

CHAPTER 4

Committee view and recommendations

4.1 The committee acknowledges the passionate and heartfelt arguments presented on both sides of the debate during the course of this inquiry. The issue of marriage equality for same-sex couples in Australia provokes an emotive response, and this is strongly evidenced by the unprecedented number of submissions received by the committee for the inquiry.

4.2 It is overwhelmingly apparent, though, from the evidence received that same-sex couples feel that the current definition of marriage in the Marriage Act discriminates against them because they are denied the fundamental social, cultural, psychological, administrative and legal benefits that marriage can provide. As a result, and on balance, the committee strongly supports legislation to provide for marriage equality in Australia, on the basis that it will remove discrimination in this important area for same-sex couples.

4.3 In saying this, the committee acknowledges the significance of the institution of marriage and the place that it holds in Australian society. The committee considers that allowing all couples access to marriage – regardless of their sex, sexual orientation or gender identity – will only strengthen the institution of marriage, and increase its value and importance.

Marriage equality is about rights and removal of discrimination

4.4 While the committee specifically notes that the Australian Government's same-sex law reforms in 2008 represented significant progress in removing discrimination against same-sex couples, the committee is of the view that those reforms do not, in fact, provide the full equality to which same-sex couples are entitled. The committee also recognises that, in the absence of marriage equality in Australia, several state and territory jurisdictions have established civil union or relationship registers as a means of providing couples with a mechanism to have their relationships formally recognised. While these arrangements may have their place, they are not a substitute for full marriage equality.

4.5 The committee strongly believes that providing true equality means that all couples should be treated 'equally' – 'separate, but equal' is simply inadequate. Marriage is about two people in a committed and loving life-long relationship, and it has nothing to do with sex, sexual orientation or gender identity. The time has come for same-sex couples to have their relationships treated with the dignity and respect that they deserve: the Marriage Act should be amended, and marriage equality should be provided for all couples who wish to marry in Australia.

4.6 In this context, the committee notes the considerable weight of evidence provided during the inquiry by the psychological profession that discrimination

against same-sex couples, including a lack of relationship recognition, is a significant contributing factor to poor mental and physical health outcomes. The committee considers that marriage equality would foster inclusion and acceptance for these groups in society. Further, the committee believes that the strong weight of psychological evidence indicates that marriage equality would lead to improved mental and physical health outcomes for LGBTI people.

4.7 As an additional point, the committee considers that marriage equality cannot be dismissed simply as an issue being pursued by a minority group. The committee has received evidence and submissions in support of marriage equality from a broad and diverse range of organisations and individuals, including parents and friends of same-sex couples, churches and church leaders, politicians, groups representing young people, and mental health experts. The committee also notes that many submissions to the inquiry who expressed support for marriage equality specifically mentioned that, while they themselves are heterosexual, they fully support the right of same-sex couples to marry.

Marriage is a secular institution

4.8 The committee recognises that marriage in Australia is a secular institution available to both religious and non-religious heterosexual couples. Ministers of religions are able to solemnise marriages – but they are not obligated to solemnise all marriages. As a number of submissions pointed out, the Marriage Act provides for both civil and religious marriage ceremonies, and the marriage equality bills currently before the parliament allow for churches and religious groups to continue to conduct marriage ceremonies on the basis of their religious beliefs.¹

4.9 The committee agrees with the views expressed by the Very Reverend Dr Peter Catt, Dean of St John's Cathedral, who, in noting that Senator Hanson-Young's Bill will not affect the rights of churches or other religious groups to celebrate marriage according to their own understanding and religious beliefs, stated:

[This will] provide a positive space in which religious groups will be able to have their own internal debates and conversations about their approach to marriage. This in turn allows for these sectarian debates to be separated from the debate as it applies to the nation as a whole. I see this as an honouring of the pluralistic nature of Australian society.²

4.10 In the committee's view, marriage equality for same-sex couples is *not* an inherently religious issue. While the committee understands that many people strongly oppose marriage equality because of their religious beliefs, the committee also notes that strong religious convictions do not, as a matter of course, prevent people from

1 See, for example, Association of Australian Christadelphian Ecclesias, *Submission 237*, p. 1; Reverend Nathan Nettleton, South Yarra Community Baptist Church, *Submission 302*, p. 1.

2 *Submission 72*, p. 1.

supporting marriage equality. This was evidenced by the many submissions from individuals who explicitly identified themselves as religious, as well as from various religious groups and leaders, who fully support marriage equality.³ In this context, the committee notes comments made by Pastor Michael Hercock from Imagine Surry Hills Baptist Church in articulating his personal journey to a position of support for marriage equality:

As a Baptist Minister with a strong traditional Christian background, the concept of marriage equality was not something I historically agreed with. It posed questions of my cultural upbringing, unrealised fears, and dare I say prejudices. Yet in asking the simple question of what is best for my neighbour and for my community in relation to the just God I serve, I was able to listen in a fresh way. The answer I was left with was personal – not Christian, religious, gay, straight or otherwise. It was also simple: no person has the right to enforce their historical version of marriage onto those who form a committed life-long union while accepting the same social responsibilities as I do. Exclusive heterosexual marriage is not natural justice for my neighbour or our community and needs to change.⁴

4.11 Given that marriage is a secular institution in Australia and that the Marriage Act provides for religious organisations to celebrate marriage according to their beliefs, the committee considers that it is important that religious objections to marriage equality for same-sex couples are *not* given disproportionate weight in this debate.

Evolution of marriage in modern society

4.12 Arguments were advanced during the course of the inquiry that marriage is traditionally between a man and a woman for the purpose of producing children. The committee recognises and respects that this is a strongly held view among many members of the community, and particularly by those of various religious faiths. Despite recognising this view, the committee does not agree that it should amount to a reason for opposing marriage equality.

4.13 In addressing the idea that marriage is 'traditionally' between a man and a woman, the committee does not consider that the union of a man and a woman is a fixed and immutable requirement of marriage. Marriage has changed throughout history, and it has changed to adapt to certain developments in human society and culture. On this point, the committee agrees with comments made by Mr Brian Greig OAM in his submission – 'traditions change [and] tradition can never be used as an argument in favour of maintaining discrimination'.⁵

3 See, for example, Reverend Ben Gilmour, Paddington Uniting Church, *Committee Hansard*, 3 May 2012, p. 44; Reverend Greg Smith, Metropolitan Community Church, *Committee Hansard*, 3 May 2012, p. 45; Union for Progressive Judaism, *Submission 75*, p. 1.

4 *Submission 249*, p. 1. See also: the Hon Kristina Keneally MP, *Submission 98*, pp 1-4.

5 *Submission 64*, p. 1.

4.14 The committee also disagrees with the view that marriage equality should be opposed on the basis of the procreative potential of a couple. The Marriage Act does not contain *any* requirement that heterosexual couples commit to having children, or even contemplate having children, in the course of their marriage. Further, not every heterosexual couple who gets married wishes to have children, many people who are married are unable for various reasons to have children, and there is no requirement that people be married prior to having children. Indeed, as Mr Senthorun Raj from the NSW Gay and Lesbian Rights Lobby pointed out in evidence to the committee: the Marriage Act makes absolutely no reference to children.⁶ It is therefore illogical to suggest that the ability, or inability, of a relationship to naturally produce children, is a reason to prohibit a couple from getting married.

Impact of marriage equality on children

4.15 The committee does not agree with arguments presented during the inquiry which suggest that children always 'do best' with married, biological parents. There appears to be no scientific basis for assertions that LGBTI persons are less fit to become parents than heterosexual couples.⁷

4.16 On the other hand, there is substantive empirical evidence that refutes absolutely the arguments about children 'doing better' with heterosexual parents. For example, the Australian Psychological Society has conducted considerable research in this area:

The research indicates that parenting practices and children's outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families.⁸

4.17 The American Psychological Association has also made similar findings:

Homosexuality is a normal expression of human sexual orientation that poses no inherent obstacle to leading a happy, healthy, and productive life, including the capacity to form healthy and mutually satisfying intimate relationships with another person of the same sex and to raise healthy and well-adjusted children, as documented by several professional organisations.⁹

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

7 Australian Psychological Society, *Submission 261*, p. 10. See also Psychologists for Marriage Equality, *Submission 201*, pp 5-6.

8 Australian Psychological Society, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review prepared for The Australian Psychological Society*, August 2007, p. 4, tabled by the Australian Psychological Society at public hearing on 4 May 2012.

9 American Psychological Association, *Resolution on Marriage Equality for Same-Sex Couples*, Adopted by the APA Council of Representatives on 3-5 August 2011, p. 1, tabled by the Australian Psychological Society at public hearing on 4 May 2012.

4.18 The committee is also conscious of the many same-sex couples in Australia who are already raising children.¹⁰ As Rainbow Families Queensland explained to the committee, marriage equality will have important benefits for these children:

Far from hurting children, marriage equality will actually benefit those children being raised by [LGBTI] couples by removing legal discrimination against their families and promoting a change in social attitudes towards the Rainbow Families.¹¹

4.19 It is clear that it is the *quality* of parenting which is the most significant and influencing factor in the upbringing and welfare of children, not the mere fact that a child is raised by both of his or her biological parents. The committee also notes in this context that there are many children in Australia being raised by single parents or by a biological parent and a step-parent.

Marriage equality for same-sex couples is not a 'slippery slope'

4.20 The committee points out that Senator Hanson-Young's Bill (along with the other two bills currently before the parliament) provides only for the union of two people, and not more; and there is no suggestion that any of the proponents of marriage equality in Australia are advocating for anything different. The committee strongly rejects any assertion that these bills represent a 'first step' towards the legal recognition of unions of more than two people.

4.21 Moreover, the committee does not believe that there is any widespread public support in Australia for the recognition of 'poly' relationships in the Marriage Act: there is simply no call or push in mainstream Australian society for such relationships to be legalised. On the basis of the views expressed in the nearly 80,000 submissions received by the committee in this inquiry, the committee does not believe that there is *any* impetus in the Australian community for the law to be changed to recognise polygamous or polyamorous relationships. There was no evidence presented to the committee suggesting that people in such relationships feel discriminated against or that they should be given the right to marry multiple partners.

4.22 The committee also notes that there is no legislative history in Australia with respect to recognition of polygamous relationships, and this can be distinguished from the legislative changes that have been made within the Commonwealth, and the states and territories, to end discrimination against same-sex couples.¹² In any event, if a member of parliament were to introduce legislation in the future that provides for such relationships to be legally recognised, that legislation would be subject to the same

10 See Rainbow Families Queensland, *Submission 200*, pp 2-3; Australian Marriage Equality, *Submission 260*, p.

11 *Submission 200*, pp 3-4.

12 Professor John Williams, University of Adelaide Law School, *Committee Hansard*, 4 May 2012, p. 11.

robust parliamentary checks and balances that are applied to every piece of legislation, and would *not* simply pass into law unabated.

4.23 In the committee's view, it is manifestly absurd to suggest that ending the discrimination currently suffered by same-sex couples who are unable to get married will somehow lead to an influx of groups of more than two people seeking formal recognition of their relationships in the Marriage Act.

Public support for marriage equality

4.24 As emphasised in chapter 1, the committee's deliberations and conclusions are not based simply on public opinion. In the committee's view, however, there has been a significant increase in public support for marriage equality for same-sex couples since its inquiry on this issue in 2009: the number of submissions in support of marriage equality that were received by the committee during the current inquiry – around 46,000 – amount on their own to the most submissions ever received by a Senate committee. Further, the number of submissions supporting Senator Hanson-Young's Bill is significantly more than the number of submissions opposing the bill.

4.25 As a point of interest, the committee also notes that the level of support recorded by the House of Representatives Standing Committee on Social Policy and Legal Affairs for its inquiry into the Bandt/Wilkie Bill and the Jones Bill,¹³ and support for Senator Hanson-Young's Bill in this committee's inquiry, are relatively consistent: in this inquiry, approximately 59 per cent of submissions indicated support for Senator Hanson-Young's Bill; and the House of Representatives committee's survey responses showed that there is 64 per cent support for the Bandt/Wilkie Bill and 60.5 per cent support for the Jones Bill. These figures accord generally with the results of other polls conducted in recent years.¹⁴

4.26 In the committee's opinion, this appears to demonstrate a call by the Australian community for the acceptance of marriage equality, and related issues of sexual orientation and gender diversity, as essential components of true social justice and equality for all. In addition to increasing public support within Australia, the committee is also mindful of the increasing number of overseas jurisdictions which recognise or are considering the recognition of marriage equality for same-sex couples.

13 See House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012, Summary of Responses, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill_marriage/survey.htm (accessed 17 May 2012).

14 See Australian Lawyers for Human Rights, *Submission 137*, p. 2; Australian Marriage Equality, *Submission 260*, pp 18-19.

Conscience vote on marriage equality legislation

4.27 While the committee is strongly supportive of the principle of marriage equality for same-sex couples, it also recognises that marriage equality is an issue which provokes strong and impassioned sentiment in the community. As noted above, this is clearly evidenced by the overwhelming number of submissions received during the committee's inquiry, representing views on both sides of the debate.

4.28 Against this background, the committee would like to comment on the issue of a conscience vote in the parliament on the issue of marriage equality. The term 'conscience vote' is most commonly used in Australia to describe votes on moral, religious and social issues in which senators and members are not obliged to vote along party lines but according to their individual beliefs. The term may also include issues on which the parties do not always have a formal policy.¹⁵

4.29 The committee notes evidence suggesting that, historically with respect to votes on legislation to amend the Marriage Act, political parties in Australia have allowed members of parliament a conscience vote on the issue. It is also interesting to observe that, up until 2004, every piece of legislation related to marriage which has come before the federal parliament was designed to expand the opportunities for marriage and to extend protection to people in a marriage-related environment.¹⁶ The three bills before the parliament – Senator Hanson-Young's Bill, the Bandt/Wilkie Bill and the Jones Bill – also attempt to remove current limitations in the Marriage Act to expand the opportunities to marriage to same-sex couples. Accordingly, the committee considers that it would be in keeping with tradition for political parties to allow their senators and members a conscience vote on these bills.

4.30 The committee strongly supports the notion of a conscience vote on the issue, and encourages all parties to allow their federal senators and members to vote according to their conscience – and not along party lines – on Senator Hanson-Young's Bill and any other legislation which proposes to amend the Marriage Act to provide for marriage equality for all couples in Australia.

Specific commentary on Marriage Equality Amendment Bill 2010

4.31 After due consideration of all competing points of view presented during the inquiry, the committee has reached the conclusion that, subject to some amendments, it supports Senator Hanson-Young's Bill. The committee provides the following commentary on specific aspects of the bill – including suggestions for amendment – and issues relating to its constitutional validity.

15 Parliamentary Library, 'Conscience votes during the Howard Government 1996-2007', Research Paper No. 20 2008-09, available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp20#_Toc221347476 (accessed 1 June 2012).

16 Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 25.

Constitutionality validity

4.32 The committee notes the conflicting evidence it received in relation to the constitutional validity of Senator Hanson-Young's Bill supported by the marriage power in section 51(xxi) of the Constitution.

4.33 On balance, though, the committee accepts that there are strong arguments suggesting that on current authority the High Court of Australia may adopt a broad interpretative approach to the marriage power, which would encompass marriage for same-sex couples. The committee also notes evidence suggesting that the High Court starts from a presumption that all Commonwealth legislation is valid, and that such a presumption of constitutionality should be strongest when the High Court considers legislation relating to a 'deep-seated moral issue'.¹⁷

4.34 In the committee's view, the mere possibility that the High Court might find certain legislation constitutionally invalid is not a bar to the parliament considering, and passing, legislation. As was highlighted in evidence, there is a long history of the parliament passing legislation, even where there may be some level of uncertainty in relation to matters of constitutional validity.¹⁸

Definition of 'marriage' in the bill

4.35 The committee agrees with views expressed during the course of the inquiry that preserving the current definition of marriage in the Marriage Act as a union between a man and a woman serves only to highlight the discrimination against LGBTI people, and perpetuates their feeling of being treated differently to heterosexual people.

4.36 The committee notes that there is some concern relating to the appropriateness of the definition of 'marriage' in Senator Hanson-Young's Bill – in particular, to the phrase 'regardless of sex, sexual orientation and gender identity'. While the committee acknowledges that there is some support for the definition of 'marriage' in the Jones Bill,¹⁹ evidence to the committee indicated a preference for a definition of marriage as 'the union of two people, to the exclusion of all others, voluntarily entered into for life'. The committee concurs that a general, 'all-inclusive' definition is to be preferred – this correlates with the idea that marriage equality relates to the rights of *any* two people to marry.

17 Associate Professor Dan Meagher, Deakin University School of Law, *Committee Hansard*, 4 May 2012, p. 8.

18 Professor Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 3 May 2012, p. 22

19 The definition of marriage in the Jones Bill is 'the union of two people, *regardless of their sex*, to the exclusion of all others, voluntarily entered into for life': Item 1 of Schedule 1 of the Marriage Amendment Bill 2012 (emphasis added).

Protections for ministers of religion

4.37 The committee is of the view that section 47 of the Marriage Act, as currently drafted, clearly and unequivocally protects religious ministers from being obliged to conduct marriages that do not accord with their religious beliefs or practices. In addition, as evidence presented to the committee pointed out, section 116 of the Constitution specifically prevents the Commonwealth from legislating to limit the free exercise of religion in Australia. It is the committee's view, therefore, that concerns expressed during the inquiry as they relate to marriage equality impacting upon religious freedom of conscience and expression for ministers of religion are unfounded.

4.38 Despite expressing this view, however, the committee believes that the insertion of a specific provision in Senator Hanson-Young's Bill would assist in clarifying the bill's application to religious ministers and in allaying concerns within certain religious groups, and some elements of the community, in relation to this issue. An express provision on the matter in the context of same-sex marriage would also align the bill's application with the guarantee contained in section 116 of the Constitution.²⁰

4.39 The committee considers that a specific amendment to section 47 in this regard (such as the approach taken in the Jones Bill) is not favourable from a legislative drafting perspective because it would 'single out' marriages where the parties are of the same sex. In effect, this would continue to discriminate against people on the basis of their sexuality and sexual preference: such a 'special' provision would serve only to emphasise, in relation to same-sex couples, what section 47 already does with respect to other marriages that religious bodies may currently refuse to perform (such as, for example, those involving a divorced person, or a non-member of a particular religious faith).²¹ Most importantly, the committee believes that such an approach would serve to undermine the committee's strongly held view that providing true equality for LGBTI people in Australia means treating all couples, regardless of their sex, sexual orientation or gender identity, in exactly the same way under the law.

4.40 Accordingly, the committee has concluded that Senator Hanson-Young's Bill would benefit from adopting a similar approach to that taken in the Bandt/Wilkie Bill: namely, the insertion of an application – or 'avoidance of doubt' – provision that expressly states that the amendments in the bill do not limit the operation of section 47 of the Marriage Act.

20 Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 6.

21 Liberty Victoria, *Submission 166*, p. 5.

Recommendation 1

4.41 The committee recommends that all political parties allow their federal senators and members a conscience vote in relation to the issue of marriage equality for all couples in Australia.

Recommendation 2

4.42 The committee recommends that the definition of 'marriage' in item 1 of Schedule 1 of the Marriage Equality Amendment Bill 2010 be amended to mean 'the union of two people, to the exclusion of all others, voluntarily entered into for life'.

Recommendation 3

4.43 The committee recommends that the Marriage Equality Amendment Bill 2010 be amended to include an application, or 'avoidance of doubt', clause which expressly provides that the amendments made by Schedule 1 of the bill do not limit the effect of section 47 of the Marriage Act.

Recommendation 4

4.44 The committee strongly supports the Marriage Equality Amendment Bill 2010 and recommends that it be debated and passed into law, subject to the suggested amendments set out in Recommendations 2 and 3.

Senator Trish Crossin

Chair