas and Dubois v France* (European Court of Human Rights, 'The refusal to allow a woman to adopt her same-sex partner's child was not discriminatory', *Press Release*, ECHR 108 (2012), 15 March 2012, p. 3) as reaffirming the decision in Schalk: National Marriage Coalition, *Submission 134*, p. 11; Australian Christian Lobby, *Submission 147*, p. 34; Australian Marriage Forum, *Submission 199*, p. 7.

that there is no impediment to states recognising same-sex marriage if that is what the state thinks appropriate to do.⁴³

Recognition of the rights of intersex and transgender people

2.34 Some submissions and witnesses argued that the issue of marriage equality is not only about lesbian and gay couples, it is also an important issue for intersex⁴⁴ and transgender people, who are often overlooked in the debate on marriage equality for 'same-sex' couples.⁴⁵

2.35 The committee was informed that the current definition of 'marriage' in the Marriage Act does not provide clarity for intersex and transgender persons on the validity of their marriages, and the limited case law in this area does not appear to have provided certainty on this issue.⁴⁶

2.36 The Organisation Intersex International Australia observed that the Marriage Act currently defines marriage as between a man and a woman, but 'makes no attempt to clarify exactly what a man or woman is'.⁴⁷ The Organisation Intersex International Australia referred to the Family Court of Australia case of *C and D (falsely known as C) (C and D)*⁴⁸ where the court considered the validity of the marriage of an intersex person:

Intersex [people] are not wholly male or female and in the matter of C and [D] his honour found that being of indeterminate sex [, intersex persons] were barred from marriage. The intersex individual in that matter had undergone significant surgery to confirm a male sex assignment and had cardinal documents revised to reflect that surgery...⁴⁹

2.37 Some submissions also referred to the case of *Re Kevin: Validity of the marriage of a Transsexual (Re Kevin)*,⁵⁰ a case involving the marriage of a person described as a 'post-operative female to male transsexual' to a female. In *Re: Kevin*, the Family Court at first instance found (and upheld on appeal to the Full Court) that 'Kevin' was a male at the date of his marriage, and as such, his marriage was valid

43 *Committee Hansard*, 3 May 2012, p. 20.

44 The Organisation Intersex International Australia explained that the term 'intersex' refers to people whose biological sex cannot be classified as clearly male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or other sex: Organisation Intersex International Australia, *Submission 198*, p. 1.

45 See Inner City Legal Centre, *Submission 173*, p. 4.

46 Organisation Intersex International Australia, *Submission 198*, p. 3.

47 *Submission 198*, p. 2.

48 (1979) 35 FLR 340.

49 *Submission 198*, pp 2-3.

50 (2001) 28 Fam LR 158.

under Australian law.⁵¹ The Inner City Legal Centre contended that the case of *Re Kevin* 'disapproved the ruling in C and D', namely:

The finding in [*Re Kevin*] would have the effect that if an intersex person were to adopt a gender...then that person would be entitled to marry someone of the opposite gender.⁵²

2.38 The Organisation Intersex International Australia disputed that *Re Kevin* has settled this issue for intersex persons who have adopted a gender, arguing that 'irrespective of surgery or other medical interventions if [a person] is born Intersex [that person] remains intersex'.⁵³

2.39 The Inner City Legal Centre pointed out that transgender people also face uncertainty with regards to the validity of their marriages:

A transgender person may wish to marry their same sex partner using their old birth certificate, meaning the marriage is 'heterosexual' in theory but gay or lesbian in practice; and

A marriage where one person transitions is placed in a position where the couple must separate if the transgender partner wishes to amend their birth certificate.⁵⁴

2.40 A number of submissions recommended that any amendments to the Marriage Act to provide for marriage equality for same-sex couples should also address the issues faced by intersex and transgender persons.⁵⁵

Psychological and health benefits of marriage equality

2.41 Several submitters and witnesses pointed out that the institution of marriage is associated with positive physical and mental health benefits.⁵⁶ For example, the National LGBTI Health Alliance argued:

Marriage is positively associated with a large number of outcomes including better mental and physical health for adults, improved cognitive, emotional and physical well-being for children, and greater economic advantage for family members...Research indicates that marriage affords social recognition and thereby improves health, socioeconomic

51 See Inner City Law Centre, *Submission 173*, pp 3-4. See also: Law Council of Australia, *Submission 178*, pp 6-9.

52 *Submission 173*, p. 4.

53 *Submission 198*, p. 3.

54 *Submission 173*, p. 4.

55 See, for example, Inner City Legal Centre, *Submission 173*, p. 4; Organisation Intersex International Australia, *Submission 198*, p. 3.

56 See, for example, Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; National LGBTI Health Alliance, *Submission 157*, p. 5; Dr Fiona Barlow, Psychologists for Marriage Equality, *Committee Hansard*, 4 May 2012, pp 47-48.

achievement, civic participation and involvement with extended family members.⁵⁷

2.42 Those supporting marriage equality argued that amending the Marriage Act would enable same-sex couples to access these health benefits. As Dr Fiona Barlow from Psychologists for Marriage Equality explained:

Being happier and healthier is something that same-sex attracted people desperately need. Same-sex relationships can be committed, loving, and monogamous in the same way that any other special pair bond can be. States and countries that support same-sex marriage have seen happiness and health boost in same-sex attracted people. On the other hand, opposing same-sex marriage makes same-sex attracted people feel lonely, powerless and weak.⁵⁸

2.43 Psychologists who submitted to the inquiry highlighted that sexual minorities generally have poorer mental and physical health outcomes than the general population, with homosexual and bisexual individuals faring significantly worse than heterosexuals in measures such as rates of homelessness, smoking, chronic health conditions, psychological distress, and suicidal thoughts and attempts.⁵⁹

2.44 Several submissions observed that there is a clear link between discrimination against sexual minority groups and poor health outcomes. For example, the Australian Medical Students' Association argued that discrimination 'is an important cause of the health inequities experienced by LGBTI populations'.⁶⁰

2.45 A number of submissions asserted that a lack of relationship recognition for same-sex couples is a significant contributing factor to feelings of discrimination, which in turn lead to poorer health outcomes.⁶¹ As Psychologists for Marriage Equality argued:

[T]he Australian government's current Marriage Act (2004), which restricts marriage to only heterosexual couples, is directly reinforcing high levels of social stigma directed towards individuals who are gay or lesbian. This in

57 National LGBTI Health Alliance, *Submission 157*, p. 5. See also: Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; Dr Fiona Barlow, Psychologists for Marriage Equality, *Committee Hansard*, 4 May 2012, pp 47-48.

58 *Committee Hansard*, 4 May 2012, p. 47.

59 Psychologists for Marriage Equality, *Submission 201*, p. 3; Australian Psychological Society, *Submission 261*, p. 5. Research from the Drug Policy Modelling Program, University of New South Wales, also indicates that homosexuals as a minority group in Australia may be up to twice as likely as heterosexuals to develop alcohol and other drug problems: see *Submission 103*, p. 1.

60 *Submission 133*, p. 2. See also: National LGBTI Health Alliance, *Submission 157*, p. 4; Australian Marriage Equality, *Submission 260*, p. 43.

61 National LGBTI Health Alliance, *Submission 157*, p. 4; ACON, *Submission 177*, pp 2-3; Australian Psychological Society, *Submission 261*, p. 7.

turn has lead to an unsatisfactory level of psychiatric illness within the community. The associated burden of disease has wide-reaching implication, both from a social but also economic position.⁶²

2.46 Opponents of Senator Hanson-Young's Bill questioned whether legislating for marriage equality would in fact change mental health outcomes among the homosexual community in Australia.⁶³ Submissions supporting marriage equality argued, however, that marriage equality will in fact provide positive health impacts.⁶⁴ For example, in the National LGBTI Health Alliance's view, legislating for marriage equality 'will reduce prejudice against lesbian, gay and bisexual people and their children in Australia, and contribute to the improved wellbeing of a significant part of the population'.⁶⁵

Public support for marriage equality

2.47 Proponents of marriage equality for same-sex couples argued that '[s]ame-sex marriage is an idea whose time has come'.⁶⁶ In particular, submissions referred to opinion poll results to indicate support for marriage equality within the Australian community.⁶⁷

2.48 Australian Marriage Equality's submission, for example, noted that support for marriage equality has been increasing since 2004.⁶⁸ In 2004, a poll commissioned by SBS Television found that 38 per cent of those surveyed supported marriage equality, with 44 per cent opposed and 18 per cent undecided. In October 2010, a Galaxy poll found that 62 per cent of Australians support marriage equality, and a

62 Psychologists for Marriage Equality, *Submission 201*, p. 1.

63 See, for example, Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 28; Dr David van Gend, Australian Marriage Forum, *Committee Hansard*, 4 May 2012, p. 27.

64 See, for example, ACON, *Submission 177*, p. 3. ACON cited a study from Massachusetts in the United States which showed that healthcare costs and mental health visits by gay men declined by a statistically significant amount in the year after legislative reforms relating to marriage equality were introduced in that state.

65 National LGBTI Health Alliance, *Submission 157*, p. 5. See also: Drug Policy Modelling Program, University of New South Wales, *Submission 103*, p. 1. ACON, *Submission 177*, pp 2, 4; Australian Psychological Society, *Submission 261*, p. 10.

66 Peter Tatchell Foundation, *Submission 276*, p. 4. See also: Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 40.

67 See, for example, the Hon Trevor Khan MLC, *Submission 110*, p. 17; Australian Lawyers for Human Rights, *Submission 137*, pp 2-3; Australian Marriage Equality, *Submission 260*, pp 18-19.

68 *Submission 260*, pp 18-19. See also: the Hon Trevor Khan MLC, *Submission 110*, p. 17.

Roy Morgan poll in August 2011 found that 68 per cent of Australians support marriage equality.⁶⁹

2.49 In addition, Australian Marriage Equality referred to a Galaxy poll conducted in May 2011, which found that 75 per cent of Australians believe that it is 'inevitable' that marriage equality will become law.⁷⁰

2.50 Australian Lawyers for Human Rights also referred to opinion polls as 'strong and consistent evidence that the majority of Australians support marriage equality, and that support is likely to be enduring'.⁷¹ In particular, Australian Lawyers for Human Rights noted support for marriage equality within specific groups in the community traditionally believed to oppose marriage equality:

Even allowing for religious beliefs, 53% of Christians polled by Galaxy Research conducted in August 2011 supported same-sex marriage. In the same survey, people of other religions polled their support at 62%, and people of no religious affiliation polled their support at 67%.

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.⁷²

2.51 Proponents of marriage equality argued that the increasing public support for marriage equality indicates a widely held view that marriage is a life-long, voluntary commitment, regardless of a couple's sex, sexual orientation or gender identity. As Mr Croome explained to the committee at the public hearing in Sydney:

[M]ost Australians today understand that marriage at the most fundamental level is...about a lifelong relationship based on love, commitment, responsibility and respect. As poll after poll shows, the majority of Australians understand that this definition of marriage, their definition, easily encompasses same-sex partners.⁷³

69 Ambrose Centre for Religious Liberty also referred to its polling which showed that 58 per cent of Australians agree that same-sex couples should have the right to marry, however, only 49 per cent support changing the Marriage Act to include same-sex marriage: Ambrose Centre for Religious Liberty, *Submission 156*, p 13; Ambrose Centre for Religious Liberty, *Public attitudes towards same-sex marriage in Australia: report of research findings*, 22 November 2011, p. 8, available at: www.ambrosecentre.org.au (accessed 24 May 2012).

70 *Submission 260*, p. 19.

71 *Submission 137*, p. 2.

72 *Submission 137*, pp 2-3.

73 *Committee Hansard*, 3 May 2012, p. 2.

Recognition of marriage equality in other jurisdictions

2.52 Supporters of marriage equality for same-sex couples pointed to the growing number of overseas jurisdictions which have legislated for marriage equality, or are considering such legislation. Marriage equality is currently recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland and Argentina, as well as several states in the continental United States and Mexico City. Further, the legalisation of marriage equality is under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay.⁷⁴

2.53 The committee also notes that the President of the United States of America and the New Zealand Prime Minister have both recently announced their support for the legal recognition of same-sex marriage;⁷⁵ and the new French President campaigned for election on a platform of marriage equality.⁷⁶

2.54 The New South Wales Gay and Lesbian Rights Lobby argued that Australia is 'falling behind comparable jurisdictions' by failing to legislate for marriage equality.⁷⁷ Similarly, Australian Lawyers for Human Rights observed:

[T]he proposed amendments [in Senator Hanson-Young's Bill] 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 liberalising marriage.⁷⁸

Arguments opposing marriage equality

2.55 During the committee's inquiry, submissions and witnesses opposing marriage equality for same-sex couples (or expressing support for the status quo) advanced a number of arguments, in particular:

- marriage is, and should remain, between a man and a woman;
- children need both a biological mother and a biological father;
- the Marriage Act, as currently drafted, is not discriminatory;
- there is no 'right to marriage' for same-sex couples; and

74 Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, pp 40-41; Australian Marriage Equality, *Submission 260*, pp 16-18; Castan Centre for Human Rights Law, *Submission 356*, pp 19-28.

75 See Julie Pace, *Associated Press*, 'Obama voices his support for gay marriage', 10 May 2012; *The Australian*, 'New Zealand PM John Key open to gay marriage', 11 May 2012.

76 *The Guardian*, 'Gay rights campaigners around the world hail Obama's message of support', 10 May 2012.

77 *Submission 109*, p. 2.

78 *Submission 137*, p. 16.

- marriage equality for same-sex couples is a 'slippery slope' to the recognition of other relationships, such as polygamous relationships, as marriage.

Marriage is between a man and a woman

2.56 One of the primary reasons put forward by those opposing marriage equality is that marriage has been understood throughout history and across all cultures, religions, and people groups as being a 'unique' male-female union.⁷⁹

Religious objections to marriage equality

2.57 The Australian Christian Lobby observed that the current definition of marriage in the Marriage Act (although only inserted in 2004) 'codified its historic meaning, one that has been held in the Christian tradition for millennia'.⁸⁰ Further, the Australian Christian Lobby argued that the view that marriage can only be between a man and a woman, is not just a Christian position, it is 'a position held dearly by many Australians'.⁸¹

2.58 Similarly, the submission by the Rabbinical Council of Victoria noted that the current definition of marriage is consistent with 'the millennia-old definition of marriage expressed in Jewish texts and accepted throughout the ages by the other major world religions'.⁸²

2.59 A number of submissions and witnesses also referred to the origins of marriage in the Bible as the basis for marriage today.⁸³ Rabbi Gutnick from the Organisation of Rabbis in Australasia explained to the committee that, in his view, the civil institution of marriage is based on religious foundations:

I believe that our civil [A]ct was designed in order to promote the ability to be married in accordance with Jewish law, with the Church of England, with the Roman Catholic law et cetera, instead of under one canon law...Until someone can show me in the Bible or in religious writings that God wants same-sex marriage I cannot say otherwise. I believe secular marriage is nevertheless based upon that original [founding] principle.⁸⁴

79 Australian Christian Lobby, *Submission 147*, p. 3; Focus on the Family Australia, *Submission 150*, p. 1; Mr Rocco Mimmo, Ambrose Centre for Religious Liberty, *Committee Hansard*, 3 May 2012, p. 28.

80 *Submission 147*, p. 3.

81 *Submission 147*, p. 4.

82 *Submission 231*, p. 1. See also: Organisation of Rabbis of Australasia, *Submission 145*, p. 1.

83 See, for example, Association for Reformed Political Action, *Submission 118*, p. 1; National Marriage Coalition, *Submission 134*, pp 3-4; Church and Nation Committee of the Evangelical Presbyterian Church of Australia, *Submission 155*, p. 1; Rabbi Moshe Gutnick, Organisation of Rabbis of Australasia, *Committee Hansard*, 3 May 2012, p. 36.

84 *Committee Hansard*, 3 May 2012, p. 40.

2.60 Similarly, the Episcopal Assembly of Oceania argued:

Marriage is regarded above all as a **sacrament** that has been instituted by God who created man and woman in His own image and likeness (Genesis 1:27-31). There is a strong biblical basis for this view, and the position of the Orthodox Church worldwide (not only in Australia) can never depart from the teaching of Holy Scripture. The union between a man and a woman in the Sacrament of Marriage reflects the union between Christ and His Church (Ephesians 5:21-33).⁸⁵

2.61 In addition to highlighting the importance of marriage as between a man and a woman on religious grounds, submissions also referred to the prohibition of homosexual relationships in some religions.⁸⁶ For example, the Presbyterian Church of Queensland argued:

The [Marriage Act] should not be further amended to allow same sex 'marriage' even though homosexual practice between consenting adults is not illegal in Australia and its Territories, because homosexual practice is a sinful act in the sight of God, and because the status of marriage will be eroded.⁸⁷

2.62 Focus on the Family noted:

The five major world religions, Buddhism, Christianity, Hinduism, Islam, and Judaism recognise and uphold the natural, heterosexual understanding of marriage. By contrast, these religions teach that homosexual behaviour is sinful or wrong...

[T]he Bible clearly proscribes any form of homosexual behaviour as sinful. As such, it is not and cannot be the basis for a sacred marriage relationship.⁸⁸

2.63 The Organisation of Rabbis of Australasia distinguished between 'tolerating' homosexual relationships and recognising them as marriage:

[W]hile tolerance for individuals who are in homosexual relationships is consistent with the core values of Judaism, there is a great difference between tolerance for an individual and recognition of a movement which wishes to turn something clearly prohibited by Judaeo-Christian standards into something not only tolerated, but recognised and indeed solemnised by being included in the institution of marriage.⁸⁹

85 *Submission 106*, p. 1 (emphasis in original).

86 See, for example, Presbyterian Church of Queensland, *Submission 105*, p. 1; Institute for Judaism and Civilisation, *Submission 146*, p. 9; Focus on the Family, *Submission 150*, pp 3-4.

87 *Submission 105*, p. 1.

88 *Submission 150*, p. 3.

89 *Submission 145*, p. 1.

2.64 Supporters of marriage equality disputed the characterisation of marriage by opponents of Senator Hanson-Young's Bill as an unchanging institution that could only occur between a man and a woman. Many submissions focussed on how marriage has evolved in order to adapt to changes in societies and cultures.⁹⁰ The NSW Gay and Lesbian Rights Lobby summarised the changes in marriage which have occurred over the last century:

Over time, we have seen the regulation of marriage adapt to different cultural and historical circumstances. Less than a century ago women were seen as chattels or property for transaction through a marriage contract, no provisions were made for no-fault divorce, and marital rape exemptions existed until the mid 1980s. Mixed race marriages were prohibited on the basis that having 'mixed blood' children was seen as a threat to the preservation of distinct racial lineages.⁹¹

2.65 Mr Christopher Puplick AM and Mr Larry Galbraith, among others, challenged the perception that marriage between same-sex couples is only a recent occurrence, noting historical instances of such marriage in Ancient Rome, Spain and China.⁹²

Marriage is for procreation

2.66 Proponents of the status quo focussed on marriage as being between a man and a woman for the purpose of procreation. For example, the Ad Hoc Interfaith Committee argued:

What we can say about marriage is that, despite varying cultural expressions in customs and rituals, across all cultures and eras it has been the union of a man and a woman who make a permanent and exclusive commitment to each other, of the type that is fulfilled by bearing and rearing children together. Marriage involves a comprehensive union of spouses, with norms of permanence and exclusivity. These combine to create a special link to children, for their sake, that protects their identity and nurture by a mother and father.⁹³

90 See, for example, Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; the Hon Trevor Khan MLC, *Submission 110*, pp 8-9. See also: Mr Justin Koonin, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 3 May 2012, p. 3; Mr Ben Callegari, Psychologists for Marriage Equality, *Committee Hansard*, 4 May 2012, p. 52.

91 *Submission 109*, p. 5. See also: Australian Marriage Equality, *Submission 260*, p. 55; Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2.

92 *Submission 193*, pp 54-55. See also: Australian Marriage Equality, *Submission 260*, p. 56. In this context, the Castan Centre for Human Rights Law noted that the 'banning of same-sex marriage went hand-in-hand with the broader legal limitations imposed on homosexual behaviours...from the 13th century onwards': *Submission 356*, p. 5.

93 *Submission 202*, p. 5. See also: FamilyVoice Australia, *Submission 101*, p. 3; Reverend Stefan Slucki, Presbyterian Church of Australia, *Committee Hansard*, 3 May 2012, p. 35.

2.67 In contrasting same-sex relationships with marriage between a man and a woman, Mr Chris Meney, representing the Australian Catholic Bishops Conference, told the committee:

[A]lthough the community formed by a homosexual couple may involve genuine caring, affection and commitment to each other, it is not an inherently procreative community because their sexual relationship is not designed to generate children. Marriage is not simply a loving, committed relationship between two people but a unique kind of physical and emotional union which is open to the possibility of new life.⁹⁴

2.68 The Australian Catholic Bishops Conference expressed the view that 'same-sex marriages would be quite different in nature and purpose [to a marriage between a man and a woman]. [T]hey therefore should not be called the same thing'.⁹⁵

2.69 His Eminence Cardinal George Pell AC, Archbishop of Sydney, made a distinction with heterosexual couples who cannot, or do not, have children:

They are still married because their sexual union is naturally designed to give life, even if it cannot give life at a particular point in time, or ever. Marriage between a man and a woman always has an inherent capacity for, and orientation towards, the generation of children, whether that capacity is actualized or not.⁹⁶

2.70 A number of submissions in support of marriage equality emphasised that, for various reasons, many heterosexual marriages never produce children. They questioned why these heterosexual couples should be able to marry while same-sex couples should not.⁹⁷

2.71 In his submission, Mr Brian Greig OAM contested this line of reasoning, arguing that there is no 'fertility' test for marriage:

You do not have to have children if you get married. You do not have to be married to have children. Many heterosexual people marry with the intention of not having children, either for medical reasons, age or because

94 *Committee Hansard*, 3 May 2012, p. 33.

95 *Submission 234*, p. 7.

96 *Submission 113*, pp 1-2. See also: National Marriage Coalition, *Submission 134*, p. 11; Australian Catholic Bishops Conference, *Submission 234*, p. 5.

97 See, for example, the Hon Michael Kirby AC CMG, *Submission 74*, pp 9-10; Australian Lawyers for Human Rights, *Submission 137*, p. 10; Lawyers and academics from Deakin University School of Law, *Submission 189*, p. 6; Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 61; Australian Marriage Equality, *Submission 260*, p. 61.

they simply do not wish to have a family. Married couples who choose not to have children are not required to divorce.⁹⁸

Protection of children by the state

2.72 Some submissions and witnesses argued that, because marriage gives rise to the possibility of children, the state is involved in the regulation of marriage. In contrast, same-sex relationships should be treated differently because they do not.⁹⁹ As the Presbyterian Church of Victoria (Church and Nation Committee) explained:

[M]arriage has always been of interest to the state, primarily because marriage protectively encases a child in his or her natural family unit. The wellbeing of children is essential to the future functioning of the state and of society and hence the state has a duty to protect and guard the deposit of its future resource wisely. In this way, although marriage can exist without government or state, as it did in the beginning, it is obviously beneficial for the state to safeguard its position as the cornerstone of our society.¹⁰⁰

2.73 The Australian Family Association argued:

[G]iven that same-sex relationships are not conducive to human reproduction in the same way that heterosexual relationships are, they don't attract the *same* kind of recognition from the state. That is to say, same-sex and opposite-sex relationships are different in a deeply significant way, and so, quite sensibly, they are treated differently.¹⁰¹

2.74 Similarly, the Australian Marriage Forum contended that marriage exists for the 'typical case of marriage' – being that which creates children – and that there is no need for the state to be involved in the regulation of other unions which do not produce children:

If marriage did not [have the] momentous consequence, typically, of creating a child who needs stable care over prolonged periods, there would be no need to urge a marriage contract on adults entering a sexual relationship...Self-evidently, homosexual relations cannot create children, so society has no institutional interest in regulating such friendships.¹⁰²

98 *Submission 64*, p. 3. See also: Mr Senthoran Raj, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 3 May 2012, p. 4; Ms Gina Wilson, Organisation Intersex International Australia, *Committee Hansard*, 3 May 2012, p. 56.

99 See Australian Catholic Bishops Conference, *Submission 234*, p. 5; Australian Marriage Forum, *Submission 199*, p. 5; Presbyterian Church of Victoria (Church and Nation Committee), *Submission 117*, p. 14; Mr Chris Meney, Australian Catholic Bishops Conference, *Committee Hansard*, 3 May 2012, p. 33.

100 *Submission 117*, p. 14.

101 *Submission 153*, p. 4 (emphasis in original).

102 *Submission 199*, p. 5.

Children need both a biological mother and a biological father

2.75 The committee heard arguments from opponents of Senator Hanson-Young's Bill regarding the potential impact of marriage equality on children. The principal argument raised was that children with married, biological parents 'do best', and that legislating for marriage equality would create a new family model which removes the rights of children to be raised by their biological parents.¹⁰³ As Professor Tom Frame highlighted in evidence:

My point is that both men and women are necessary. Societies like ours and even some quite different to ours have said that men and women play an important part in the raising of children and that they have a complementary role. In wanting to bring about a policy which I think could solidify the alienation of a child from those people, we should not countenance that as a matter of public policy.¹⁰⁴

2.76 Supporters of marriage equality rejected the notion that children with parents of the same sex fare worse than children raised by a man and a woman.¹⁰⁵ Australian Marriage Equality noted that a significant percentage of same-sex couples in Australia are already raising children,¹⁰⁶ and argued that introducing marriage equality will have a positive impact on the children of same-sex couples who marry.¹⁰⁷ The Australian Psychological Society agreed, stating that 'there is no scientific basis for an assertion that lesbian, gay, bisexual and transgender persons are less fit to...become parents of healthy and well-adjusted children than heterosexual people'.¹⁰⁸ Mr Ben Callegari, representing Psychologists for Marriage Equality, informed the committee that outcomes for children are 'more to do with having two parents...not in the gender or...sexuality per se'.¹⁰⁹

2.77 It is worth noting that both sides of the debate contested the research findings which support the opposing view in relation to the issue of parenting. The Australian Christian Lobby submitted that studies which assert that there is no difference between same-sex parenting and opposite-sex parenting 'have been

103 Australian Christian Lobby, *Submission 147*, p. 6. See also: Family Council of Victoria, *Submission 63*, p. 3; Professor Margaret Somerville, *Submission 65*, pp 6-7; Australian Marriage Forum, *Submission 199*, p. 2.

104 *Committee Hansard*, 4 May 2012, p. 43.

105 See, for example, Australian Marriage Equality, *Submission 260*, p. 63; Psychologists for Marriage Equality, *Submission 201*, p. 6; Australian Psychological Society, *Submission 261*, p. 10.

106 Studies cited by Australian Marriage Equality suggest approximately 15-20 per cent of lesbian couples in Australia have children: *Submission 260*, p. 62.

107 Australian Marriage Equality, *Submission 260*, pp 35-36. See also: Rainbow Families Queensland, *Submission 200*, p. 1; Professor M.V. Lee Badgett, *Submission 293*, p. 3.

108 *Submission 261*, p. 10. See also: Psychologists for Marriage Equality, *Submission 201*, pp 5-6.

109 *Committee Hansard*, 4 May 2012, p. 49.

criticised as having serious methodological flaws'.¹¹⁰ Conversely, Australian Marriage Equality claimed that studies which have been cited by opponents of marriage equality to argue that same-sex parenting do not provide a healthy environment in which to raise children are 'either deeply flawed methodologically, or...never purported to make the sort of claims that anti-marriage equality activists have attributed to them'.¹¹¹

Marriage Act is not discriminatory

2.78 Those opposed to Senator Hanson-Young's Bill rejected the argument that denying same-sex couples the right to marry constitutes a form of discrimination.¹¹² For example, His Eminence Cardinal George Pell AC, Archbishop of Sydney, commented that '[u]njust discrimination against persons is always wrong, but participation in particular social institutions is not always equally available to all persons within society'.¹¹³ Similarly, FamilyVoice Australia noted:

Marriage law prohibits children from marrying, which could be described as 'discrimination' on the basis of age...Likewise, marriage law prohibits close relatives from marrying, which could be described as 'discrimination' on the basis of kinship...Recognition of reality is not unjust discrimination.¹¹⁴

2.79 Opponents of marriage equality often referred to the Australian Government's same-sex law reforms in 2008, arguing that those reforms removed any discrimination faced by same-sex couples and their families, and that there is no need to amend the Marriage Act to provide for marriage equality.¹¹⁵ Australian Marriage Is, for example, contended:

Following legislative reforms in [2008], there is no difference in the treatment of couples who are recognised as in a 'de facto' relationship, whether they be of the same sex or opposite sexes, and married couples.

While there is no difference in the legal rights of two people in a relationship, 'marriage' must remain a term that refers to the unique relationship between a husband and wife...¹¹⁶

110 *Submission 147*, p. 9.

111 *Submission 260*, p. 64.

112 For example, Mr Bill Muehlenberg, National Marriage Coalition, *Committee Hansard*, 4 May 2012, p. 20; Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 28; Shop, Distributive and Allied Employees' Association, *Submission 180*, pp 4-5.

113 *Submission 113*, p. 2. See also: Tasmanian Baptists, *Submission 310*, p. 4.

114 *Submission 101*, p. 2.

115 See, for example, Australian Christian Lobby, *Submission 147*, p. 35; Ambrose Centre for Religious Liberty, *Submission 156*, p. 7; Dr David van Gend, Australian Marriage Forum, *Committee Hansard*, 4 May 2012, p. 23.

116 *Submission 275*, p. 7.

2.80 Similarly, the Ambrose Centre of Religious Liberty argued:

It is common knowledge and an established fact that the Federal Government made [amendments] to Commonwealth Legislation in [2008]. In doing so, it removed all and any differences applying between opposite sex marriages and same-sex couples in established relationships.

The Federal Government did not amend the [Marriage Act] as it has consistently held that marriage is between one man and one woman.

Any suggestion that same-sex couples are in any way treated differently to opposite sex couples inside or outside of marriage, other than the right to marry, is unsustainable.¹¹⁷

No 'right' to marriage at international law

2.81 Several submissions opposed to marriage equality contended that there is no evidence to support a right for same-sex couples to marry under international human rights law. Submissions frequently referred to Article 23 of the ICCPR and Article 16 of the UDHR to advance this argument.¹¹⁸

2.82 In relation to Article 23(2) of the ICCPR, the Ambrose Centre For Religious Liberty asserted:

Item 2 of Article 23 is often referred to as being open to the meaning of any two people may marry. Such a view fails to connect the second limb of that item 2 which links marriage with founding a family...The reference to 'men and women' and to 'found a family' has an inescapable meaning that marriage is intended only for men and women marrying each other.¹¹⁹

2.83 The Australian Christian Lobby commented on the use of the phrase 'men and women' in Article 23(2) of the ICCPR:

Elsewhere, the [ICCPR] refers to 'persons' *without* making the distinction between male and female. This indicates the importance of gender in marriage. At the very least, it indicates that same-sex marriage is not a fundamental human right recognised in international law.¹²⁰

2.84 The Australian Christian Lobby also focused on the wording of Article 23(1) of the ICCPR, arguing that the references to the 'natural' and 'fundamental' group

117 *Submission 156*, p. 7.

118 See, for example, FamilyVoice Australia, *Submission 101*, pp 17-18; Australian Christian Lobby, *Submission 147*, p. 34; Australian Family Association, *Submission 153*, p. 3; Ambrose Centre for Religious Liberty, *Submission 156*, p. 4; Presbyterian Church of Australia, *Submission 228*, pp 5-6.

119 *Submission 156*, p. 4; Mr Rocco Mimmo, Ambrose Centre for Religious Liberty, *Committee Hansard*, 3 May 2012, pp 28-29. See also, Lawyers for the Preservation of the Definition of Marriage, *Submission 262*, pp 14-15, in relation to Article 16(1) of the UDHR.

120 *Submission 147*, p. 34 (emphasis in original).

would 'only [make] sense in the context of heterosexual marriage, as nature requires an opposite-sex union for procreation to occur'.¹²¹

2.85 Submissions opposing marriage equality referred to decisions of the UNHCR and the European Court of Human Rights where the issue of the right to same-sex couples to marry has previously been considered, and determined in the negative.¹²²

Is marriage equality a 'slippery-slope'?

2.86 An argument advanced by some of those opposing Senator Hanson-Young's Bill was that it will lead to a 'slippery slope' of legal recognition of other types of relationships.¹²³ In particular, some submissions and witnesses suggested that people involved in polygamous and polyamorous relationships could argue, on the basis of equality and non-discrimination, for further amendments to the Marriage Act to be made to recognise their relationships with multiple partners.¹²⁴

2.87 Strong counter-arguments were made during the inquiry as to why amending the Marriage Act to provide for marriage equality for same-sex couples would *not* lead to recognition in Australia of other relationships – such as polygamous or polyamorous relationships – as marriage. For example, Pastor Michael Hercock, of Imagine Surry Hills Baptist Church, noted that the argument for equality has boundaries, specifically in relation to fidelity and monogamy:

A commitment to monogamy and fidelity is the basis of marriage and the institution that we want as family...[M]onogamy and fidelity can exist in same-sex relationships; that [is] what we argue. We are making the point that monogamy and fidelity can exist inside any family unit, be progressive and good for the children, and good for the community that they live in. The argument...about equality across a broader spectrum—we are not arguing for that. We are asking for those individuals who want monogamy and fidelity in their lives for their families.¹²⁵

2.88 Australian Marriage Equality also indicated that there are legal, social and cultural limits to extending marriage equality to polygamous and polyamorous

121 *Submission 147*, p. 34.

122 See Australian Christian Lobby, *Submission 147*, p. 34, referring to the UN Human Rights Committee in *Joslin v New Zealand*, (2002) UN Doc CCPR/C/75/D/902/1999; Ambrose Centre for Religious Liberty, *Submission 156*, pp 5-6.

123 Australian Christian Lobby, *Submission 147*, p. 30; FamilyVoice Australia, *Submission 101*, p. 3; National Marriage Coalition, *Submission 134*, pp 26-27; Australian Marriage Forum, *Submission 199*, pp 3-4; Australian Catholic Bishops Conference, *Submission 234*, pp 7-8;

124 Family Council of Victoria, *Submission 63*, p. 3; National Marriage Coalition, *Submission 134*, pp 26-32; Australian Marriage Forum, *Submission 199*, pp 3-4; Mr Bill Muehlenberg, National Marriage Coalition, *Committee Hansard*, 4 May 2012, p. 18; Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 24.

125 *Committee Hansard*, 3 May 2012, p. 48.

relationships.¹²⁶ As an additional point, Australian Marriage Equality emphasised that marriage for same-sex couples is a 'natural stopping point' for marriage reform:

[S]ame-sex attracted people remain the last class of people excluded from marriage on the basis of an immutable characteristic. Currently, same-sex couples don't have the option to marry, and there is nothing they can do to earn that right. But when same-sex marriage is eventually legalised, there will be no class of citizens left who are expressly prohibited from marrying because of something about themselves they cannot change.¹²⁷

126 *Submission 260*, pp 70-74.

127 *Submission 260*, p. 73.