DISSENTING REPORT BY COALITION SENATORS

Introduction

1.1 The Coalition authors of this dissenting report are disappointed that the committee majority has seen fit to recommend support for the Marriage Equality Amendment Bill 2010. Those Coalition senators believe passage of this bill would represent a major breach of trust by the Australian Parliament, the overwhelming majority of whose members were elected at the 2010 Federal election on a platform of supporting the traditional definition of marriage as the union of a man and woman.

1.2 Further, Coalition senators are concerned that this legislation represents an attempt to satisfy a demand from one section of the community for 'equality', without a clear rationale for why Parliament should compromise an institution which underpins this, and all other, human societies.

1.3 We believe that this legislation is based on a very doubtful constitutional head of power, constitutes a doorway to further widening of the concept of marriage to other types of relationships and does not satisfy any obligation Australia might have to the human rights of Australian homosexuals.

1.4 Coalition senators have produced this report in an unnecessarily truncated period of time. Coalition senators have had less than one week to respond to a majority report which has been months in preparation. This underlines the very unsatisfactory process whereby this issue has been considered by the Australian Senate.

An unbalanced report

1.5 The conduct of this inquiry and the resultant majority report sells short the well-earned reputation of Senate committee reports that has been carefully nurtured over the years.

1.6 The controversial nature of a topic such as same-sex marriage is no excuse for ignoring evidence or for the condescending tone of the majority report. It bears a proselytizing flavour not usually found in Senate committee reports.

1.7 For example, chapter 2 of the majority report purports to deal with 'Policy arguments for and against marriage equality'. The deliberate use of the term 'marriage equality' rather than a more neutral term such as same-sex marriage is regrettably indicative of the bias pervading many aspects of the report.

1.8 This bias can be measured. It will be noted that the arguments in favour of same sex marriage were given 14 pages (pages 11-25) of the majority report. Of those

14 pages, only three paragraphs (2.26, 2.32 and 2.46) were devoted to any resemblance of rebuttal.

1.9 The arguments in opposition to the bill were only afforded at best ten pages (pages 26-36). Out of those ten pages large sections, indeed eight paragraphs (2.64, 2.65, 2.70, 2.71, 2.76, 2.77 (part thereof), 2.87 and 2.88) were devoted to rebuttal – a full two pages – meaning the actual space allocated to arguments against the Bill was even further reduced. This quantitative imbalance reflects a similar intellectual and qualitative imbalance in the arguments against same-sex marriage the majority report selects to rebut.

1.10 Submissions opposing the bill were categorised as 'arguments opposing marriage equality'. That these submissions should be so categorised is unfortunate. Any semblance of balance is completely vacated in favour of sloganeering and advocacy. A more reasonable approach would have been to describe opponents to the Bill as status quo supporters or simply as opponents of same-sex marriage.

1.11 Turning to 'Chapter 4, Committee View and Recommendations', we see a continuation of this regrettable bias. A few examples will suffice before dealing with the majority report's filtered and selective quoting of the evidence.

1.12 In paragraph 4.15 the unsuspecting reader is told, 'The committee does not agree with arguments presented during the inquiry which suggests that children always (emphasis added) 'do better' with married biological parents'. It is noteworthy this remarkable assertion is not footnoted to a particular submission. Common sense dictates that there are exceptions to the rule. To set up such a transparent straw man for an argument highlights the lengths the majority have descended to in their bid to undermine the strong argument in favour of the status quo.

1.13 Another egregious example is found at paragraph 4.21. There we have a similarly bold and just-as-false an assertion made when told '…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'.

1.14 Clearly there *is* an impetus as witnessed by some who made submissions, statements they subsequently made and other statements made by polyamorists in the media and elsewhere (see below). To say the impetus is limited would be fair. To deny there is 'any impetus' is to simply deny the undeniable.

1.15 That a submitter to the committee was reduced to seek an assurance from the committee that '…oral and written submissions to the inquiry will be presented to the public fairly and accurately' following a senator's 'clear misrepresentation' of another submitter is another disappointing example of the majority's approach.[1]

---

1 Legal and Constitutional Affairs Legislation Committee, *Committee Hansard*, 3 May 2012, p. 33.

1.16 Both the ALP and the Coalition went to the Australian people promising to maintain the definition of marriage. The only reason this topic is on the public agenda is because of the Greens and their domination of the Government's agenda.

1.17 The fact that the first of the majority report's four recommendations calls for all political parties to allow their members a conscience vote on this issue is a further example of the majority allowing their enthusiasm for same-sex marriage to override an objective analysis of the issue. Such a concern has nothing to do with the merits of Senator Hanson-Young's Bill.

1.18 Whilst poll results can be interpreted and results vary – especially after a campaign (witness the Republic polls, campaign and ultimate referendum result) – there was no evidence suggesting that there is a sense of high priority within the community for same-sex marriage even among those who may favour it at present.

1.19 The majority argue that there appears to be no scientific basis for assertions that, all things being equal, children are better off being raised with the diversity of a male and female role model. Regardless of whether or not children are or are not better off in this circumstance, it is simply not true to say there is no evidence for the proposition.

1.20 For example, the submission by the Australian Christian Lobby quoted an 'extensive body of research [which] tells us that children do best when they grow up with both biological parents'.[2] This research includes Professor Susan Brown writing in the *Journal of Marriage and Family*,[3] Dr Karin Grossmann and other researchers in *The Uniqueness of the Child-Father Attachment Relationship: Fathers' Sensitive and Challenging Play as a Pivotal Variable in a 16-year Longitudinal Study*[4] and renowned paediatrician Kyle Pruett in *Role of the Father*.[5]

1.21 Whether the committee majority is persuaded by this evidence is one thing; to deny that the evidence exists is quite another.

---

2 Kristin Anderson Moore, Susan M Jekielek, and Carol Emig (June, 2002), *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It*, Child Trends Research Brief, p 1, http://www.childtrends.org/files/marriagerb602.pdf.

3 Professor Susan Brown (2010), 'Marriage and Child Well-Being: Research and policy perspectives', 72 *Journal of Marriage and Family* 1059-1077, 1062 (references omitted), cited in Parkinson (2011), *For Kids' Sake*, p 48.

4 Karin Grossmann, Klaus E Grossmann, Elisabeth Fremmer-Bombik, Heinz Kindler, Hermann Scheuerer-Englisch, and Peter Zimmerman (2002), *The Uniqueness of the Child-Father Attachment Relationship: Fathers' Sensitive and Challenging Play as a Pivotal Variable in a 16-year Longitudinal Study*, Social Development, 11, 3.

5 Kyle D Pruett (November 1, 1998), *Role of the Father*, Pediatrics, Vol 102 No Supplement E1, pp 1253-1261.

'Marriage equality'

1.22 'Marriage' has been recognised as a vital societal institution. In recent times marriage has been seen by some as an institution that confers only rights rather than the countervailing obligations that are always attached with the conferral of rights. Coalition senators noted the concentration on rights by submitters favouring change.

1.23 'Equality' is always – at least superficially – something that is hard to 'be against'. As such it is a wonderfully powerful sales pitch if the word can be inserted into one's narrative irrespective of the topic. And so it is with 'marriage equality': a great slogan designed to immediately put any opponent on the back foot.

1.24 'Marriage equality' as a universal concept is not actually accepted by many of us other than the Greens who actually advocate marriage for all.

1.25 On more careful examination do we believe in so-called 'marriage equality' for brothers and sisters or close relations? Do we believe in 'marriage equality' for three in polygamous relationships? Do we believe in 'marriage equality' for minors?

1.26 Some differences do matter. In the words of Dr Peter Jensen, Anglican Archbishop of Sydney:

> We may, with justice, make quite acute distinctions between people. For a political party to be allowed to hire someone who shares their political conviction is fair. Likewise, it is perfectly allowable for two men or two women to be prevented from entering as partners in a mixed doubles competition of tennis. The reality of the world God made is that human beings are in two sexes, male and female.[6]

Committee majority: failure to take evidence into consideration

1.27 Coalition senators are of the view that in considering Senator Hanson-Young's Bill it is appropriate to consider the potential consequences of where the logic of 'marriage equality' may lead.

1.28 The majority report seeks to selectively highlight certain submissions received by the committee in support of the proposition that 'Marriage Equality for same-sex couples is not a 'slippery slope'".

1.29 The majority report fails however to acknowledge submissions received by the Senate committee from Mr James and Mrs Rebecca Dominguez[7] and, further, the

---

6 'Stylish same sex campaign glosses over real issues', *Sydney Morning Herald*, 16 June 2012.

7 Mr Dominguez, *Submission 181*; and Mrs Dominguez, who claims to have submitted the following submission to the inquiry, but which apparently was not received by the committee – http://blogs.bluebec.com/submission-to-the-senate-on-marriage-equality/.

evidence given by former High Court Justice Michael Kirby[8] at the committee's hearing in Sydney, which cogently demonstrate that the conclusion of the committee majority in this regard is factually incorrect.

1.30 The majority report also fails to acknowledge the statements made by polyamorists, both in support of future polyamorist marriage and also expressing concern at Senator Hanson-Young's statement purporting to rule out Greens' support for polygamous marriages. For example, Rachelle White, a prominent practising polyamorist, in an interview with Mr Paul Murray on 6PR Perth Radio on 24 May 2012, in response to the issue of polyamory which was raised at the Senate inquiry, said:

> PM: Do you really think Australians are going to cop polyamorous marriage?
>
> RW: I would like to see it in my lifetime. I certainly think the visibility of the polyamorous community, we certainly are becoming more visible, and that is a very good thing. Whether we become visible to the point of being perhaps what some people deem 'the new gay' as it were, whether or not people do see our issues as their issues and fight our fight and help us get marriage equality I am not sure. I would like to see it happen, I remain positive, I certainly hope it does happen in my lifetime…

1.31 Mr and Mrs Dominguez are practising polyamorists. Mrs Dominguez is the former President of PolyVic, an organisation representing Victoria's polyamorous community.

1.32 Both Mr and Mrs Dominguez made submissions to the Senate Inquiry. Only Mr Dominguez's submission (Submission 181 on behalf of the Bisexual Alliance Victoria) was published due to the number of submissions received by the inquiry. Mrs Dominguez's submission was however posted on line at http://blogs.bluebec.com/submission-to-the-senate-on-marriage-equality/. While the submissions by Mr and Mrs Dominguez did not explicitly canvass polyamorous marriage, both made subsequent statements supporting this proposition at some time in the future.

1.33 In an article in *The Australian* newspaper on 23 May 2012, entitled 'Marriage for four put to Senate', Mrs Dominguez is quoted as saying: 'Some time in the distant future we should look at the idea of plural marriage'. On a blogsite entitled *Polyamory in the news*, Mr Dominguez said:

> I just want to re-stress that: despite the Oz misquoting yet again and saying The Greens are "against" poly marriage, they have actually said simply that it's not part of their platform and they have no plans to pursue it. If there is ever a popular movement to legalise poly marriage in the future, The Greens will be the first to lend their support, I guarantee it. A few poly

8 Legal and Constitutional Affairs Legislation Committee, *Committee Hansard*, 3 May 2012, p. 9.

> people are angry with them for not expressing support, but I think we need to be realistic.[9]

1.34 A number of other polyamorists subsequently expressed the view that there should be greater recognition of polyamorist relationships, or disappointment with the Greens' claim not to support polyamorous marriage.

1.35 The evidence of former High Court Judge Michael Kirby also supports the contention that this Bill will have potential consequences for the future recognition of other forms of relationships. Mr Kirby when questioned at the committee hearing in Sydney gave evidence that whilst the question before the Parliament at this time was the question of marriage for homosexual people, there may be in the future some other question:

> **Senator CASH:** …What I am putting to you is: are you limiting the definition of equity and equality in relationships to purely a man and a woman, whether they be heterosexual or homosexual; or are you saying there should be equity and equality in relationships regardless of, for example, the number of people participating in that relationship?
>
> **Mr Kirby:** The parliament looks at legislation from time to time, but nothing is finally written. The question that is before the parliament at the moment is the question of equality for homosexual people. There may be, in some future time, some other question. The lesson in courts and in the parliament, I suggest, is that you take matters step by step…(emphasis added).[10]

1.36 Coalition senators are of the view that the committee majority has failed to take into consideration the fact that there are thousands of polyamorous relationships in the United States and a growing number in Australia.[11] People in these relationships are starting to campaign for what they perceive as their right to equal marriage.[12]

1.37 Coalition senators believe that a pertinent question which needs to be clearly answered and which the proponents of the Bill have failed to address when

---

9 See: http://polyinthemedia.blogspot.com.au/2012/05/foursome-marriage-murdoch-paper-gets.html.

10 *Committee Hansard*, 3 May 2012, pp 12-13.

11 Jessica Bennett (July 28, 2009), 'Only You. And You. And You.', *The Daily Beast*, http://www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.html.

12 See, for example, Australian articles advocating polyamory: Ean Higgins (10 December 2011), 'Three in marriage bed more of a good thing', *The Australian*, http://www.theaustralian.com.au/news/features/three-in-marriage-bed-more-of-a-good-thing/story-e6frg6z6-1226218569577; Katrina Fox (2 March 2011), 'Marriage needs redefining', *The Drum*, http://www.abc.net.au/unleashed/44576.html; and overseas academics such as Columbia University law professor Elizabeth Emens (2004), *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, Chicago Public Law and Legal Theory Working Paper No 58, The Law School, The University of Chicago.

considering this Bill is: 'where would you draw the line when it comes to marriage equality' and, if a line is to be drawn, 'why would you allow marriage equality only to couples regardless of their sex and not to other consensual sexual relationships?'

1.38 Again, this proposition is supported by the evidence of former Justice Michael Kirby at the inquiry where he said in answer to the direct issue: 'The lesson in courts and in the parliament, I suggest, is that you take matters step by step…'

1.39 It is the view of Coalition senators that the majority report selectively ignores the evidence before the committee in relation to the 'slippery slope' argument and the logical consequences of accepting marriage 'equality'.

1.40 In considering the evidence given to the committee and in particular the evidence of former Justice Kirby, Coalition senators are of the view that the passage of this Bill will lead ineluctably to demands from polygamists and others for the legalisation to be widened to encompass other forms of consenting sexual relationships to be embraced in the term 'marriage'.

Constitutional validity of the Bill

1.41 A number of submissions expressed concern that any attempt by the Parliament to legislate for same sex marriage may be unconstitutional due to the express and implied constraints relating to the meaning of 'marriage' as provided for in section 51(xxi) of the Australian Constitution.

1.42 Coalition senators consider the issue of whether legislating for same-sex marriage is within the power of the Parliament is a critical threshold issue.

1.43 Coalition senators believe it would be an exercise in futility for the Parliament to devote scarce parliamentary time and resources legislating on an issue that is clearly divisive on social, religious and cultural grounds and which stands a high risk of being *ultra vires*, only to have the legislation struck down by the High Court of Australia.

1.44 In the late 1890s, when the founding fathers considered the merit in establishing a federation of states, one of the agreed foundation issues was that a Federal Parliament, if established, would have a Constitution of limited and specified powers.

1.45 It was the clear intention of the founding fathers to limit by specific description the legislative powers of the Federal Parliament, with whatever legislative powers were not so described residing with the states. Any attempt by the Federal Parliament to exceed its legislative capacity would render such legislation *ultra vires*.

1.46 As stated in Sir Robert Garran's authoritative text *Commentaries on the Constitution of the Commonwealth of Australia*:

> The Federal Parliament and the State Parliaments are not sovereign bodies; they are legislatures with limited powers, and any law which they attempt to pass in excess of those powers is no law at all it is simply a nullity, entitled to no obedience.[13]

1.47 The Constitutional Debates of the 1890s made it apparent that it was never the intention of the founding fathers to enact a Constitution which would enable a Federal Parliament to expand its limited and specified powers at the convenience of the Parliament or at the mere behest of interest groups by simply changing the meaning of the words of the Constitution setting out the Commonwealth's powers.

1.48 As stated by Garran:

> Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in the persuasion of its existence, must be deemed null and void, like the act of any other unauthorized agent.[14]

1.49 In a submission from Lawyers for the Preservation of the Definition of Marriage, it was asserted that:

> It is not for Parliament to deem what meaning may be given to a particular power in the Constitution. That is for the High Court to decide. In that role, "the judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest. The function of the judiciary, including this court (the High Court) is to give effect to the intention of the makers of the Constitution as evidenced in the terms in which they expressed that intention. *That necessarily means that decisions, taken almost a century ago by people long since dead, bind the people of Australia today* (emphasis added) even where most people agree that those decision are out of step with the present needs of Australian society."
>
> In *Cormick v Cormick*, Gibbs CJ said:
>
> "It would be a fundamental misconception of the operation of the Constitution to suppose that Parliament itself could effectively declare that

13 http://adc.library.usyd.edu.au/data-2/fed0014.pdf, p. 789.

14 http://adc.library.usyd.edu.au/data-2/fed0014.pdf, p. 795.

> particular facts are sufficient to bring about the necessary connexion with a head of legislative power so as to justify an exercise of that power. It is for the courts and not Parliament to decide on the validity of legislation..."
>
> Cormick is important because Mason, Wilson, Dean and Dawson JJ expressly agree with the reasons for judgement of Gibbs CJ. Brennan J (as he then was) added some of his own reasons and subject to those reasons also agreed with Gibb's CJ's judgement.
>
> His honour said:
>
> "The scope of the marriage power conferred by sec. 51 (xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems to be, or to be within that conception".[15]

1.50 This argument, in the opinion of Coalition senators, carries considerable weight. That is, a law purporting to sanction the marriage of a man to a man may not be validly based on a constitutional power which is intended to allow the parliament to regulate only marriage of a man to a woman. If section 51(xxi) does not support laws regulating same-sex marriage, no amount of redefining of the term 'marriage' will fix the defect.

1.51 In other words, the Commonwealth cannot acquire a power to regulate, say, schools by defining its power over 'lighthouses' to mean 'schools'.

1.52 A number of the submissions received by the committee from proponents of same-sex marriage appear to conveniently confuse the meaning of the word 'marriage', as provided for in section 51(xxi) of the Constitution, by ascribing to the word an array of disparate meanings, in an attempt to avoid the actual meaning and intent of the word 'marriage' as intended by the framers of the Constitution.

1.53 However, if there is a deficiency – or a reasonable fear that such a deficiency might exist – in the constitutional power of the Commonwealth to legislate for same-sex marriage, a remedy is available.

1.54 The founding fathers recognised that the specified powers set out in the Constitution should not be immutable forever, but provide a mechanism in section 128 to ensure that any change to the powers set out in the Constitution should be subject to the will of the people and not the mere convenience of the Parliament from time to time.

1.55 In *Re Wakim: Ex parte McNally* (1999) 198 CLR 511, McHugh J said:

> Change to the terms and structure of the Constitution can only be carried out with the approval of the people in accordance with the procedures laid down in s.128 of the Constitution.

---

15 Lawyers for the Preservation of the Definition of Marriage, *Submission 262*, p. 3.

1.56 Section 128 of the Constitution provides a mechanism to enable the people to expand or limit the specified powers set out in the Constitution. In seeking to avoid the meaning and intent of the word 'marriage' as intended by the framers of the Constitution, proponents of same-sex marriage seem intent on ignoring this avenue to resolving any doubt about the constitutional position.

1.57 When discussing the need for a referendum on the extent of the section 51(xxi) powers relating to 'marriage', Mr Neville Rochow SC of Lawyers for the Preservation of the Definition of Marriage stated:

> It seems in our respectful submission a corollary of that where there is a matter of such social importance and clear legal uncertainty that a referendum is the only respectful way in which to treat the people by taking the matter to them.[16]

1.58 Coalition senators believe it is profoundly unsatisfactory to erect such major law reform on so weak a constitutional foundation. In particular, the possibility that people might undertake marriage pursuant to such a law, only to have their 'marriages' struck down by the High Court, is a highly unsatisfactory way for the Parliament to proceed. The committee majority shows contumelious disregard for the interests of homosexual Australians by advancing such a risky and ill-advised course of action.

1.59 Coalition senators are of the view that, given that a number of the submissions to the committee acknowledged that same-sex marriage raises significant social, religious and cultural issues and that section 128 of the Constitution provides a mechanism to enable the people to expand the specified powers set out in the Constitution, a referendum to enable the people to pronounce on the issue of same-sex marriage is worthy of serious consideration.

1.60 Had the Parliament the capacity to seek a Declaratory Opinion from the High Court, this may have given greater certainty to the constitutionality of the same-sex marriage proposal. However, it is clear from the decision in *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 and the later decisions in *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal and Torres Strait Islanders Affairs* (1996) 189 CLR 1, which gave credence to the notion of incompatibility as it related to the maintenance of the doctrine of the separation of powers, this is not currently an option available to the Parliament.

1.61 A number of the submissions received by the committee from proponents of same-sex marriage appear confused in their understanding of the constitutional issues that are brought to the fore by discussion of the meaning of the word 'marriage' in section 51(xxi) of the Constitution. The proponents of these submissions appear to be more interested in clamouring to achieve their objective of same-sex marriage at any cost, irrespective of the constitutional issues that will arise, by disregarding the probable meaning of the word 'marriage' as provided for in section 51(xxi).

---

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

1.62 In digesting the substance of many of the submissions received by the committee from proponents of same-sex marriage, it would be obvious to an independent reviewer that there is a strong element of self-interest in some views that have been put to the committee and that the serious constitutional issues are often either overlooked or ignored. However, it must be said that, in a number of submissions to the committee, both the proponents for same-sex marriage and those opposed to same-sex marriage recognise that the constitutional issues raised in trying to determine the meaning of the word 'marriage' need to be settled prior to the Parliament devoting valuable parliamentary time and resources legislating on an issue that is clearly divisive on social, religious and cultural grounds.

The issue of discrimination – is same-sex marriage a human right?

1.63 The committee received a number of submissions which *inter alia* claimed that the failure of the Parliament to legislate for same-sex marriage constitutes an act of discrimination, breaching the human rights of gay people.

1.64 Australia is a signatory to the *International Covenant on Civil and Political Rights (ICCPR) 1966*, which came into effect in Australia on 13 November 1980.

1.65 Article 23 of the ICCPR provides:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

1.66 The issue of the right to marry as enshrined in Article 23 of the ICCPR was considered by UN Human Rights Committee (HRC) in *Joslin et al. v New Zealand Communication*.

1.67 In its decision the HRC stated at para 8.2 and 8.3 that:

> Para 8.2
>
> Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

> Para 8.3
>
> In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee **cannot** find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.
>
> Para 9
>
> The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.[17]

1.68 The European Court of Human Rights has considered the issue of whether the rights to marriage and equality require the member states to recognise same-sex marriage. In *Schalk and Kopf v Austria* [2010] 30141/04 (24 June 2010), the plaintiffs claimed that Articles 12 and 14 of the *European Convention of Human Rights* entitled them the right to marry.

1.69 Article 12 provides:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

1.70 Article 14 provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1.71 The European Court of Human Rights found that Article 12 did not impose an obligation on the Austrian Government to grant a same-sex couple, like the applicants, access to marriage. It therefore unanimously held that there had been no violation of that Article. The court further concluded, by majority vote, that there had been no violation of Article 14 in conjunction with Article 8.

1.72 Coalition senators are of the view that, whilst it has been commonplace for homosexual couples to argue that their inability to marry is a fundamental breach of their human rights, the decision of the UN Human Rights Committee, when considering the provisions of the *International Covenant on Civil and Political Rights 1966*, and the European Court of Human Rights, when considering the provisions of the *European Convention of Human Rights*, have firmly rejected the spurious claim that marriage is a universal human right and that same-sex couples have a right to marry because their mutual commitment is just as strong as that of husbands and wives.

---

17 *Joslin et al v New Zealand Communication*, No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

Keeping faith with the electorate

1.73 The majority report comments, in our view inappropriately, on the procedure used within political parties to determine their position on same-sex marriage. The majority 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.

1.74 Putting aside the observation that this clearly goes outside the scope of a Senate committee's brief to inquire into the terms of legislation before it, it also exhibits breathtaking hypocrisy, as some senators making up the committee majority are known to have lobbied internally for the Australian Labor Party to adopt a policy position in favour of same-sex marriage. Had they succeeded, any ALP senator or member exercising a conscience vote against same sex marriage would have been automatically expelled from their party!

1.75 Coalition senators note that, in the lead-up to the 2010 federal election, both major parties promised the electorate that there would be no change in the Marriage Act. Senior members of both the Labor Party[18] and the Coalition[19] made the commitment that their parties stood firmly behind the traditional definition of marriage.

1.76 Given that some 210 of the 226 members of Parliament were elected on this promise by their respective parties, Coalition senators believe that the passage of this Bill would amount to a grave betrayal of the Australian people.

1.77 In its submission to the inquiry, the ACT Branch of the Australian Family Association stated that:

> A so-called 'conscience' vote on same-sex marriage would be a major change in policy, and a breach of faith with the electorate.[20]

1.78 The Marriage Equality Amendment Bill 2010 seeks to fundamentally change what is agreed by all parties to be a vital legal and social institution. In the view of Coalition senators it would not be prudent for any party to allow its passage without first seeking a mandate from the Australian people.

---

18 http://www.abc.net.au/tv/qanda/txt/s2971154.htm; http://www.theaustralian.com.au/national-affairs/wong-branded-traitor-by-gays-and-lesbians/story-fn59niix-1225897735066.

19 http://www.abc.net.au/tv/qanda/txt/s2978032.htm.

20 ACT Branch of the Australian Family Association, *Submission 104*, p. 6.

1.79 Breaking promises has become second nature to the Labor Government. Its credibility has steadily eroded as commitment after commitment has been abandoned, for example:[21]

- a Commonwealth takeover of public hospitals;
- means-testing changes to the Private Health Insurance Rebate;
- cutting Defence spending;
- failing to deliver on the promised 64 GP Super Clinics;
- abandoning plans to establish a Department of Homeland Security;
- failing to deliver on Trade Training Centres in Australian secondary schools;
- the poker-machine pre-commitment fiasco; and
- the introduction of a carbon tax, which the Prime Minister promised would not exist under the Government she led.

1.80 Coalition senators believe same-sex marriage should not be added to this ignominious list.

Recommendation 1

1.81 Coalition senators recommend that the Senate reject the Marriage Equality Amendment Bill 2010.

Senator Gary Humphries **Senator Michaelia Cash**

Deputy Chair

Senator the Hon Eric Abetz

21 http://www.theaustralian.com.au/national-affairs/in-depth/labor-faces-pulpit-led-backlash-on-gay-marriage/story-fnba0rxe-1226213649258.