CHAPTER 3

Key issues relating to the bill and its constitutional validity

3.1 Four main issues were raised during the course of the committee's inquiry with specific reference to Senator Hanson-Young's Bill and several of its provisions:

- whether the bill is constitutionally valid;
- the appropriateness of the bill's definition of 'marriage';
- the adequacy of protections for ministers of religion under the bill; and
- the merits of the bill's proposed repeal of section 88EA of the Marriage Act, which prohibits the recognition in Australia of marriages conducted overseas.

Constitutional validity of the bill

3.2 The committee received substantial evidence in submissions and at the public hearings on the extent of the federal parliament's power to legislate for marriage and, in particular, whether the scope of section 51(xxi) of the Constitution (the marriage power) is sufficient to support the bill.[1]

3.3 Section 51(xxi) of the Constitution provides that 'Parliament shall...have power to make laws for the peace, order, and good government of the Commonwealth with respect to marriage'. There is no further definition of 'marriage' in the Constitution.

3.4 The Gilbert and Tobin Centre of Public Law noted that the current definition of marriage in subsection 5(1) of the Marriage Act does not necessarily represent the limit of the federal parliament's power; however, the parliament cannot define the constitutional meaning of marriage through legislation.[2]

3.5 This raises the question of whether the parliament's power in section 51(xxi) extends to supporting legislation for marriage equality for same-sex couples. Evidence to the committee was divided on whether Senator Hanson-Young's Bill (if passed)

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1 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 61*, pp 2-4; University of Adelaide Law School, *Submission 151*, pp 4-8; Law Council of Australia, *Submission 178*, pp 9-10; Professor Patrick Parkinson AM, *Submission 194*, pp 3-4; Lawyers for the Preservation of the Definition of Marriage, *Submission 262*, pp 1-9; Ms Emily Burke, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 3 May 2012, p. 21; Mr Neville Rochow SC, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 3 May 2012, pp 25-26, 30; Ms Gabrielle Appleby, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, pp 7-8.

2 *Submission 61*, pp 2-3. See also: Professor John Williams, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, p. 9.

would be constitutionally valid, pointing to the general difficulty and uncertainty in predicting any decision of the High Court of Australia.[3]

Interpreting the marriage power

3.6 Submissions and witnesses outlined two different interpretative approaches that might be applied by the High Court in any consideration of the scope of the Commonwealth's power to legislate for marriage.[4] The Gilbert and Tobin Centre of Public Law summarised these approaches:

> On one view, the permissible meanings of [section 51(xxi)] are limited by the framer's intentions. This might mean that 'marriage' includes only...different-sex unions, and cannot now be enlarged. Alternatively...it might be argued that gender is not central to the constitutional definition of 'marriage', which is instead focussed upon the commitment of two people to a voluntary and permanent union. This would be an example of an evolving interpretation in which the Constitution retains its essential meaning while accommodating later understandings as to what may fall within those concepts. The fact that a same-sex union was not within the intended meaning of 'marriage' [in] 1901 need not preclude such an interpretation today.[5]

3.7 Mr Neville Rochow SC, representing Lawyers for the Preservation of the Definition of Marriage, argued that Senator Hanson-Young's Bill, if passed, would be constitutionally invalid.[6] At the hearing and in its submission, Lawyers for the Preservation of the Definition of Marriage cited four High Court cases as evidence for the proposition that the definition of marriage adopted in Australia, and by the High Court, remains as it was in 1900 – the voluntary union for life of one man and one woman, to the exclusion of all others.[7]

3.8 Other witnesses dismissed the authorities upon which Lawyers for the Preservation of the Definition of Marriage relied, noting that the references in the

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3 See, for example, Mr Neville Rochow SC, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 3 May 2012, p. 26; Ms Gabrielle Appleby, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, p. 7.

4 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 3; Ms Emily Burke, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 3 May 2012, p. 21; Ms Gabrielle Appleby, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, pp 7-8.

5 *Submission 61*, p. 3.

6 *Committee Hansard*, 3 May 2012, p. 25.

7 Mr Neville Rochow SC, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 3 May 2012, pp 25 and 32; *Submission 262*, pp 9-13. The cases referred to are: *The Queen v L* (1991) 174 CLR 379 per Brennan J at 391-392; *Re F; Ex parte F* (1986) 161 CLR 376 per Brennan J at 399; *Fisher v Fisher* (1986) 161 CLR 376 at 383; and *Re Cormick* (1984) 156 CLR 170 per Gibbs CJ at 177.

cited cases were to *obiter dicta* comments and were only representative of the views of two former members of the High Court.[8]

3.9 Professor John Williams from the Adelaide University Law School informed the committee that, in his view, an 'original intent' approach to the marriage power is problematic:

> The argument that [Senator Hanson-Young's Bill] is not supported is essentially one of original intent. At the time of the framing of the Constitution the understanding was that this was a definition of marriage and that that definition continues through time. The trouble that...I have is there are so many other examples in the Constitution where things have moved. A trial by jury was clearly a male institution at Federation. Today we could not exclude women jury trials.[9]

3.10 Although there was widespread acknowledgement that there have been no High Court decisions supporting the position that the meaning of marriage may have evolved to include unions between any two people, several submitters and witnesses pointed to *obiter* comments of Justice McHugh, and lower level court decisions, which suggest that the High Court may adopt a broader approach to marriage.[10]

3.11 For example, in *Re Wakim; Ex parte McNally*, Justice McHugh said:

> [I]n 1901, 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of all others.[11]

3.12 Submissions also noted the decision of the Full Court of the Family Court in *Attorney-General (Cth) v Kevin*[12] as supporting an evolution in the definition of marriage in the context of today's society:

> [W]e think it is plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The

8 Ms Gabrielle Appleby, Mr James Farrell, Associate Professor Dan Meagher and Professor John Williams, answer to question on notice, received 9 May 2012, pp 1-2.

9 *Committee Hansard*, 4 May 2012, pp 9-10. See also: Professor Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 3 May 2012, p. 24.

10 University of Adelaide Law School, *Submission 151*, p. 6. See also: Gilbert and Tobin Centre of Public Law, *Submission 61*, pp 2-4.

11 (1999) 198 CLR 511 at 533.

12 (2003) 30 Fam LR 1.

> concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time.[13]

3.13 While the arguments for and against the constitutional validity of Senator Hanson-Young's Bill appear to rely on *obiter* statements of former High Court judges, academics from the University of Adelaide Law School suggested that the current composition of the court provides important guidance as to the approach the High Court might take in any consideration of the issue.[14] On this point, Ms Gabrielle Appleby informed the committee that there are recent decisions which indicate that current members of the High Court are likely to take a more progressive approach to interpreting the marriage power:

> In the two recent voting cases of Roach[[15]] and Rowe,[[16]] many of the current members of the court adopted an approach to constitutional interpretation which allowed for the evolution of constitutional terms. Importantly, these two cases considered limitation on the Commonwealth's power to restrict the franchise. This approach applies with even greater force when you look at the Commonwealth's marriage power, because it is an empowering provision. In the case of Commonwealth power, the court has indicated that the words should be interpreted with all the generality that they bear – that is, generously in the Commonwealth's favour. In setting the other parameters of the scope of the marriage power, the court would be likely to allow the parliament some discretion in defining the ever-evolving legal institution of marriage.[17]

3.14 Associate Professor Dan Meagher, from the Deakin University School of Law, also pointed out that the High Court starts from a presumption that all Commonwealth legislation is valid.[18] Moreover, Associate Professor Meagher argued that the presumption of constitutionality should be strongest when the High Court considers legislation relating to a 'deep-seated moral issue':

> [T]he issue of legislating for same-sex marriage is clearly a moral issue which people of good faith disagree about and have strong views on. However, in the event that legislation were enacted, it is the democratic will

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13 (2003) 30 Fam LR 1, 22 (Nicholson CJ, Ellis and Brown JJ). Also see: Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 4; University of Adelaide Law School, *Submission 151*, p. 5; Law Council of Australia, *Submission 178*, p. 8.

14 Ms Gabrielle Appleby, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, p. 9.

15 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

16 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

17 *Committee Hansard*, 4 May 2012, p. 7. See also: Associate Professor Dan Meagher, Deakin University School of Law, *Committee Hansard*, 4 May 2012, p. 9, who noted that Justice Heydon AC QC has 'made it quite clear that he subscribes to a very strong originalist position', meaning that, in Associate Professor Meagher's opinion, Justice Heydon would be likely to take a view that marriage is a purely heterosexual institution.

18 *Committee Hansard*, 4 May 2012, p. 8.

> or decision of the Australian parliament – and therefore the Australian people – that same-sex marriage is considered both moral and legitimate. That presumption of constitutionality, it seems to me, should be at its strongest when the High Court is called upon to rule on legislation which makes a decision or determination on effectively what is a deep-seated moral issue. The democratic credentials of that legislation should be taken seriously by the court, unless there is something in the Constitution that clearly precluded it...I do not think, on my reading of the Constitution or the High Court's jurisprudence, that there is anything clear that would preclude the regulating and legislating for same-sex marriage.[19]

3.15 Professor Andrew Lynch, from the Gilbert and Tobin Centre of Public Law, contended that the mere possibility that the High Court might find marriage equality legislation invalid, and consequently invalidate the marriage of same-sex couples, should not be a reason for the parliament to not pass Senator Hanson-Young's Bill:

> I am sure the parliament often has that experience when the High Court strikes at the validity of legislation. It can be hugely inconvenient. This would obviously be very upsetting for the individuals concerned, but I am certain that the groups who are advocating for same-sex marriage would not see this as a reason for not pursuing their objective. They would rather the Commonwealth parliament pass the legislation and then see what happens at the High Court rather than see the parliament hesitate on the question for fear that it might lack the power when there is really no strong reason to suggest that it does not have that power.[20]

3.16 Professor John Williams from the University of Adelaide Law School referred to Australian's 'constitutional history [being] replete with examples of the Commonwealth parliament passing laws where there is a degree of uncertainty as to their constitutionality', and concluded:

> [E]ven if there is some doubt that the parliament has the power to pass [Senator Hanson-Young's Bill], this is not itself a reason for which the Commonwealth should decline to do so.[21]

Referendum on section 51(xxi)

3.17 Lawyers for the Preservation of the Definition of Marriage argued that legislation for marriage equality for same-sex couples would involve a change to the meaning of the institution of marriage, and any such change should be considered by the Australian people by way of a referendum, as provided for in section 128 of the Constitution.[22] At the Sydney public hearing, Mr Neville Rochow SC explained that,

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19 *Committee Hansard*, 4 May 2012, p. 8.

20 *Committee Hansard*, 3 May 2012, p. 22. See also: Professor John Williams, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, p. 7.

21 *Committee Hansard*, 4 May 2012, p. 7.

22 *Submission 262*, p. 15.

because marriage is a socially significant institution, the proposed changes to the Marriage Act should not be allowed to remain a matter of legal uncertainty. Accordingly:

> [A] referendum is the only respectful way in which to treat the people by taking the matter to them...[W]e say that uncertainty can really only be bypassed by a referendum. It is just too important a question to be treated in any other way.[23]

3.18 Professor John Williams rejected this view:

> [T]hat fundamentally misunderstands the role of the parliament. We do not have a system whereby [A]cts that are in doubt are sent to the people. We do not abrogate in that sense to the people the right to pass legislation. The parliament is elected to do so. It acts within its constitutional right to pass legislation which it believes to be valid, and ultimately in our system it will be left to the High Court to determine otherwise. I think it is a very narrow misunderstanding of how our system works. Yes, you could provide certainty but there are also arguments that locking in a definition of 'marriage' today, if that is what was [to be done] by constitutional amendment, you fail to understand the fluidity of how the Constitution works.[24]

3.19 The University of Adelaide Law School pointed out additional problems with a referendum: for example, historically in Australia proposals to amend the Constitution are more likely to fail than succeed.[25]

Is the bill's definition of 'marriage' appropriate?

3.20 The committee received a significant amount of evidence relating to whether the definition of 'marriage' in Senator Hanson-Young's Bill is an appropriate definition to achieve marriage equality for same-sex couples.[26] In particular, issues were raised in relation to:

- the inclusion of intersex and transgender persons in the definition; and
- whether the definition in the bill should be refined.

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23 *Committee Hansard*, 3 May 2012, p. 25.

24 *Committee Hansard*, 4 May 2012, p. 8. See also: Professor Andrew Lynch, *Committee Hansard*, 3 May 2012, pp 22-23; University of Adelaide Law School, *Submission 151*, p. 10.

25 *Submission 151*, p. 10.

26 See, for example, Organisation Intersex International Australia, *Submission 198*, p. 3; Inner City Legal Centre, *Submission 173*, p. 4; Australian Lawyers for Human Rights, *Submission 137*, p. 11; Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 2; Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 5.

Inclusion of intersex and transgender persons

3.21 As discussed in chapter 2, there is considerable uncertainty as to how the current definition of 'marriage' in the Marriage Act applies to intersex and transgender persons.

3.22 Further, the Organisation Intersex International Australia noted that intersex persons currently 'do not qualify for heterosexual marriage' and suggested that intersex persons would not qualify for 'same-sex marriage':

> It is our view that rather than attempt to resolve the irresolvable and make all human beings conform to male or female anatomies irrespective of how they are born, and thereby place the burden of heterosexual certainty on Intersex bodies, the Marriage Act should not specify sex or gender in declaring who might qualify for that institution.[27]

3.23 The Inner City Legal Centre contended that '[a]s long as the definition of marriage contains gender restrictions, transgender people will be excluded and the status of their marriages will be uncertain'.[28]

Refining the bill's definition

3.24 The committee received several submissions which queried the necessity of certain terms in the definition of 'marriage' in Senator Hanson-Young's Bill, and suggested that the bill's definition should be revised.[29]

'A union of two people'

3.25 Some submissions argued that the definition in the bill should be simplified. For example, Australian Lawyers for Human Rights submitted:

> [W]e consider that the phrase 'regardless of their sex, sexual orientation or gender identity' [is] superfluous. We submit [that] the words 'two individuals' are sufficiently broad and flexible to rid the section of any restrictive connotations regarding gender and sex. Implicit in the neutrality of the phrase 'two individuals' is the notion that the gender of those persons is irrelevant to the institution into which they are entering.[30]

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27 *Submission 198*, p. 3.

28 *Submission 173*, p. 4.

29 See, for example, Australian Lawyers for Human Rights, *Submission 137*, p. 11; Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 2; Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 5.

30 *Submission 137*, p. 11.

3.26 Similarly, Mr Christopher Puplick AM and Mr Larry Galbraith recommended that the definition of marriage in the bill should be amended to 'the union of two people, to the exclusion of all others, voluntarily entered into, for life'.[31]

3.27 The Law Council of Australia expressed concern that the phrase 'regardless of their sex, sexual orientation and gender identity' may be too narrow to achieve marriage equality for all same-sex couples.[32] In particular:

> [T]he phrase 'regardless of sex, sexual orientation and gender identity' may need to be defined given that these concepts do not appear to be settled.
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> The Law Council submits that possible difficulties which may arise from the use of the phrase 'regardless of sex, sexual orientation or gender identity' may be overcome by adopting [as] the...definition of marriage...'*the lawful union of two persons to the exclusion of all others*'.[33]

3.28 In contrast to other submissions recommending a simplified definition of marriage in the bill, Australian Marriage Equality noted that the bill's current definition 'may also remove any confusion about whether intersex people...can marry'.[34] The lawyers and academics from the Deakin University School of Law also supported the definition of marriage in Senator Hanson-Young's Bill and in the Bandt/Wilkie Bill:

> [U]nlike the Jones Bill, this definition will extend the right to marry to people regardless of their sexual orientation or gender identity, which more appropriately recognises people's status and identity.[35]

Preference for the Jones Bill's definition of 'marriage'

3.29 The Jones Bill defines marriage as 'the union of two people regardless of their sex, to the exclusion of all others, voluntarily entered into for life'.[36] The Gilbert and Tobin Centre of Public Law argued that the definition of marriage in the Jones Bill is clearly sufficient to provide for 'same-sex' marriage and that it is not apparent that any material difference is made by the inclusion of the phrase 'sexual orientation or gender identity' in Senator Hanson-Young's Bill.[37]

3.30 A few submissions noted that the definition of marriage in Senator Hanson-Young's Bill differs from the definition in the Jones Bill, and

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31 *Submission 193*, p. 5.

32 *Submission 178*, pp 10-11.

33 *Submission 178*, p. 12 (emphasis in original).

34 *Submission 260*, p. 91.

35 *Submission 189*, p. 7.

36 Item 1 of Schedule 1, Marriage Amendment Bill 2012.

37 *Submission 61*, p. 2.

expressed no strong preference, simply calling for legislation to be passed which provides for marriage equality for same-sex couples.[38]

Protections for ministers of religion

3.31 Section 47 of the Marriage Act provides that there is no obligation imposed on an authorised celebrant, being a minister of religion, to solemnise any marriage.[39] As explained in chapter 1, Senator Hanson-Young's Bill does not propose any amendments to section 47 of the Marriage Act.

3.32 In contrast to Senator Hanson-Young's Bill, the Jones Bill proposes that a new paragraph be inserted into section 47 of the Marriage Act, to the effect that there is no obligation on an authorised celebrant who is a minister of religion to solemnise a marriage where the parties to the marriage are of the same sex. The Bandt/Wilkie Bill contains an 'avoidance of doubt' clause that the amendments to the Marriage Act contained in Schedule 1 of that bill do not limit the effect of section 47, but this clarification would not be included in the Marriage Act itself.[40]

Are current protections in section 47 adequate?

3.33 A number of witnesses and submissions indicated that the current protections in section 47 of the Marriage Act are clear and sufficient, and that it is unnecessary to provide additional clarification that ministers are not under an obligation to solemnise the marriage of a same-sex couple (by way of further amendments to the Marriage Act).[41] For example, Liberty Victoria said:

> [I]t is clear that respect for freedom of religious belief and expression requires that religious celebrants not be required to conduct religious ceremonies inconsistent with their beliefs, even if those beliefs are discriminatory. Section 47 of the *Marriage Act 1961* ensures precisely this.
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> [We endorse] the silence of Senator Hanson-Young's Bill on this point, and [do] not endorse adding, as the [Bandt/Wilkie and Jones] Bills seek to do, a special section to emphasize, in relation to same-sex couples, what [section 47] already does in relation to other marriages that religious bodies

38 For example, see NSW Gay and Lesbian Rights Lobby, *Submission 109*, p. 4; Victorian Gay and Lesbian Rights Lobby, *Submission 188*, p. 2; Public Interest Advocacy Centre, *Submission 138*, p. 3.

39 Subparagraph 47(a) of the Marriage Act.

40 The Bandt/Wilkie Bill proposes an amendment to the beginning of section 47, changing 'Nothing in this Part', to 'Nothing in this Part or in any other law'. The purpose of this amendment is to 'make it clear that Ministers of religion are not bound to solemnise marriage by the Marriage Act or any other law': Explanatory Memorandum, Marriage Equality Amendment Bill 2012, p. 2.

41 See, for example, Professor Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 3 May 2012, p. 17; Mr James Farrell, Deakin University School of Law, *Committee Hansard*, 4 May 2012, p. 12.

> currently refuse to perform, such as those involving a divorced person, or a non-member of the faith in question.[42]

3.34 The committee also received evidence on the protection contained in section 116 of the Constitution, which provides that 'the Commonwealth shall not make any law...for prohibiting the free exercise of any religion'.[43] As Professor Andrew Lynch from the Gilbert and Tobin Centre of Public Law explained in evidence:

> While Australia is a secular state and therefore can certainly recognise same-sex marriage, it cannot do so by dictating religious practice of the churches.[44]

3.35 However, many submissions raised concerns that the current protections in section 47 of the Marriage Act may not be adequate to protect ministers of religion who object to marrying same-sex couples.[45] The Australian Christian Lobby expressed the following view:

> Despite assurances from proponents of same-sex marriage that religious conscience will be respected, and churches, ministers, and marriage registrars will not be forced to marry same-sex couples if it violates their conscience, many Christians remain concerned that threats to religious freedom are inevitable.[46]

Inclusion of further protections in legislation providing for marriage equality

3.36 Australian Marriage Equality, among others, noted that section 47 of the Marriage Act already makes it clear that there is no obligation on an authorised celebrant – being a minister of religion – to solemnise any marriage and there is nothing in Senator Hanson-Young's Bill that would change this position. Despite this, Australian Marriage Equality indicated that it would support provisions which make it clear that religious celebrants are under no obligation to marry same-sex couples should it be against their particular doctrine, values or wishes.[47]

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42 *Submission 166*, p. 5.

43 See Professor Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 3 May 2012, p. 17; Mr Jamie Gardiner, Victorian Gay and Lesbian Rights Lobby, *Committee Hansard*, 4 May 2012, p. 31; Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, pp 22-23.

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

45 See, for example, Endeavour Forum, *Submission 68*, p. 3; His Eminence Cardinal George Pell AC, Archbishop of Sydney, *Submission 113*, pp 4-5; National Marriage Coalition, *Submission 134*, pp 22-23.

46 *Submission 147*, p. 14.

47 *Submission 260*, p. 91.

3.37 At the Sydney public hearing, Mr Rodney Croome AM elaborated on this view, noting that Australian Marriage Equality prefers the wording of the relevant provision in the Bandt/Wilkie Bill:

> ...I think our preference would be for the wording in the Bandt/Wilkie Bill because it makes it clear that section 47 would continue to apply but it does not selectively mention same-sex couples, as the Jones Bill does. Our sense is that, by mentioning same-sex couples specifically in such a provision, the suggestion is that there is some special repugnance to same-sex marriages amongst people of faith. We know from opinion polls that is not the case. So it should remain general but it should be there.[48]

3.38 The Gilbert and Tobin Centre of Public Law made a similar observation:

> [The Bandt/Wilkie] provision serves merely to confirm the existing right for religious ministers to refuse to solemnise any particular marriage. Being explicit on this point in the context of same-sex marriage may be desirable...Indeed there may be a case for going as far as the equivalent provision in the [Jones Bill].[49]

3.39 In their submission, Mr Christopher Puplick AM and Mr Larry Galbraith also recommended an amendment to section 47 of the Marriage Act to ensure that ministers of religion are not required to perform same-sex marriages; however, they did not articulate a precise form for the amendment.[50]

Recognition in Australia of marriages conducted overseas

3.40 As noted in chapter 1, from 1 February 2012 the Department of Foreign Affairs and Trade will issue Certificates of Non Impediment (CNI) to same-sex couples seeking to marry overseas.[51]

3.41 At the same time, however, section 88EA of the Marriage Act prohibits the recognition of unions solemnised in a foreign country between a man and another

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48 *Committee Hansard*, 3 May 2012, p. 8. See also: Lawyers and academics from Deakin University School of Law, *Submission 189*, p. 7.

49 *Submission 61*, p. 6.

50 *Submission 193*, pp 5 and 22-24.

51 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).

man, or a woman and another woman, as a marriage in Australia.[52] These unions will instead constitute prima facie evidence of a de facto relationship for the purposes of a civil union under some Commonwealth, and state and territory laws.[53]

3.42 A large number of submissions supported Senator Hanson-Young's Bill's repeal of section 88EA.[54] In this context, some submissions and evidence referred to Australia's international law obligations under the Hague Convention on the Recognition and Celebration of Marriages (Hague Convention), especially Article 9 which provides in part:

> A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.[55]

3.43 Australian Lawyers for Human Rights argued that Australia is in breach of Article 9 of the Hague Convention. In its view, the only way in which same-sex marriages could be refused recognition would be on the grounds of manifest incompatibility with Australia's public policy (Article 14).[56] Australian Lawyers for Human Rights stated that, in its opinion, Australia's public policy supports the recognition of same-sex marriages.[57]

3.44 Australian Lawyers for Human Rights noted that the Hague Convention does not define the term 'marriage', and explained that the term should be understood in its

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52 See sections 5 and 88EA of the Marriage Act. As noted in chapter 2, marriage equality is currently recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, and Mexico City, as well as several states in the continental United States. The committee also notes that the legalisation of same-sex marriage is currently under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay.

53 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).

54 See, for example, Public Interest Advocacy Centre, *Submission 138*, p. 3; Human Rights Law Centre, *Submission 161*, p. 11; Law Council of Australia, *Submission 178*, p. 14; Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 5.

55 The full text of the Hague Convention on the Recognition and Celebration of Marriages is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=88 (accessed 14 May 2012). Australia ratified the Hague Convention on 29 December 1987, and it entered into force for Australia on 1 May 1991.

56 *Submission 137*, p. 9. See also: Professor Kerryn Phelps OAM and Ms Jackie Stricker-Phelps, *Submission 169*, p. 16.

57 *Submission 137*, pp 8-9.

'broadest international sense' as recommended in the Explanatory Report to the Hague Convention:[58]

> [T]he international definition of marriage is changing to include same-sex marriages. Although only a minority of states currently recognises such marriages, 5% of the world's population live in jurisdictions that allow same-sex marriage. The definition of 'marriage' in its *broadest* international sense surely must include same-sex marriages.[59]

3.45 Supporters of marriage equality identified many individual cases where same-sex couples so highly value marriage that they have travelled, or relocated, overseas in order to marry, notwithstanding that their marriage would not be recognised in Australia. For example, Ms Jackie Stricker-Phelps described twice travelling to New York in the United States to marry her partner, once in a religious ceremony and again in a legal ceremony after legalisation of same-sex marriage in that state. Ms Stricker-Phelps commented:

> We would have liked our whole family and all our friends to be there but were not able to have that happen because we had to fly to another country for the wedding rather than be married at home like heterosexual couples.[60]

3.46 Given the increasing number of overseas jurisdictions which recognise marriage equality, and the number of Australian citizens who so strongly desire to get married that they are travelling overseas to have their relationships solemnised, the committee considers that it is regrettable that Australia does not recognise these unions. Therefore, the committee expresses its support for Senator Hanson-Young's Bill's proposed repeal of section 88EA of the Marriage Act.

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58 Professor Åke Malmström, Explanatory Report on the 1978 Hague Marriage Convention, Acts and Documents of the Thirteenth Session (1976) Tome III, p. 293.

59 *Submission 137*, p. 9 (emphasis in original).

60 *Submission 169*, p. 15.